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The substantive EU criminal and its constitutional basis in the light of the Treaty of Lisbon

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I. The aim, subject and structure of the dissertation

The European Union and the EU law influence almost all areas of national law of the Member States. For a long time, substantive criminal law and law of criminal procedure has been the exception, but now it became unequivocal that criminal law also cannot exclude itself from the effects of the law of the European Union. It is true that the Union does not have neither a single criminal code, nor uniform rules on the criminal procedure and on the law enforcement, and there are not any EU law enforcement agencies. Despite of this, it has to be stated that EU law and national criminal law are connected to each other in various areas, therefore we can speak about *European criminal law* and about the *criminal law in the European Union*. EU criminal law is developing inexorably and dynamically, which entails the *need for the scientific examination*.

The criminal law of the European Union is a large and wide-ranging area of law which can be examined from several perspectives. For example, we can analyze the specific criminal law legal acts of the Union, the newly established criminal justice institutions based on the principle of mutual recognition, or the operation, duties and status of the law enforcement agencies established by the European Union. In this dissertation, however, we chose another method, which is perhaps less commonly used in Hungarian legal literature and we wanted to examine *EU criminal law in a more comprehensive way*. Accordingly, the *main aim of the dissertation* is the presentation and examination of the evolution and development directions of EU criminal law, the complex relationship between EU law and national criminal law, the criminal law competences of the European Union, the developing EU criminal policy, and the functioning of general criminal law principles and fundamental rights at the EU level. The dissertation primarily focuses on the *period after the entry into force of the Treaty of Lisbon* which significantly reformed the EU (criminal) law and placed it on a new contractual basis.

In the broadest sense, the European criminal law is a large area of law, whose examination would extend beyond the framework of a PhD dissertation, therefore it was important to define the scope of the research and to limit it from several points of view. Firstly, the dissertation aims to deal only with the *criminal law integration within the framework of the European Union*, therefore the criminal activities of the Council of Europe and other international organizations are not the subject of the investigation. Secondly, the dissertation focuses only on the questions relating to the *substantive criminal law*, therefore it does not examine the criminal procedural dimensions of EU criminal law and the legal institutions established in this field, the activities of law enforcement and judicial organizations set up by the European Union (e.g. Europol, Eurojust, European Public Prosecutor's Office) and the police cooperation, while it deals with the European Union's administrative criminal law only to the necessary extent. Thirdly, the dissertation does not analyses the *appearance of EU criminal law institutions in the national criminal justice systems* of Hungary and other EU Member States.

The dissertation is divided into four main structural units. After the introduction, the first major part *(Historical and conceptual questions)* examines the main factors which induced the emergence of EU criminal law and the most important stages and phases of the development of EU criminal law. In this part we also analyze the definition of European criminal law through the standpoints of the most important authors in the Hungarian and foreign legal literature, based on which we also attempt to give a definition of the European criminal law and EU criminal law. The second and most important section of the dissertation *(Relationship between the EU law and national criminal law)* examines the effects of EU law

on the criminal law of the Member States and the relationship between the two jurisdictions. The relationship is presented primary from the point of view of the EU law, since – as it was mentioned above – the dissertation does not deal with the details of the EU dimension of the national criminal law. Based on our definition of EU criminal law, this part can be divided into three different categories: the indirect influence of EU law on national criminal law, the legal harmonization and the supranational criminal law competence of the EU. In the third main part of the dissertation *(The developing criminal policy of the European Union)*, we examine the efforts of the Union in order to develop a coherent and consistent criminal policy and we analyze how and to what extent the criminal acts adopted after the entry into force of the Treaty of Lisbon meet the expectations of the EU institutions and the legal literature. In the fourth part, which is closely related to the previous issue *(Protection of the fundamental rights in the European Union in the light of the Charter of Fundamental Rights and its impact on EU and national criminal law)*, we present the development and the current status of the protection of fundamental rights at the level of the European Union in the light of the jurisprudence of the Court of Justice of the European Union. Finally, we conclude our work by summarizing our thesis and outlining the possible directions for the further development of EU criminal law.

II. The methods of the research

Prior to the presentation of the research methods used in the dissertation, it is important to briefly mention the *most important sources applied*. The *primary sources* of the dissertation were the relevant legal sources of the European Union (primary and secondary legislation, as well as non-binding documents). In addition to the EU legislation, we also put great emphasis on the presentation of the case law of the Court of Justice of the European Union, which had immense significance for the development of EU criminal law. On the one hand, the Court's interpretation of law developed many of the principles of EU law which were not included in the Treaties, and on the other hand, it was often the Court, who gave new impetus to the criminal integration with its decisions. The second pillar of the dissertation was the *secondary sources*. In order to prepare our work, we tried to elaborate the most relevant legal literature in Hungarian and foreign languages as well.

Among the methods used during the research, the most accentuated was the *normative and dogmatic method*. The dissertation primarily focuses on the analysis of the primary legal framework of EU criminal law and the examination of the relevant secondary legal sources, during which the normative analysis of the relevant legal institutions was particularly relevant. Where it was necessary, we also used the method of the *grammatical, logical, historical and systematical interpretation* of norms.

