CHAPTER 2
LEGAL RELATIONS: FROM THEORY TO PRACTICE

THE MAIN STAGES OF FORMATION AND PROSPECTS OF HARMONIZATION OF EU CRIMINAL LAW

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Abstract. *The basis of the article is the study of the topical issue of the formation of the criminal law of the EU countries through the convergence of the national criminal legislation of the EU member states, which is necessary to increase the effectiveness of the fight against organized crime and other socially dangerous acts that pose a threat to state security, public order, life and health. persons who are under the jurisdiction of the Union. The purpose of the article is to establish the main stages of the formation of EU criminal law. The main methods that were used in the research were methods of analysis and synthesis, as well as comparative analysis and historical analysis, which helped to achieve the goal of the research. Attention is drawn to the fact that EU law, which determines the standards for the development of national legal systems, acts as a tool for the convergence of the national law of the member states. At the same time, today "EU criminal law" is at the stage of slow formation due to existing differences in national criminal laws, national legal traditions and the unwillingness of countries to transfer their sovereign powers in the criminal law field for regulation at the EU level. The article confirms the heterogeneity of EU criminal law and highlights its following components: administrative and criminal law of the EU; norms of EU law relating to criminal law and process, which mainly require national criminal law systems to implement measures in a certain way; EU criminal procedural law; the draft norms of the unified European criminal law (Corpus Juris). The prospects for the development of the national criminal legislation of the states are determined, taking into account new challenges and threats, which determine the directions of convergence of the national criminal legislation of the member states.*

Keywords: *criminal legislation, Europeanization of criminal law, EU criminal law, convergence of national criminal law systems, Euro-crimes.*

JEL Classification: K14, K33

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Introduction. At the time of the establishment of the European Communities, they pursued mainly economic goals and criminal law did not play any role. However, the situation changed with the formation of the common market and the need to protect it from criminal encroachments, and became especially complicated with the formation of the European Union as a supranational entity that has its own bodies and institutions, budget, etc., taking into account the growth of transnational organized crime. Despite the fact that the European Union does not have direct criminal jurisdiction (neither legislative, judicial, nor executive) as such, it is not deprived of the possibility of indirect regulation of criminal-law relations and the ability to determine certain obligations of member states in this regard EU.

Literature review. The "EU Criminal Law and Policy Values, Principles and Methods" offers a review of the significance of EU criminal law and crime policy as a rapidly emerging phenomenon in European law and governance (Joanna Beata

Banach-Gutierrez, Christopher Harding, 2017). Bringing together an international set of contributors, the book questions the nature, role and objectives of such 'criminal law', its relationship with other areas of EU policy and law, and the established rules of criminal law and criminal justice at the Member State level.

EU criminal law is one of the fastest evolving, but also challenging, policy areas and fields of law. У "Research Handbook on EU Criminal Law. Cheltenham" provides a comprehensive and advanced analysis of EU criminal law as a structurally and constitutionally unique policy area and field of research (Mitsilegas, V., Bergström, M., & Konstadinides, T., 2016). With contributions from leading experts, focusing on their respective fields of research, the book is preoccupied with defining cross-border or 'Euro-crimes', while allowing Member States to sanction criminal behaviour through mutual cooperation. It contains a web of institutions, agencies, and external liaisons, which ensure the protection of EU citizens from serious crime, while protecting the fundamental rights of suspects and criminals.

Previous studies on procedural rights assessing the feasibility of the numerous instruments and proposals contained in the Roadmap should be mentioned, in particular academic projects coordinated by Taru Spronken and Gert Vermeulen,38 as well as those comparing national criminal procedures [3]. Other comparative studies focused on evidence and procedural criminal law carried in the run-up to the establishment of a European Public Prosecutor's Office, those coordinated by the Max Planck Institute [4] and those coordinated [5] and edited by Katalin Ligeti in particular [6]. Other works put a more narrow emphasis on either specific procedural safeguards, such as the right to information [7], the right to translation [8], and the right to access to a lawyer [9], to name but a few, or those areas where the EU has only taken preliminary steps towards harmonisation, such as evidence law [10] and detention conditions [11]. Finally, a few authors analysed the challenges of implementing EU directives in national laws from the standpoint of individual Member States, such as France [12], Romania [13], Italy [15], and Portugal [16].

