The Principle of Direct Effect in Criminal Law: Theory and Practice*

Edita Gruodytė**
Saulė Milčiuvienė***
Neringa Palionienė****

Summary: The meaning of the general principles of EU law has been broadly developed by the Court of Justice of the European Union; however, for many years it had only limited competence in deciding criminal cases. The principle of direct effect is important for ensuring the efficient functioning of EU law. The aim of this research is to find out if and how this principle affects criminal justice. To reach this objective, the researchers examine how the substance and content of the principle, through the doctrine and the judgments of Court of Justice of the European Union, can influence national criminal law and criminal procedure. Afterwards, the actual impact of EU law on national criminal law is evaluated, taking Lithuania as an example. The analysis reveals that direct application of directives in material criminal law is highly unlikely, while in criminal procedural, law such a possibility is real if EU norms are clear, unconditional, and precise.

Keywords: Criminal law, European Law, EU cooperation in criminal matters, direct effect

* This article has been prepared as part of a project to create an institutional module on „EU Criminal Law and Policy“ project number 585318-EPP-1-2017-1-LT-EPPJMO-MODULE

** Edita Gruodytė is tenure professor in public law department and vice-dean for research at Faculty of law of Vytautas Magnus University, Kaunas, Lithuania. She has more than 20 years' experience of diverse legal work (both as a lawyer in various business companies and as attorney) and in scientific research and academic work. Gruodytė is the author and co-author of several books, author of more than 40 scientific articles in various national and international scientific journals and books. Specializes in criminal law (including national, European, business crimes), legal ethics and certain aspects of human rights. She is an expert in various national and international organizations has some legislative drafting experience. Contact: Edita.gruodyte@vdu.lt

*** Saulė Milčiuvienė (Ph.D) is an associated professor at the Law faculty of Vytautas Magnus University, Kaunas, Lithuania. She is giving lectures on the European Union law (institutional and substantive law) for more than 5 years at the Law faculty. She is accredited to supervise doctoral thesis, has two doctoral students at the moment. Both doctoral students are preparing dissertations on issues, which are related to the EU substantive law – free movement of capital and free movement of services. Contact: Saule.milciuviene@vdu.lt

**** Neringa Palionienė (Ph.D) is a lecturer in at the Law faculty of Vytautas Magnus University, Kaunas, Lithuania. She specializes in criminal law. Contact Neringa.palioniene@vdu.lt

1. Introduction

There are no doubts regarding the importance of the general principles of EU law and their substantial implications in the areas they influence, as they are used to fill in the gaps in EU law, they are helpful for interpreting existing EU norms, and they are valuable instruments for judicial review,[1] i.e., deciding whether a specific national norm is violating a general principle of EU law. These aspects, and especially the first one, are significant in the field of EU criminal law,[2] as this branch of law is less developed than common market issues. This indicates that there are still many gaps the Court of Justice of the European Union (CJEU) could fill in by using general principles.

The doctrine of direct effect provides an opportunity for legal subjects to question actions of Member States in national courts applying EU law,[3] and it is one of the classic concepts on which the EU's *sui generis* system of law is based,[4] "therefore, it is believed that direct effect is an essential characteristic of the Community order."[5]

Initially, the principle of direct effect had narrow treatment, and it was applied only to the EU treaties themselves and to regulations,[6] as confirmed by the first cases in the CJEU,[7] as only these norms require no further action from national authorities or the community, i.e., they "are normative acts with *erga omnes* effect."[8] By contrast, directives "are never self-sufficient to be fully effective in the national legal systems,"[9] as they require national implementing measures and they "acquire general application with *erga omnes* effect through them."[10]

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1 MIETTINEN, S. *Criminal Law and Policy in the European Union.* London: Routledge, 2014, p. 103.

2 Ibid.

3 SOLOVEIČIKAS, D. Europos Sąjungos teisės tiesioginis veikimas ir jos taikymas – dvi skirtingos tapačios doktrinos dalys? [Direct Effect and Application of European Community Law: Two Distinct Parts of the Same Doctrine?]. *Jurisprudencija,* 2007, vol. 94, no. 4, p. 41.

4 Ibid.

5 VUKADINOVIC, R. D. The concept and faces of direct effect of European Community law. *Review of European Law*, 2011, Vol. 13, no. 1, p. 37.

6 Treaty establishing the European Economic Community, Rome, the 25 of March 1957, Art. 189. [online]. Available at: <http://data.europa.eu/eli/treaty/teec/sign> Accessed 23.03.2020.

7 For example, the CJEU statement: "Article 12 of the Treaty establishing European Community produces direct effect and creates individual rights which national courts must protect," in case 26/62, *NV Algemene Transport—En Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1, par. 5.

8 KARAYIGIT, M. T. Are directives directly applicable? *Ankara Avrupa Calismalari Dergisi*, 2016, vol.15, no. 2, p. 67.

9 Ibid., p. 68.

10 Ibid., p. 67.

Afterwards, with development of CJEU case law,[11] other legal acts such as decisions and directives were given direct effect if they are clear, unconditional, and precise, i.e., satisfy established criteria of direct applicability.

So, the principle of direct effect means that if the EU norm matches three interrelated conditions, it may have direct effect, and individuals may use it for enforcement of their rights established in EU law in national courts, i.e., it "means that EU norm must be directly applicable in concrete situations," and it must have "priority over any conflicting provisions of national law."[12] The principle of direct effect together with the principle of supremacy "are necessary for the efficient functioning of the European Union"[13] as "both Member States and the institutions of the European Union are under a legal duty … to ensure that EU law is adequately applied and followed,"[14] i.e., to ensure effectiveness of EU law in practice.