However, we intended to present the relevant legal sources not only in a descriptive way, but our aim was the *critical, dogmatic analysis* of the different legal institutions as well. In several issues affecting EU criminal law (e.g. the acceptance or rejection of the supranational criminal law competence of the European Union), there are serious debates in the legal literature – typically in foreign countries – therefore we put special emphasis on the presentation, collision and evaluation of the different opinions and on the formulation of our own standpoint on the basis of these.

Secondly, the *historical method* has to be mentioned, which is not limited to the bare presentation of the different stages of the development of EU criminal law at the beginning of the dissertation. The EU criminal law shows a steady, unbroken development, therefore it is

always particularly important to place the different legal institutions in a historical context before we intend to analyze them. Therefore, although the dissertation essentially examines the legal situation after the entry into force of the Treaty of Lisbon, it pays special attention to the presentation of the previous legal regulation (or its absence) and the evolution of each legal institutions.

The *conceptual method* also played a particularly important role in the dissertation. One of the most important objectives of the research was to clarify the concepts related to the topic. The definition of European criminal law is not unified in the legal literature; it is defined by different authors with different content. Therefore, the dissertation presents the different conceptual approaches used by the authors dealing with the topic, the similarities and differences between them, after which – as it was mentioned above – we attempt to define the concept of European criminal law and EU criminal law.

The *functional method* was also used during the research. The scope of the criminal law competences of the European Union is closely linked to the factors which led to the emergence of EU criminal law integration. These motives could also be regarded as the objectives and tasks of EU criminal law, therefore they constantly had to be kept in mind during the research.

Finally, the *inductive method*, the case law approach was also frequently used during the research. As it was mentioned above, the Court of Justice of the European Union played a very important role in the development of EU criminal law, because in many times the case law of the Court set out important principles in connection with EU criminal law. Therefore, the dissertation often uses a case-law approach, which means it attempts to deduct general conclusions from the relevant judgments of the Court of Justice. The inductive approach appears most obviously in the chapter of the protection of the fundamental rights of the European Union, because it is presented through the practice of the Court of Justice – since the Court has played a dominant role in the development of it –, based on which we formulate general tendencies relevant from the point of view of the EU and national criminal law.

III. The results of the research

If we want to summarize the results of the research in one sentence, we can state that the EU criminal law is an area of law, which *evolved due to practical reasons* and is still *strongly connected to these causes*; which is *continuously and irreversibly developing, deepening and unifying* but is still *fragmented, sectoral* and has a *'special part approach'*; which *influence directly and indirectly the national criminal law* in a number of ways, and which seeks to *take into account the national sovereignty, the coherence of the national criminal justice systems and the classic criminal law and developing sui generis EU principles*[1] *and fundamental rights*. Henceforward, we summarize the conceptual elements briefly.

EU criminal law has fundamentally been developed due to *pragmatic reasons*. For a long time, it was a common opinion in the history of the European integration, that *criminal law is excluded from the scope of the European Communities*. Although criminal law was regarded as the the symbol and last rampart of national sovereignty, there were two main factors which forced them to slowly give up their sovereignty in this field as well. The two main justifications for Union action in the field of criminal law were firstly the *need to*

[1] See KARSAI Krisztina: *Alapelvi (r)evolúció az európai büntetőjogban*. Pólay Elemér Alapítvány, Szeged, 2015. 43, 89-90.

combat against the increased cross-border transnational criminality to which the traditional forms of international cooperation could not respond adequately, and secondly the *need to safeguard interests, policies and objectives of the European Union (e.g. the financial interests of the European Union)*, which can not be protected solely through national criminal law. These aspects continue to affect EU criminal law, defining its scope as well.

The EU criminal law gave *two types of responses* for the aforementioned challenges. The first method – which was not analyzed in the dissertation – is the *strengthening of the cooperation between the law enforcement authorities of the Member States* either through the reinforcement of the existing forms of cooperation (e.g. extradition, procedural legal assistance, transfer of criminal procedure and law enforcement), or through the development of new legal institutions based on the principle of mutual recognition, which is the cornerstone of EU criminal cooperation.

The second method is the *approximation, harmonization and unification of national criminal law systems*. The harmonization of criminal law primarily aims to gradually eliminate the differences between the criminal justice systems of the Member States and to achieve that Member States judge each unlawful conducts in the same way and impose similar penalties on offenders and perpetrators. The gradual abolition of the discrepancies between the national criminal law systems can prevent transnational offenders from committing criminal offenses in the Member State where the chances of criminal prosecution are the least, and its conditions are the slightest. However, two other factors have to be taken into account in connection with this. On the one hand, *harmonization does not mean only the approximation of substantive criminal law* – although only this was examined in the dissertation –, but also includes the *approximation of the criminal procedure and the law enforcement*. Even if there are common substantive criminal law rules, if the national rules on criminal procedure and law enforcement are significantly different, the jurisdiction will not be uniform, which could result in different levels of criminal protection in the Member States. On the other hand, the attainment of the aforementioned objective, namely the elimination of *forum shopping*, can only be accomplished by the *unification of – certain areas of – the national criminal justice systems*. However, this is still not the political reality. The legal harmonization itself has many difficulties since the EU legislator does not do anything less than defines the common denominator of national criminal justice systems which have more or less common European historical and cultural roots, but have strong national characters and traditions, different conceptual and linguistic features.[2] Therefore the EU legislator pays particular attention to the *respect of the traditions and dogmatic systems of the national criminal laws* as far as possible.