Aims. The purpose of the article is to establish the main stages of the formation of EU criminal law.

Methods. The main methods that were used in the research were methods of analysis and synthesis, as well as comparative analysis and historical analysis, which helped to achieve the goal of the research.

Results. The use of the term "EU criminal law" is conditional. This is explained by the fact that, as such, EU criminal law in the traditional sense (as a system of legal norms that establish the principles of criminal liability, types of crimes and punishment for their commission) does not exist and cannot exist at this moment, and we can only talk about type of so-called transnational criminal law – a system of international legal norms aimed at regulating criminal law issues of national criminal jurisdiction and extradition, as well as at harmonizing the criminalization of the most significant offenses in the EU legal space and establishing proportionate and effective criminal sanctions. In addition, EU criminal law now covers the so-called transnational criminal procedural law - supranational legal norms regulating: a) cooperation of justice authorities and the police on matters of criminal proceedings, b) optimization of the

functioning of national law enforcement and judicial systems and ensuring guarantees of human rights in criminal proceedings.

Thus, the criminal law of the EU is not an internal criminal law, but acts as one of the types of regional transnational criminal law in the material, legal and procedural sense.

Given that, according to the EU Treaty, the European Union acts as a single institutional structure that unites the three so-called "pillars": Communities, common foreign policy and security (CFSP), police and court cooperation in the criminal sphere, there is a position on the allocation of two levels of manifestation of EU criminal law:

1) harmonization of provisions of criminal law by legal means of first aid (through the application of the principle of loyal cooperation and with the help of regulations and directives);

2) mechanisms, institutions of intergovernmental cooperation of EU member states on issues of criminal law and process. In particular, Art. 29 TEU provides for the implementation of measures aimed at: closer cooperation of police, customs and other competent authorities of member states, directly or through the European Police Agency (Europol); closer cooperation of judicial and other competent authorities of the member states, in particular through the European unit of judicial cooperation (Eurojust); convergence, if necessary, of the norms of criminal law of the member states.

Researchers note the heterogeneity of EU criminal law and identify its following components:

1) administrative-criminal law of the EU (prohibitions of EU law and procedural rules, which for formal-legal and political, but not essential reasons are called "administrative-legal" and not "criminal-legal");

2) norms of EU law relating to criminal law and process, which mainly require national criminal law systems to implement measures in a certain way;

3) EU criminal procedural law – a system of EU law norms that determines the standards of proceedings in criminal cases and the status of its individual subjects (i.e. the application of criminal or criminal procedural law at the national level), regulates judicial (procedural) cooperation in criminal cases by providing legal assistance in the investigation or trial of criminal cases, execution of criminal procedural decisions;

4) draft norms of the unified European criminal law (Corpus Juris).

At the time of the creation of the European Communities (Treaty on the European Coal and Steel Community of 1951, Treaty on the European Economic Community of 1957, Treaty on the European Atomic Energy Community of 1957) issues related to the sphere of criminal justice (criminal law, criminal procedure , criminal executive law) did not appear, in connection with the purely economic interest in the existence of the specified Communities. However, over time, the exclusively economic goals of the European Communities have evolved. The new legal nature of the European Union, based on the freedom of movement of goods, persons, services, capital, and single citizenship, became a factor that negatively affected the growth of transnational crime and exacerbated the problem of ensuring internal security (especially at the stage of accepting new EU members).

Cooperation of states in the field of criminal law in the territory of the modern European Union has gone through a number of stages.

1) *The first stage* covers the 50s-70s of the 20th century. It is associated with the creation of an internal market without borders on the basis of the founding treaties and the strengthening of transnational crime, which quickly reacted to new opportunities. The DEU, concluded in 1957, did not contain any provisions on the cooperation of the Community member states in the sphere of justice and internal affairs. United Europe was satisfied with existing mechanisms of cooperation in the criminal law sphere within the framework of the Council of Europe.

