FONDATION ROBERT SCHUMAN

POLICY PAPER

Schuman Paper
n°766
29th October 2024

Jack STEWART

A Union of Criminal Law: the vital European area of freedom, security and justice

The growth in increasingly transnational crime highlights the need for more internationalised judicial cooperation in criminal matters to combat this phenomenon effectively. The European Union seems to have understood this in the interests of securing its internal market. Indeed, on 9 August 2024, the Goliath investigation led to the indictment by the Düsseldorf Regional Court of three leaders of an international criminal group to the tune of €93 million in VAT fraud. This investigation is a major step forward in European integration. Undertaken by the regional office of the European Prosecutor's Office in Hamburg, it revealed that the suspects were exploiting European rules on cross-border transactions, exempt from VAT, to avoid their own tax obligations. The investigation involved police forces in several European countries, including France, Germany, Hungary and Lithuania. Despite very little media coverage, such information is comforting because VAT fraud truly is a scourge across Europe. Working within this framework is therefore of paramount importance.

Awareness of this problem and the success of this investigation are attributable to the fact that criminal law has gone beyond its purely sovereign monopoly. From the moment that the aim of this law is to repress actions and behaviour designed to protect society, it seems natural that it should be structured around the legislation enacted at European Union level and its demanding vision of the rule of law. To understand the nuances and the indispensable nature of this, it is vital also to understand the EU's competence in criminal matters, its founding principle, its practical instruments and, lastly, its structures, which enable essential advances to be made in the construction of Europe.

HARMONISATION THROUGH THE COMMON MARKET - WHAT'S 'GOOD' FOR ONE MEMBER STATE IS ALSO GOOD FOR THE OTHERS

In the beginning the European Communities had no legislative powers in criminal matters. They had an exclusively economic and political vocation. The Court of Justice of the European Communities (CJEC) recognised, in the so-called Casati, judgment that in principle, '*a standstill provision also applies to national rules operating in matters such as criminal law which are properly within the competence of the Member States*'. However, the distribution of material powers between the Communities and the Member States inevitably means that the national criminal sphere is somewhat permeable to the influence of European law.

Firstly, Community law influences national legislation so as to eliminate obstacles to free movement within the internal market. In other words, if there is a violation of this freedom, resulting from domestic law, the State is obliged to preclude its standard or to abolish it. This follows from the principle of primacy.

The so-called 'Cassis de Dijon' judgment opened the way for this in 1978. Despite the 1968 customs union, the German Federal Alcohol Monopoly Administration decided to ban the import and sale of Dijon blackcurrant liqueur on its territory. The case was referred to the ECJ, which established

the essential principle of mutual recognition between Member States. In other words, in the absence of Community regulations, a Member State recognises a product legally produced and marketed in another Member State. Unless there is an '*overriding reason with regard to the public interest*', such as health, the ruling specifies, which was not the case for the liqueur at issue. It is therefore up to the national court, even in criminal matters, "*to preclude the application of a provision of national law which infringes a provision of the Treaty establishing the European Community*".

More recently, the so-called "Kanavape" judgment provides a concrete example of the influence of common market law. In 2014, French legislation prohibited the marketing of CBD on its territory. Two retailers were convicted on this basis. In a ruling dated 19 November 2020, the Court of Justice of the European Union (CJEU) deemed, a in reference for a preliminary ruling, that this criminalisation was incompatible with EU law, as it constituted a disproportionate and illegitimate obstacle to the free movement of a product that was not classified as a narcotic. This position was subsequently accepted by the French legal system. Following the decision of the CJEU, the Criminal Division of the Court of Cassation accepts that "*the principle of the free movement of goods precludes national legislation prohibiting the marketing of CBD lawfully produced in another Member State*".

In this way, European law resonates with the criminal law of the Member States if there is a concrete link with the freedoms granted to its internal market. This is clearly evident in disputes requiring a ruling by the Court of Luxembourg. As it has developed, the European Union's areas of competence have been extended through what is known as the dialogue of judges, on the basis of the provisions of the Treaties.

THE AMBITIONS OF A EUROPEAN AREA OF FREEDOM, SECURITY AND JUSTICE

Since the Maastricht Treaty of 7 February 1992, the European Union had been divided into three pillars, each with different legislative powers. While there was no question of the emergence of a genuine European criminal law, the stated aim was to create '*an area of freedom, security and justice without frontiers*' . To bolster this momentum, the Amsterdam Treaty of 2 October 1997 introduced the Framework Decision, an instrument for cooperation in criminal matters that obliges Member States to achieve certain objectives while leaving them room for manoeuvre[1].

