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THE EUROPEAN CRIMINAL LAW – CRIMINAL LAW PRACTICE IN STRASBOURG AND LUXEMBURG

Theses of Doctoral Dissertation

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TOPIC OF DISSERTATION PROPOSAL

The dissertation's system of thought has three new approaches. In one of the approaches became reasonable in the preparation of the final period when the Lisbon Treaty has entered into force, which transformed the way the Union's past institutional and decision-making mechanism. The previous ambitious monographs (mainly made by the author Krisztina Karsai and Katalin Ligeti) as an in-depth studies and articles have been written prior the Lisbon Treaty. Accordingly the author was in the position to be the first one publishing studies after the Lisbon Treaty.

The "second pillar" of the dissertation that the law of the European Communities (Treaty of Rome) and the European Convention on Human Rights (Rome Convention) ultimately derive from the same lake and both of them the same legal basis instruments of Europe.
Therefore, almost the one-third part of the dissertation focuses on the operation and jurisdiction of the European Court of Human Rights (formerly the Commission). Accordingly to the judicial practice, the dissertation concentrates for just few articles of the Convention which are significant in the territory of criminal law. These are the jurisdiction as the first article, the right to life as the second article, the third article on the prohibition of torture, the right to liberty and security as the fifth article, the right to the fair trial as the sixth article, and the prohibition of punishment without a statutory provision as the seventh article. (The latter does include itself the non-retroactivity of the more serious criminal provisions.) Relating court decisions to these articles are forming the most important pillars of criminal judgments. Considering that the laws of Strasbourg are case-law, of the Court decisions are maintained as "precedent". It also sought to explain such decisions, which had impact, or impact on the Hungarian criminal policy well.

The novelty of the dissertation is its third pillar based on the historical point of view. This means that institutions are not discussed in the dissertation only a snapshot captured, but the historical dimension of development to put them in the present - as in the past and the future interval is displayed. In this context, the development of European law is part of the European history and cultural history. This process begun during the period of Roman law and canon law, and has continued in the humanism and the renaissance era - and continue rolling to the enlightenment and the French Revolution era. This process has taken in the latter stages of the nation, the national rights and the development of parliamentarism in the era of national rights within the framework of the guarantees made to the rule of law.

The period preceding World War I and between the two world war formed the international criminal scientific associations, which had been searching the relationships between national laws and looking for a world moving towards a universal law. The World War II had destroyed these progresses. Against this background, some of the conclusions drawn from the end of World War II and has taken the idea of human rights, which are born in the care of human rights institutions.

This is the institutions of the European Convention on Human Rights in Europe, as it established the "Commission" and "the Court". The competence of the Court is now covering forty-seven member states. In the meantime the human rights institutional set up in parallel to the Schuman's principle, ECSC, EURATOM, and the "Six" in Europe. This scheme will be taken for decades in the development of the European Union. The European Court of Justice - within the framework of the European Communities - will provide the basis to establish the European Union Court of Justice on 1st of December 2009.

It should be noted, twenty-seven Member States of the Union at the same time as a member of the European Court of Human Rights operates. According to this fact the two institutions ultimately linked.

The European Union and the Council of Europe institutions geographically located in an interesting arc in Brussels, Luxembourg, Strasbourg. The European Union Court of Justice in Luxembourg work, the Council of Europe European Court of Human Rights Court in Strasbourg. Interestingly, the theoretical proximity to the physical proximity also expressed as the European Union, the Parliament building in Strasbourg, just a few hundred meters from the building of the European Court of Human Rights and slightly further from the building of the Council of Europe, where the Council of Europe Parliamentary Assembly session. In addition to the geographical proximity of the Statute of the European Union expresses the idea that the European Convention on Human Rights is basic instrument of the Union too. Finally, both the major European institutions are symbols of the twelve star flag and the Ode to Joy, the anthem ...

The thought that it is hard to define the concept of European criminal law will be a returning theme of my dissertation. It is also a difficult task for those interested in the subject to create a picture close to reality about the future of European criminal law. To summarize the objectives and results of my dissertation, I made an attempt to reveal the path determined by the necessity deriving from the structure and operational system of the European Union, which draws from the organic development of community law and human rights judicial practice, moving towards the blueprint for a prospective supranational criminal justice system. The interaction between the European and national criminal law is apparent, with the intensification of role of the former.