With the Lisbon treaty, as certain areas of criminal law enumerated by EU Treaty were supranationalized,[15] the EU gained supremacy over national law in ten areas of criminal law treated as particularly serious crimes with cross-border dimensions.[16] The EU is allowed to intervene in these areas using directives as legal instruments and establishing minimum rules concerning the definitions of criminal offences and sanctions[17] besides its pre-Lisbon functional criminalization competence.[18] The question arises of how the principle of direct effect should

[11] In the *Grimaldi* case, the CJEU stated that "whilst under Article 189 Regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other measures covered by that article [directives and framework decisions] can never produce similar effects". Case C-322/88, *Salvatore Grimaldi v. Fonds*, ECLI:EU:C:1989:646, par. 11. For example, in Case C-9/70, the CJEU recognized that certain clauses of council decisions are directly applicable and that "it would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision… Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the courts, may be the same as that of a directly applicable provision of a regulation." Case C-9/70, *Franz Grad v. Finanzamt Traunstein*, ECLI:EU:C:1970:78, par. 5.

[12] STEINER, J., WOODS, L. *EU Law. 10th Edition*. Oxford: Oxford University Press, 2009, p. 106.

[13] GILBERT, E. Supremacy and direct effect: necessary measures? *North East Law Review,* 2017, vol. 5, p. 15.

[14] Ibid., p. 11.

[15] HERLIN-KARNELL, E. The Lisbon Treaty and the area of criminal law and justice. European policy analysis. *Swedish Institute for European Policy Studies,* 2008, vol. 3, p. 9.

[16] Consolidated version of the Treaty on the Functioning of the European Union. Official Journal 115, 09/05/2008 P. 0047-0388. Art. 83. [online]. Available at: <http://data.europa.eu/eli/treaty/tfeu_2008/oj> Accessed 23.03.2020.

[17] Ibid., Art. 83 (1).

[18] "as a means enabling the Union to achieve effectiveness with regard to its policies and objectives". MITSILEGAS, V. From overcriminalisation to decriminalisation. The many faces of

be interpreted in criminal law and what role it plays or could play in future in this very sensitive area of national law.

The researchers searched for the answer through an analysis of the academic literature and the jurisprudence of CJEU, afterwards taking Lithuania as an example, as "the doctrine's reception is unique in the practice of applying the law in each Member State."[19] The hypothesis of the article is that "criminal law is still not a branch among others but has some restrictions due to its character and close relation to state sovereignty."[20]

2. The Principle of Direct Effect in Criminal Law

Criminal law and criminal procedure law are one of four EU policy areas forming "the content of the criminal justice dimension in the area of freedom, security and justice,"[21] but they are traditionally treated as indicators of a state power and sovereignty,[22] i.e., part of national identity, which the EU must respect.[23]

In accordance with Arts. 82 and 83 of TFEU, which are traditionally associated with criminal procedure law (Art. 82) and substantive criminal law (Art. 83),[24] in both substantive and procedural criminal law, the EU is allowed to adopt directives, establishing minimum rules, which means that the EU gains certain powers while Member States have obligations to implement them taking "into account the differences between the legal traditions and systems of the Member States,"[25] i.e., that there is no full harmonization in this area of law and much space is left for national authorities. Both treaty articles use term "approximation of laws," which "means that national legislation is brought closer together without completely harmonizing or unifying it."[26]

effectiveness in European criminal law. *New Journal of European Criminal Law*, 2014, vol. 5, no. 3, p. 419.

19 SOLOVEIČIKAS, D. supra note 3, p. 35.

20 SUOMINEN, A. Effectiveness and functionality of substantive EU criminal law. *New Journal of European Criminal Law*, 2014, vol. 5, no. 3, p. 388.

21 VERVAELE, J. A.E. European criminal justice in the European and global context. *New Journal of European Criminal Law*, 2019, vol. 10, no. 1, pp. 7–16, p. 10.

22 HUOMO-KETTUNEN, M. EU criminal policy at a crossroads between effectiveness and traditional restraints for the use of criminal law. *New Journal of European Criminal Law*, 2014, vol. 5, no. 3, pp. 301–326, p. 305.

23 KETTUNEN, M. *Legitimizing European criminal law: Justification and restrictions. Comparative, European & International Criminal Justice 2.* Helsinki: Springer, Cham, 2020, p. 173.

24 See for example, BIONDI, A., EECKHOUT, P., RIPLEY, S. (eds). *EU After Lisbon.* Oxford: Oxford University Press, 2012, pp. 335–336.

25 TFEU, supra note 16, Art. 82(2).

26 KETTUNEN, M., supra note 23, p. 67.

As already discussed, if EU norms satisfy certain conditions, the norms may have direct effect. This means that directives enacted on criminal law issues may have direct application at least in theory if they are clear, unambiguous, and unconditional. But is this possible in practice, evaluating the fact that criminal law is guided by certain principles also evaluating issues of sovereignty of state[27]?

The different impact of EU norms in substantial and procedural criminal law requires us to cover the matters in separate sections.

2.1. Direct Effect in Material Criminal Law

"Defining … criminal law is a difficult task … [as it] symbolises states' national identity and culture."[28] However the essence of material criminal law (the definition of offences and the determination of penalties) is that individuals and legal entities (when criminal liability for legal persons is established in criminal law) are obliged not to infringe criminal prohibitions or otherwise they will experience certain negative consequences, and it is common to every state, i.e., criminal law provides certain obligations.

EU interference in national criminal law is mostly related to increasing the efficiency and effectiveness of criminal law measures,[29] which means introducing criminal liability through the introduction of certain criminal offences, provision of common definitions, and giving certain guidelines regarding criminal sanctions following the EU triad that they should be effective, proportionate, and dissuasive.