The harmonisation of criminal legislation finally took concrete form in primary law with the signing of the Treaty of Lisbon on 17 December 2007. This put an end to the Union's division into three pillars opting for a unitary approach to its legislative powers. At the same time, the signatories gave the Union the power to legislate in criminal matters. Firstly, the area of freedom, security and justice is one of the competences shared between the European Union and its Member States[2]. Then chapter 4 of the Treaty on the Functioning of European Union (TFEU) is devoted to cooperation in criminal matters.

Article 82 provides that the European Parliament and the Council may adopt directives for the purpose of approximating minimum rules relating to criminal procedure in criminal matters having a cross-border dimension, particularly with regard to the mutual admissibility of evidence, the rights of persons in such procedure and the rights of victims. Any other element could fall into this category after unanimous identification by the Council and approval by the European Parliament. Article 83 grants the European Union legislative competence in the area of substantive criminal law. It confers on the Parliament and the Council the power to establish, by means of directives, minimum rules relating to the definition of offences and sanctions in certain branches of crime, when these are particularly serious and have a cross-border dimension. There is a non-exhaustive list that enables the European Union to define and provide penalties for certain offences, including terrorism, trafficking in human beings, illicit drug trafficking and corruption. With the approval of the European Parliament, the Council can adopt a unanimous decision to extend the European Union's substantive criminal law powers to other offences that meet the above criteria[3].

[1] Article K.6 §2 b) of the Amsterdam Treaty of 2 October 1997.

[2] Article 4§2 j) of the TFEU.

[3] It is important to note that these two articles contain a §3 providing for a clause safeguarding the fundamental aspects of the Member States' criminal justice systems. A member of the Council can suspend the legislative procedure and express his or her refusal. If a consensus has not been reached, the draft will be blocked. Only the possibility of another legal procedure provided for by EU law, that of enhanced cooperation, could make the draft applicable. v. Article 20(2) TEU; Article 329(1) TFEU.

For example, the European Parliament and Council directive (EU) 2017/541 of 15 March 2017, regarding the fight to counter terrorism, lists a number of material definitions of offences that can be classified as terrorist acts. Article 5 mentions public provocation to commit a terrorist act. Here, the European legislator characterises it as "*dissemination or otherwise making available to the public, by any means, online or offline, of a message with the intent to incite the perpetration of one of the terrorist offences (listed above in Article 3), where such conduct incites, directly or indirectly, the perpetration of a terrorist act, thereby creating the risk that one or more of these offences may be committed*."

Ultimately, the European Union is equipping itself with the means to strengthen harmonisation in the field of procedural and substantive criminal law. It has gone from being an 'influential' supranational organisation to a '*potential generator of criminal law*'. However, this European legislative power remains subject to the sovereignty of the Member States and the principles of proportionality and necessity.

THE SOVEREIGN EQUALITY OF STATES AS A FOUNDING PRINCIPLE OF EU CRIMINAL LAW

The European treaties have been adopted by the Member States, which are equal before the law. This is the meaning of Article 82(1) TFEU, which states that '*judicial cooperation in criminal matters within the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of laws*'. As a matter of principle, a court in one Member State recognises the decisions and effects of a third court in another Member State. The foundation of the Union around common values, such as '*respect for human dignity, freedom, democracy, equality, the rule of law...'*. (article 2 TEU) demonstrates that the Member States are able to provide equivalent protection of fundamental rights[4].

This transposition of the European rule of law is the driving force behind cooperation and harmonisation in criminal matters: decisions taken by a judicial authority in one Member State can be enforced - if necessary - directly by a judicial authority in another Member State without the latter reviewing the decision. In other words, if a convicted criminal from one Member State flees to another Member State, the authorities of the latter State must help the former State to enforce its legislation.

Recognising the need for such cooperation overcomes the difficulties associated with traditional legal cooperation, brings criminal law closer together in practical terms and strengthens the system of freedom of movement. Traditional judicial cooperation is based on a request from one State to another on a bilateral basis, with diplomatic issues coming into play. However, this does not correspond to the Community's original ambition. The free movement of people includes the free movement of judicial decisions - the case of indisputable road traffic offences is particularly easy to grasp in this case.

The Member States are therefore obliged, in principle, to recognise foreign decisions. This is an essential first step. It is now important to take a closer look at the necessary instruments and measures aimed at approximating and harmonising the criminal legislation of its members.