I am certain that criminal policy cannot exist in a vacuum as a guiding principle without regards to judicial practice. The essence of criminal policy can be captured in how legislation, based on past experience, affects present application of law, and, in this interaction, what messages are delivered for the legislator, father of criminal policy. Was the modification and methodological adjustments realized in the world of criminal law appropriate or perhaps in the future, further assignments have to be undertaken by legislation governed by criminal policy in light of social processes. Regarding the fact that the Republic of Hungary and its justice system stepped into a new dimension by joining the Council of Europe and then the European Union, it is only possible to interpret criminal policy in this enhanced dimension. For this, it is important to be familiar with the criminal

law practice of the Court of Justice of the European Union and the European Court of Human Rights and the relevant institutions of the European Union.

Recognition of certain future interaction between the European and national criminal law and criminal justice systems is already possible. I think that the most pronounced change would be the actual establishment of the European Public Prosecutor's Office introducing a new actor in the field of public prosecution. Naturally, such a change would introduce numerous practical and substantial issues from forms of cooperation to rules of jurisdiction and venue to undertaking everyday investigative and prosecutorial tasks. Prosecutors have to prepare for this change because it is no longer a question whether or not this supranational prosecutorial institution will be established, and even the timeframe of its establishment is becoming less and less of an issue.

Obviously, sooner or later, the development of Europol will raise serious issues of jurisdiction at investigative organizations. To resolve conflicts between investigative jurisdictions requires new outlook from national authorities, whose main motive must be cooperation. The national criminal authorities should not view EU institutions as competitors or outsiders restricting their authority but as cooperation partners with whom investigative work will become more efficient and better fit to react to modern crime. Of course, all this requires the training of well-prepared teams that speaks foreign languages and effective leadership open to cooperation between institutions and familiar with the European institutions of criminal law. Evidently, expanding the current framework of cooperation in criminal investigations will pose newer and newer challenges, which require responses from the practice of criminal law. Here we can think of the criminal law issues of the constitutional state regarding the European Arrest Warrant, the appropriate application of the *ne bis in idemi* principle, the assurance of expanding catalogue of human rights guaranties, and so on.

We can only resolve and overcome the tasks and difficulties mentioned here, if we are familiar with the content and sources of Union law and practice. The national legal practitioner defending to the end the untouchable ivory tower of national criminal law may be unpleasantly surprised. Today, a criminal judge is a judge of the European Union, too; a prosecutor drafting a criminal complaint cannot disregard Community jurisprudence; a defense attorney cannot provide effective representation without knowing the jurisprudence of the Court of Justice of the European Union and European Court of Human Rights. From this angle, my dissertation can be viewed as the necessary minimum, as it discusses the reasons for, and history of, legal developments, relevant content of the founding treaties, development of institutions, and, judicial practice.

Legal practitioners should realize that even if they are well versed in Hungarian law, their knowledge is inadequate even if they are extremely devoted. It is more and more apparent that without knowing Union law, which, if we think about it, with our national laws and regulations, in essence, create a coherent whole, it is impossible to provide adequate legal advice or render a decision, because the value of routine experience is exponently eroding with the advancement of Union law.

European criminal law, as a compilation of regulations, is motivated and governed by the EU's criminal policy. According to Károly Bárd[1], we can only affirm the existence of European criminal law if criminal law is not tied to national traditions, the legal culture of a country or nation, and that unification and regional harmonization would be predestined to fail. As emphasized by Katalin Ligeti[2], we have to take into account that the criminal policy of the European Communities and later the European Union was created by practical reasons. The internationalization of crime made supranational cooperation of Member States' law enforcement necessary, because cross-border criminality gained significant advantage with the development of the common internal market and borderless Europe. National law enforcement and criminal justice system were unable to follow this pace. As Ligeti correctly finds, new forms of crime and *modus operandi* were born to which it was impossible to react with the available instruments. It had to be realized that the institutions of international law enforcement cooperation were inadequate to serve the expectations resulted from increased criminality. Additionally, it was an obvious reason, too, that the Member States did not emphasize the protection of their legal interests. National authorities did not step up at all or only with limited efficiency for the protection of their community-level, see community budget, achievements and legal interests.

The development of European criminal law also means the acceptance of the partial abandonment of national sovereignty. If we accept that criminal law can be perceived as the foundation of the state's law enforcement monopoly, then criminal law may be formulated as a form of appearance of state sovereignty. However, a state is reluctant to sacrifice its sovereignty even if the goals are sufficiently noble and the reasons appear unquestionably proper. András Jakab explained in detail in his article, which also outlined alternatives, that in many cases Member States are not willing to recognize the „European" challenges to their national sovereignty.[3] Politicians tend to make themselves believe that the development of the European Union does not affect the sovereignty of their national state. They are able to do this especially because sovereignty does not appear in the form of formal rights but filled with political content as the battlefield of political views. This problem is well demonstrated by the postponement of establishing the European Public Prosecutor's Office by the larger net-paying Member States, for whom, in principal, the protection of Community budget would have been more important. Aside from Euro skepticism, the legal development of EU institutions took a number of steps to establish European criminal law.