The question arises, what happens if the Member State does not transpose directives correctly in time? This arose in the case *Pretore di Salo v. X*,[30] in which an Italian authority wanted to know whether a directive may have direct effect independently of national law.[31] The CJEU answered 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

[27] SEHNÁLEK, D., STEHLÍK, V. European "Judicial Monologue" of the Czech Constitutional Court – a Critical Review of its Approach to the Preliminary Ruling Procedure. *International and Comparative Law Review*, 2019, vol. 19, no. 2, pp. 181–199; GOMBOS, K. Europeanisation Effects in the Court Jurisprudence. *International and Comparative Law Review*, 2019, vol. 19, no. 1, pp. 261–275.

[28] KETTUNEN, M., supra note 23, p. 47.

[29] See, for example, sec. 13 of Directive 2019/713 on combating fraud and counterfeiting of non-cash means of payment [2019] *OJ L 123*/18.

[30] Case C-14/86, *Pretore di Salo v X*, ECLI:EU:C:1987:275.

[31] Ibid., par. 18.

directive."[32] It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person,[33] but only as a measure of sanctioning a Member State and as a prevention measure for the state to take advantage of its own failure to comply with community law,[34] i.e., "allowing individuals to rely on their EU rights."[35]

The matter was further clarified in the *Kolpinghuis Nijmegen BV* case, in which a Dutch court asked if direct application of the directive is possible in criminal proceedings against a company for possible infringements of local acts. The main issue in the case was that infringements by the company took place on August 7, 1984, while the directive became national law on August 8, 1985,[36] i.e., it was not a part of national law on the day of the criminal offence. The court repeated the *Pretore* rule that it is not.[37] This case is also important, as it clarifies certain limits of Member States' obligations to interpret legislation in the light of the wording and the purpose of the directive to reach the result (also known as the doctrine of consistent interpretation[38]). This obligation "is limited by the general principles of law which form part of Community law and in particular the principles of legal certainty and non-retroactivity,"[39] which means that in certain cases, there would be no possibility even using indirect effects of the directive to reach the result required by the directive, as it would infringe general principles.

This aspect was clarified in famous *Tarrico* saga,[40] notwithstanding the fact that the first decision was controversial.[41] The court indicated that the "provisions of criminal law must comply with certain requirements of accessibility

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[32] Ibid., par. 20.

[33] Case C-152/84, *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, ECLI:EU:C:1986:84, par. 48.

[34] *M.H. Marshall v. Southampton and South-West Hampshire Area Health Authority (Teaching)*, supra note 32, par. 49.

[35] PEREIRA, R. M. *Environmental Criminal Liability and Enforcement in European and International Law.* Leiden: Brill, 2015, p. 159.

[36] Case C-80/86, *Kolpinghuis Nijmegen BV*, ECLI:EU:C:1987:431, par. 2.

[37] *Pretore di Salo v X*, supra note 30, par. 14.

[38] HARTLEY, T. C. *The Foundations of European Union Law*. 7th Edition. Oxford: Oxford University Press, 2010, p. 235.

[39] *Kolpinghuis Nijmegen BV*, supra note 36, par. 13.

[40] Case C-105/14, *Tarrico and Others (Tarrico I)*, ECLI:EU:C:2015:555; Case C-42/17, *M.A.S. and M.B. (Tarrico II)*, ECLI:EU:C:2017:936.

[41] In its first decision, the CJEU stated that "the national court must give full effect to Article 325(1) and (2) TFEU, if need be by disapplying the provisions of national law the effect of which would be to prevent the Member State concerned from fulfilling its obligations under Article 325(1) and (2) TFEU" (*Tarrico and Others (Tarrico I)*, supra note 39, par. 660, i.e., requiring non-application of the time limitation established in the Italian criminal code, "which would lead to the defendant being subjected to longer time limitations than the ones applicable when the offence was committed" (MANACORDA, S. The Tarico saga: A risk or an opportunity for

and foreseeability, as regards both the definition of the offence and the determination of the penalty,"[42] while "the requirement that the applicable law must be precise … means that the law must clearly define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable."[43] This is not the case in criminal matters. The CJEU clearly explains in *Tarrico II* that in such cases when national criminal law infringes the requirements of EU legal acts (even treaties, which have priority over national law), it must not break important principles such as non-retroactivity, and that *nullum crimen*, *nulla poena sine lege* infringement can only be fixed by legislators,[44] which makes direct effect in substantial criminal law highly unlikely.

Why in criminal law is direct effect not evidentiary? Usually, direct effect is understood in the opposite sense—as an instrument of legal protection against national authorities,[45] but not as an instrument empowering the state. So, if the directive was not implemented properly, the state is at fault, and it cannot use the directive against individuals. The next reason that substantial criminal law is guided by the principles of legality, non-retroactivity, and legal certainty, among others is explained in the jurisprudence of the CJEU. "In the context of unclear regulations or unimplemented directives,"[46] these principles "could operate as a basis for avoiding criminal liability,"[47] i.e., it is evident that the directive alone cannot aggravate or be a basis for criminal liability. The only theoretical possibility of direct effect is if the directive provides certain norms that meet requirements of direct applicability and that are more lenient than the national ones, which is difficult to imagine in practice taking into account the present situation, in which the EU is allowed to establish only minimum rules.

2.2. Direct Effect in Procedural Criminal Law

Under Art. 82 of the Lisbon Treaty, for the first time, the European Union was given competence to set certain minimum standards in criminal proceedings (as

European criminal law? *New Journal of European Criminal Law,* 2018, vol. 9, no. 1, p. 6), suggesting infringement of basic principles of criminal law such as legality and non-retroactivity.

