

THE EU COMPETENCE IN CRIMINAL LAW AND NATIONAL IDENTITY AS AN OPT-OUT FOR THE MEMBER STATES OF THE EUROPEAN UNION / Sára Kiššová

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Abstract: *The article examines the EU's competence in criminal law, and the ways in which the EU can intervene in this area within the national law of the Member States. Considering the current debate in Slovakia regarding amendments to criminal codes and the proposal to abolish the Special Prosecutor's Office, the paper discusses the delimitation of competence in this respect between the EU and the Member State. The article also discusses the possibility of a Member State to argue national identity in Article 4(2) TEU on the issue at hand.*

Key words: *National Identity; Constitutional Identity; Primacy of EU Law; the Contro-limiti Doctrine*

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1. INTRODUCTION

The question of national identity is increasingly coming to the fore in the context of the discourse on values in the European Union (hereinafter also referred to as the "EU"). Reference to national identity can be found in some judgments of constitutional courts of the Member States such as Poland, Romania, Hungary, the Czech Republic, Italy, and Germany.¹ In any case, references to national identity in the judgments of the national courts of the Member States are not in themselves a problem; on the contrary, they can make an interesting contribution to the field of constitutional law of the European Union.

In Slovakia, the end of the year 2023 and the beginning of the year 2024 will be marked by discussions on the proposed abolition of the Special Prosecutor's Office, which is currently a special part of the General Prosecutor's Office,² and changes to the Criminal Code and the Criminal Procedure Code. Among the changes in the Criminal Code are announced, for example, adjustment of the basic principles for the imposition of penalties, changes in the limitation period, changes in the amount of damages, or reduction of penalties for property and economic crimes. Among the amendments to the Criminal Procedure Code are, for example, changes in the legal regulation of the

¹ Constitutional Court of the Czech Republic, Pl. ÚS 29/09 (3 November 2009); Constitutional Court of the Czech Republic, Pl. ÚS 5/12 (31 January 2012); Constitutional Court of Romania, No 390/202 (8 June 2021); Constitutional Court of Hungary, Decision No. 22/2016 (XII.5.) AB; Constitutional Court of Poland, K 3/21 (7 October 2021); Constitutional Court of Italy, No 24/2017 (26 January 2017).

² § 38(1) a) Act of 28 March 2001 no. 153/2011 Z.z. o prokuratúre.

cooperating person and the suspect or amendment in the discontinuation of prosecution in the preparatory proceedings (pre-trial proceedings) pursuant to Article 215(1)(a), (b), (c) of the Criminal Procedure Code. As regards the proposal to abolish the Special Prosecutor's Office, so far, from the information available on the Internet, it does not appear that the abolition of the Special Prosecutor's Office would mean that the active criminal proceedings would come to an end. There is an assumption that if the Office were to be abolished, these proceedings would be transferred to the regional prosecutor's offices through an organisational change.³

The fact remains that at the time I am writing this paper, I have almost no available academic information on the impact of the abolition of this office on human rights or the rule of law in the Slovak Republic, nor do I have any academic articles dealing with the impact of possible changes to our criminal codes. I have media reports by experts and a few online blogs. All considerations regarding the situation in question in relation to EU law will, therefore, be conducted on a hypothetical level with a purely theoretical-legal interest. It is not the subject of this paper to assess the correctness or incorrectness of the proposed changes, nor is it relevant to this article who proposes the changes in question.

In this paper, I would like to take a strictly theoretical look at the situation in question (organisational change of the prosecutor's Office of a Member State and change of the criminal codes of a Member State) from the point of view of the obligations of EU law. I would also like to refer to national identity in Article 4(2) Treaty on the European Union (hereinafter also referred to as the "TEU").

2. COMPETENCES OF THE EUROPEAN UNION IN THE FIELD OF CRIMINAL POLICY OF THE MEMBER STATES

The EU's competence in criminal matters is currently contained in the shared competence in Article 4 of the Treaty on the Functioning of the European Union (hereinafter also referred to as the "TFEU"). Article 4(2)(j) contains the 'area of freedom, security and justice'. Furthermore, this area is covered by Articles 67 et seq. TFEU. Within this area of EU shared competence, the relevant articles for procedural criminal law and substantive criminal law are Articles 82 and 83 TFEU, which can be found in the chapter entitled "judicial cooperation in criminal matters".

However, both provisions must be read in conjunction with Title V, Chapter 1 TFEU, which sets out the general objectives for this area to be achieved (Herlin-Karnell, 2012, p. 335). In the context of the Europeanisation of criminal law, we can talk about the convergence of the elements of selected crimes (listed below) and the development and strengthening of cooperation between Member States in criminal matters (Klimek, 2017, p. 21).