Due to the enhanced protection of the sovereignty of the Member State and the national criminal justice systems, the evolution of EU criminal justice cooperation can be characterized by the *'step-by-step approach'*. Although the idea of the *single European judicial area*, modeled on the basis of the single economic area, was already presented by Valéry Giscard d'Estaing in 1977, it became a political reality only in the 1990s.[3] After the first attempts which were typically based on the intergovernmental cooperation (e.g. the European Political Cooperation, the TREVI-cooperation and the Schengen cooperation), the *Treaty of Maastricht*, signed in 1992, extended the scope of the European integration to the cooperation in justice and home affairs, although it did not become part of the Community

[2] FARKAS Ákos: *A kölcsönös elismerés elve az európai büntetőjogban I.* Ügyészségi Szemle, 2016/1. p. 95.
[3] See: FARKAS Ákos: *Az Európai Uniós büntetőjog fejlődésének újabb állomásai.* In: Farkas Ákos – Nagy Anita – Róth Erika – Sántha Ferenc – Váradi Erika (szerk.): Tanulmányok Dr. Dr. h. c. Horváth Tibor professor emeritus 80. születésnapja tiszteletére. Bűnügyi Tudományi Közlemények 8. Bíbor Kiadó, Miskolc, 2007. pp. 501-502., M. NYITRAI Péter: *Nemzetközi és európai büntetőjog.* Osiris Kiadó, Budapest, 2006. p. 249.

law, but formed a separate pillar for which specific rules had to be applied. Although this specialty of the cooperation in justice and home affairs caused many difficulties in practice, it was only abolished by the Treaty of Lisbon signed in 2007.

The *Treaty of Lisbon* put an end to the pillar structure of the European, in consequence of which the former third pillar was transformed into the Community legal order and became a *supranational policy*. The Treaty improved the efficiency of the decision-making through the introduction of the ordinary legislative procedure and the qualified majority voting instead of the the former unanimity; more or less eliminated the problems arising from the lack of democratic legitimacy with the increased involvement of the European Parliament and the national parliaments; and strengthened the judicial control through the extension of the jurisdiction of the Court of Justice of the European Union. However, it has to be regarded as a disadvantage that the Treaty of Lisbon has not completely eliminated the special status of the area of freedom, security and justice, since it introduced or maintained a number of provisions in order to protect the sovereignty of the Member States which could *potentially hinder the deepening of the criminal law integration*. These are for example the *unanimous decision-making* in certain areas (e.g. in case of the extension of the scope of the Union's legal harmonization competences or the establishment of a European Public Prosecutor's Office), the *opt-out right* of the United Kingdom, Ireland and Denmark and the *emergency brake procedure* which can be used in order to safeguard the coherence of national criminal justice systems. It is therefore apparent that although the Treaty of Lisbon has significantly strengthened, deepened and accelerated the cooperation in criminal matters in the European Union, the *protection of national sovereignty* still poses a very significant limit on the criminal law integration.

As it could be seen, the history of the EU criminal law shows long, but steadily expanding and deepening process, therefore it can now be stated that EU law has a significant impact on the criminal law and the law on criminal procedure of the Member States in many areas. According to our point of view – taking into account the relevant standpoints in the Hungarian and foreign legal literature[4] – this relationship can be divided into three different categories: we can speak about the *indirect influence of EU law on national criminal law*, about *legal harmonization* and about *supranational criminal law competence of the European Union*.

With regard to their impact on national criminal law, the aforementioned categories also form an *intensity order*. The first group of legal institutions (the assimilation principle, the reference of national criminal law to the EU law, the neutralization of national criminal law by the EU law and the principle of the interpretation of national law in light of the EU law)