42 *M.A.S. and M.B. (Tarrico II)*, supra note 40, par. 55.

43 *M.A.S. and M.B. (Tarrico II)*, supra note 40, par. 56.

44 Ibid., par. 61–62.

45 VUKADINOVIC, R. D., supra note 5, p. 46.

46 HERLIN-KARNELL, E., supra note 15, p. 1120.

47 Ibid.

far as the protection of individual rights are concerned) and minimum standards for the protection of the rights of victims of crime.[48] So the situation in criminal procedure law is different regarding direct effect, as directives, introduced using Art. 82 of TFEU provide certain rights, which can be enforced by individuals in national courts if Member States do not implement them on time, i.e., the direct effect of directives is more realistic.

At the moment there are six directives[49] for the protection of certain rights of suspects or accused persons in criminal procedures (access to a lawyer, right to be present at the trial, presumption of innocence, right to information, right to legal aid, and right to translation) and two directives related to protection of victim rights.[50]

The most interesting legal act is a regulation on mutual recognition of freezing and confiscation orders,[51] which means direct application of regulation rules by national authorities in issues directly related to criminal procedure, as means of freezing and confiscation are directly connected with pre-trial investigation and afterwards with establishment of crimes. Its provision of a legal basis—Art. 82(1) of TFEU—even though such a form of legal act is not even mentioned in the article, indicates that the EU is expanding its competence. The form of the document is grounded on the principle of effectiveness that "mutual recognition and execution of freezing orders and confiscation orders … [can] be better achieved at Union level … in accordance with the principle of proportionality, as set out in article 5 TEU."[52] What does this mean for the future? EU competence may increase at the expense of Member States' powers and the principle of direct

[48] SAKALAUSKAS, G., BIKELIS, S., KALPOKAS, V., POCIENĖ, A. *Baudžiamoji politika Lietuvoje: tendencijos ir lyginamieji aspektai* [*Criminal Policy in Lithuania: Trends and Comparative Aspects*]. Vilnius: Teisės institutas, 2012, p. 52.

[49] Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings [2010] OJ L 280/1; Directive 2012/13/EU on the right to information in criminal proceedings [2012] OJ L 142/1; Directive 2013/48/EU on the right to access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L 294/1; Directive 2016/343/EU on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65/1; Directive 2016/800/EU on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132/1; Directive 2016/1919/EU on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297/1.

[50] Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315/57; and directive 2011/99/EU on the European protection order [2011] OJ L 338/2.

[51] In force from December 19, 2020. Regulation 2018/1805 of November 14, 2018 on mutual recognition of freezing orders and confiscation orders [2018] OJ L 303/1.

[52] Ibid, Preamble of Regulation, sec. 51.

effect has gained power, as a regulation is a legal act with direct applicability. For example, the regulation provides a definition of "proceedings in criminal matters," which may be treated differently by national legislators. Thus, in cross-border cooperation, a Member State must ignore its national legislation and follow the requirements of the regulation. Even more interesting is the statement in the regulation that the procedural rights set out in the mentioned directives should apply to criminal proceedings covered by the regulation,[53] which strengthens the obligation to follow requirements established in the mentioned directives. The general activity of EU legislation in criminal procedure law, including the establishment of the EPPO, which "will enforce EU criminal law directly within the limits of its competence,"[54] indicates that the EU will gain more power in criminal procedure law issues and the principle of direct effect will accelerate in the near future.

Notwithstanding the potential of criminal procedure law at EU level and its direct effect if the directive satisfies the conditions for direct effect, the CJEU has not developed the matter further. However, there are two Bulgarian cases that are related to the questions of criminal procedure law for which the CJEU has provided interesting preliminary decisions.

In Case C-612/15, the Bulgarian court asks "whether, with respect to criminal offences in customs matters, Article 325 TFEU (protection of financial interests) must be interpreted as precluding national legislation that establishes a procedure for terminating criminal proceedings, such as that provided for in Articles 368 and 369 of the Code of Criminal Procedure."[55] The court basically repeats the *Tarrico II* result, i.e., that "real" solutions are changes by national legislators (adoption of the measures necessary to meet treaty obligations).[56] However, the next clause providing that "the referring court must also, without waiting until the national legislation at issue is thus amended by legislation or by any other constitutional procedure, give full effect to those obligations by interpreting that legislation so far as at all possible in the light of Article 325(1) TFEU, as interpreted by the Court, or, as necessary, disapplying that legislation"[57] could be seen as requiring disapplication of national law and giving priority to the treaty article, i.e., direct effect of the treaty norm against national law. However, the CJEU provides wide discretion regarding both the form and content of the grounding to the national court, stating that "it is for the court to decide whether it is necessary, to that end, to disregard all the requirements set out in Articles

[53] Regulation 2018/1805 of November 14, 2018, supra note 51, Section 18 of Preamble.
[54] KETTUNEN, M., supra note 23, p. 67.
[55] Case C-612/15, *Nikolay Kolev and Others*, ECLI:EU:C:2018:392, par. 48.
[56] Ibid, par. 65.
[57] Ibid, par. 65–66.

368 and 369 of the Code of Criminal Procedure, or whether it is appropriate to extend the time limits imposed on the prosecutor by those articles with respect to bringing the pre-trial stage of the proceedings to an end"[58] and the priority of fundamental human rights over EU financial interests is stressed.[59] How we should "translate" this ruling? Is there any difference from *Tarrico*?