In the area of substantive criminal law, Article 83 TFEU allows for the establishment of "minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis". For this reason, this Article defines ten criminal areas, the so-called Euro-crimes, which are described in EU primary law mainly because of their particularly serious nature and their typical cross-border dimension, and therefore require a common approach within the Union (Bogensberger, 2019, p. 900). The provision in

³ For example, see: Kurilovská Lucia: Neexistuje právo na zákonného prokurátora, In: Rozhovory s Mimi Šramovou, online, 18.12.2023, Youtube. Available at: <https://youtu.be/fx4G4Sndp-o?si=UVvLcbJX6tQRbZQh&t=743> (accessed on 31.12.2023).

question lists crimes such as terrorism, several types of trafficking with *res extra commercium*, money laundering, organised crime, corruption, etc. This list mainly focuses on the protection of the European Union's financial interests; however, paragraph 2 contains a general clause allowing the Union to approximate further if this proves to be 'essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures...'. In this context, Herlin-Karnell notes the rather broad definition of the EU's competence by this provision (2012, p. 339).

As regards criminal procedural law, Article 82(2) a-c) TFEU contains a list of areas within the EU's legislative competence where minimum rules may be laid down, such as the mutual admissibility of evidence between Member States, the rights of individuals in criminal proceedings and the rights of victims of crime. The European Union can thus adopt minimum rules on selected procedural rights of persons in criminal proceedings. However, the procedural rights of persons in criminal proceedings are also protected within the EU by Article 47(2) of the Charter of Fundamental Rights of the European Union, which is, in essence, one of the many projections of the rule of law enshrined in Article 2 TEU.⁴ It is also essential to recall the membership of all Member States in the Council of Europe and, thus the automatic protection of the procedural rights of persons by the provisions of the European Convention on Human Rights. Moreover, Article 82(2)(d) TFEU constitutes a general clause for the approximation of any other specific aspect of criminal proceedings, which, however, the Council must identify in advance by a decision.⁵

As regards the competence of the Court of Justice of the European Union (also as "CJEU"), prior to the adoption of the Lisbon Treaty, there was no general jurisdiction in this area. The jurisdiction of the CJEU could only be established voluntarily based on a declaration or acceptance of such jurisdiction by the Member States (Herlin-Karnell, 2012, p. 337). Following the adoption of the Lisbon Treaty, which, among other things, abolished the three-pillar structure of the EU pillars, the area of freedom, security, and justice came under the general jurisdiction of the CJEU, albeit with a transitional period of five years.⁶ The Court of Justice can thus decide on infringement proceedings against a Member State under Article 258 TFEU or answer a referred question for a preliminary ruling in pending proceedings before a national judicial authority in respect of a person who is in custody under Article 267 TFEU, whereby the Court of Justice acts without delay. From the above, we can conclude in this section that the European Union has specific competencies in the field of criminal policy of the Member States, which are laid down in primary EU law. From a general point of view, this includes selected areas of substantive criminal law, procedural criminal law (criminal proceedings), cooperation in criminal matters between Member States (recognition of judicial decisions - Article 82 TFEU), and, finally, the creation of bodies to promote cooperation between EU Member States in criminal matters, such as Eurojust, Europol and so on.⁷ For these reasons, the EU has an interest in scrutinising legislative changes within Member States and may scrutinise parts of changes that explicitly affect the EU in selected areas.

On the other hand, EU primary law also guarantees specific breaks that a Member State can use if it perceives that proposed legislation in a particular criminal area interferes with fundamental aspects of its criminal justice system. One of these breaks is Article 82(3) TFEU and Article 83(3) TFEU, which allow a Member State to object to or

⁴ Art. 47(2) follows as: "Everyone has the right to have his or her case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal established by law."

⁵ It is important to draw attention to the unanimous vote of the Council following the consent of the European Parliament.

⁶ Article 10 of the Protocol (No 36) on transitional provisions attached to the Treaty of Lisbon.

⁷ See Articles 85 and 88 TFEU.

trigger the suspension of an ordinary legislative procedure in progress and to submit a draft directive to the European Council which will decide unanimously on the proposal. In Article 69 TFEU, the necessity of respecting the principles of proportionality and subsidiarity (in accordance with Protocol no.2) in legislative initiatives under Chapters 4 and 5 of Title V is also recognised.