[4] See for example: AMBOS, Kai: *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht – Rechtshilfe.* C. H. Beck Juristischer Verlag, München, 2014; ESSER, Robert: *Europäisches und Internationales Strafrecht.* C. H. Beck Juristischer Verlag, München, 2014; HECKER, Bernd: *Europäisches Strafrecht.* Springer Verlag, Berlin – Heidelberg, 2012; JACSÓ Judit: *Europäisierung des Steuerstrafrechts am Beispiel der gesetzlichen Regelungen in Deutschland, Österreich und Ungarn* (Manuscript, under publication); KARSAI Krisztina: *Az európai büntetőjogi integráció alapkérdései.* KJK-Kerszöv Kiadó, Budapest, 2004; KARSAI Krisztina: *Alapelvi (r)evolúció az európai büntetőjogban.* Pólay Elemér Alapítvány, Szeged, 2015; LIGETI Katalin: *Büntetőjog és bűnügyi együttműködés az Európai Unióban.* KJK-Kerszöv Kiadó, Budapest, 2004; SAFFERLING, Christoph: *Internationales Strafrecht. Strafanwendungsrecht – Völkerstrafrecht – Europäisches Strafrecht.* Springer Verlag, Heidelberg – Dordrecht – London – New York, 2011; SATZGER, Helmut: *Internationales und Europäisches Strafrecht. Strafanwendungsrecht – Europäisches Straf- und Strafverfahrensrecht – Völkerstrafrecht.* Nomos Verlagsgesellschaft, Baden-Baden, 2016; SCHAUT, Andreas B.: *Europäische Strafrechtsprinzipien. Ein Beitrag zur systematischen Fortentwicklung übergreifender Grundlagen.* Nomos Verlagsgesellschaft, Baden-Baden, 2012; SIEBER, Ulrich: *Einführung: Entwicklung, Ziele und Probleme des Europäischen Strafrechts.* In: Sieber, Ulrich – Satzger, Helmut – v. Heintschel-Heinegg, Bernd (Hrsg.): Europäisches Strafrecht. Nomos Verlagsgesellschaft, Baden-Baden, 2014.

have the least influence on the criminal law of the Member States as they do not involve the adoption and implementation of any common legal norms. In these cases, the EU law affects the constitution or application of the national criminal law without the adoption of explicit criminal acts, indirectly and often not consciously, only through certain principles of the EU law. In case of legal harmonization in criminal matters, the European Union already exercises specific legislative activities and adopts criminal law norms, which have to be transformed by the Member States into the domestic criminal law, therefore criminal prosecution is ultimately based on the national criminal law. The sovereignty of the Member States is affected in the most drastic way in case of the supranational criminal legislation. In this case the Union also pursue an active legislative activity, but it adopts supranational criminal provisions directly applicable in the Member States, consequently the criminal liability is solely based on the supranational criminal norm.

Four types of the *indirect influence of EU law on national criminal law* can be distinguished. The first is the *principle of assimilation*, which requires the Member States to treat the infringements of EU law in a matter analogous to the manner that breaches of same or similar domestic law and therefore to extend the scope of their national criminal norms to the protection of relevant legal interests of the European Union. In this case, the national criminal law becomes an instrument for the protection of the EU law. The assimilation principle can be based either on the principle of sincere cooperation enshrined in Article 4(3) TFEU, or on specific primary and secondary legal acts.

The second type of the interconnection between the EU and the national law is the *reference of national criminal law to the EU law*, which also allow the sanctioning of the infringement of the EU law by the national law. In this case, as opposed to the assimilation principle, the criminal law of the Member States refers to the EU law, because certain elements of a national criminal norm are defined by reference to the EU law, which means that the framework of the national criminal norm is filled by the EU law. This regulatory technique, however, can be considered problematic from the point of view of the specific principles of criminal law (the principle of legal certainty, the *lex certa* principle, the prohibition of retroactive effect).

While in the former two cases the EU law has a positive effect (obligation to criminalize) on the national criminal law, in case of the *neutralization of national criminal law*, the EU law places a negative obligation (obligation to decriminalize) to the Member States. This neutralization effect is also based on the principles of the EU law, namely on the principle of sincere cooperation already mentioned and on the principle of the primacy of EU law. According to this latter principle, national law can not override the EU law, therefore the criminal law provisions of Member States which are incompatible with the primary or secondary EU law with direct effect and applicability become inapplicable in the specific cases before the national law enforcement bodies and are replaced by the EU norms.

Finally, the fourth type of the indirect effect of EU law on national criminal law is the *principle the interpretation of national law in light of the EU law*. According to this principle, the national law enforcement agencies must interpret national law in their proceedings, so far as possible, in the light of the EU law in order to avoid the collision between the national and EU law and therefore the neutralization of the national law. However, this interpretation principle is limited by the general principles of law (in case of criminal law particularly the principle of legality, legal certainty and non-retroactivity), and cannot serve as the basis for an interpretation of national law *contra legem*.

Prior to the entry into force of the Treaty of Lisbon, the main area of the *criminal law harmonization* was the *third pillar*, which governed the cooperation in justice and home

affairs. Based on the provisions of the Treaties, the Member States adopted several legal acts (conventions, joint actions and framework decisions), which regulated the elements of different criminal offenses, the type and/or the degree of the sanction to be imposed and other issues relevant to the criminal liability. After the entry into force of the Treaty of Amsterdam, the *framework decision* became the primary instrument of legal harmonization, which was a more effective legal instrument than the other legal acts of the third pillar, although their enforceability was not sufficiently ensured due to the lack of the direct effect and the judicial review.

Because cooperation in criminal matters was placed in the third pillar, it was a general opinion that the *European Communities (the first pillar) did not have criminal competences*. For this reason, several attempts failed, when the European legislator expressly intended to regulate criminal law issues in the first pillar. In some cases, the EU legislature adopted legal acts which required the Member States to impose sanctions on certain conducts, but Member States were always free to determine whether they intend to comply with this obligation by criminal or by other sanctions.[5] Therefore, these legal norms *did not impose any obligation to criminalize*, which means that they can be considered as criminal norms.