INSTRUMENTS FOR THE MUTUAL RECOGNITION OF JUDICIAL DECISIONS

The framework-decision taken by the Council on 13 June 2002 regarding the European Arrest Warrent and the directive of 3 April 2014 regarding the directive of 3 April 2014 regarding the European investigation order in criminal matters states that the Member States shall implement these instruments "*on the basis of the principle of mutual recognition*".

The European Arrest Warrant

The circumstances surrounding the adoption of the European Arrest Warrant are a clear demonstration of the need for European harmonisation. The destruction of the World Trade Center towers in New York on 11 September 2001 by two aircraft whose crews had been taken hostage by members of a terrorist organisation

[4] *ECJ, so-called "Aranyosi and Caldararu" judgment of 5 April 2016, §77.*

prompted an unprecedented response. Convened as a matter of urgency, the Justice and Home Affairs Council (JHA) of 20 September 2001 took the view that '*the seriousness of recent events requires the Union to speed up the creation of an area of freedom, security and justice (...)*'. Harmonisation is therefore more than necessary: Article 29 TEU states that the Union's objective is '*to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation and by preventing and combating terrorism*'. The Framework Decision embodies the need to replace all previous extradition instruments in relations between Member States.

The European Arrest Warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another State of a person wanted for the purposes of a criminal prosecution or the execution of a custodial sentence or detention order, such as a psychiatric detention order.

The warrant may be issued for offences punishable by a prison sentence of at least one year or, in the event of conviction, where a sentence of at least four months has been handed down. This written document contains a number of items of information, including the identity of the wanted person, the enforceable judgment, the nature and legal classification of the offence, a description of the circumstances of the offence or the sentence handed down. The effect of the warrant is to surrender the person to the authorities of the State that has requested him or her to be prosecuted or to serve his or her sentence in accordance with the facts set out in the warrant. It is important to note that the State receiving the request is entitled to refuse it, but only on the grounds set out in its legal instrument. Accordingly, the Framework Decision on the European Arrest Warrant provides three grounds for mandatory non-execution, one of which is if the person was under 13 years of age at the time of the offence, and seven grounds for optional non-execution at the discretion of the judge (articles 3 and 4). It can be seen that the execution of a European arrest warrant is the principle and its refusal the exception. The most high-profile defendant for whom a European arrest warrant has been issued was Salah Abdeslam, who was behind the 2015 attacks in Paris and the 2016 attacks in Belgium, and who was arrested in the Brussels region.

The mechanism to counter-terrorism has rapidly led to European cooperation between police officers and judges. This takes the form of mutual assistance and is enabled by *a posteriori* instruments such as the European Arrest Warrant and the European Investigation Order.

The European Investigation Order

On 3 April 2014, a directive was adopted with the aim of facilitating cross-border criminal investigations and the gathering of evidence on the territory of other Member States of the European Union. '*The European Investigation Order is a judicial decision issued or validated by a judicial authority of a Member State - the issuing State - for the purpose of executing one or more specific investigative measures in another Member State - the executing State - with a view to obtaining evidence in accordance with this Directive*', explains Article 1.

It also allows the temporary prevention in the executing State of any destruction or removal of items that could be used as evidence. Lastly, it can be used to temporarily transfer a detained person to the issuing State to allow procedures requiring that person's presence to be carried out. It is the proper conduct of the procedure, heard jointly when cases involve several Member States, that ensures a fair decision that meets the requirements of the rule of law. According to a report by the European Commission of 20 July 2021 regarding the implementation of the said directive, it is stated that "*in the majority of Member States, the competent authorities for the issue of European Investigation Orders are public prosecutors, investigating magistrates or courts*".[5]

The decision contains various items of information, including details of the issuing authority, the purpose of and reasons for the decision, information on the person concerned, a description of the criminal act,

[5] *In France, Article 694-20, §1 and 2 of the French Code of Criminal Procedure. In Germany, law authorises the* Finanzamt fur Steuerstrafsachen und Steauerfandung Munster *(here, the Munster department of criminal tax affairs and tax investigations, an administrative authority) Articles 386-401 of the* Abgabenordnung *(German tax code).*