Here, I will extend the scope of the emergency brakes in this area by adding the Union's obligation to respect the national identity inherent in the fundamental political and constitutional systems of the Member States, as defined in Article 4(2) TEU. The concept of national identity (as I usually refer to the first part of Article 4(2) TEU in my papers) is an essential element of the EU primary law in relation to the obligations of Member States arising from their membership in the EU and with regard to the principle of the primacy of EU law. Thus, in Chapter 3 of this paper, I will focus on the content of the notion of national identity and look for possible links with the criminal law and criminal policy of a Member State. I will be interested in whether a Member State can refer to the structure of its criminal justice system as an element of its national identity and whether Article 4(2) TEU can also be invoked in the case of changes to criminal codes.

3. THE CRIMINAL POLICY OF A MEMBER STATE AND NATIONAL IDENTITY IN ARTICLE 4(2) TEU

As regards the general definition of the elements of the concept of national identity, I must point out that despite the presence of the concept of national identity in EU primary law for more than thirty years, there has been both: insufficient academic research on the concept and insufficient judicial interpretation of the concept of national identity by the Court of Justice.⁸ The Court's interpretation of the content of the concept of national identity has been rather narrow, firstly because the concept of national identity has been referred to by the Member States in their submissions mainly as a secondary argument and,⁹ secondly, I consider that in many cases the Court has avoided the possibility of interpreting the concept in the context of the issues at stake in the cases in question.¹⁰

There will be no room in this section for a comprehensive examination of the concept of national identity in Article 4(2) TEU; I have done that elsewhere (Kiššová, 2023). For these reasons, I will focus *in medias res* only on the essential conclusions of the research already carried out, which I will present in the context of the selected issues of this Article. The main objective of this chapter is to examine the substance or elements of the concept of national identity in Article 4(2) TEU and to explore whether it is hypothetically possible for a Member State to claim interference with its national identity if it were to be criticised by the European Union for an organisational change in the form of the abolition of a specific branch of a particular public authority. I will also be interested to see whether a Member State can make the same argument in relation to a proposed change to national criminal codes.

⁸ Compare this with the principle of subsidiarity, which was also incorporated into EU primary law by the Maastricht Treaty in 1992 with the same aim of protecting the sovereignty of Member States as the concept of national identity.

⁹ See e.g.: CJEU, judgment of 24 May 2011, *European Commission v Grand Duchy of Luxembourg*, C-51/08, ECLI:EU:C:2011:336; CJEU, judgment of 15 March 2006, *Eurojust v Spain*, C-160/03, ECLI:EU:C:20045:168.

¹⁰ See here: Opinion of Advocate General Kokott of 15 April 2021, *V.M.A. v Stolichna obshtina, rayon "Pancharevo"*, C -490/20, ECLI:EU:C:2021:296, and then cf. CJEU, judgment of 14 December 2021, *V.M.A. v Stolichna obshtina, rayon "Pancharevo"*, C-490/20, ECLI:EU:C:2021:1008.

3.1 *The Division of Competencies within a Member State as an Element of the Concept of National Identity in Art 4(2) TEU*

As I have indicated above, the concept of national identity is an autonomous concept of the EU law, so its meaning and substance can only be defined or interpreted by the Court of Justice. However, on the other hand, the Member States determine what is perceived as part of, or an element of, national identity within their national law (and, in particular, their constitutions and constitutional laws). In this section, I will not avoid partly addressing the notion of 'constitutional identity' (for example: Kelemen and Pech, 2019; Hamulák, Kopal and Kerikmäe, 2017; Blagojević 2017; Drinóczi, 2020; Calliess and van der Schyff, 2021). Some authors interchange "national identity" and "constitutional identity". Similarly to Cloots (2016, pp. 82-98), I believe that the synonymous use of the terms interchangeably in the context of Article 4(2) TEU is not entirely correct (Kiššová, 2023, pp.91-127), given the importance of the concept in EU primary law. I believe both concepts include certain elements of the material core of a Member State's constitution, which the Member State perceives as unchangeable under any circumstances. However, regarding Article 4(2) TEU, only certain elements of the identity of a Member State may fall within the protection of the concept of national identity, namely those elements which will fall within the scope of the concept of "national identity" in Article 4(2) TEU, that scope being defined by the Court of Justice.