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1 Károly Bárd, *The Role of the European Convention on Human in the Development of „European" Criminal Law*, 2003/3, Criminal Law Codification, 4 (2003).

2 Katalin Ligeti, *The Criminal Policy of the European Union*, XLIII, Law and Political Science, 73-97 (2002).

3 András Jakab, *Compromise Strategies Related to the Concept of Sovereignty Particularly in European Integration*, 2006/2 Európai Jog [European Law] pp. 3-14.

At the beginning of my dissertation, I emphasized the importance of open and modern dogmatic approach that by the end, in my opinion, becomes perhaps even more pronounced. The Hungarian criminal, substantive and procedural law, and criminal policy, reshaped time to time by Hungarian governments in power, could not be conceived without the influence of Union law. The challenge is given: learn the Union law, synthesize it with national law, and try to apply it correctly regardless of whether you are a judge, prosecutor, attorney, or investigator. The success of EU criminal law is also up to you, because you are not only a Hungarian lawyer but also a lawyer of Hungarian nationality living in the European Union.

RESEARCH METHODOLOGY

In the Hungarian legal literature, several articles were published in professional journals (Európai Jog [European Law], Magyar Jog [Hungarian Law], Ügyészek Lapja [Journal of Prosecutors], Acta Humana) relating to law enforcement cooperation and criminal law. Also there are a number of cumulative works, such as Krisztina Karsai's monograph and a handbook edited by Katalin Ligeti and Ferenc Kondorosi, Ákos Farkas's monograph about law enforcement cooperation or Katalin Ligeti's monograph. On the jurisprudence of Strasbourg, the scientific literature is hallmarked by the names of Károly Bárd and András Grád. In light of this, while writing my dissertation, I could not strive to achieve scientific perfection regarding European criminal law and the jurisprudence of the European Court of Human Rights, because of well recognized and highly respected scholars have already done this in great quality. In addition, the limited length of my dissertation was also determinative.

The objective of my work is to provide a special summary by synthesizing the scientific findings and views whose examination would respond to the question as to what challenges Hungarian substantive or procedural criminal law has to face in the future, and what extra values it has received and could receive through familiarity with the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights.

Within the framework of the latter, I will discuss in detail the operation of the European Court of Human Rights based on certain individual cases, which of course, cannot involve the entire jurisprudence. During its tenure, until now (especially since November 1, 1998) or from the first day of operation of the permanent Court, the Court reviewed tens of thousands of cases. Only special databases are capable of providing a complete registry of the judgments, which are analyzed by commentators. One of my criteria of selection was that from rights enlisted in the Treaty, I only discuss articles relevant to criminal law. The second, narrowing criteria of selection was the prominent role of the Court's judgment in the administration of justice. The question is that from among the many thousands of criminal cases which are those pillars (or at least important representatives of these pillars) that are determinative in the administration of justice. Finally, it was a criterion that these judgments be associated with important stations of European history.

The Treaty was widely studied in the Hungarian legal literature. Dr. András Grád wrote a handbook, titled *Handbook on Human Rights Adjudication of Strasbourg.* Articles on Hungarian cases include *Hungarian Cases in Strasbourg* written by Mónika Welle and Attila Teplán, and two articles by Dániel Karsai, *Hungarian Cases in Strasbourg 2000-2004* and *Hungarian Cases in Strasbourg 2005-2008*. International work in Hungarian translation is Vincent Berger' *Jurisprudence of the European Court of Human Rights*.

The author of the only scientific monograph is Károly Bárd. The title of the monograph is *Human Rights and Criminal Justice in Europe. The Fair Procedure in Criminal Cases*. It is a human rights dogmatic treatise. Károly Bárd's work analyzes Article 6 of the Treaty. As it appears from the title, the method of analysis is dogmatic. The book reaches such heights and depths that it is not only a commendable work of the dogmatic of Hungarian criminal justice but also the entire Europe-wide human rights literature.

