Limits to European Harmonisation of Criminal Law

Werner Schroeder

ABSTRACT

The harmonisation of criminal law and criminal procedure in the EU is subject to specific conditions, which differ from those generally applicable to the approximation of laws in the Union. Specific limits may result from the rules of competence set out in Art. 82 et seq. TFEU, from EU fundamental rights, or from constitutional conditions applicable in certain Member States. These factors can impede the negative approximation of national criminal law systems through mutual recognition as well as the positive approximation through EU secondary law. Furthermore, if serious doubts arise as to whether the rule of law is fully respected by Member States participating in the Area of Freedom, Security and Justice, the premise for any form of judicial cooperation in criminal matters in the EU is no longer valid.

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I. Objectives of EU Harmonisation of Criminal Law

The terms “approximation of laws” and “harmonisation” stand for the alignment of national rules with a standard prescribed by Union law. Since the Treaty of Lisbon, criminal law in the EU has been approximated or harmonised within the supranational framework of “Judicial Cooperation in Criminal Matters” (Art. 82 et seq. of the Treaty on the Functioning of the European Union, TFEU), which is part of the “Area of Freedom, Security and Justice” (Art. 67 et seq. TFEU). In principle, criminal law thus follows general rules, which also apply in other areas of Union law, e.g., in the internal market. However, the harmonisation of criminal law is subject to a number of peculiarities.

In the EU, legislative harmonisation is not an end in itself but has to be understood functionally. It therefore not only serves to reduce legal differences between the Member States but also to achieve certain policy objectives as well as an overall “European common good.”[1] For example, the European harmonisation of the Member States’ criminal laws under Art. 67 para. 3 and Art. 82 et seq. TFEU is a building block in the Area of Freedom, Security and Justice, as it ensures a “high level of security.” However, this policy goal of the EU is not merely designed to meet criminal law problems arising as a side effect of a European area without internal borders. Beyond that, it has a meaningful function for the EU as a whole, which has developed from a European economic area into a supranational living space. This becomes clear in the values and objectives of the EU, which are set out in Art. 2 and Art. 3 para. 2 of the Treaty on European Union (TEU). Consequently, the harmonisation of criminal law is an expression of the common values of the Member States.

II. Instruments for EU Harmonisation of Criminal Law

Primarily, limits for the harmonisation of criminal law result from the EU’s limits of competence. The perception that the EU legislator is only allowed to harmonise legislation where it has the necessary legislative powers to do so may seem trivial. It is well known, however, that the EU legislator tends to extend its legislative and harmonisation powers. For example, Directive (EU) 2015/849 on combating money laundering and terrorist financing[2] is based on the internal market competence (Art. 114 TFEU), which seems reasonable, since there is a given link to the free movement of capital. However, as the Directive constitutes accompanying law to the effective enforcement of criminal law prohibitions, Art. 83 TFEU should have served as its genuine legal basis.

As a rule, legal harmonisation in the EU is achieved by way of minimum harmonisation, which gives Member States room for broad discretionary power. For example, Art. 17 Regulation (EC) No. 178/2002 on the general principles and requirements of food law[3] obliges Member States to create effective, proportionate and dissuasive sanctions in the event of infringements of food law[4] but leaves it up to the States on how to implement this obligation at the national level.[5]

In exceptional cases however, certain areas of EU law require full harmonisation. In this case, all requirements concerning the approximation of legislation derive from the EU act itself. This means that Member States will not then be able to incorporate laws into their legislation or maintain laws other than those set out in the applicable EU act.[6] In regards to the areas of criminal procedural law and substantive criminal law, the EU does not have such a comprehensive competence for legal harmonisation, even under the Lisbon Treaty. Instead, in specifically defined areas under Art. 82 and Art. 83 TFEU, it may establish “minimum rules” for the approximation of national law, and only by means of “directives.”

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III. Positive and Negative Strategies for EU Harmonisation of Criminal Law

In order to understand the significance of approximating laws in the EU, it is important to note that this method exists in a relationship of mutual tension with other strategies that promote European legal integration.