Although the concept of national identity has been present in EU primary law since the adoption of the Maastricht Treaty, the wording of the concept has changed (in)significantly through subsequent revisions until the Lisbon Treaty.¹¹ From the analysis of particular court proceedings in which reference has been made, either directly or indirectly, to the concept of national identity, the post-2009 jurisprudence is particularly relevant for us due to the different wording of the concept. However, in this respect, we do not miss anything in terms of interpretation with regard to the case law in which the concept of national identity appeared before 2009 because in that period, the concept of national identity was dealt with marginally, and by the Advocates General¹² rather than by the Court of Justice.¹³ Following the adoption of the Lisbon Treaty, it is possible to identify case law that sheds more light on the concept of national identity. However, based on previous research, I have to conclude that the Court of Justice is taking a more passive approach. So far, it can be stated that the elements of the concept of national identity that Member States can point to include i) the form of the state system,¹⁴ ii) the state (official) language,¹⁵ iii) the distribution of powers in a Member State,¹⁶ which is hand in

¹¹ The changes in the wording of the concept are particularly noticeable when comparing Article F(1) of the Maastricht Treaty with the later Article 6(3) of the Amsterdam Treaty and the current Article 4(2) TEU, which is the most detailed of all the versions in terms of specifying the notion of national identity within the provision.

¹² Opinion of Advocate General Maduro of 20 September 2005, Marrosu and Sardino, C - 53/04, ECLI:EU:C:2005, paragraphs 39-40; Opinion of Advocate General Maduro of 8 October 2008, Michaniki, C-213/07, ECLI:EU:C:2008:544, para 33; Opinion of Advocate General Colomer of 25 June 2009, Umweltschutzwahl von Kärnten, C-205/08, ECLI:EU:C:2009:397, paragraphs 43-47.

¹³ In this respect, I refer to two similar cases: CJEU, judgment of 2 July 1996, Commission v Luxembourg, C-473/93, ECLI: EU: C: 1996: 263, and CJEU, judgment of 24 May 2011, European Commission v Luxembourg, C-51/08, ECLI: EU: C: 2011: 336 in which the argument of national identity was present, but the Court's judgment lacks an interpretation of the elements of the concept of national identity.

¹⁴ CJEU, judgment of 20 December 2010, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, C-208/09, ECLI:EU:C:2010:806.

¹⁵ CJEU, judgment of 12 May 2011, Runevič-Vardyn, C-391/09, ECLI:EU:C:2011:291.

¹⁶ CJEU, judgment of 12 June 2014, Digibet Albers, C-156/13, ECLI:EU:C:2014:1756; CJEU, judgment of 21 December 2016, Remondis v Region Hannover, C-51/15, ECLI:EU:C:2016:985.

hand linked to iv) the choice of the model of the relationship between the state and religious entities.¹⁷

For the purposes of this paper, the element of interest to us will be the "redistribution of powers in a Member State". In this context, there are several judgments of the Court of Justice, particularly concerning the internal distribution of competence in cases of provisions of the Treaties or of secondary law conferring powers or imposing obligations on Member States to apply EU law. In these instances, it has been stated several times that the question of how Member States may confer the exercise of powers or the performance of duties on national authorities is a matter exclusively for the constitutional system of each Member State.¹⁸ Similarly, Advocate General Mengozzi stated in his Opinion that "[i]t is nevertheless clear from the case-law that the internal organisation of the State does not fall under EU law".¹⁹

Given the context that inspired this paper, it can therefore be concluded that part of the concept of national identity is the preservation of the sovereignty of Member States to determine the internal organisation of public authorities and the conferral of powers on those authorities. In other words, it is entirely in the hands of the Member States themselves to determine the internal structure of public authorities, for example, the form of organisation of the judicial system, the form and organisation of the public prosecutor's Office, or the organisation of district and regional authorities, etc.

Despite the sovereignty of the Member States in relation to the internal organisation of public authorities, respect for the rule of law and democracy, in particular, must be maintained. Specific organisational changes may also affect the efficiency of exercising a particular area within the Union's competencies. Therefore, it is necessary to guarantee this efficiency vis-à-vis the EU in the event of organisational changes.

3.1.1 The Limits of the Elements of the National Identity of a Member State

Elements of national identity, which can take different forms in the fundamental political and constitutional systems of Member States, have their limits. This means that the mere fact that a Member State points to an interference with an element of a Member State's national identity will not always automatically be a "roadblock" for the EU and the EU law in a particular matter. Of all the elements of national identity identified, the focus will be left furthest at the element of "distribution of competencies within a Member State" and I will proceed to the specific cases on which the objective of this subchapter can be demonstrated.

As I mentioned above, the concept of constitutional identity is present in the current discourse in various areas of EU law, alongside that of national identity. These two concepts have come to be used most prominently by some Member States over the last ten years, but each in a different context and for a different purpose. I have already dealt with this topic elsewhere, so I will skip a more detailed description of the issue and move on to specific ideas related to the paper's topic (Kiššová, 2022).

