



Freedom, Security and Justice within the European Union

- with special emphasis on criminal justice issues

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MODULE 2

Shaping Factors for the Area of Freedom, Security and Justice

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Reading Lecture 2

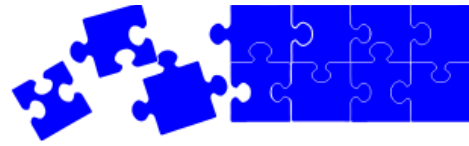
PURPLE BADGE – Union Law & National Criminal Justice

1. In this lecture you will learn about...

- the dynamic of the evolution within the AFSJ (justice and home affairs),
- the criteria of the development (from the traditional point of view of being criminal justice a closed national system) and
- basic features of union law¹ and how union law affects national legal systems.

Learning time – approximately 2 hours

¹ In this course I am using the terms Community law and union law (and EU law) as synonyms.



Criteria of Europeanization



union law

unfolding the legal relationship between EU law and national criminal law



functional integration

protecting EU supranational interests through criminal law



ius puniendi

development of supranational ius puniendi



competence gaining at supranational level

extension of justice and home affairs competencies in the supranational framework



cooperation in criminal matters

facilitation and juridification of cooperation between MS



procedural law & fundamental rights

approximation of criminal procedure; fundamental rights context; European standards



2. Purple Badge

Read the following text!

One of the most important reference in this process is the so-called principle of loyalty enshrined in Article 4 (3) TEU, which provides for an obligation of Member States

principle of loyalty

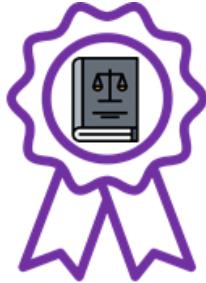
- (1) to actively **ensure compliance** with the EU Treaty,
- (2) to **facilitate** the achievement of Union tasks, and
- (3) to **abstain** from any contravening measures.²

Today the duty of sincere cooperation (or the principle of sincere cooperation) is also included into the principle of loyalty. The loyalty binds the Member State and all its state machinery, including the legislature, the executive and the judiciary, with a positive obligation to act and a negative residence requirement. It is the duty of the legislature to amend, repeal or supplement national law in order to achieve Union’s objectives, and therefore, in the field of criminal law, to adequately protect union interests and to ensure

² Important to note that provisions on loyalty have been a constant element in the various EU Treaties, including the European Coal and Steel Community (ECSC) Treaty. Furthermore the wording of these provisions has barely changed since the 1950s and is thus very similar to what is currently stated in Article 4 (3) TEU. See more Marcus Klamert: The Principle of Loyalty in Eu Law. Oxford Studies in European Law, 2014. <https://library.oapen.org/bitstream/id/405e1d9f-8b26-4202-affc-ced6591a6578/468331.pdf>



that its own nationals do not infringe union law, or, if this occurs, take appropriate action against the infringer.



union law

unfolding the legal relationship between EU law and national criminal law

The article allows Member States to choose the measures they deem most appropriate to fulfil their obligations, so that they can, of course, even resort to criminal law.

The **principle of assimilation** states that, although Member States may choose to sanction infringements of union law, they must ensure that acts which infringe union law are prosecuted under similar substantive and procedural rules as those which infringe national law, similar acts by type and weight. It also stated that the **penalties** provided for in such cases must in any case be **effective, proportionate and dissuasive**, and emphasized that national authorities must **exercise the same care** in dealing with infringements of union law as in applying the relevant national law.

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The EU legal order may also appear in the criminal justice system of a Member State to have an effect on the establishment and course of criminal responsibility in specific cases. The interaction of union law with a national criminal law rule is not based on a structural link, since the rules of union law do not (primarily) focus on criminal law. In the relationship between the two legal systems, this interaction is functional: **criminal law also contributes to the realization of the objectives of EU** and the enforcement of its specific norms - with the effective help of the specifics of union law.

Criminal law must not lead to discrimination if union law recognizes the principle of equal treatment in a given case. The adoption of national rules stricter than union law, and thus in some cases restrictions on the fundamental freedoms of the EU, is permitted depending on (in the absence of an express provision) whether the common rule contains a minimum level or a maximum level of protection. This principle also applies to criminal law provisions. It also follows that **the application of the internal law** of a Member State, and thus of domestic criminal law, **must not lead to a restriction on the freedoms guaranteed by the EU**.

Criminal law must not lead to discrimination if union law recognizes the principle of equal treatment in each case.

This relationship or interference between union law and national criminal law has resulted from the unique character and features of the former, with direct effect and primacy of union law. **The functional interference** between community law and criminal law requires an explicit relevancy to Community (former first pillar) matters.

There are two forms of this relevancy to be distinguished.



Ruling relevancy can be identified for example in the relation between the free movement of goods/services and economic crimes or customer protection, or between the free movement of capital and financial crimes etc.

The personal relevancy is defined as a relation based on the nationality of the accused person who is a citizen of another Member State as well; accordingly, the applied criminal sanction and the procedure against the person have to be in accordance with

Finally, **indirect effect of the union law** shall be mentioned which is actually a specific EU-related principle of legal interpretation whereby the courts of the member states of the EU must interpret national laws (particularly any that implement EU directives or framework decisions) as far as possible in a manner that is consistent with the provisions of EU law even if they do not have direct effect. Also known as the principle of harmonious interpretation.³ This consistency is otherwise ensured by the rule of primacy and direct effect of union law in the event of a conflict, but consistency must be established even if there is no (yet) actual conflict between a union rule and national law. This is usually the case where the union provision in question is not directly applicable. **The limitation of the influence of union law on criminal law lies in the fact that the scope of criminal responsibility cannot be extended on the basis of union law alone, in this case.** This means that a derived union rule cannot in itself establish or increase an individual's criminal responsibility, so that a national court is not required to interpret national law in accordance with the wording and purpose of the rule if it would lead to a criminal offense which would not otherwise be given.



3. Watch the video lecture No 5!

Watch the video
lecture No 5!

³ See the entry in Glossary:
[https://uk.practicallaw.thomsonreuters.com/7-107-6712?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/7-107-6712?transitionType=Default&contextData=(sc.Default)&firstPage=true)



4. Questions for review

1. What is the principle of loyalty?
2. What is the difference between direct and indirect effect of EU law?
3. What is the limit of union law relating criminal responsibility?

5

Reference:

Marcus Klamert: The Principle of Loyalty in Eu Law. Oxford Studies in Eruopean Law, 2014.
<https://library.oapen.org/bitstream/id/405e1d9f-8b26-4202-affc-ced6591a6578/468331.pdf>

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