1. Principle of mutual recognition

In a strict sense, the concept of approximation of laws described above is also referred to as an instrument of *positive* integration. This instrument eliminates differences in national legal systems by creating a (positive) uniform standard for the entire EU with the enactment of EU secondary legislation.

The method of *negative* integration, on the other hand, is based on the elimination of national legal differences in the EU through mutual recognition.[7] This concept has its origin in the internal market principle and applies to areas that have not been harmonised by EU secondary legislation yet. It provides that authoritative decisions from the Member State of origin regarding a product, service, or person (e.g., a permission, an authorization, or a license, etc.) also have legal effect in the Member State of destination, thus making further legal scrutiny dispensable. Therefore, a specific good, service, or professional activity that is approved in one Member State must also be approved in other Member States.[8] As a result, this mechanism brings about a *de facto* approximation of laws, in the form of a negative approximation of laws to the lowest national level applicable in the EU.

However, mutual recognition has its limits. In the internal market, this concept presupposes that the legal standards applicable in the two Member States concerned, i.e., the country of origin and the country of destination, are almost equivalent. If this is not the case, the Member States of destination may refuse recognition by relying on justifications, e.g., necessary protection of the national *ordre public*.

2. Relationship between EU harmonisation of criminal law and mutual recognition

The TFEU chapter on judicial cooperation in criminal matters also encompasses these two strategies described above. In comparison with internal market law, however, it is remarkable that mutual recognition should take priority over the approximation of national legislation by means of EU secondary legislation. Positive harmonisation of criminal law should merely be a subsidiary means of enforcing the principle of mutual recognition.[9] In relation to criminal procedural law, this is set out in Art. 67 TFEU ("if necessary") and in Art. 82 para. 2 TFEU ("to the extent necessary").

As the above mentioned example of the internal market law shows, mutual recognition ultimately brings about an indirect European approximation of law – yet, an approximation at the lowest legal level applicable in an EU Member State, as the decisions of each Member State have to be recognised by all other Member States. This approach is particularly problematic in the area of criminal law. The functionalist considerations on which mutual recognition in the internal market is based cannot simply be transferred to the recognition of criminal decisions.[10] In the latter area, the principle of recognition does not – in contrast to its application in the internal market – serve to extend rights and freedoms but rather serves to reduce them transnationally. Hence, in order to make mutual recognition a proper tool for the integration of criminal law, further conditions must be observed:

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(1) Firstly, unlike in the internal market, mutual recognition of acts may not work automatically in the area of criminal justice. Rather, pursuant to Art. 83 para. 1 subpara. 2 lit. a TFEU, the principle of recognition must first be implemented by the EU under secondary law through special "rules and procedures." Framework Decision 2002/584/JHA on the European arrest warrant[11] represents the most important example of such a rule, which lays down certain conditions for the mutual recognition of an arrest warrant.

(2) Secondly, implementation of the principle of mutual recognition of judicial decisions crucially depends on mutual trust in the quality and rule of law of criminal justice in all Member States.[12]

3. Limits of mutual recognition

One may wonder whether such mutual trust is justified if criminal justice in the Member States has not been brought to a European minimum standard yet. Art. 82 para. 1 TFEU ignores these concerns and calls for mutual recognition of judicial decisions even without prior approximation of laws. In this regard, the Framework Decision on the European arrest warrant, according to which a European arrest warrant issued by the requesting EU Member State must be enforced by the delivering Member State (Art. 1 para. 2), is again worth mentioning. This strict standard "which reflects the consensus reached by all the Member States"[13] is justified by the fact that all Member States are constitutional states, a condition that was scrutinized when they joined the EU (cf. Art. 2 TEU in conjunction with Art. 49 TEU).