¹⁷ Opinion of Advocate General Tanchev of 9 November 2017, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.*, C-414/16, ECLI:EU:C:2017:85; Opinion of Advocate General Kokott of 16 February 2017, *Congregación de Escuelas Pías Provincia Betania v Ayuntamiento de Getafe*, C-74/16, ECLI:EU:C:2017:135.

¹⁸ CJEU, judgment of 3 April 2014, *Cascina Tre Pini Ss v Ministero dell'Ambiente e della Tutela del Territorio e del Mare and Others*, C-301/12, ECLI:EU:C:2013:420, para 42; CJEU, judgment of 4 October 2012, *European Commission v Belgium*, C-391/11, ECLI:EU:C:2012:611, para 31; CJEU, judgment of 16 July 2009, *The Queen, on the application of Mark Horvath v Secretary of State for Environment, Food and Rural Affairs*, C-428/07, ECLI:EU:C:2009:458, para 50.

¹⁹ Opinion of Advocate General Paolo Mengozzi delivered on 30 June 2016, *Case C-51/15 Remondis GmbH & Co. KG Region Nord v Region Hannover*, ECLI:EU:C:2016:504, paras. 38-39.

A relevant example of the limits of the element of national identity (or protection of national identity, in this particular case also constitutional identity) of a Member State is Poland, in the context of its not-so-distant "rebellion" regarding the primacy of EU law, which could be observed in the national proceedings of the Constitutional Court of Poland in the cases P 7/20²⁰ and K 3/21.²¹ In my opinion, there was no substantive and professional argumentation on the part of Poland as regards the protection of their national or constitutional identity. Even if their argumentation had been more substantiated, the argument for the protection of national or constitutional identity would not have gone through, mainly because of the factual situation, which was most concerned with the values on which the EU is based. In case P 7/20, a member of the Disciplinary Board sought an answer to the question of whether Poland had to implement the interim measure concerning the organisational structure and functioning of the constitutional bodies within the judiciary of that Member State, which had been issued by the Court of Justice in Case C-791/19, and which concerned an area which had not been transferred to the European Union.²² In these domestic proceedings, the Constitutional Court held that Articles 4(3) TEU and 279 TFEU "are incompatible with the Polish Constitution in so far as the Court of Justice *ultra vires* imposes obligations on the Republic of Poland as a Member State of the EU by ordering interim measures concerning the organisational structure and functioning of the Polish courts and how proceedings before those courts are to be conducted".²³ At the end of the day, it can be stated that the Constitutional Court was correct in this particular statement, given what has been argued above, however, such sovereignty of a Member State "ends" when certain decisions of a Member State create a violation of one of the values set out in Article 2 TEU. In the present case, it was the manner and conduct of the proceedings of the Disciplinary Chamber that interfered with the rule of law since, *inter alia*, the substance of the judicial decisions could be qualified as disciplinary misconduct by the judges of the general courts, or the way in which the Disciplinary Chamber was itself appointed.²⁴ Such a setting of the Disciplinary Chamber thus significantly interfered with the independence and impartiality of the judicial system, which is one of the elements of the principle of the rule of law (Rawls, 1999, pp. 208-210).

The fact that the limits of respect for national identity in Article 4(2) TEU are indeed rooted in Article 2 TEU was recently confirmed in a judgment of the Court of Justice. Despite several question marks surrounding this concept, the Court has, for the first time, expressed itself more comprehensively towards Article 4(2) TEU in the annulment proceedings brought by Poland and Hungary. The paradox is that the proceedings to which I am referring are, in principle, also (but not only) the result of the aforementioned national proceedings brought by Poland since the action for annulment in question concerned a mechanism of conditionality, which again can only be seen as a reaction (a new mechanism) to the absolute ineffectiveness of other mechanisms for the protection of the rule of law - i.e., Article 7 TEU (see more: Máčaj, 2022, pp. 49-84). In *Hungary v. European Parliament* (C-156/21) and *Poland v. European Parliament* (C-

²⁰ Constitutional Court of Poland, P 7/20 (14 July 2021).

²¹ Constitutional Court of Poland, K 3/21 (7 October 2021).

²² CJEU, order of 8 April 2020, *European Commission v Republic of Poland*, C-791/19 R, ECLI:EU:C:2020:277.

²³ Press release on P 7/20: The obligation of an EU Member State to implement interim measures pertaining to the organisational structure and functioning of constitutional authorities within the judicial branch of government of that Member State. 14 July 2021, available at:

<https://trybunal.gov.pl/en/hearings/judgments/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-na-wykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-kszaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa> (accessed on 31.12.2023).

²⁴ *Ibid.*, par. 3.