In my dissertation, I tried to ensure that reference to Community and Union law is distinct if it is relevant under the given topic. However, since my dissertation belongs in the world of criminal justice, I want to remain faithful to, and focus on, this discipline. While examining European criminal law, because of the special nature of the topic and because of the third-pillar nature of its structure, I am unable to reproduce the conceptual clarity of public international law and differentiation between Community and Union law, and, because I am not familiar with scholarly work of other branches of law, I cannot even undertake this task. For these reasons, in my dissertation, I use the term "Union law" referring to both the laws of the European Communities and European Union. My decision regarding terminology is supported by the fact that on December 1, 2009, the Treaty of Lisbon entered into force abolishing the three-pillar structure and, further, in Article 1, paragraph 3 declaring that the European Union replaces the European Community and becomes its successor. It is clear, however, that in relation to the basic principles and institutional development, the first- and second-pillar legislation is authoritative, which, thus, establishes reference to Community law. In the case, however, when we examine legislation exclusively concentrating on cooperation in law enforcement, because of its third-pillar nature, Union law terminology is appropriate.

In my dissertation, I discuss in detail the operation of four institutions, Europol, Eurojust, Olaf, and Penalnet. I mention the operation of Frontex, too, in relation to the Stockholm Program. All this is not a mandatory task of my dissertation, but they have great importance in the development of European criminal law and its future direction.

I did not intend to discuss in detail the structure and operation of the European Court, whose proper name since December 1, 2009 is the Court of Justice of the European Union, but merely highlight the changes resulted from the Lisbon Treaty in relation to the Court.

SUMMARY OF THE RESULTS OF THE RESEARCH

The Necessity of the Criminal Law of the European Union

With the enactment of the Lisbon Treaty, the starter's gun went off, and in the next few years the only question is how much attention the legislator pays to the field of European criminal law. What was unimaginable at the signing of the Treaty of Rome is today belongs to the category of necessities. If I accept as an axiom that one of the elements of state sovereignty belongs to criminal law, then the encroachment of Union law into the word of criminal law means that this sovereignty must be sacrificed to a certain extent. It is a matter of viewpoint whether we see that "extent" very small or very big. When the Member States of the European Communities longed only for a common market, the communitarization of pertinent criminal law provisions did not even occur. We have to see, however, that the European Common Market required more and more complete legal regulation and pertinent institutional system. The tendency was clear. An entity started to form that had a parliament (European Parliament), government (Council of the European Union), bank (European Central Bank), institutions responsible for policy (Commission of the European Union), and during the years, managed to establish its own currency. Since December 1, 2009, it also declared to have its own population. If we defined content of territory and border according to the terminology of public international law, we would come very close to the concept of the state, the birth of a United States of Europe.

A legal system cannot exist without criminal law, because then the violation of regulations and social conditions would remain without consequences. If we accept this reasoning, it is questionable why we need to wonder about the European Union's need for criminal law. Neither state nor legal system can exist without adequate criminal law and institutional system applying it. Thus, the development of the past decades determined the European Union to enact its own criminal law provisions and form related institutions. All this became necessary and indispensable without regards to the effects on carefully guarded sovereignty.

The Concept of European Criminal Law

One of the basic tasks of my dissertation was to formulate the definition of the concept of European criminal law. "The European perpetrator commits a euro-crime on European territory, which is then investigated by European police. Later, a European public prosecutor files a criminal complaint before the European criminal court, whose guilty sentence is enforced by a European penal institution."4 As Professor Ferenc Nagy excellently illustrates, this utopistic image is perhaps rather strange. It would mean that the

4 Ferenc Nagy, *About the Concept of European Criminal Law*, 2001/1, Európai Jog [European Law], pp. 5-7.

European Union would take every little detail of the penal authorities of the Member State and create an integrated criminal scientific and justice system. Professor Nagy concludes that the European criminal law incorporates the criminal law norms of the European Union and the criminal law related treaties of the Council of Europe. We can refer to this heterogeneous set of laws principally as the result of supranational European legal thinking.

But what does the European Union really mean for criminology? Does criminal law of the European Union exist? Can we talk about European criminal law? We are unable to provide a definite and satisfactory answer. Obviously, the European Union has a criminal policy with which it wants to coordinate the thinking and view of the Member States. However, we cannot talk about European criminal law as a set of provisions with homogeneous subject matter constituting a separate branch of laws. As Krisztina Karsai highlighted, "although it sounds good politically, it does not meet the required precision for legal terms, in case we want to use the term as a legal category."5 Thus, in this sense, we cannot talk about European criminal law.

If we do not subject European criminal law to the positivist test of national law but view it as the goal and, at the same time, the instrument of European Union's criminal policy, the statement, according to which European criminal law is a set of norms regulating law enforcement and police cooperation, is correct. In my dissertation, I use the concept of European criminal law in this definition.