In fact, this assumption is no longer valid.[14] We are witnessing a massive rule-of-law crisis in some Member States, such as Hungary, Poland, and Romania, with regard to the judiciary in particular. The European Court of Justice (ECJ) has therefore limited the application of the principle of mutual recognition in the area of criminal proceedings by adding an implicit reservation regarding matters of the rule of law and fundamental rights to the Chapter on Judicial Cooperation in Criminal Matters in the TFEU. Therefore, if serious shortcomings regarding the rule-of-law principle or fundamental rights within a Member State are identified, other Member States may no longer recognise judicial decisions from that State. In contradiction to the wording of Framework Decision 2002/584/JHA, this is how the ECJ has rendered decisions in cases concerning the execution of a European arrest warrant.[15] Additionally, the same explicitly applies to Directive 2014/41/EU on the European Investigation Order in criminal matters.[16] According to Art. 11 para. 1 lit d) and f) of the Directive, the recognition or execution of an investigation order in the executing State "may" (!) be refused if there is reason to fear that the rule-of-law principle or fundamental rights will be violated. This provision is to be interpreted in conformity with fundamental rights to the effect that recognition "must" be refused in such cases.

IV. Limits of EU Harmonisation of Criminal Law

1. Emergency brake on EU harmonisation of criminal law

When harmonising criminal law, each Member State has a right of objection, the so-called "emergency brake" (Art. 82 para. 3, Art. 83 para. 3 TFEU) in order to stop an ongoing EU legislative procedure in the Council. This instrument may be used by a Member State if the planned EU measure were to affect "fundamental aspects of its criminal justice system." In such cases, a specific procedure provides for the referral to the European Council, which must seek a consensus.

It should be up to each Member State to define such "fundamental aspects." From the German point of view, this would probably concern the principle of personal guilt (*Schuldprinzip*)and the principle of non-retroactivity. In this respect, the German Federal Constitutional Court has set strict rules according to which the German representative in the Council of the EU must apply the emergency brake.[17]

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2. "Cautious" EU harmonisation of criminal law?

Art. 67 para. 3 and Art. 82 para. 2 TFEU emphasise that the approximation of national criminal law must be "necessary." At the same time, they demand respect for the "legal systems and traditions of the Member States."

For some authors of criminal law this reference, acknowledges a genuine legal principle under Union law, based on respect for the sovereignty of Member States and in deference to democratic decision-making in these states. According to this principle, the EU may only intervene cautiously in the national criminal law systems ("*Schonungsgrundsatz*").[18] In my opinion, however, the TFEU by no means requires that every act of EU criminal law need be subject to a particularly restrictive examination. The Treaty of Lisbon in fact rejects a complete European harmonisation of criminal law. In my view, therefore, the references in Art. 67 and Art. 82 TFEU merely underscore the importance of the principles of subsidiarity and proportionality in the area of EU criminal law.

Because of the subsidiarity principle under Art. 5 para. 3 of the EU Treaty, EU harmonisation measures under criminal law must also have an added value for Europe; otherwise, the objectives cannot be achieved to a sufficient degree by the Member States. Moreover, according to the proportionality principle set out in Art. 5 para. 4 TEU, they may not "go beyond what is necessary." This means, the more intrusive harmonisation measures intervene in national criminal law systems, the more important they must be for achieving the Union's objectives.

However, a further reaching towards national "criminal law sovereignty" by means of a legal principle calling for a restrictive approach to the EU legislation in the area of criminal matters, in general, cannot be said to exist. Such a principle cannot be proven in the case law of the ECJ either,[19] for example as the judgment of the ECJ on the annulment of Framework Decision 2003/80/JHA on the protection of the environment through criminal law[20] clearly shows:[21]

"However, (this) does not prevent the Community legislature (…) from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective."

3. Harmonisation of EU criminal law in light of fundamental rights

In my estimation, the more important limits of European criminal law harmonisation are to be found in the Charter of Fundamental Rights of the European Union (CFR). This is already emphasised in Art. 67 para. 1 TFEU, which reflects the European legal perspective according to which criminal law is not an area like any other. Thus, any approximation of criminal law through EU secondary law must be compatible with the CFR (Art. 6 para. 1 TEU in conjunction with Arts. 51 para. 1 and 52 para. 1 CFR). Above all, this applies to fundamental judicial rights, e.g., the presumption of innocence under Art. 48 CFR and the principle of proportionality in connection with penalties under Art. 49 CFR.