It looks like it gives more flexibility and discretion than the first one, as the CJEU is silent regarding the principle of legality. However, protection of fundamental rights means that respect for Art. 47 of the EU Charter (besides others) must be given and the requirement that "everyone is entitled to a fair and public hearing within a reasonable time"[60] must be fulfilled.

In opinion of the authors, in the Bulgarian case, the judge would hardly risk infringing national laws when evaluating the facts of the case taking into account the arguments of the European Court of Human Rights (ECHR) relating to the reasonableness of the length criteria. The facts in Bulgarian case[61] indicate some fault of authorities and infringe the reasonableness criteria explained by the ECHR.[62] The fact that infringements of procedure occurred at least partially because an accused abused his or her rights and objectively prevented the prosecutor from carrying out the various procedural acts required by the law in opinion of the authors is not the central one. Arguments justifying long pre-trial periods[63] do not outweigh mistakes of authorities and really long period of pre-trial investigation.

In Case C-467/18, one of the questions related to direct effect is the compliance of Bulgarian norms of criminal procedure code with Art. 8(2) of directive

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58 *Nikolay Kolev and Others,* supra note 55, par. 67.

59 "Fundamental rights guaranteed by the Charter to the accused persons in the main proceedings are respected. … [They] cannot be defeated by the obligation to ensure the effective collection of the Union's resources." Ibid, par. 68.

60 European Union, Charter of Fundamental Rights of the European Union, 18 December 2000, 2000/C 364/01.

61 Due to the long period of pre-trial investigation (it took more than 6 years), the case was twice referred back to the competent prosecutor to draw up new charges, because they were not adopted by the competent body and infringements of procedural requirements were established; afterwards new infringements of essential procedural requirements were established by the national court on the ground that the new charges had not been disclosed to two suspects (out of eight) and the parts of the indictment concerning one suspect contained contradictions. Ibid, par. 26, 31.

62 This is evaluated using such aspects as the complexity of the case and the conduct of the applicant and the authorities dealing with the case. ECHR 20 January 2009, *Norkūnas v. Lithuania,* appl. no. 302/05 Par. 35–36.

63 The proceedings in the analyzed case may be deemed complex, given the number of participants (eight persons), the fact that they were officials (customs officers), and the nature of the offences (financial crimes and crimes against the civil service, done on the border, i.e., involving cross-border aspects and possibly many victims), *Nikolay Kolev and Others,* supra note 55.

2012/13: "Member States shall ensure that suspects or accused persons or their lawyers have the right to challenge, in accordance with procedures in national law, the possible failure or refusal of the competent authorities to provide information in accordance with this Directive,"[64] which is defined by the CJEU as the clear, unconditional, and precise,[65] i.e., satisfying the criteria of direct effect, and that "the latter provision precludes any national measure which impedes the exercise of effective remedies in the event of a breach of the rights protected by that directive,"[66] even though the CJEU does not develop this line further.

By contrast, in the next paragraphs the method of consistent interpretation that is traditional in criminal cases and its limits are discussed,[67] while the court concludes "that Article 47 of the Charter, Article 8(2) of Directive 2012/13 and Article 12 of Directive 2013/48 must be interpreted as precluding national legislation," such as that at issue in the main proceedings "in so far as that legislation does not enable the court with jurisdiction to verify that the procedural rights covered by those directives were respected in proceedings prior to those before the court, which were not subject to such judicial review,"[68] i.e., it requires courts to apply the norms of the directive instead of national norms of criminal procedure, as it is not possible to solve the matter using consistent interpretation.

So in both analyzed cases, the CJEU indicates the priority of the treaty and directive article over national norm of criminal procedures, but it leaves much discretion to the national court regarding its actual implementation—whether to interpret national norms in accordance with the requirements of EU law, or whether to disapply national law.

Looking further, theoretically there could be situations when the direct effect of the EU norm is possible in practice. For example, Art. 5 of Directive 2012/29/EU requires Member States to ensure that victims can make complaints in a language they can understand or receive the necessary linguistic assistance. The norm is both clear and unconditional, allowing direct application in practice even if national authorities have not implemented it correctly.

This discussion indicates the first steps towards a possible direct application of certain EU clauses (treaties and directives) that are clear, unconditional, and precise, but this is still a very sensitive issue, as the balance between national sovereignty, the effectiveness of EU law, and the protection of human rights must be balanced and needs further clarification and development from the CJEU and

[64] Directive 2012/13/EU, supra note 49.
[65] Case C-467/18, *Rayonna prokuratura Lom*, ECLI:EU:C:2019:765, par. 57.
[66] Ibid.
[67] Ibid, par. 60–62.
[68] Ibid., par. 63.

national jurisprudence. New EU instruments—regulations and the EPPO—provide additional opportunities for this.

3. Effect of EU Law on National Criminal Law: The Case of Lithuania

The relationship between the EU and the national law in Lithuania is defined by Art. 2 of the Constitutional Act providing that "the norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of the European Union law shall be applied directly, while in the event of collision of legal norms [except the Constitution], they shall have supremacy over the laws and other legal acts of the Republic of Lithuania."[69] This is interpreted by some Lithuanian academics as the establishment of both the direct applicability and the direct effect of the EU norms.[70]

Lithuanian criminal law theory generally recognizes that EU legislation is a source of criminal law, and the implementation of EU legislation in national criminal law is possible only by harmonizing the provisions of national criminal law with the requirements of EU legislation using the following ways: (a) legislative, (b) supervisory, and (c) judicial.[71]

The legislative method of harmonization is widely applied in Lithuanian practice: 47 percent (14 cases) of amendments and additions to the Criminal code (CC) from 2004-2016 were related to the implementation of EU legislation.[72,73] As in Lithuania both criminal and criminal procedure norms (CPC) are codified, the usual procedure is that EU legal acts are transferred into these codes. Today there are 35 listed EU legal acts implemented in the CC and 22 EU legal acts implemented in the CPC.[74]

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[69] Constitutional act of the Republic of Lithuania on membership of The Republic of Lithuania in the European Union, Official Gazette, 2004, No. 111-4123. [online]. Available at: <https://www.lrs.lt/upl_files/Lietuvos_pirmininkavimas_ES/dokumentai/ CONSTITUTIONAL_ACT.pdf> Accessed: 23.03.2020.