Multilateral special conventions on cooperation in the field of criminal law concluded by states under the auspices of the Council of Europe (on the extradition of offenders from 13.12.1957, on mutual assistance in criminal cases from 20.04.1959, on the international validity of criminal sentences from 28.05.1970 ., on the transfer of proceedings in criminal cases from 05.15.1972, on the fight against terrorism from 01.27.1977, etc.), unified the existing international legal directions and forms of combating crime.

Security cooperation strengthened with the formation in 1970 of the institutional mechanism - European political cooperation, which was created mainly for the purpose of coordinating the foreign policy and security of the Community members. The Munich tragedy of 1972 marked the need to unify their internal policies in the sphere of justice and internal affairs. During the European Council at the highest level on May 1-2, 1975, a decision was made to create the TREVI group as an intergovernmental meeting with the participation of officials from the ministries of justice and internal affairs of the countries of the European Community to coordinate counter-terrorist measures. Over time, its functions were expanded and extended to immigration regulation, visa policy, border control, countering the distribution of drugs in the EU.

2) *The second stage* (80s and early 90s of the 20th century) is associated with the course of policy coordination in the field of internal affairs, in particular with the creation of the so-called the Schengen area. On June 14, 1985, the governments of five countries (Belgium, Luxembourg, the Netherlands, France and Germany) signed the Agreement on the gradual abolition of checks at common borders (the so-called "Schengen Agreement"). This document established the need to ensure the harmonization of the legislation of the participating states in the field of crime prevention and the search for criminals, the application of agreements on the procedure of extradition and the implementation of the fight against crime by giving the police the right to pursue with the help of communication mechanisms and international legal assistance. Later, the specified countries concluded an international agreement - the Convention on the Application of the Schengen Agreement of May 14, 1985 on the gradual abolition of checks at common borders.

In addition, the European Committee on Drugs (CELAD) and a special group on immigration issues (Ad hoc Immigration Group of Senior Officials) are being created during this period.

Achievements in matters of cooperation in the fight against terrorism and crime were summarized in the EEA (Single European Act) and the Political Declaration

attached to it in 1986. Despite the fact that the EEA did not clearly define the circle of persons who have the right to freedom of movement, the methods and guarantees of ensuring such freedom, although cooperation remained at the intergovernmental level, it was important that the EEC states declared their intention to develop a common approach to justice and home affairs. An important next step was the Dublin Convention of 1990, the purpose of which was to eliminate the controversial solution of the Community states to the issue of granting political asylum.

At the same time, the lack of a clear demarcation of the competence of supranational bodies of the Communities and member states on cooperation in internal affairs and justice caused conflicts and complicated cooperation. At the summit in Luxembourg in June 1991, German Chancellor G. Kohl first clearly formulated the idea of "communitarianization" of immigration and political asylum policy, calling on the Council to develop a program of cooperation in the field of internal affairs and justice.

3) The Maastricht Treaty of 1992, which is associated with the third stage of the development of EU criminal law, not only formed the three-pillar structure of the EU, but also defined the main provisions of cooperation between EU members in the field of internal affairs and justice, which included: the policy of providing political shelter; control over the external borders of the Union; immigration policy; customs cooperation; cooperation in matters of civil and criminal justice; cooperation of police services and creation of Europol.

4) Over time, the need to communitize part of the third pillar of the EU and transfer its provisions to the sphere of competence of the Community became obvious. At the Intergovernmental Conference of 1996-1997, which is associated with the beginning of the fourth stage, it was proposed to "communitarianize" such areas of internal affairs and justice as the provision of political asylum, immigration and protection of common borders, cooperation in civil matters. The main achievement of the conference was the proposal to create the European Area of Freedom, Security and Justice, which led to the conclusion of the Treaty of Amsterdam in 1997.

The Amsterdam Treaty completely replaced Chapter VI of the Maastricht Treaty. The subject of the third pillar, which covered cooperation in the field of Justice and Home Affairs (JHA) was narrowed down to Police and Judicial Cooperation in Criminal Matters (PJCC), leaving the intergovernmental method of cooperation. Thus, close cooperation of police forces, as well as judicial and customs authorities was foreseen. The concept of police cooperation was expanded, including by giving the European Police Agency powers that allowed it to conduct and coordinate investigations of specific cases, to develop methods of providing assistance to national police authorities in the investigation of crimes committed by organized criminal groups.