157/21), the Court dealt with a number of issues. Still, the Court's response to Hungary's arguments regarding national identity in Article 4(2) TEU is relevant to this subchapter. In this regard, the Court noted that, despite the different national identities of each Member State, which the Union respects by their membership in the Union, the Member States recognise the values in Article 2 TEU, which are the common values of their constitutional traditions, which they have committed themselves to uphold at all times. According to the Court of Justice, national identity cannot be interfered with if the national identity is contrary to Article 2 TEU.²⁵ However, I cannot fully agree with the Court of Justice in this view, given the multiple societal value issues/disputes across the EU and the broad interpretation of the concept of the rule of law. However, I will not address this at this point in this paper.

3.2 Criminal Codes of Member States under the Protection of National Identity or Constitutional Identity - the Taricco case

Above, I have discussed the EU's competence in the field of criminal law, concluding that there is as yet no separate legal area of EU criminal law but that there has been a significant Europeanisation of criminal law in certain areas. In this respect, I have defined the ways in which the EU (or the European Public Prosecutor's Office) can challenge specific changes/amendments within the criminal codes of the Member States. I have also discussed the definition of the different elements of the concept of national identity in Article 4(2) TEU. To summarise, among the elements identified so far by the Court are i) the form of the state system, ii) the national (official) language, iii) the distribution of powers within the Member State, and iv) the choice of the model for the relationship between the state and religious entities. I dare to call everything else that a Member State defines as its material core, hardcore, or constitutional tradition constitutional identity.

For this reason, I believe a distinction must be made between the two concepts because each encompasses different elements of the identity of a Member State. If I could express it in propositional logic, it would read as follows: Every element of the national identity of a Member State may also be an element of the constitutional identity of a Member State, yet not every element of the constitutional identity of a Member State is also an element of the national identity of a Member State. It, therefore, follows that a Member State can claim respect for only some parts of its fundamental political and constitutional system, while the remaining parts appear at first sight to be subject to the principle of the primacy of EU law. I believe it is rather unlikely that a Member State would be able to claim its national or constitutional identity when amending criminal codes introduced by a Member State. More likely is a situation in which amendments to criminal codes would have to be made precisely due to secondary EU law, and an element in the transposition would conflict with a Member State's national identity. Given that national identity is quite narrowly defined, I assume that in the event of an objection to a change introduced by the EU, either the emergency brakes of Articles 82(3) and 83(3) TFEU would have to be invoked first. Otherwise, it would have to be well-argued why the change in question interferes with the fundamental constitutional system of a Member State.

²⁵ CJEU, judgment of 16 February 2022, *Hungary v European Parliament and Council of the European Union*, C-156/21, ECLI:EU:C:2022:97, paras. 232-234.

3.2.1 What if an EU Act Collides with an Element a Member State Classifies under its Constitutional Identity?

No mechanism in EU law protects the constitutional identity of a Member State, so one can only observe and evaluate the practices of, for example, Germany or Italy in particular cases.²⁶ In this respect, the Taricco case is also relevant to criminal law and the protection of financial interests.²⁷ The Taricco case aptly demonstrates the way in which the EU can interfere in certain areas of a Member State's criminal policy and how the very act of the EU can run against a Member State's constitutional principle.

The case concerned the issue of limitation periods for certain tax crimes under Italian criminal law and the issue of criminal prosecutions relating to tax fraud.²⁸ However, tax fraud crimes usually consist of very complex investigations, so the proceedings take a very long time already at the preparatory stage of the criminal investigation. The way in which limitation periods have been set in Italy and their possible extension has led, in relation to the length of such proceedings (at all stages of the criminal procedure), to *de facto* impunity in these types of cases in Italy, which was not an isolated but a standard phenomenon.²⁹ This resulted in the impossibility of recovering the tax that was the subject of the crime in question by the Italian tax authorities, which, at the end of the day, also affected the EU's financial interests.

The Italian Constitutional Court referred this issue to the Court of Justice for a preliminary ruling, with the result that the Italian criminal law provisions at issue, which provide for short limitation periods, may have adversely affected the Member States' compliance with their obligations under Article 325 TFEU - i.e., to protect the financial interests of the European Union by adopting effective and dissuasive penalties.³⁰ In other words, it is not certain whether the Court of Justice has held that, in practice, Italian judges have an obligation to ensure the full effect of Article 325(1) and (2) TFEU, and they must refrain from applying the provisions of national law governing limitation periods for VAT crimes or whether limitation periods should be extended.