[70] SOLOVEIČIKAS, D., supra note 3, p. 39; JARUKAITIS, I. Adoption of the third Constitutional Act and its impact on national constitutional system. *Teisė*, 2006, vol. 60, pp. 22–37.

[71] ŠVEDAS, G., VERŠEKYS, P., LEVON, J., PRAPIESTIS, D. *Lietuvos Respublikos baudžiamojo kodekso bendrosios dalies vientisumo ir naujovių (su)derinimo iššūkiai* [*Challenges in Harmonizing the Integrity and Novelties of the General Part of the Criminal Code*]. Vilnius: Vilnius University Press, 2017, p. 39.

[72] May 25, 2020.

[73] ŠVEDAS, G., VERŠEKYS, P., LEVON, J., PRAPIESTIS, D., supra note 71, p. 47.

[74] Each code has a section "Implemented EU acts" in which information is provided and updated by the legislator. Criminal Code of Lithuania. Approved in 2000 September 26 by law

The main supervisory body is the EU Commission, but there were no cases against Lithuania initiated by the commission for improper implementation of EU acts in criminal matters during the examined period.[75] On the other hand, Lithuanian doctrine makes some criticisms regarding the quality of supervision, as it is largely based on information from Member States and it covers only the assessment of whether EU legislation has been implemented fully, properly, and in a timely manner, without focusing on its practical application and impact assessment, or analyzing whether the national legal measures are in line with the general and specific objectives of EU law.[76]

The judicial method is applied in two ways: either consistent interpretation of the current norms of the CC/CPC in the practice of national courts in accordance with the EU legal act or the non-application of provisions of national law that have been declared incompatible with EU law.[77] So far there is only one case in Lithuania where negative harmonization has been indicated by the CJEU. The CJEU ruled that Regulation No. 1782/2003 precluded national legislation prohibiting the cultivation and storage of hemp grown for fiber covered by this regulation and that community law precludes a court of a Member State from applying national law that, contrary to the regulation, prohibits the cultivation and storage of hemp grown for fiber.[78]

There were several attempts from parties (accused or civil defenders) in criminal cases[79] to request the direct application of certain EU directives against national law and to request national courts to initiate applications to CJEU for clarification of their questions because of improper implementation of certain requirements of the EU directives by national authorities.[80] The court reasonably

no. VIII – 1968. Official Gazette, 2000, No. 89-2741. [online]. Available at: <https://www.e-tar.lt/portal/lt/legalAct/TAR.2B866DFF7D43/asr> Accessed 02.06.2020.

75 From 2004 until the end of 2018.

76 ŠVEDAS, G., VERŠEKYS, P., LEVON, J., PRAPIESTIS, D., supra note 71, p. 41.

77 Ibid., pp. 41–42.

78 Case C-207/08, *Babanov*, ECLI:EU:C:2008:407. [online]. Available at: <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-207/08> Accessed 03.03, 2020, par. 37.

79 Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], May 24, 2011, 2K-239/2011. Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], June 19, 2014, 2K-317/2014. Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Sept. 30, 2014, 2K-389/2014.

80 In these cases, the question of direct application was not directly related to the issues of criminal law or procedure, but to compensation for damage arising as a consequence of crime. National regulations at that time established a maximum limit for non-pecuniary damages (until November 12, 2009, 1,000 euros; until June 10, 2012, 2,500 euros; until October 31, 2018, 5,000 euros; only since November 1, 2018 has there been no concrete sum of non-pecuniary damages provided in the law), which was rather small, and the difference had to be paid by guilty person. The main argument was that national authorities improperly implemented an EU directive that established

rejected these requests in all three cases, indicating that "the national court shall not be obliged to refer to the Court of Justice if the question of the interpretation of European Union law which is raised in the case is irrelevant, i.e. the answer to this question, no matter what, cannot affect the outcome of the case."[81] This was grounded by two interrelated legal arguments: (1) the impossibility of interpreting national law in accordance with the directive (as the content is different, and in such a case it would infringe the principles of legal certainty and non-retroactivity); (2) no horizontal application for the directive (as the dispute is between two private parties—an insurance company and a natural person).

Notwithstanding the result, this example indicates that national courts know the main aspects of the principle of direct effect and its limits, while the issues of EU law are cropping up in national cases. The parties in criminal proceedings are starting to raise questions regarding direct applicability of directives.

3.1. Application of Directives in the Decisions of the Supreme Court in Criminal Cases

An analysis of the jurisprudence of the Court from May 1, 2004[82] to the end of 2019 was performed.[83] Reference to directives in national case law started in 2007 (3 years after becoming a member of EU), and there was a significant increase in 2018 and 2019,[84] which could be a clear indicator of the growing importance of EU law in national criminal law.

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no limit for non-pecuniary damages and that in such a case, national law should be explained in accordance with the requirements of the EU directive. In all three cases, the plaintiffs sought preliminary rulings from CJEU to determine whether the particular norm of EU directive 2005/14/EC was to be interpreted as not conferring on the Member State the right to limit damages on the basis that the damage to the person is pecuniary or non-pecuniary.