Rethinking the Hierarchy of Sources of Law

The experience is that scholars teaching the theory of law simply incorporate Union law into international law as a formal source of law at the top of the hierarchy of sources of law, perhaps because of the failure to recognize the practical importance of the question. Yet, international law and Union law carry basic differences both in formal and substantive sense, and, thus, treating them as they occupied the same place in the hierarchy of sources of law is certainly contrary to positivist legal thinking and principles of sources of law hierarchy.

To demonstrate the differences between international law and Union law, we can mention, a non-exhaustive list of characteristics to show their obvious differences. Based on the differences presented in my dissertation, it is easy to accept that combining international law and Community law in the hierarchy of sources of law is a solution posing concerns from the viewpoint of positivist legal theory. However, the solution is erroneous also from a substantive stance, because the relationship between international law and Union law should be examined separately.

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5 Krisztina Karsai, *Hungarian Criminal Law in the Current of European Integration*, 2001/3 Jogtudományi Közlöny [Journal of Legal Science].

It is easy to see also that the Member States of the European Union are generally uniformly affected by multilateral treaties and international conventions, because the common historical past and democratic approach are the common basis or the European Communities and the European Union. Based on these, we can state that in case of the collision of international law and Union law, we have to accept the primacy of international law. With formulating this principle, we also state that international law and Union law cannot be the same source of law occupying the same rank in the hierarchy, in other words, they cannot be viewed as equal.

As a consequence of the argument above, the theory on the hierarchy of sources of law should be reformulated by wedging Union law, as an independent source of law, between the ranks occupied by international law and constitutional law.

The Lisbon Treaty, by abolishing the pillar system, perhaps simplifies the relationship between national law and Union law. At the same time, the interaction between the two legal systems brings up newer and newer problems relating to areas of constitutional law and, with respect to my topic, criminal law.

The Effects of the Lisbon Treaty on the Basic Criminal Law Principles of the Constitutional State

At the same time the Lisbon Treaty entered into force, §57(4) of the Hungarian Constitution was amended. This brought new meaning to the basic principle of criminal law of the constitutional state, as each of its elements is expanded with a EU dimension. The principle of *nullum crimen sine lege* can be interpreted not only under the Hungarian Criminal Code but, at the same time, applicable under Union law, too. The principle of *ultima ratio* goes beyond the practice of the state's necessary and proportional penal authority in the interest the EU legal system. The interpretation of *application in time* is a complex task for legal practitioners. The cases, such as the relevant concept of *error of law - error in danger to society* probably show overlap because of the difficulties to interpret Union law. The prohibition of analogy should be extended to Union law, too.

The Achievements of the Lisbon Treaty and Its Expected Effects

The Treaty of Lisbon, signed on December 13, 2007 and entered into force on December 1, 2009, finally gave green light to the development of a uniform European criminal law. The goal of the Lisbon Treaty is to eliminate the democratic deficit manifesting between the citizens and governance of the European Union. There are several studies discussing the fact[6] that the European Union, based on democratic societies, has a European

6 Katalin Ligeti, *The Legitimization of European Criminal Law*, 2004 Kálmán Györgyi-jubilee, pp. 373-387.

Parliament to no effect, if it is too distant from the citizens and its powers are limited regarding the matters of the European Union. For this very reason, new powers were vested in the European Parliament in the area of legislation. The Lisbon Treaty eliminates the three-pillar Community legal system, as a result of which, cooperation in law enforcement now falls under the scope of ordinary legislative procedure.

Under Article 83(1) of the Lisbon Treaty, "[t]he European Parliament and Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning" criminal offenses and related sanctions.

Under Article 84 of the Lisbon Treaty, "[t]he European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention." However, it is not the goal of this measure to harmonize national norms of Member States if for no other reason but because of the theory of law.

Articles 85 and 86 of the Lisbon Treaty independently mention Eurojust and, for the first time, the European Public Prosecutor's Office. According to Article 85(1), Eurojust's mission should be the assurance of action by support and coordination, and cooperation between national authorities having investigating and prosecuting authorities over serious crime affecting two or more Member States. Eurojust utilizes information obtained during operations conducted by Europol. The European Parliament and the Council adopt regulations "to determine Eurojust's structure, field of action, and tasks."

The Lisbon Treaty determines the three types of cases under the jurisdiction of Eurojust: (1) proposing the initiation of prosecution by national authorities particularly in cases relating to offenses against the financial interest of the Union; (2) coordinating prosecution initiated in the above manner involving more Member States; and (3) resolving conflicts of jurisdiction during judicial cooperation among more Member States and cooperation with the European Judicial Network.