Regarding the question of the criminal law competences of the Union in the first pillar, the judicial practice of the *European Court of Justice* had extreme importance. In the judgments of the Environmental Crimes Case and the Ship-Source Pollution Case[6], the Court radically *loosened the borders between the first and the third pillar* when it ruled that the EU legislator could adopt criminal measures in the first pillar as well if it is indispensable for the effective implementation of an EU policy. The Court of Justice therefore significantly contributed in the deepening of the criminal law integration of the European Union; due to the decision, criminal legislation began in the first pillar as well. The much criticized principle of the judgment was later taken over by the Treaty of Lisbon.

With the abolition of the pillar structure, the Treaty of Lisbon terminated the battle of competence between the first and the third pillars, and Article 83 TFEU significantly *strengthened and extended the legal harmonization competences of the European Union.*

According to *Article 83(1) TFEU* the European Union is entitled to establish minimum rules concerning the definition of criminal offences and sanctions. Harmonization measures be adopted in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The Treaty lists ten so-called *'eurocrimes'*, however, according to our point of view, it would be necessary for the Council to exercise its powers under the Treaty and to extend the scope of the harmonization competence to other offenses, because there are several other delicts which meet criteria of particular seriousness and cross-border dimension (e.g. criminal offences against the environment, crimes against intellectual property, economic offenses).

Article 83(2) TFEU regulates an *ancillary harmonization competence*, according to which, if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, the European Union may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. With this

[5] See for example: Council Directive 89/592/EEC of 13 November 1989 coordinating regulations on insider dealing [OJ L 334, 18.11.1989, pp. 30-32]; Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [OJ L 166, 28.6.1991, pp. 77-82]

[6] Case C-176/03 *Commission of the European Communities v Council of the European Union* [13.9.2005] ECR I-7879; Case C-440/05 *Commission of the European Communities v Council of the European Union* [23.10.2007] ECR I-9097.

provision the Treaty essentially incorporated the basic principles of the European Court of Justice formulated in the Environmental Crimes Case in 2005. The ancillary harmonization competence can be applied in every EU policy area where previous harmonization measures have already been adopted. It means that the Union, prior to the adoption of criminal sanctions, already has adopted harmonized (non-criminal) rules in the area concerned. The second condition is that criminal sanctions have to be essential for the effective implementation of the aforementioned harmonized Union policy. This requirement demands the Union legislator to prove that the current enforcement regime cannot achieve effective implementation of the policy concerned and that criminal law is more efficient than the existing less restrictive measures. The introduction of the ancillary harmonization competence in the Treaty of Lisbon confirms a *functionalist view of criminal law*, which means that criminal law is considered as a mean to an end which is the effective implementation of other Union policies.

Both Article 83(1) and Article 83(2) TFEU enable a so-called *'minimum harmonization'* on the basis of which EU legal acts can provide for a minimum level of repression, while the Member States are entitled to introduce or maintain stricter rules. This kind of legislative technique is also aims at the maximum *consideration of the national sovereignty and the differences between the legal systems of the Member States*.

According to Article 83 TFEU, the instrument of the legal harmonization is the *directive* which is considered to be a much more effective instrument than the earlier framework decision. The directive has direct effect under certain conditions and infringement procedure can be brought before the Court of Justice of the European Union if a Member State fails to implement it into its national law. Therefore, after the entry into force of the Treaty of Lisbon, the EU legislator seeks to *transform the previously adopted framework decisions into directives*, whose legal effect therefore became much stronger, even if their content is not significantly modified in some cases. After the entry into force of the Treaty of Lisbon, the European Union adopted six directives based on Article 83(1) TFEU[7] and two directives based on Article 83(2) TFEU[8]. Therefore, it can be stated that the *European Union uses his legislative competences* in the area of criminal law, which *should be continued in the future* according to our point of view.

[7] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [OJ L 101, 15.4.2011, pp. 1-11]; Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [OJ L 335, 17.12.2011, pp. 1-14]; Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA [OJ L 218, 14.8.2013, pp. 8-14]; Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union [OJ L 127, 29.4.2014, pp. 39-50]; Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA [OJ L 151, 21.5.2014, pp. 1-8]; Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [OJ L 88, 31.3.2017, pp. 6-21]
Beside these six directives the European Commission also issued another proposal which has not been adopted yet. See: Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law [COM(2016) 826, 21.12.2016]

[8] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse [OJ L 173, 12.6.2014, pp. 179-189]; Directive 2017/1371/EU of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law [OJ L 198, 28.7.2017, pp. 29-41]

For a long time, the European Union has not had any *supranational criminal legislative competence*. Prior to the Treaty of Lisbon, the Union had solely a *punitive sanctioning competence*, which did not formally belong to the area of criminal law in the narrower sense, but could be place between the administrative and the criminal law.