81 Case 2K-239/2011, supra note 79.

82 This is when Lithuania became a member of the EU.

83 The authors used the commercial database Infolex [Available at: http://www.infolex.lt/portal/start.asp, accessed 03.03.2020] to find the court decisions. The following search criteria were applied: only criminal cases from the Supreme Court of Lithuania [this is the highest court, and it investigates only cassation, but not factual issues], in which the word directive (without ending) was used. With these selection criteria, 57 cases were found. After content review, 51 court decisions remained [two documents were Supreme Court reviews, and the remaining four decisions either did not indicate any directive or had other irrelevant facts, for example, they concerned certain directives in the Netherlands], and they are analyzed in this section. This makes up about half a percent of the court decisions in criminal cases during this period [the total number of Supreme Court decisions in criminal cases in the system is 9,185].

84 2 (in 2017), 1 (2008), 2 (2009), 1 (2010), 3 (2011), 4 (2012), 7 (2014), 4 (2015), 6 (2016), 3 (2017), 9 (2018), 9 (2019).

The court decisions covered many EU directives, but EU Directive 2011/36/EU covering issues of trafficking in human beings is most frequently (nine times) referred to in court decisions. In the second place (eight cases), questions indirectly related to criminal law concerned insurance against civil liability in respect of the use of motor vehicles.[85] In third place (four times) was the directive against money laundering and terrorist financing.[86]

The most active party to the proceedings (i.e., the ones that refer to the EU directives) is the court. Such cases involved directives in 36 cases out of 51, but in more than half the cases, the court was "provoked" to react, answering to the statements of parties in the case (mostly to the arguments of accused/convicted person, who is mostly interested in a favorable result in criminal cases). Only in three cases was the reference made by the victim. In many cases, more than one party in the proceedings referred to the EU directives.[87]

After analyzing the content of the selected court decisions, two reasons for references to the EU directives were established:
(a) interpretation of national law in consistency with EU law;
(b) questioning existing national regulation.

3.1.1. Interpretation of National Law in Consistency with EU Law

This category dominates in court decisions. In most cases, the EU directive is cited as a supplementary legal act, grounding the necessity for certain national legal regulations, i.e., as an instrument strengthening court position. For example, in Case 2K-281-489/2019, the court stated that in the case law of the Court of Cassation, the recruitment of the victim to exploit her by inducing her to commit a crime also covers the suggestion to go abroad to steal from shops, promising to take her there, to accommodate her, to feed her, etc.[88] In another case, the court referred to the EU directive among other things to counter the argument that because prostitution is legal in a certain country, the organizer could not be held guilty for exploitation for prostitution.[89]

[85] Directive 84/51/EEC was referred to once, Directive 2005/14/EC was referred to four times, and Directive 2009/103/EC was referred to three times.

[86] Directive 2005/60/EC on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing [2005] OJ L 309/15.

[87] For example, in Case 2K-317/2014, which related to criminal liability for infringement of traffic rules causing serious damage (severe bodily injury to a passenger), four parties in the proceedings (court, prosecutor, defendant, and victim) referred to the EU directives. Case 2K-317/2014, *supra* note 79.

[88] Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Nov. 28, 2019, 2K-281-489/2019, par. 24.

[89] The court indicated that the appellant's argument that his defendant could not be found guilty under Article 307 CC because where the alleged offenses were committed, prostitution is legal was unfounded, since legalization of prostitution does not eliminate responsibility for the exploitation

In three cases (out of 45) the court went further—it cited specific norms of directives, as there is no definite national regulation on specific aspects. In Case 2K-290-489/2019, the convict questioned his conviction for recruitment of a person for a fictitious marriage, as this form of exploitation was not established in Art. 147 of the Criminal Code when the crime was committed.[90] The court cited the relevant provisions of Directive 2011/36/EU[91] and used this definition as an argument for rejecting a cassation complaint of a convicted person, i.e., notwithstanding the fact that the specific form of exploitation was not criminalized in the national criminal code in accordance with the definition of the directive, it was covered by general term "other purposes of exploitation." There was a similar interpretation in the next case—this time, the Supreme Court cited Directive 2011/36/EU for the definition of "exploitation of criminal activities" as convicts challenged their convictions in this aspect, and this term is not defined in national law.[92]

The most progressive example is the last case,[93] in which the court not only quoted definitions from directives to explain of national norms, but also used them as court arguments (among others) grounding the decision of the court and acquitting E.J. of unlawful interception and use of electronic data:

Electronic (computer) data is any representation of facts, information or concepts in a form that can be processed by a computer system as well as a program by which a computer system can perform a specific function (Article 2 (b) of Directive 2013/40/EU)… The panel of judges rules that the abovementioned

of a person for prostitution. The court expressly stated that the accussed had profited from the victims of human trafficking, and that such acts are prohibited by both EU Directive 2011/36/EU and international law (the supplementary protocol of the United Nations Convention against Transnational Crime). Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Nov. 26, 2019, 2K-278-697/2019, par. 7.5.

90 This form of exploitation was introduced in Art. 147 of CC two weeks later (May 26, 2016), while the recruitment was from April 16 to May 25, 2016.

91 Other purposes of exploitation, which are understood as any other form of dangerous exploitation of a victim that constitutes a serious violation of fundamental human rights and dignity and physical integrity. Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Dec.17, 2019, 2K-290-489/2019, par. 15.