In any event, putting either approach into practice would bring the CJEU's ruling into conflict with Article 25 of the Italian Constitution, which enshrines the principle of legality, which the Italian Constitutional Court interprets as "prohibiting a retroactive application in peius of the limitation period (or the non-application of the same) over the time". In contrast, the Court of Justice does not interpret the principle of legality in this way.³¹ Italy regulates limitation periods within the field of substantive criminal law. Consequently, a situation has arisen where either the Italian national courts would ignore the Court of Justice's ruling in the Taricco case and thus violate the principle of the primacy of EU law, or they would follow the Court's instructions and *de jure* and *de facto* disregard the principle of legality, which, moreover, is perceived as the core of the Italian constitutional system, i.e., constitutes an element of Italy's constitutional identity.³² In this situation, Italy thus chose the path of protecting its constitutional identity through the so-

²⁶ Federal Constitutional Court of Germany, Judgment of the Second Chamber of 30 June 2009-2 BvE 2/08; Federal Constitutional Court of Germany, Order of the Second Chamber of 14 January 2014-2 BvR 2728/13; Constitutional Court of Italy, No 183/1973 (18 December 1973); Constitutional Court of Italy, No 232/1975 (22 October 1975); Constitutional Court of Italy, No 170 /1984 (5 June 1984); Constitutional Court of Italy, no. 232/1989 (13-21 April 1989).

²⁷ CJEU, judgment of 8 September 2015, Taricco and Others, C-105/17, ECLI:EU:C:2015:555.

²⁸ Articles 157-161 of Italian Criminal Act No 251 of 5 December 2005.

²⁹ CJEU, judgment of 8 September 2015, Taricco and Others, C-105/17, ECLI:EU:C:2015:555, para 24.

³⁰ *Ibid.*, para 58.

³¹ *Ibid.*

³² Constitutional Court of Italy, no. 24/2017 (26 January 2017), para. 7.

called doctrine of *controlimiti*, and the Italian Constitutional Court initiated a dialogue with the Court of Justice in yet another national proceeding through the reference for a preliminary ruling in the MAS and MB case (also called the *Taricco II*).³³ In its judgment, the Court of Justice held that the Italian national courts should not disapply the national provisions on limitation periods “[i]f such a waiver would lead to an infringement of the principle of the legality of crimes and penalties on account of the lack of certainty of the applicable law or on account of the retroactive application of legislation which lays down stricter conditions of criminality than those in force at the time of the commission of the crime”.³⁴

It follows from the above that Member States can argue against EU acts if they interfere with their constitutional identity, which can also be reflected in their criminal codes (however, in general, it does not matter which area of law it would be). The *Taricco* case shows that there can be situations where certain criminal law instruments are viewed or interpreted differently by each of the parties. In conclusion, I would add that the key to resolving similar situations is maintaining mutual respect between the EU and a Member State. In the event of a dispute, it is always necessary to establish a dialogue, for example, by initiating a reference for a preliminary ruling or by using other diplomatic channels.

4. COMMUNICATION BY THE EUROPEAN UNION ON AMENDMENTS TO CRIMINAL CODES AND CHANGES TO THE ORGANISATION OF THE PUBLIC PROSECUTOR'S OFFICE

In the case of proposed changes to Slovakia's criminal codes, the EU may, in particular, examine the impact of legislative amendments on the protection of the EU's financial interests. In the rest, the EU can review whether the changes are consistent with the values in Article 2 TEU, particularly concerning the rule of law and human rights. In the EU, this will mainly be the responsibility of the European Commission, but the European Public Prosecutor's Office, which started its work in 2021, is also important in this area.

In a situation such as the current one in Slovakia, the EU or the European Public Prosecutor's Office can comment on the way in which the individual elements of the Euro-crimes are to be amended or even on amendments to the penalties of the Euro-crimes. The European Union may (despite the necessary reform) criticise the excessively low penalties for economic crimes in the sense of not respecting the principle of criminal law that penalties should be not only proportionate but also dissuasive. This is because the European Public Prosecutor's Office may be affected by the reduction of criminal rates in terms of the possibility of investigation methods, according to Article 30 of Council Regulation (EU) 2017/1939.³⁵ Based on this provision, the European Prosecutor's Office is only entitled to use certain forms of securing evidence provided that the crime under investigation is punishable by a custodial sentence with a maximum penalty of at least four years.³⁶

The European Public Prosecutor's Office can also be interested in amending the procedural criminal law of the Member States, in particular, to ensure effective

³³ CJEU, judgment of 5 December 2017, *M.B.A. v M.B.*, C-42/17, ECLI:EU:C:2017:936, [*Taricco II*].

³⁴ *Ibid.*, paras 62 and 64.

³⁵ The Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO').