Certainly, the most important step regarding the future is the establishment of the European Public Prosecutor's Office from Eurojust, as decided by the legislator. This institutional transformation is possible by means of regulation adopted in accordance with special legislative procedure of the Council that requires the preliminary consent of the European Parliament. It is possible that the unsuccessful Green Paper on the establishment of a European Prosecutor motivated the possibility of strengthened cooperation in this round also. However, this provision projects that the European Public Prosecutor's Office based on Eurojust by itself would not abolish the institution of Eurojust.

The Objectives of the Stockholm Program

By eliminating the three-pillar system, the Lisbon Treaty opens new perspectives for Union legislation. Developing optimism based on this permeates the Stockholm Program, adopted by the Commission on June 10, 2009 and discussed by the European Parliament and the European Council in December 2009, which could be viewed as the continuation of the Tampere and Hague Programs.

Naturally, the program highlights those achievements accomplished by the Union in the past 10 years. However, we can discover repetitions regarding the objectives compared to the previous two programs mentioned above. The Program mentions as a problem that the enforceability of regulations relating to the field of criminal justice is restricted by the limited jurisdiction of the Court of Justice of the European Union and because the Commission cannot initiate infringement procedures. According to the Program, continuous problems include illegal immigration, limited access to effective justice, increase of cybercrime, the continued activity of terrorism, and the low efficiency of fight against cross-border organized crime. It is interesting to mention the statistical numbers serving as the basis of the Program.

In the center of the 2010-2014 Program is the creation of a citizens' Europe. This slogan-like definition has new meaning in light of Protocol 8 of the Lisbon Treaty. According to this, the European Union has accessed the European Convention on the Protection of Human Rights and Fundamental Freedoms. Although, this can be viewed as a political gesture with symbolic importance, as all Member States of the Union are signatories of the Convention, it is worth to provide a detour of thought.

In light of this, it could be a question, regarding the acts of the European Union and the procedures of the Union, in case of human rights violations, whether it will be possible to bring an action before the European Court of Human Rights. Articles 19 and 32 of the European Convention on Human Rights (ECHR) raise the theoretical question of complete subjection. The fact is that accession to the ECHR is only possible by uniform accession to the entire Convention and its Protocols. This would mean the acceptance of Article 19, about the establishment of the European Court of Human Rights, and Article 32, jurisdiction of the Court. If true, this theoretical suggestion would mean that the judgments of the Court of Justice of the European Union could be challenged before the European Court of Human Rights in case of violation of the Convention. Just think about the tingling curiosity of this idea. However, we should not spend too much time contemplating about this theory.

The answer to the question is definitely negative, because Article 6(2) of the Lisbon Treaty clarifies that "[s]uch accession shall not affect the Union's competences as defined in the Treaties." Furthermore, this is affirmed by Article 2 of Protocol 8 cited before.7

7 "Article 2:

In reality, the provisions of ECHR also exclude the European Union as a party to the Convention. Although, we can accept the fact that the Union is a legal entity, it cannot be considered as a state. Thus, it is not a member of the Council of Europe, as a result of which, it cannot be a High Contracting Party to the ECHR.8

After this brief but important detour, we return to the Program which affirms that the judicial practices of the Court of Justice of the European Union and the European Court of Human Rights should be further developed in harmony with each other, considering also that the Charter of Fundamental Rights of the European Union itself contains those basic values of the region that are based on the prevalence of freedom, security, and justice.

The Program favors cost-effective electronic communications that overcome the obstacles posed by distance making it possible to conduct procedural acts via videoconference. However, this requires the uniformization on Union level formal standards and authentication of public documents. The most important development, however, is the European Evidence Warrant. The Commission emphasized the necessity of uniformization of procedural laws with regards to judicial procedures and evidentiary principles of different legal systems influenced by different traditions and cultural heritage. Accordingly, in relation to cross-border cases, instead of the current legal acts, uniform regulations are needed similarly to the European Arrest Warrant where the goal was the same.

The European Evidence Warrant must establish the legal framework of evidence, minimal principles of admissibility of evidence, and restraints on the possibilities to refuse cooperation among Member States. The Program affirms the necessity of further development of Eurojust and, although it does not mention the possibility of the institution of the European Public Prosecutor's Office, the need and aspiration for that institution is apparent from the Program.

