European Criminal Law: Impact on National Defence Practice. Competences of the EU, Instruments, Institutions, Developments

Julia Victoria Pörschke

“European Criminal Law“

- European Criminal Law is a branch of law with a sui generis nature.

- It comprises:
  - legal acts of the union relevant for criminal proceedings,
  - local international law and
  - national penal law provisions that are influenced by the law of the union.
The Area of Freedom, Security and Justice (Art. 67 ff. TFEU)

- definition of the term

- measures of the AFSJ:
  abolition of border checks within the internal market, effective surveillance of the external borders, a common policy on asylum and refugees, judicial cooperation in civil and criminal matters (Art. 82 ff. TFEU) as well as police cooperation (Art. 87 ff. TFEU)

- trend: imbalance between the various elements
AFSJ –
a detailed look at the element of security

- measures for coordination and cooperation between police and judicial authorities and other competent authorities by establishing European institutions
  - e.g. Europol (Art. 87 ff. TFEU), Eurojust (Art. 85 TFEU), European public prosecution office (Art. 86 TFEU)
- mutual recognition of judgments in criminal matters (Art. 82 Abs. 1 TFEU)
  ➔ principle of mutual recognition as cornerstone of the judicial cooperation in criminal matters
  - European Arrest Warrant
  - European Evidence Warrant
- approximation of criminal law provisions (competences of the EU)

Competences of the Union in the field of criminal law

- area of freedom, security and justice as part of the shared competence (Art. 4 par. 2 lit. j TFEU)

- legislative competences vs. competences of approximation of legislation
Competences of the Union in the field of criminal law

- **Art. 82 par. 1 subpar. 2 TFEU:**
  measures to promote cooperation between judicial authorities of the Member States in relation to proceedings in criminal matters, forms of action: directives, regulations, decisions and more
- **Art. 82 par. 2 TFEU:**
  approximation competence in the field of criminal procedure law, form of action: directives
- **Art. 83 par. 1 TFEU:**
  approximation competence in the field of substantial criminal law, form of action: directives
- **Art. 83 par. 2 TFEU:**
  approximation competence in the field of substantial law for areas which have been subject to harmonisation measures, form of action: directives
- **Art. 325 TFEU:**
  legislative competence to protect the financial interests of the European Union, form of action: regulations

Art. 82 par. 1 subpar. 2 TFEU

(1) Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

(a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
(b) prevent and settle conflicts of jurisdiction between Member States;
(c) support the training of the judiciary and judicial staff;
(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.
Art. 82 par. 2 TFEU

(2) To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:

a) mutual admissibility of evidence between Member States;
b) the rights of individuals in criminal procedure;
c) the rights of victims of crime;
d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Art. 83 par. 1 TFEU

(1) The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions 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.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.
Art. 83 par. 2 TFEU: “Annex-competence”

(2) 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, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

Legislative competence to protect the financial interests of the European Union (Art. 325 TFEU)

(1) The Union and the Member States shall counter fraud and any other illegal activities affecting the financial interests of the Union through measures to be taken in accordance with this Article, which shall act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.

(2) Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests.

(3) Without prejudice to other provisions of the Treaties, the Member States shall coordinate their action aimed at protecting the financial interests of the Union against fraud. To this end they shall organise, together with the Commission, close and regular cooperation between the competent authorities.

(4) The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union with a view to affording effective and equivalent protection in the Member States and in all the Union's institutions, bodies, offices and agencies.

(5) The Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken for the implementation of this Article.
Mutual Recognition of Judicial Decisions as structural Principle of European Criminal Law - Instruments

- European Arrest Warrant
- European Evidence Order
- transnational “ne bis in idem” throughout the Union
- mutual recognition of fines
- mutual recognition of previous convictions
- development of electronic systems for the exchange of information on criminal records
- transferability of evidence throughout the Union

EU-Institutions in the Area of Criminal Law

- objective: strengthening cooperation between the Member States
  - Europol
  - Eurojust
  - European Anti-Fraud Office ("OLAF")
  - European Judicial Network (EJN)
Role and Activities of Europol

- criminal intelligence agency allocated in The Hague
- Europol became fully operational on 1 July 1999 and was established by the Europol Convention of 26 July 1995
- Europol's aim is to improve the effectiveness and cooperation between the competent authorities of the Member States primarily by sharing and pooling intelligence to prevent and combat serious international organized crime. Europol takes action when two or more Member States are affected by serious international organised crime in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned.

This covers an increasing number of areas, namely:
- preventing and combating terrorism;
- drug trafficking and trafficking in human beings;
- illegal immigrant smuggling;
- trafficking in nuclear and radioactive substances;
- motor vehicle crime;
- counterfeiting and forgery of means of payment;
- money laundering (except for predicate offences).

Europol pursues its mission by…

… the exchange of information between the Member States

… the collection und analysis of information and “intelligence”

… informing the authorities of the Member States about connections identified between criminal offences

… supporting investigations of the Member States

… the coordination of Joint Investigation Teams (“JITS“)

… the maintainance of automatized information systems
Role and Activities of Eurojust (1)

- Europol’s mirror image in the field of judicial cooperation
- exchange of information between the judicial authorities of the Member States
- enhancing the effectiveness of the national authorities when they are dealing with the investigation and prosecution of cross-border and organized crime
- coordination and support of transnational investigations

Role and Activities of Eurojust (2)

- Eurojust was set up to stimulate and to improve coordination and cooperation between competent judicial authorities of the Member States
- it shall improve judicial cooperation between the Member States of the European Union, especially by facilitating international mutual legal assistance and the implementation of extradition requests