While the question was raised in the past as to whether the Union standard of fundamental rights in the area of criminal law would provide adequate protection for the individual, this has changed with the entry into force of the CFR. Hence, the ECJ's awareness of fundamental rights has grown considerably since then. However, the Court's strategy regarding the area of criminal law has not yet been to declare EU criminal acts null and void for violations of fundamental rights. Instead, it favours an interpretation of the Union Act in conformity with fundamental rights. For example, it instructs national authorities and courts not to execute a European arrest warrant if the person who is to be surrendered is threatened with inhuman and degrading

treatment in the issuing Member State within the meaning of Art. 4 CFR[22] or if there is a risk that the courts of the issuing State will violate the fundamental right to a fair trial guaranteed in Art. 47 para. 2 CFR.[23]

4. A German perspective on national limits of EU harmonisation of criminal law

In some Member States, national constitutional law imposes limits on European criminal law approximation. This applies to Germany in particular.

In its ruling on ratification of the Lisbon Treaty, the German Federal Constitutional Court identifies criminal law as the most important area that must be retained by the Member States. For this reason, the EU's powers to harmonise criminal law and criminal procedure must be interpreted restrictively. The German Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter: BVerfG) has urged taking Art. 83 para. 1 TFEU seriously, which requires a particular need to harmonise substantive criminal law. In this regard, it is not sufficient for the Union legislature to demonstrate a corresponding willingness to act.[24] Also, according to the BVerfG, the catalogue of criminal offences under Art. 83 para. 1 subpara. 2 TFEU must be interpreted restrictively. Care should be taken to ensure that the European framework provisions address the cross-border dimension of a particular criminal offence only.[25] The same applies to the annex competence under Art. 83 para. 2 sentence 1 TFEU. In order to make use of this competence, a serious lack of enforcement has to be demonstrated.[26]

The court had previously already demanded in its ruling on the European arrest warrant that "a gentle way" must be found in European criminal law legislation "in order to preserve national identity and statehood in a uniform European legal area."[27] Therefore, the "principle of cautious harmonisation" mentioned above is not rooted in Union law but rather in the jurisprudence of the BVerfG.

Whether these requirements set out by the BVerfG for the interpretation of Art. 82 et seq. TFEU are promising in terms of EU law seems questionable. In my opinion, a national court cannot simply declare certain areas of criminal law to be unavailable to European harmonisation. This applies, in particular, to the offences listed in Art. 83 para. 1 TFEU. In this regard, the clear wording of Art. 83 para. 1 and para. 2 TFEU goes beyond the requirements imposed by the BVerfG. In addition, the teleological restriction of the norm by the BVerfG is by no means mandatory according to Union law. The same applies to the German court's idea that the Union legislator must provide empirical evidence for a regulatory need. Ultimately, from the EU's point of view, this is a question of legislative discretion.

It might be more convincing, if the BVerfG assumes the role of an advocate for a superior European fundamental rights standard in EU criminal legislation and thus enters into a dialogue with the European Court of Justice. This is happening to some extent. In 2015, before the ECJ's *Aranyosi* decision of 2016, the BVerfG had already ruled that German courts may not extradite persons in accordance with a European arrest warrant if this violates human dignity, e.g., because the principle of personal guilt is disregarded when the person is convicted *in absentia* in the issuing State.[28] Such a process of discussion when initiated by a national constitutional court can be helpful but must also be mediated in the other Member States.

V. Conclusion

European harmonisation of criminal law not only promotes security in the EU but also makes an important contribution to European integration. Limits to the harmonisation of criminal law result less from barriers to jurisdiction/competences and national sovereignty than from the rule of law and fundamental rights, which are particularly relevant to this sensitive area of law. If there are serious doubts as to whether the rule of law

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and fundamental rights are being observed in EU Member States, the fundamental premise on which judicial cooperation in criminal matters is based – the mutual trust of the Member States that their partner's legal and judicial systems adhere to the values of the EU (Art. 2 TEU) –, is no longer valid. In this case, we must therefore not only stop mutual recognition of judicial decisions but also question whether further selective harmonisation of criminal procedure and substantive criminal law is still acceptable at all.