In addition to administrative criminal law, however, the Treaty of Lisbon empowered the European Union with a supranational legislative competence which clearly belongs to the area of criminal law. According to *Article 325(4) TFEU* the European Union is entitled to adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union. According to the majority opinion of the legal literature, this article authorizes the Union to adopt *supranational criminal law norms directly applicable* in the Member States in the field of the protection of the financial interests of the EU. Nevertheless, there are authors who deny the existence of a supranational criminal competence based on the grammatical interpretation of the Treaty, on the principle of conferral, on the principle of subsidiarity and proportionality, and on the systematic interpretation of Articles 83, 86 and 325 TFEU. According to the most common criticism, Article 83 TFEU takes precedence over Article 325 TFEU, since the adoption of the supranational criminal competence under the latter article results the evasion of the regulations of Article 83 TFEU aiming at the protection of national sovereignty (e.g. minimum harmonization, emergency brake procedure, *opt-out* right). However, these points of view are not well-founded according to our standpoint. The combat against offenses affecting the financial interests of the European Union is justified by the proper functioning of the EU budget, which can be regarded as a fundamental supranational legal interest which can *legitimize the differences between the two articles*. The protection of the budget of the European Union requires a unified action, which can only be effective if all Member States take actions against the unlawful behaviors intending to infringe or endanger this legal interest. In this case, contrary to legal harmonization, the Treaty clearly *prefer the need for the unified protection* instead of the *preservation of the national sovereignty and the integration of the national criminal justice systems*.

The debate on the interpretation of Article 325 TFEU, however, did not remain on a theoretical level, because the institutions of the European Union also interpret the provisions of the Treaty differently, therefore it is not inconceivable that the Court of Justice of the European Union will formulate the final standpoint in this question.

Beside Article 325 TFEU, the Treaty contains several other articles where it can be argued for a supranational criminal legislative competence due to the similar formulation of the Treaty. However, according to our point of view, the European Union only obtains supranational criminal legislative competence if it is *justified by the protection of a supranational legal interest* (these are Article 325(4) TFEU on the protection of the financial interests and Article 33 TFEU on the customs cooperation). In order to implement common policies or fight against cross-border criminality, however, the Union did not have supranational criminal jurisdiction in the absence of an adequate legal basis.

Regarding the criminal competences of the European Union, it is important to emphasize that the *Union does not have general criminal law competence*. The legal harmonization and supranational legislative competence of the European Union can be exercised only under the conditions set out in the Treaty and only in case of criminal offences which are expressly listed in the Treaty or which meet the criteria set out by the Treaty. The EU criminal law therefore covers the serious cross-border crimes according to Article 83(1) TFEU; the criminal offenses endangering the effective implementation of the harmonized EU policies under Article 83(2) TFEU; and fraud and other illicit activities affecting financial interests of the EU based on Articles 33 and 325 TFEU. It means that the European Union

does not have competence to regulate for example murder, theft or traffic offences. This is not reasonable either, because – as it was mentioned above – the development EU criminal law was basically motivated by the fight against transnational crimes and the protection of supranational legal interests and other EU policies. *EU criminal law is legitimated by these reasons*; therefore, its scope does not extend beyond them. Therefore, it can be stated that, even after the Treaty of Lisbon, EU criminal law does not form a uniform area of law, but has a *fragmented nature and sectoral approach*.

This is closely linked to the other specificity of the EU criminal law, the *'special part approach'*. Even with regard to the aforementioned categories of offenses, EU criminal law does not have the competence to regulate all questions relating to criminal law. EU criminal law merely focuses on the approximation and unification of the definition of certain criminal offences and the sanctions, but pays less attention to the general part of criminal law.

For a long time, the EU legislator has ignored the problems resulted from the fragmented nature and special part approach of the EU criminal law. Therefore, there was a *lack of a unified, coherent EU criminal policy*. However, the Treaty of Lisbon increased the need to strengthen the coherence of EU criminal legislation, namely the *harmonization of the criminal law harmonization*. In 2009, the Manifesto on European Criminal Policy[9] was published and the EU institutions (the European Council, the Council, the European Commission and the European Parliament) also issued similar communications.[10] These documents outline the *criminal law principles* applicable during the EU criminal legislation (e.g. the *ultima ratio* principle, the principle of subsidiarity, the principle of legality, the principle of guilt and the principle of coherence) and provide *guidelines on the acceptability and the content of EU criminal law provisions*. Despite the lack of the legal binding force, the importance of these documents is indisputable, because with them a process has started which could lead to the *development of a dynamically developing, unified legislative practice*. The EU institutions recognized the danger of the lack of a coherent, rational EU criminal policy and try to act against it. Therefore, these documents can be regarded as the *first steps in the development of the European criminal policy*.

If we analyze the criminal legislation of the European Union after the Treaty of Lisbon in the light of the Manifesto on European Criminal Policy and the other documents of the EU institutions, it can be stated that the endeavors of the EU institutions were not useless. A number of *positive tendencies* can be observed in response to the critical remarks, which clearly shows that the European Union *increasingly tries to take into account the criminal law principles*. As a result of the Manifesto and the guidelines the EU institutions, the *coherence of EU legal acts* significantly increased, the criminal law directives have similar structure and content, which clearly facilitates both legislation, law enforcement and legal interpretation. The EU legislator increasingly seek to adopt the directives in the light of the *ultima ratio and the subsidiarity principle* and to formulate the offenses in the most detailed and precise way possible in order to observe the *lex certa principle*. The *principle of guilt* and the *prohibition of objective liability* also clearly prevail in the EU criminal law.