In the area of police cooperation, the Program builds on three pillars by strengthening cooperation among Europol, Cepol, and Frontex. It appears that the Commission neglects Olaf in the field of police cooperation, because it views Olaf merely as a cooperative organization providing information sharing. It probably has two reasons. First, Olaf is a Commission institution, and second, its mission is very different compared to Europol, as

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The agreement referred to in Article 1 shall ensure that accession of the Union shall not affect the competences of the Union or the powers of its institutions. It shall ensure that nothing therein affects the situation of Member States in relation to the European Convention, in particular in relation to the Protocols thereto, measures taken by Member States derogating from the European Convention in accordance with Article 15 thereof and reservations to the European Convention made by Member States in accordance with Article 57 thereof."

8 The first sentence of the preamble of the ECHR states that „[t]he governments signatory hereto, being members of the Council of Europe…"

it performs its activities before police procedures. The objective of its activities is not crime prevention, as it confines its functions to the area of administrative penal law.

Changed Competences and Case Law of the Court of Justice of the European Union

With the integration of third pillar legislation into uniform Union law, the Court has general and preliminary ruling power over the totality of norms regarding the region that is based on the prevalence of freedom, security, and justice. By this, with respect to police and judicial cooperation in criminal cases, the Court's preliminary ruling power becomes mandatory, and it no longer depends on a Members State's declaration accepting this competence and appointing the national court entitled to turn to the Court. However, according to the transitional provisions, regarding the subject of preliminary ruling, the full power of the Court will be applicable five years after the entry into force of the Lisbon Treaty.

Under the last paragraph of Article 267 of the Lisbon Treaty, the Court has to act with minimum delay in pending cases before a court of any Member State if such preliminary question is raised that relates to a person in custody. By this, the text of the Treaty itself contains reference to the urgent preliminary ruling procedure entered into force on March 1, 2008

We have to highlight that according to Article 10 of Protocol 36 on transitional provisions, before the entry into force of the Lisbon Treaty, the Commission, with regards to the legal acts on police cooperation and judicial cooperation in criminal matters, e.g., framework decisions, after the expiration of the above mentioned five-year period, may bring an action for infringement if the legal act was not modified in the meantime or new norm was enacted to replace it.

In my dissertation, I analyze cases related exclusively to the Shengen Agreement, European Arrest Warrant, and administrative penal law to demonstrate the legal development work of the Court of Justice of the European Union directly in the field of law enforcement cooperation.

In her monograph, *The Fundamental Questions of European Criminal Law Integration*9 Krisztina Karsai was the first in the national literature to analyze with impressive thoroughness those judgments of the Court of Justice of the European Union that, because of the framework disposition nature of criminal law, referred to Community law and, by this, influenced the final results of national criminal procedures.

9 Krisztina Karsai: *The Fundamental Questions of European Criminal Law Integration*, KJK-Kerszöv, Budapest, 2004, pp. 1-263.

The work of the Court of Justice of the European Union on the improvement of the law is connected with the application of the Convention Implementing the Schengen Agreement10 (CISA) and, as mentioned before, with the codification work of the European Council manifesting in framework decisions. In my dissertation, I analyzed seven judgments connected with the principle of *neb is in idem*. The Court of Justice of the European Union clarified that the principle of *neb is in idem* contains not only the prohibition of double punishment but also of double procedure. In this regard, it points beyond its classical version prevailing until now in international law cooperation in criminal law. This deeper analysis relates to the fact that the decisions always emphasize the mutual recognition principle, and, thus, multiple comparisons are unnecessary. With the help of this axiom, the Court is able to provide separate analysis for Article 54 of CISA, independently from the different dogmatic approaches found in various national laws, the various factual legal formulations, or the protection under different criminal policy approaches of legal interests.

The decisions of the Court of Justice of the European Union strengthened the institution of the European Arrest Warrant. Although it is obvious that the European Arrest Warrant is still only in its adolescence, it brought significant transformation in the fight against crime in Europe because it guarantees that criminals could not find safe haven within the borders of the Union. As the national authorities and the system of law enforcement are getting more familiar with it, the European Arrest Warrant is becoming more and more effective. The European Arrest Warrant is an important milestone in the development of a region based on freedom, security, and justice, and it is the first tangible success story of this aspiration.

