Guest Editorial eucrim 2/2014

John Vervaele

eucrim
European Law Forum: Prevention • Investigation • Prosecution

EDITORIAL

AUTHOR

John Vervaele

CITE THIS ARTICLE

Vervaele, J. (2014). Guest Editorial eucrim 2/2014. Eucrim - The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2014-006

Published in eucrim 2014, Vol. 9(2) pp 45 – 46

https://eucrim.eu

ISSN:

The enforcement of EU law is traditionally based on indirect enforcement; this means that, for the achievement of policy goals, the EU relies on the institutional and procedural design in the jurisdictions of the Member States. This traditional approach has mainly been interpreted as procedural autonomy of the Member States. Those who read this procedural autonomy as a part of the national order that is reserved to the sovereignty of the nation states are on the wrong track. In fact, from the very beginning, the European Court of Justice has made clear that this procedural autonomy of the Member States is conditional upon the dual requirement of equivalence and effectiveness.[1] This dual requirement applies in all areas of national procedure, including criminal procedure, when the criminal procedure deals with the enforcement of EU policies and EU laws. The requirement also applies when there are no relevant Union provisions on the subject, in our case on the specific enforcement design. It can be considered to be the minimum threshold, and some scholars deny even the existence of the autonomy as such.[2] Moreover, equivalence and effectiveness can affect enforcement obligations and rights and remedies in the enforcement area. This means that it can affect the right to an effective remedy for suspects, victims, and third parties as well as related legal guarantees and human rights under the ECHR and the EU Charter of Fundamental Rights (EUCFR).

The ECJ has been respectful of the Member States' autonomy when it comes to the choice of enforcement regime (civil, administrative, penal), but it has imposed in its case law on equal treatment and on the protection of the EU's financial interests, for instance, quality standards for the law in the books and the law in action: the national enforcement regimes may not discriminate between similar national and EU interests and must be deterrent, effective, and proportionate. This might result in indirect harmonization of national criminal law and criminal procedure in order to meet the required standards. A Member State might be obliged to opt for criminal enforcement in order to meet the standards in its jurisdiction. These obligations are not limited to substantive criminal law but also include criminal procedure and judicial control in the criminal procedure when it comes to ex-ante authorization of judicial investigations of ex-post judicial remedies.

Direct harmonization of national criminal procedure is a very recent feature. The gradual replacement of Mutual Legal Assistance (MLA) by new EU instruments based on Mutual Recognition (MR) has substantially affected national criminal procedure, especially when one compares the way in which judges were involved in decisions concerning incoming and outgoing MLA requests to the MR design. The rich debate found in scholarly work and in case law on the European Arrest Warrant shows to which extent this instrument has affected effectiveness, legal safeguards, constitutional standards, and human rights standards of national criminal procedure. The simple fact that the role of judges in the executing state has been limited to a formal test of the requirements and that the remedies must be used exclusively in the jurisdiction of the ordering judicial authority has completely reshuffled the judicial control of MR in the European legal order. Mutual recognition based on mutual trust, relying semi-blindly on the equivalence of Member States' criminal procedural regimes, has not always strengthened previously built-up trust and sometimes even weakened it. The disproportional use of the EAW by the judicial authorities of some Member States (for de facto petty offences or for gathering evidence) has also resulted in further distrust. This is the reason why the Union has tried to rebalance the effectiveness and the fairness of the MR regime, by attempting to impose the harmonization of certain legal guarantees in the Member States' criminal procedure. The first draft for a framework decision in this sense[3] had, however, resulted in a political comprise that could not meet the minimum standards of the European Courts of Human Rights case law.

