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THE INFLUENCE OF EU LAW ON NATIONAL CRIMINAL LAW

EUROPEAN CRIMINAL LAW, PROF. A.F. TRIPODI, AY 2022-2023

Summary

(A) European Union Law primacy

(B) EU-oriented interpretation of National Criminal Law

(C) EU-induced neutralization of National Criminal Law

(A) European Union Law (EUL) primacy

§ EU sources

§ Primary law: Treaty of the EU (TEU), Treaty on the Functioning of the EU (TFEU), Charter of the Fundamental Rights of the EU (CFREU)

§ Secondary law: Regulation (reg), Directive (dir) + others.

§ Primacy

«The Treaty [...] produces *direct effects* and creates *individual rights* which *national courts must protect*» (CJ, 5.2.1963, C-26/62).

«The EEC Treaty has created *its own legal system* which, on the entry into force of the Treaty, became *an integral part of the legal systems* of the Member States and which their courts are bound to apply [...] The laws stemming from the Treaty, an independent source of law, *could not*, because of its special and original nature, *be overridden by domestic legal provisions*, however framed, without being deprived of its character as Community law, and without the legal basis of the Community itself being called into question» (CJ, 15.7.1964, C-6/64).

(B) EU-oriented interpretation (EUOI) of National Criminal Law (NCL)

§ Definition

EUOI implies that **a national judge must interpret NCL in the light of EUL**.

Eg.: a national provision punishes whoever commits fraud against *public* financial interests —> EUOI implies that this provision should cover not only frauds against *state* financial interests, but also frauds against *European* financial interests.

§ Rationale

Art. 4 §3 TEU — «[...] Pursuant to the *principle of sincere cooperation*, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, *to ensure fulfillment of the obligations* arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall *facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives*».

§ Parameters

Every EUL provision, even those without direct effect.

§ Limits

§ Literal meaning

Eg.: a national provision punishes whoever commits fraud against *national* financial interests —> this provision cannot cover frauds against *European* financial interests.

§ Legal certainty

Eg.: the EUL provision refers to a *generic* principle (non discrimination, equality etc.) —> this provision cannot be used as a parameter for EUOI.

§ Dispute: *in malam partem* application?

Preferable the negative solution.

«The Court has, however, also consistently ruled that **a directive cannot of itself impose obligations on an individual** and cannot therefore be relied on as such **against that individual** [...] In the specific context of a situation in which a directive is relied on against an individual by the authorities of a Member State **within the context of criminal proceedings**, the Court has ruled that **a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law** of persons who act in contravention of the provisions of that directive» (CJ, **3.5.2005, C-387/02, C-391/04, C-403/02, §73s**).

«In the specific context of a situation in which a directive is relied on against an individual by the authorities of a Member State within the context of criminal proceedings, the Court has ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive» (CJ, 3.5.2005, C-387/02 et al.).

(C) EU-induced neutralization of NCL

§ Meaning

The national judge must not apply a NCL provision in contrast with EUL.

§ Rationales

Principle of sincere cooperation (**art. 4 §3 TEU**) +

Art. 4 §2 TEU — «[...] *The Union shall respect the **equality of Member States** before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State [...]*».

§ Conditions

EUL Direct applicability + impossible EUOI.

(i) Conflict NCL / primary EU Law: the ‘Placanica case’

*«[...] restrictions imposed on intermediaries such as the defendants in the main proceedings **constitute obstacles to the freedom of establishment** of companies established in another Member State [...] The prohibition imposed on intermediaries [...] constitutes **a restriction on the right of that supplier freely to provide services**, even if the intermediaries are established in the same Member State as the recipients of the services [...] although the Member States are free to set the objectives of their policy on betting and gaming and, where appropriate, to define in detail the level of protection sought, the restrictive measures that they impose must nevertheless satisfy the conditions laid down in the case-law of the Court as regards **their proportionality** [...] In any case, those restrictions must be applied **without discrimination**» (CJ, 6.3.2007, C-338/04 et al.).*

(ii) Conflict NCL / secondary EU Law: the ‘El Dridi case’

«[...] The order in which the stages of the return procedure established by Directive 2008/115 are to take place corresponds to **a gradation of the measures** to be taken in order to enforce the return decision, a gradation which goes from the measure which allows the person concerned the most liberty, namely granting a period for his voluntary departure, to measures which restrict that liberty the most, namely detention in a specialized facility; the principle of proportionality must be observed throughout those stages [...] although in principle criminal legislation and the rules of criminal procedure are matters for which the Member States are responsible, **this branch of the law may nevertheless be affected by EUL [...] States may not apply rules, even criminal law rules, which are liable to jeopardize the achievement of the objectives pursued by a directive and, therefore, deprive it of its effectiveness.** » (CJ, 28.4.2011, C-61/11).

§ Limits

§ Explicit exceptions (primary EUL)

The ‘Maastricht coffeeshop case’: *«there is, under international law and European Union law, a prohibition in all the Member States on marketing narcotic drugs, with the exception of strictly controlled trade for use for medical and scientific purposes. [...] It cannot be held to be inconsistent for a Member State to adopt appropriate measures to deal with a large influx of residents from other Member States who wish to benefit from the marketing – tolerated in that Member State – of products which are, by their very nature, prohibited in all Member States from being offered for sale [...] Article 49 EC [now Art. 56 TFEU] must be interpreted as meaning that rules such as those at issue in the main proceedings constitute a restriction on the freedom to provide services laid down by the EC Treaty. That restriction is, however, justified by the objective of combating drug tourism and the accompanying public nuisance» (CJ, 16.12.2010, C-137/09).*

§ NO in malam partem application

Art. 4 §2 TEU — *«[...] The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. [...]»*

Art. 6 §3 TEU — *«[...] 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».*

Art. 49 §1 CFREU — *«No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable [...]»*

The ‘Taricco saga’

(I) Tribunale of Cuneo (IT): tax fraud time-barred. Is it compliant with **art. 325 TFEU**?



(II) CJ Taricco I: if the NCL provision establishing limitation period **prevents the imposition of effective and deterring punishments** in a significant number of cases of serious fraud affecting the financial interests of the EU, Italian courts **have to refrain from applying (= neutralize)** that provision and proceed with the trial (**CJ, 8.9.2015, C-105/14**).

(III) Italian CC I: ‘Taricco rule’ cannot be applied because it’s **incompatible with Italian supreme constitutional principles**, specially the principles of legality (**art. 25 §2 Const.**) and of separation between powers (**art. 101 §2 Const.**) (**Italian CC, n. 24/2017**).



(IV) CJ Taricco II: NO retroactive application of ‘Taricco rule’ + State appreciation whether the ‘Taricco rule’ is compatible with the principle of certainly in CL, which is a **supreme principle** both of the Italian Constitutional order and of the EU (**CJ, 5.12.2017, C-42/17**).



(V) Italian CC II: ‘Taricco rule’ cannot be applied **in any case** because it’s incompatible with Italian supreme constitutional principles, specially the principles of legality (**art. 25 §2 Const.**) and of separation between powers (**art. 101 §2 Const.**) (**Italian CC, n. 105/2018**).