92 Case 2K-281-489/2019, *supra* note 88, par. 24.

93 In this case E.J. unlawfully connected his USB flash drive with the "Spower Windows Password Reset Special" program to a computer located in the public security service video surveillance system and removed the login information belonging to the administrator of the ABK account. This allowed E.J. to access the system as an administrator of that system. E.J. was convicted for three offences: unlawful disposal of software (Art. 198-2), unauthorized access to an information system (Art. 198-1), and unlawful interception and use of electronic data (Art. 198). In his cassation appeal, E.J. disputed his conviction for all three indictments. E.J., besides other arguments, argued that interception of administrator rights did not involve electronic data. Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], July 2, 2019, 2K-199-648/2019.

administrator rights, which were granted to E.J. by unauthorized access to a computer, do not constitute non-public electronic data within the meaning of Article 198 CC. In this respect, it should be noted that the automatic processing of computer data in an information system is based on the software installed in it; this equipment may be considered as part of an information system when considered as a whole (Article 2 (a) of Directive 2013/40/EU).[94]

The court practice indicates that still there is no direct effect in criminal cases, as in most cases it would be detrimental to the accused and against the principle of legality. But the court practice in 2019 indicates that consistent interpretation (indirect effect) of national law is gaining more power in criminal cases and this is likely to increase in future.

3.1.2. Questioning Existing National Regulations

This category is relatively rare, as out of 51 cases, it occurred in just six. In five cases,[95] references to the EU directives were only indirectly related to criminal law or procedure, as an issue of improper implementation of the EU directives (84/5/EEC, 2005/14/EC, and 2009/103/EC) relating to compensation for damage due to violation of the regulations governing road traffic safety or operation of vehicles causing damage (Art. 281 of the Criminal Code) was questioned.[96] In the last case, improper criminal procedure relating to improper implementation of directive 2010/64/EU was raised, which, in opinion of the accussed, resulted in unjustified court findings regarding his involvement in the commission of the offenses, and a request for direct application of the relevant directive was raised.[97] The court rejected the complaint, stating that a directive

[94] E.J.'s ability to operate the computer as an administrator was granted by unauthorized access to the information system, so obtaining such rights and the ability to use such rights was primarily related to the actions of E.J.'s unauthorized access to the system (Art. 198-1 CC). Case 2K-199-648/2019, supra note 93, par. 29.

[95] Cases 2K-239/2011, 2K-317/2014, 2K-389/2014, supra note 79; Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], May 12, 2015, 2K-242-511/2015; Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Jan. 12, 2016, 2K-52-942/2016.

[96] Basically, as already analyzed in Section 3.1 in all five cases, the parties were raising the same issue from different angles: that Lithuania being a member of the EU must ensure that all injured parties are compensated for their damage and that the amounts of insurance under national law were not lower than the minimum amounts laid down in the directives for personal injury and damage to property. However in all five cases, the complaints were rejected on the ground that the provisions of the mentioned directives cannot be applied in cases where the parties are only individuals (i.e., there is no direct horizontal effect), and even with a positive preliminary ruling from the CJEU, it would not be possible to impose on the individual an obligation to make good any non-pecuniary damage suffered.

[97] The convicted Vietnamese persons questioned the quality of provided interpreters—that no adequate, correct, and qualified translation was ensured in this case and that the directive should

is not a directly applicable legal act, but that the relevant provisions of the criminal procedure code must be interpreted as far as possible in the light of the provisions and objectives of the directive and as an example the case *Pupino*, C-105/03 is referred.

The last decision indicates that so far, the court has followed the position formulated in the jurisprudence of CJEU before the Lisbon treaty, when criminal law was an issue of intergovernmental cooperation expressed by framework decisions and it made no difference between the framework decision and the directive, which is not applicable after the Lisbon treaty. In opinion of the authors, the court had to discuss whether the directive was properly implemented, and if not, the test for the direct application of the certain norms of the directive should have been discussed in the case.

4. Conclusions

The hypothesis was confirmed, as it is difficult to compare criminal law with other sections of EU law due to its character and its close relation to state sovereignty, even though the strengthened role of the EU in the field of criminal law after Lisbon automatically limits the Member States' autonomy both in enacting and applying legislation on the matter.

The principle of direct effect in substantial criminal law is highly unlikely, as when national legislation does not allow consistent interpretation of the national norm, the principle of direct effect cannot be used to determine or aggravate criminal liability, as it would infringe the principles of legality, non-retroactivity, and foreseeability. Theoretically, if we find certain EU norm that is mitigating liability compared to national regulation, it could be applied directly, but is rarely possible in practice given that EU norms are not precise, but provide only minimum rules concerning definitions of crimes and only certain guidelines regarding criminal sanctions, i.e., much discretion is left to national authorities.

The situation in criminal procedure law is different than material law, as one of its attributes is the protection of basic procedural rights of parties in criminal cases, i.e., it may provide and require more protection of individual rights than national law, and basically it protects individual (accused, victim) from the state.

be applied directly in the case, as it was not properly transferred into national law. As a result it was violation of their rights – to a fair defense, to know what they are accused of – and it violated their right to testify in this case, leading to the recording of unlawful, untrue, false translations of one defendant's and another convict's testimony, making unjustified court findings regarding his involvement in the commission of the offenses, Lietuvos Aukščiausiasis Teismas [LAT] [Supreme Court of Lithuania], Apr. 11, 2019, 2K-7-648/2019.

The authors could not find examples of direct application of EU norms on issues of criminal procedure law, but it may be expected in the near future taking into account the newest EU legislation and the EU's ambition to move further in developing additional directives regarding rights in trial.

The case of Lithuania illustrates that the role of EU directives is slightly increasing in national criminal cases, mostly interpreting national law in consistency with EU legislation either to explain national criminal law or to strengthen court arguments in cases. Requests for direct application of directives so far have been unsuccessful, and the grounding of the courts in the cases indicates that courts still hold that direct effect is not possible in criminal law.

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