In addition to the positive tendencies, it cannot be concealed that certain problems have still not been eliminated by the EU criminal policy after the Treaty of Lisbon. The most

[9] A Manifesto on European Criminal Policy. Zeitschrift für Internationale Strafrechtsdogmatik, 12/2009.

[10] See especially: Conclusions of the European Council 26/27 June 2014 [79/14, 27.6.2014]; Draft Council conclusions on model provisions, guiding the Council's criminal law deliberations [16542/2/09, REV 2, 27.11.2009]; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee Of The Regions: Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law [COM(2011) 573, 20.9.2011]; European Parliament resolution of 22 May 2012 on an EU approach to criminal law [2010/2310(INI) – P7_TA(2012) 208, OJ C E 264, 22.5.2012, pp. 7-11]

disquieting problem is the *tendency of increasing repression* which can be observed at the level of the European Union as well. In this regard, however, it is important to note that the increase of the criminal law harmonization activity of the European Union cannot be considered as a negative trend by itself, since it is necessary to create a unified EU regulation in order to ensure the effective fight against cross-border criminality and to protect the supranational legal interests. According to our point of view, the real problem is that, in many cases, the EU legislation after the entry into force of the Treaty of Lisbon already criminalize conducts that cannot always be defended on the basis of the abovementioned criteria. The increasing repression can therefore be considered as a complex problem, because the extension of the criminal threat and the sanctions can indirectly cause the violation of other principles, e.g. the *ultima ratio principle*, the *lex certa requirement* and the *coherence of national criminal law*. The principle of coherence still does not always prevail during the EU criminal legislation, since the adopted legal acts often conflict with other EU or national criminal law norms. Finally, the *exaggerated unification* is also undesirable in some cases, according to our point of view, a *more differentiated regulation* could help the better observation of the EU principles, in particular the principles of *ultima ratio*, subsidiarity and coherence. According to our standpoint, the EU legislator is required to find solutions to these problems in the future in order to *maintain and increase the democratic legitimacy of EU criminal law*.

The aforementioned matters are closely linked to the question of the *protection of the fundamental rights in the European Union*. If we can talk about EU criminal law, we must also analyze the issue of the protection of fundamental rights at the level of the EU, because in the area of criminal law, it is particularly important to restrain the criminal monopoly of the state with rights.

Like criminal law, the protection of fundamental rights was initially also outside the scope of Community law, because it belonged primarily to the competence of the Member States. The protection of fundamental rights at the level of the EU took shape through the case law of the European Court of Justice. The Court considered fundamental rights as the *general principles of EU law*, which have two sources: the *constitutional traditions common to the Member States* and the *international human rights conventions concluded by the Member States*. From the second half of the 1990s, in parallel with the development of the jurisprudence of the Court, there was an increasing demand to formulate the catalog of human rights within EU law as well. This was finally accomplished by the adoption of the *Charter of Fundamental Rights of the European Union*, which became legally binding with the Treaty of Lisbon.

After the entry into force of the Treaty of Lisbon, the protection of the fundamental rights in the European Union rests on two pillars. The first pillar is the *Charter of Fundamental Rights* itself and the second pillar is *Article 6 TEU*, which declares the binding force of the Charter and states that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

If we examine the case law of the Court of Justice of the European Union on the protection of fundamental rights, two tendencies can be observed, which may also have an impact on EU and national criminal law. On the one hand, the European Court of Justice seeks to *extend the scope of the Charter to the widest possible extent*.[11] The provisions of the Charter are primarily addressed to the institutions, bodies, offices and agencies of the European Union but to the Member States only when they are implementing Union law.

[11] See: Case 617/10 *Åkerberg Fransson* [7.5.2013]

However, the Court of Justice interprets this provision broadly and extends the scope of the Charter not only to acts of the Member States implementing the EU law in the strict sense, but to all cases where there is a link between EU law and national law. Consequently, it is expected that more and more criminal cases will become the subject of the Charter in the future. In this case, *EU fundamental rights standards also have to be applied in addition to the national fundamental rights*. However, this tendency is only apparently positive, since the accumulation of fundamental rights does not in itself mean the augmentation of the level of the protection of human rights. According to the second tendency of the judicial practice of the Court, *national fundamental rights can only be applied if the principle of the primacy and effectiveness of EU law is not thereby compromised*.[12] Therefore, in order to ensure the primacy, the consistency and the effectiveness of EU law, the *Court adjust national fundamental rights to the level of the protection of the Charter*, even if this results the *intervention of the dogmatic systems of the national criminal law*. The national legal protection can therefore be reduced to the level of EU legal protection, which can generate serious dangers.