a description of the investigative measures requested and the evidence to be obtained. There are eight grounds for non-execution, including the existence of an immunity or privilege under the law of the executing State that makes it impossible to implement the investigative decision, or where there is a risk of harm to essential national security interests (article 11). Here again, however, execution is the principle and strict reasons must be given for non-execution. For example, in Bulgaria, an individual was prosecuted for participation in a criminal organisation linked to tax offences. He was accused of importing sugar from other Member States, in particular the Czech Republic, through a company, then selling it in Bulgaria without paying VAT and presenting false documents. On 11 May 2017, Bulgaria's Specialised Criminal Court (Spetsializiran nakazatelen sad) issued a European Investigation Order so that the Czech authorities could carry out raids, seizures and an interrogation of the head of the shell company. However, the Czech authorities noted that Bulgarian law does not provide for any remedy against decisions ordering the performance of the aforementioned acts, nor against the issuing of a European investigation order. Thus, pursuant to Article 11(f) of Directive 2014/41/EU, the Czech authorities refused to execute the Bulgarian decision because there were serious grounds to believe that the execution of the investigative measure would be incompatible with the obligations of the executing State pursuant to Article 6 TEU and the Charter of Fundamental Rights, in particular its Article 47 on the right to an effective remedy[6].

The documentary "Escort-girl", co-produced in 2013 by the Robert Schuman Foundation with the support of the European Commission, illustrates judicial and police cooperation in Europe as it followed the dismantling of a Europe-wide prostitution network that offered escort girls recruited online in Eastern European countries. Five countries were involved (France, Hungary, Romania, Cyprus and the Czech Republic) and it took almost three years to make the documentary[7].

As in the case with legal considerations, judicial activity on this instrument has been intense; even if it takes place far from the noise of political life in the media, it reflects the image of this part of European integration as an illustration of cooperation between equal states united in the face of adversity.

FLOURISHING EUROPEAN JUDICIAL COOPERATION: THE DEVELOPMENT OF THE UNION'S CRIMINAL JUSTICE STRUCTURES

The establishment of European criminal justice structures has proved necessary to enable judicial and police cooperation. The adoption of a European approach to criminal justice is reflected in the establishment of European bodies acting at the various stages of the criminal justice process to ensure coordination of investigations, prosecutions and the enforcement of decisions. Within this framework, it is possible to mention the structures of Europol, Eurojust, the mechanism of liaison magistrates or that of the European Judicial Network.

A final body in criminal matters in the European Union emanated from a procedure under Article 86 TFEU on 12 October 2017. The Council then adopted a regulation establishing enhanced cooperation on the creation of a European Public Prosecutor's Office. Twenty-two Member States have signed up to this structure, which has the power to investigate, prosecute and bring to trial the perpetrators and accomplices of certain criminal offences, '*irrespective of their classification by the said States*', affecting the Union's financial interests. Its material jurisdiction concerns only intentional acts or omissions in connection with the territory of two Member States and resulting in damage totalling at least €10,000.

This prosecution authority operates '*as a single prosecution authority with a decentralised structure*' (article 8), organised on two levels. On the one hand, there is a central level responsible for supervising and directing cases. It comprises a Chief Prosecutor (Laura Kovesi), a college of twenty-two European Public Prosecutors, comprising one prosecutor per Member State participating in the said prosecution service, and permanent divisions. On the other hand, the national or decentralised level comprises the Deputy European Public Prosecutors, who conduct investigations and

[6] *Reference has been made to the CJEU for a preliminary ruling on this dispute. In a judgment of 11 November 2021, it pointed out that Article 14 of 2014/41/EU precludes the legislation of a Member State issuing a European Investigation Order which does not provide for any means of appeal against the issuing of a European Investigation Order having as its object the carrying out of searches and seizures and the organisation of a hearing of a witness by videoconference.*

[7] *Two other documentaries on the investigations into the trafficking of child pickpockets. are used for the training of police officers and judicial staff.*

criminal prosecutions on behalf of the European Public Prosecutor's Office in their respective Member States. In the Goliath case, charges were brought in Hamburg based on effective and fruitful cooperation between European police forces and national courts.

As a result, real involvement and integration of this body in domestic criminal policy is evident in terms of the opportuneness of investigations and prosecutions. The Prosecutor's Office's most recent annual report shows that at the end of 2023, there were a total of 1927 investigations in progress, with an estimated loss to the EU budget of €19 billion. It received and processed 4187 reports of infringements, 26% more than in 2022. One hundred and thirty-nine indictments were filed, and the judges granted the Deputy European Public Prosecutors freezing orders worth €1.5 billion.

***

The harmonisation of criminal law in Europe is no longer simply a key issue in ensuring an area of freedom, security and justice without internal borders. It seems to have become central to the building of Europe, and the fact that it receives so little attention probably reflects the fact that it is necessarily indisputable.

Jack Stewart

Project manager for the Ministry of Justice's Department of Access to the Law, Justice and Victim Support.

Publishing Director: Pascale JOANNIN
ISSN 2402-614X