According to the Treaty of Amsterdam, the convergence of criminal law and procedural norms of the EU member states was decided to be carried out within the framework of the Council of the EU. The main legal instruments of the third pillar of the EU were defined as decisions and framework decisions aimed at the approximation of the legislation of EU member states, joint positions, which determine the Council's

approach to solving a certain issue, and conventions. , which are of a recommendatory nature, which unlike the tools of the first pillar (decisions, directives and regulations) were less effective. Thus, joint positions are not binding, framework decisions do not have direct effect, and for the convention to come into force, it needs to be ratified by at least eight EU member states.

The Council of Ministers of Internal Affairs and Justice was authorized within five years to move from unanimity in the decision of internal affairs to the principle of qualified majority; the Protocol on the Integration of Schengen Rules into Community Law and the Protocol on the Procedure for Granting Political Asylum in the EU to Citizens of EU Member States were included in the agreement. Provisions on free movement of citizens, immigration and political asylum, cooperation in civil matters were assigned to the first pillar (to the competence of the Community).

The Amsterdam Treaty introduced the principle of in-depth cooperation in areas remaining within the competence of the states, but the mechanism for its implementation was not defined.

Thus, the fundamental goal of the European Union in accordance with Art. Art. 2, 29 of the TEU became the formation of the space of freedom, security and justice. The idea of the European area of freedom, security and justice implies the creation within the framework of the European Union of a territory without internal borders, within which citizens could move freely in conditions of complete security. In the considered context, the concept of "freedom" includes freedom of movement of citizens, immigration, asylum; in the concept of "security" - ensuring internal and external security (the fight against organized crime, terrorism, drug trafficking, etc.); the concept of "justice" - implementation of close cooperation and legal assistance in civil and criminal cases.

An Action Plan was adopted at the summit in Vienna in December 1998 to fulfill the EU's priority task of establishing a European area of freedom, security and justice. The Vienna action plan developed the concept of the "European space": its main principles - freedom, security and justice - are closely interconnected: citizens can fully enjoy freedom of movement only when they feel safe, that is, under the protection of the police and courts regardless of the country in which they are located.

The fifth stage, initiated by the extraordinary summit of the European Union in the Finnish city of Tampere, which took place on October 15-16, 1999, became key in the development of EU criminal law. The Tampere summit was the result of the formulation of the European criminal law space, which changed the perception of state sovereignty. Despite the fact that the European Union does not have its own territory (it is owned only by the EU member states), nevertheless a single legal space is created - the space of "freedom, security and justice". Thus, as soon as the decision acquires legal force in the territory of one of the member states of the European Union according to its law, this decision directly acquires legal force throughout the EU.

Based on the results of the discussions, the summit adopted "Conclusions" (also known as "Tampere Milestones"), in which the priority areas of activity were formulated: immigration policy and the provision of political asylum; creation of a European legal space (in particular, improvement of access to justice in Europe,

affirmation of the principle of mutual recognition of court decisions; substantial convergence of civil law); strengthening the fight against crime (by preventing crime at the EU level; intensifying cooperation in the fight against crime; taking special measures to combat "dirty" money laundering), etc.

In order to implement the indicated priority directions, a special "Tampere Scoreboard" was developed by analogy with the schedule followed by the Communities when implementing the plan to create the Common Market. The events of September 11, 2001 forced the EU member states to review the deadlines for the implementation of the Tampere schedule and the implementation of measures to create a European area of freedom, security and justice. On September 17-21, 2001, an extraordinary EU summit was held in Brussels, at which the Conclusions were approved and the Action Plan for the fight against terrorism was adopted, which provided for the strengthening of police and judicial cooperation; development of an international legal framework for anti-terrorist actions; combating the financing of terrorist organizations through the money laundering directive; strengthening requirements for flight safety. At an emergency meeting of the Council of Ministers of Internal Affairs and Justice, decisions were made to expand Europol's mandate, start the work of Eurojust, introduce a European arrest warrant, formulate a general definition of the concept of terrorism and streamline sanctions against it1.