This tendency is particularly problematic in the area of criminal law since it could lead to the *reduction of the criminal law guarantees*. Although the EU legislature is inclined to regard criminal law as one of the tools to ensure the effective implementation of an EU policy, the main objective of criminal law is not this, but the repression and the prevention, the restoration of the violated legal order, the sanctioning of criminal offenders and the prevention of the perpetration of further crimes.[13] Since criminal law is the strongest weapon in the legislature's hands, it can only be applied with strict guarantees. The fundamental principles of criminal law can not be overshadowed by the requirements of the effectiveness and the primacy of EU law, because it could ultimately *endanger to the legitimacy of EU criminal law* according to our standpoint.

As it could be seen, EU criminal law is not a static branch of law, but a *dynamically developing area of law*. Therefore, it is necessary to briefly present the *possibilities of the future development of EU criminal law*. Of course, it is not easy to make predictions in this area because, due to the enhanced protection of national sovereignty, not only legal but political aspects also pay an important role during the deepening of the EU criminal law integration.

According to our point of view, one of the directions of the further development of EU criminal law is the *approximation of the general parts of the national criminal laws of the Member States*. As it was mentioned above, the EU criminal law has been limited to the criminalization of certain offenses, and it only tangentially deals with the general part of criminal law (e.g. the liability of legal persons, the limitation of criminal punishment). The adopted legal acts of the European Union *contain some notions in connection with the general part* (e.g. intentionality, negligence, attempt, involvement in criminal offences), but these concepts have not been defined by the EU legislator yet. In the absence of a uniform EU concept, the *regulations of the national criminal law have to be applied* to these legal institutions. However, as there can be significant differences between the general parts of the criminal law of the Member States, the *approximation of the general part* of criminal law in the Member States is also reasonable in order to achieve the main objectives of EU criminal law, namely the fight against transnational criminality, the abolishment of *forum shopping*, and the protection of supranational legal interests.

[12] See: Case C-399/11. *Melloni* [23.2.2013]

[13] See: LUKÁCSI Tamás: *Az ultima ratio elve az Európai Unió jogában.* Állam- és Jogtudomány, 2015/2. pp. 38-39.

Another possible way forward for EU criminal law is the *legal unification*. So far the EU criminal has basically *preferred legal harmonization*, the Member States have successfully resisted the legal unification which could affect their national sovereignty, and the integrity of their criminal law system in a more drastic way. Therefore, the attempts for the unification have always failed. However, according to our point of view, the objective legitimizing EU criminal law can fully be achieved only by the unification of – certain areas of – the national criminal justice systems. Of course, we do not consider necessary or desirable to standardize the whole criminal law system of the Member States, but the unification of criminal offenses, sanctions and other relevant questions of the general part of criminal law in connection with crimes falling within the scope of EU criminal law (cross-border crimes, offenses against the supranational legal interests) seems essential. This could create a *genuine supranational EU criminal law* which could make law enforcement (e.g. criminal cooperation) more effective as well.

The third way of the further development of EU criminal law is the *establishment of the European Public Prosecutor's Office*. Although the idea of the European Public Prosecutor's Office has a long history (e.g. Corpus Juris or the Green Paper of the European Commission of 2001[14]), its legal basis has solely been created by the Treaty of Lisbon. Based on Article 86 TFEU, the *European Commission submitted for a regulation on the establishment of the European Public Prosecutor's Office in 2013*.[15] Although there are vivid debates in connection with the rules on the organization, competences and procedure of the European Public Prosecutor's Office both in the legal literature and between the EU institutions, the establishment of a supranational investigation authority could, according to our point of view, give great impetus to the development of EU criminal law, which could also have impacts for substantive criminal law issues.

In 2001, Professor Ferenc Nagy formulated an idea, which was considered as utopist even by himself, according to which *'the European criminal offender commits a eurocrime in the European area, which is investigated by the European police, prosecuted by the European Public Prosecutor's Office before the European Criminal Court, whose sentence of conviction is enforced in a European prison'*.[16] With some malice, it can be stated that the situation has not become less utopian since then. EU criminal law still cannot be described with the traditional criminal law concepts, we cannot speak about uniform general and special part, and coherent criminal law dogmatism.[17] However, the fragmented and sectoral EU criminal law, which is primarily based on legal harmonization rather than legal unification, is developing cautiously, uncertainly, step-by step, but continuously, steadily and irreversibly, therefore we can trust that slowly – and with the maximum attention to the respect of national sovereignty and the coherence of the national criminal law systems – a genuine supranational EU criminal law begins to evolve.

[14] Green paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor [COM(2001) 715, 11.12.2001]

[15] Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office [COM(2013) 534, 17.7.2013]

[16] NAGY Ferenc: *Az európai büntetőjog fogalmáról.* Európai Jog, 2001/1. p. 5.

[17] FARKAS Ákos: *Az európai büntetőjog értelmezési tartománya.* In: Farkas Ákos (szerk.): Fejezetek az európai büntetőjogból. Bíbor Kiadó, Miskolc, 2017. p. 17.

IV. Publications related to the PhD dissertation

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