1. Regarding the terminology, cf. ECJ,17.12.1970, case 11/70, *Internationale Handelsgesellschaft*, para. 16.↩
2. Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 on prevention of the use of the financial system for the purpose of money laundering or terrorist financing, *O.J.* L 141, 5.6.2015, 73.↩
3. Regulation No. 178/2002/EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, *O.J.* L 31, 1.2.2002, 1.↩
4. Cf. ECJ, 13.11.2014, case C-443/13, *Reindl*, para. 37 et seq.↩
5. Cf. H. Satzger, "The Harmonisation of Criminal Sanctions in the European Union", (2019) *eucrim*, 115, 116.↩
6. Cf. ECJ, 19.10.2017, case C-295/16, *Europamur Alimentación*, para. 38 et seq.↩
7. M. Schwarz, *Grundlinien der Anerkennung im Raum der Freiheit, der Sicherheit und des Rechts*, 2016, pp. 45 et seq.↩
8. See the landmark decision ECJ, judgement of 20.2.1979, case 120/78, *Cassis de Dijon*, para. 13 et seq.↩
9. Cf. H. Satzger, "Art 82 AEUV", in: Streinz (ed.), *EUV/AEUV*, 3rd ed. 2018, mn. 10.↩
10. See Schwarz, *op. cit.* (n. 7), pp. 203 et seq.↩
11. Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *O.J.* L 190, 18.7.2002, 1.↩
12. ECJ, 11.2.2003, – joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33; H. Satzger, *op. cit.* (n. 9), mn. 19.↩
13. ECJ, 26.2.2013 – case C-399/11, *Melloni*, para. 62.↩
14. Cf. W. Schroeder, "The European Union and the Rule of Law", in: Schroeder (ed.), *Strengthening the Rule of Law in Europe*, 2016, p. 3.↩
15. ECJ, 5.4.2016, joined cases C-404/15 and C-659/15 PPU (*Aranyosi and Căldăraru*), para. 82 et seq.; ECJ, 25.7.2018, case C-216/18 PPU, *LM*, para. 43 et seq.↩
16. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *O.J.* L 130, 1.5.2014, 1.↩
17. Cf. BVerfGE 123, 267, 413 et seq. [decision on the Lisbon Treaty].↩
18. B. Hecker, *Europäisches Strafrecht*, 5th ed. 2015, p. 296 et seq.; H. Satzger, *op. cit.* (n. 9), mn. 3.↩
19. Cf. H. Folz, „Karlsruhe, Lissabon und das Strafrecht – ein Blick über den Zaun", (2009) *ZIS*, 427, 428.↩
20. Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, *O.J.* L 29, 5.2.2003, 55.↩
21. ECJ, 13.9.2005, case C-176/03, *Commission vs. Council*, para. 48.↩
22. ECJ, 5.4.2016, joined cases C-404/15 and C-659/15 PPU (*Aranyosi and Căldăraru*), para. 98, 104; see also recently ECJ, 15.10.2019, case C-128/18, *Dorobantu*, para. 70 et seq. on serious deficiencies in detention conditions as an obstacle to surrender under a European arrest warrant.↩
23. ECJ, 25.7.2018, case C-216/18 PPU, *LM*, para. 44 et seq.↩
24. BVerfGE 123, 267, 410 et seq. [decision on the Lisbon Treaty].↩
25. BVerfGE 123, 267, 412 et seq.↩
26. BVerfGE 123, 267, 411 et seq.↩
27. BVerfGE 113, 273, 299 [decision on the German law implementing the Framework Decision on the European Arrest Warrant].↩
28. BVerfG NJW 2016, 1149 [decision on the identity control in European Arrest Warrant cases, cf. also eucrim 1/2016, p. 17]. This decision is a direct reaction to the ECJ judgement of 26.2.2013, case C-399/11, *Melloni*, para. 35 et seq., 49 et seq. and 57 et seq.↩

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