The Nice Treaty of 2001 transformed the institution of enhanced cooperation: if at least eight EU member states express a desire to cooperate intensively in any field, they can do so in agreement with the Council, which makes decisions by a qualified majority. One of the first examples of in-depth cooperation was the creation of the Schengen area. In addition, cooperation in the field of justice was strengthened through the establishment and activities of Eurojust.

In connection with the failure of the ratification of the Treaty on the introduction of a Constitution for Europe, signed by 25 EU member states on 10/29/2004, the EU members signed on 12/13/2007 the Lisbon Treaty on Amendments to the Treaty on European Union and the Treaty on its Establishment of the European Community. Among the innovations of the Lisbon Treaty: rejection of the tripartite system of the EU and granting this regional organization the status of a single legal entity. The ratification of the Lisbon Treaty will create new opportunities for the development of cooperation between EU member states in the field of criminal justice, and will strengthen the role of EU institutions in this area.

Discussions. The means of criminal law should be used only if others are insufficient, which requires additional justification. In 2011, the European Commission published specific guidelines in this regard in the Communication "Towards EU criminal policy: ensuring effective implementation of EU policies by means of criminal law" [14], which outlined the specifics of the application of criminal law norms to ensure additional protection in relevant areas. For this purpose, a number of normative acts of the Union were adopted, aimed at the convergence of national criminal legislation within the framework of certain areas of EU activity. In particular, Directive 2017/1371 on combating fraud directed against the financial interests of the Union by criminal means defines a list of illegal acts and sanctions for their commission, which

is aimed at the convergence of national criminal legislation in this area. The adoption of the specified act was conditioned by the obligation under Art. 325 TFEU, according to which the Union and the Member States must combat fraud and any other illegal activity affecting the financial interests of the Union by means of measures which act as a means of deterrence and are effective. At the same time, Member States are obliged to take measures to combat fraud affecting the financial interests of the Union, which are similar to those they take to combat fraud affecting their own financial interests. It is worth noting that the scope of "EU criminal law" is gradually expanding, taking into account new challenges and threats, which determine the further development of EU legislation, and therefore the directions of convergence of the national criminal legislation of the member states. According to the 2021 Europol Report, the key threats to the EU are criminal networks focused on arms trafficking, corruption, money laundering, cybercrime, crimes against persons, drug trafficking, fraud, property crimes, and environmental crimes. With this in mind, the EU member states have identified 10 priority directions for combating organized crime for the period 2022–2025: high-risk criminal networks, cyber attacks, human trafficking, child sexual exploitation, migrant trafficking, drug trafficking, fraud, economic and financial crimes, organized crimes against property, environmental crimes, arms trade. Thus, one of the promising directions of reforming the national criminal legislation of the EU member states is the environmental sphere, which is trending in the context of the implementation of the priorities of the "European Green Agreement". Recently (December 15, 2021), the European Commission presented a draft Directive on environmental protection by means of criminal law to replace the current Directive 2008/99/EC [11]. Among its key proposals is the expansion of the list of environmental crimes and strengthening of responsibility for their commission.

Conclusions. As a conclusion, it should be emphasized that a characteristic trend in the development of the national criminal legislation of EU member states is the harmonization of approaches to determining the content of offenses and responsibility for their commission. Convergence of national criminal legislation occurs with the help of directives of the European Union based on the method of minimal harmonization, which involves determining the necessary list and content of socially dangerous acts and establishing the principles of responsibility for such acts. In the case of the most serious socially dangerous acts belonging to the category of "Euro-crime", sanctions are determined according to the principle of "minimum-maximum" approximation. This method allows, on the one hand, to ensure regulation with the help of uniform standards, and on the other hand, to take into account national legal traditions in the field of criminal law, in particular, to establish more severe punishments or a wider list of acts for which criminal liability arises. The scope of EU criminal legislation is gradually expanding, taking into account new challenges and threats, which determine the directions of convergence of the national criminal legislation of the member states. Prospective directions for the convergence of national criminal law within the EU are the environmental sphere, cyber security, migrant trafficking, etc.

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