The European Administrative Penal Law

In my dissertation, I analyzed individually the concept of administrative penal law through the decisions of the European Court of First Instance. The good-willing critics of the criminal justice system repeat that the procedures grow heavy, the increase of time elapsing between the commission of crime and enforcement of proportionate punishment, and the costly and ineffective procedure, whose reparative nature does not appear or is greatly neglected. Contrary to this, administrative law strived to ensure speediness and, to some extent, reparation by effective, detailed, appropriate, and regulated bureaucratic solutions. Knowing this, it is not hard to find supporters for the European administrative penal law, because it can be fast and efficient, and, at the same time, can assure repressive needs. Another argument is that administrative penal law fulfills the aspiration for decriminalization demanded by criminal policy and legislation of the last two decades. The last argument is a paradox, because the European Union, referring to decriminalization, is building a system with which it wants to get closer to the realization of supranational

10 OJ L 239/19 of 22 September 2000.

criminal policy and uniform European criminal law. As Norbert Kis formulates11, the strengthening of the penal power of administration follows three trends, including (1) the development of the Union's supranational system of sanctions; (2) the development of alternative mechanisms of sanctions substituting the tool of criminal law in the legislative harmonization of the Member States; and (3) the further alternative development of the Member States' national sanction policies that differs from criminal law.

In my dissertation, I tried to find the answer to the question of what administrative penal law means at the supranational level, and how it influences national criminal law and the uniform European criminal law yet to be developed. I am certain, however, that this question cannot be answered from only one aspect. While national criminal law is built fundamentally on the criminal liability of the natural person, in competition law, commercial companies are in the focal point of procedures. The final decisions of criminal proceedings are rendered before a court during adversarial proceedings, while in competition law, which includes administrative penal law, too, these two elements are always missing. Administrative penal law tends to emphasize its sanction measure nature, often called as penalty, avoiding the concept of punishment that is exclusively a category of criminal law. Of course, in practice, it is hard to differentiate between the two. It is obviuos, however, that avoiding the use of the term punishment serves the separation from criminal law and its guaranties.

The greatest similarity can be found perhaps with relation to fundamental rights, although the paradigms are different. During criminal proceedings, for example, the limited nature of Article 6 the Human Rights Convention does not even occur, while in proceedings before the competition authorities, the Court did not find it evident. The Court displays a very tangible desire to ensure, besides unconditionally observing fundamental rights, that administrative penal law become even speedier and more efficient even if it requires the tools of legal developments.

If we keep in mind the real objective of European administrative penal law, which is filling in certain gaps, we should not superficially disregard the narrowness of its guaranties. We cannot state that proceedings before competition authorities will only concern commercial companies and in the worst case, could only lead to establishing criminal liability of a legal person. Let me refute this with a hypothetical experiment. Let us suppose that the Commission suspects cartel agreement with regards to a Hungarian company or commercial activity taking place in Hungary. Let us also assume that the proceeding results in a judgment against the company finding unlawful conduct. As we saw from the judicial decisions, the proceeding by the Commission does not bar national authorities to conduct criminal proceedings. Based on the Commission's decision against the company, under

11 Norbert Kis, *Supranational Sanctions and Procedure*, in. Handbook of the European Criminal Law, edited by Kondorosi – Ligeti, Magyar Közlöny Lap és Könyvkiadó, Budapest, 2008, p. 375.

§296/B (1) and (2) of the Hungarian Criminal Code, criminal proceeding could be conducted against the natural person participating in the commercial activity for the crime of cartels in public procurement procedures and concession tenders restricting competition.

Criminal law practice of the European Court of Human Rights

The dissertation's system of thought has three new approaches. In one of the approaches became reasonable in the preparation of the final period when the Lisbon Treaty has entered into force, which transformed the way the Union's past institutional and decision-making mechanism. The previous ambitious monographs (mainly made by the author Krisztina Karsai and Katalin Ligeti) as an in-depth studies and articles have been written prior the Lisbon Treaty. Accordingly the author was in the position to be the first one publishing studies after the Lisbon Treaty.

The "second pillar" of the dissertation that the law of the European Communities (Treaty of Rome) and the European Convention on Human Rights (Rome Convention) ultimately derive from the same lake and both of them the same legal basis instruments of Europe.
Therefore, almost the one-third part of the dissertation focuses on the operation and jurisdiction of the European Court of Human Rights (formerly the Commission). Accordingly to the judicial practice, the dissertation concentrates for just few articles of the Convention which are significant in the territory of criminal law. These are the jurisdiction as the first article, the right to life as the second article, the third article on the prohibition of torture, the right to liberty and security as the fifth article, the right to the fair trial as the sixth article, and the prohibition of punishment without a statutory provision as the seventh article. (The latter does include itself the non-retroactivity of the more serious criminal provisions.) Relating court decisions to these articles are forming the most important pillars of criminal judgments. Considering that the laws of Strasbourg are case-law, of the Court decisions are maintained as "precedent". It also sought to explain such decisions, which had impact, or impact on the Hungarian criminal policy well.