³⁶ For example: freeze instrumentalities or proceeds of crime, intercept electronic communications, rack and trace an object by technical means, etc.

investigations of crimes against the EU's financial interests. In this sense, however, and based on the previous chapters, the EU does not, in my opinion, have a legal basis for criticism of the form and structure of the judicial authorities. However, it has a legal basis for criticism of the quality of the process within these authorities. Therefore, the European Public Prosecutor's Office can comment on and challenge changes that would adversely affect the quality of Euro-crimes investigations in terms of the specialisation and expertise of investigators or judges. However, I believe that, provided that the Slovak legislator will and can guarantee the referral of criminal proceedings prepared and initiated by the Office of the Special Prosecutor to regional prosecutor's offices, and provided that all the principles of the criminal procedure and the efficiency of criminal investigations (not only against the financial interests of the EU) are preserved, I do not perceive the mere fact that the Office would be abolished as a reason for the objection of violation of the rule of law. I would only see such a violation if it appeared that the Office of the Special Prosecutor would cease to exist, and all pending and active pre-trial criminal proceedings would be abolished.

On the contrary, I can imagine criticism in the light of the proposed changes of the change of jurisdiction for some economic crimes (based on changes in the substantive criminal law), which would be transferred from the specialised criminal Court to the district courts. This amendment would also change the jurisdiction of the National Criminal Investigation Agency in these pre-trial proceedings. It would thus remove the specialisation of investigators and judges for a certain interim period. District judges and district/county investigators would, therefore, have to become more familiar with the agenda in question, as it is mainly in economic and competition law.

5. CONCLUSION

This paper sought to explore the area of EU competence in the field of the criminal law of the Member States, with the secondary objective of examining the possibilities for Member States to invoke national identity in Article 4(2) TEU and, in some cases, constitutional identity, in their criminal policy. In general, I can state that certain areas of criminal law have been subjected to a level of Europeanisation that collectively can be referred to as "the 'EU criminal law'". Within this area, however, we are dealing in particular with the protection of the EU's financial interests, but also with terrorism or trafficking *res extra commercium*.

The paper was largely inspired by current events in Slovakia regarding proposed amendments to the criminal codes and, at the same time, the proposal to abolish the Special Prosecutor's Office. Based on these facts, I was interested in whether and how the EU is entitled to intervene and respond to the changes in question. In particular, I was interested in the question of the organisational structure of the bodies of the judicial system and the relationship between EU law and the criminal codes of the Member States. In this part, I concluded that the very division of powers between national public authorities falls within the elements of national identity in Article 4(2) TEU while also pointing out the limits of such respect for national identity. On the other hand, the relationship is already somewhat more complicated when it comes to the question of criminal codes and national identity. The outcome of such an encounter between an EU law/act and the norms of criminal codes that we could subsume under the elements of national identity would depend on the situation at hand, which would have to be genuinely exceptional. However, I consider that the argument for the protection of national identity would be viable in the case of a conflict between a norm of EU law and national law rather than a change in criminal codes by a Member State.

However, on this occasion, I have pointed out a situation in which an EU act and an element of the constitutional identity of a Member State may come into collision. At the same time, the fact remains that the protection of, or respect for, the constitutional identity of a Member State is in no way guaranteed in EU law. For this reason, the constitutional identity control mechanisms have been established by the constitutional courts of the Member States, which are trying to deal with the situations in question on their own. In addition to the Federal Constitutional Court of Germany, the Italian Constitutional Court has also been involved in the issue of constitutional identity control in the *Taricco* case, in which I have briefly analysed and demonstrated how the primacy of EU law and the fundamental constitutional principle of criminal law could come into a clash.

The cases, such as the *Taricco* case, highlight that criminal law is indeed only partially "harmonise" in the EU, mainly focusing on selected areas of criminal law. The current debate on amendments to criminal codes in Slovakia is also an excellent example of how the EU is dutifully fulfilling its role as a "watchdog" for Member States' compliance with their obligations under EU law. However, alongside the 27 criminal policies of the Member States, there is an EU criminal policy, which may not in all cases share the same view on some parts of criminal law yet has an important role to play in the functioning of the EU and the corresponding respect for the values in Article 2 TEU. However, it must not be forgotten that most EU actions are political actions. Therefore, I believe it is always necessary to take a critical yet factual view of all aspects of it. In this instance, I perceive it as essential for Member States to be cautious and aware of the limits in the areas that we share with the EU and to monitor individual actions of the EU closely, in the sense of the motto "trust but verify". Finally, I shall only add that it is more important than ever in today's society to initiate dialogue and have the will to enter into discussions.

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