Thanks to the draft EU Constitutional Treaty and the Lisbon Treaty (Art. 82 TFEU), there is now a specific legal basis for harmonization of criminal procedure. Although the necessity is linked to MR, this does not mean that the harmonization is limited solely to MR cases. In the meantime, different directives on legal guarantees in criminal proceedings have come into force, dealing with the rights of suspects as well as the

https://doi.org/10.30709/eucrim-2014-006

rights and protection of victims. The negotiations have not always been very easy, for instance concerning the right to have a lawyer present and to assist during the first police interrogation of a suspect. The implementation in some Member States will also be complex. This shows that the previously established trust on compliance with minimum standards of the ECHR was far from realistic in practice. Although the EU is developing with new directives in the field (e.g., on the presumption of innocence and the right to remain silent[4]), as it stands, it is clear that the EU will not come up with proposals dealing with the gathering of evidence (harmonization of investigative measures) and dealing with judicial control thereof (ex-ante/ex-post). It is also doubtful whether and to which extent there is a legal basis for it under Art. 82 TFEU. However, the admissibility of evidence in criminal matters and the issue of conflicts of jurisdiction, which are explicitly mentioned in Art. 82 TFEU, are different. Both are matters that substantially affect the role and function of judicial control in criminal matters. As it stands, the EU has given no indication of upcoming proposals related to these two topics.

The impact on criminal procedure through EU law is, however, not limited to (in)direct harmonization of criminal procedure and MLA/MR. Since the Treaty of Maastricht, the EU has been setting up enforcement agencies, which are increasingly becoming supranational EU enforcement agencies: Europol, Eurojust, etc. Other agencies, like OLAF, are active in the administrative enforcement field, but are de facto and de iure gathering evidence that is for criminal enforcement; this means that a lot of OLAF evidence also ends up in national criminal proceedings. In July 2013, the EU submitted a Reform Proposal for Eurojust and a Proposal for the setting up of a European Public Prosecutor's Office (EPPO). Although the powers of Europol remain limited to the building up and analysis of information positions and to participation in joint investigation teams, it is clear that some of its activities might affect data protection and personal dignity. The question can be raised as to whether data protection boards are sufficient and whether or not, under specific circumstances, judicial control would not be a better option to guarantee the rule of law. The same can be said for the proposed Eurojust reform proposal. From the moment Eurojust were to receive operational powers, be it at the central level or through its national members, acting as Eurojust, questions arise on (1) which powers Eurojust would need an a priori authorization for and by whom (type of court, national or European?) and (2) against which decision are there remedies available (type of court, national or European?). The issue becomes crystal clear in the EPPO proposal. Both the authorization of coercive measures (ex-ante) and remedies against certain judicial decisions, including the choice of jurisdiction, are at the hard core of the debate on the EPPO. A choice for judicial control in the Member States' national regimes (the option of the proposal) will certainly give rise to shortcomings in the appropriate protection of citizens' rights, as can be evidenced in the fragmentation of the national provisions. The risk of forum shopping and forum competion is also prevalent. A choice for judicial control at the European level is, however, not fully provided for by the Lisbon Treaties. The question thus emerges as to how the requirements of equivalence and effectiveness can be applied in relation to judicial control and the right to an effective remedy in an integrated legal order, which is composed of EU law, ECHR law, and national law – thus, by definition, a multi-level jurisdictional system in the EU.[5]

This issue of eucrim approaches the topic of judicial control from the three above-mentioned perspectives: direct enforcement by the EU (EPPO), horizontal mutual recognition, and national application and enforcement of EU rights (data protection and data retention). The three perspectives are part of the composite integrated legal order of the EU. Whatever the composition is, it is clear that judicial control has a substantial function related to the rule of law as well as the effective right to a remedy, most certainly in punitive proceedings.

---

1. Case 33/76, *Rewe-Zentralfinanz EG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para. 5↩
2. For further reading, see M. Bobek, Why there is no principle of "procedural autonomy" of the Member States, in : Bruno de Witte and Hans Micklitz (eds.), *The European Court of Justice and the Autonomy of the Member States* , Antwerp, Intersentia 2011↩

https://doi.org/10.30709/eucrim-2014-006

3. Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union COM/2004/0328 final↩
4. Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings COM(2013) 821 final↩
5. For further reading, see A. Meij, Some explorations into the EPPO's administrative structure and judicial review, in L.H. Erkelens, A.W.H. Meij and M. Pawlik (eds.), The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon? The Hague, T.M.C. Asser Press 2014 (forthcoming), Chapter 7 & K. Ligeti, Toward a Prosecutor for the European Union Volume, Hart , Vol. II, 2014.↩

ABOUT EUCRIM
eucrim is the leading journal serving as a European forum for insight and debate on criminal and "criministrative" law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union