



Freedom, Security and Justice within the European Union

- with special emphasis on criminal justice issues

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MODULE 4

European Criminal Justice in Actio

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Reading Lecture 1

Harmonisation (Approximation) of Laws of the Criminal Justice – An Introduction

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

- the basic concepts of harmonisation and approximation of laws,
- the EU competences of approximation of criminal law and
- how these EU competences affect national criminal justice.

Learning time – approximately 2 hours



2. Harmonisation or Approximation of Laws

Read the text!



Union for making identical rules in still more areas of governance. Under the founding Treaty of Rome harmonisation of national laws required unanimity. The Single European Act from 1987 introduced qualified majority voting for most harmonisation in the internal market. The treaties of Maastricht, Amsterdam, and Nice extended areas for majority decisions. From 2009 the Lisbon Treaty introduced the possibility of a qualified majority harmonising EU law also in sensitive political areas (for instance in the AFSJ).

Harmonisation is a key concept in the European

European integration is – among others – a legal integration.

Milestone decisions of the CJEU triggered the dynamic development of the harmonisation as legal tool of the integration: a revolutionary verdict was established in the so-called Cassis de Dijon case in 1979¹. This decision opened the way for **integrating the qualified majority voting system** into the Single European Act.

EU decision making process (ordinary legislative process) shows elements of supranationalism. This is the qualified voting system (QMV).

What do you think why can we say that QMV is a crucial element of supranational decision-making?

¹ <http://en.euabc.com/word/140>



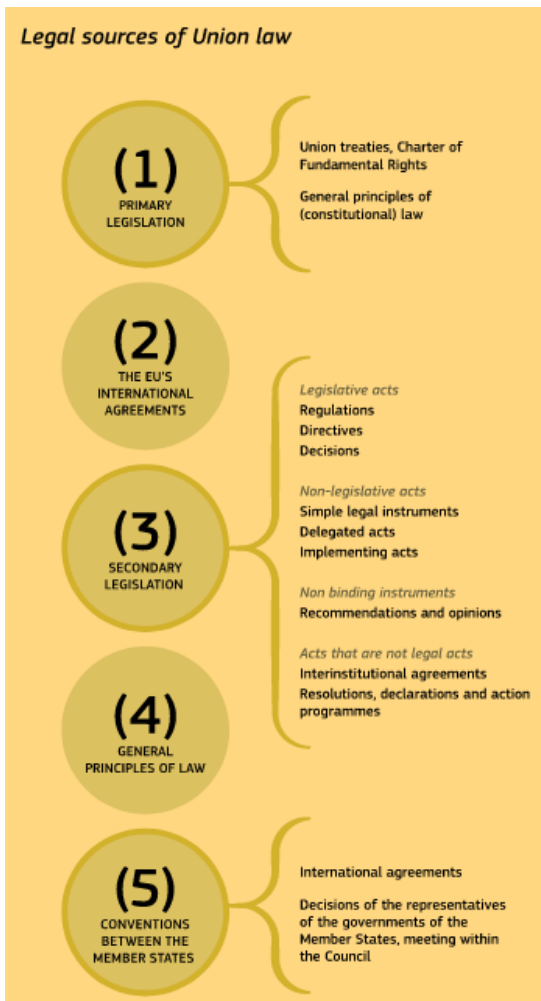
In general, the term **approximation** of laws is understood as the process making it possible, primarily through legislation, to align the provisions of two legal systems. The legal approximation carried out in all Member States serves the purpose of

You can use harmonisation and approximation as synonyms but only the latter is mentioned by the Treaties.

enabling the conformity of national legal system with the legislation of the European Union.

Union law constitutes an independent, autonomous legal system, which is created by the institutions of the European Union (European Commission, Council of the European Union, European Parliament), through special legislative procedures laid down in union law. European Union institutions have independent, definite roles in the implementation and control of union law. Union law constitutes a homogenous (and sui generis) legal system, and not only a bundle of legal instruments, with its own legislative hierarchy, and with legal principles that have effect over the whole legal system.² Parallel with union law, provisions of national legal systems are in force as well. **Apparently, to maintain the rule of law, it is essential to harmonise the two legal systems. Union law must become part of national legal systems: this process is called approximation of laws.**

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Check the graphic explanation! Learn the main legislative acts and the categories of them. legislation with the EU.

² The EU is a partnership of 27 MS, which have agreed to work together on issues of common interest. EU legal materials consist chiefly of the Treaties (TFEU, TEU) and the CFR (Charter of Fundamental Rights of the EU), which are negotiated at intergovernmental conferences and ratified by each MS, secondary legislation, decisions and cases. EU secondary legislation is made by the EU institutions. The five EU legal instruments specifically provided for in the Treaties are: regulations, directives, decisions, recommendations and opinions. The binding legal instruments that make up the secondary legislation of the EU are regulations, directives and decisions. As set out in Article 288 of the TFEU "a regulation shall have general application. It shall be binding in its entirety and directly applicable in all MS. A directive shall be binding, as to the result to be achieved, upon each MS to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them." Source: <https://libguides.bodleian.ox.ac.uk/c.php?g=422926&p=2888212>

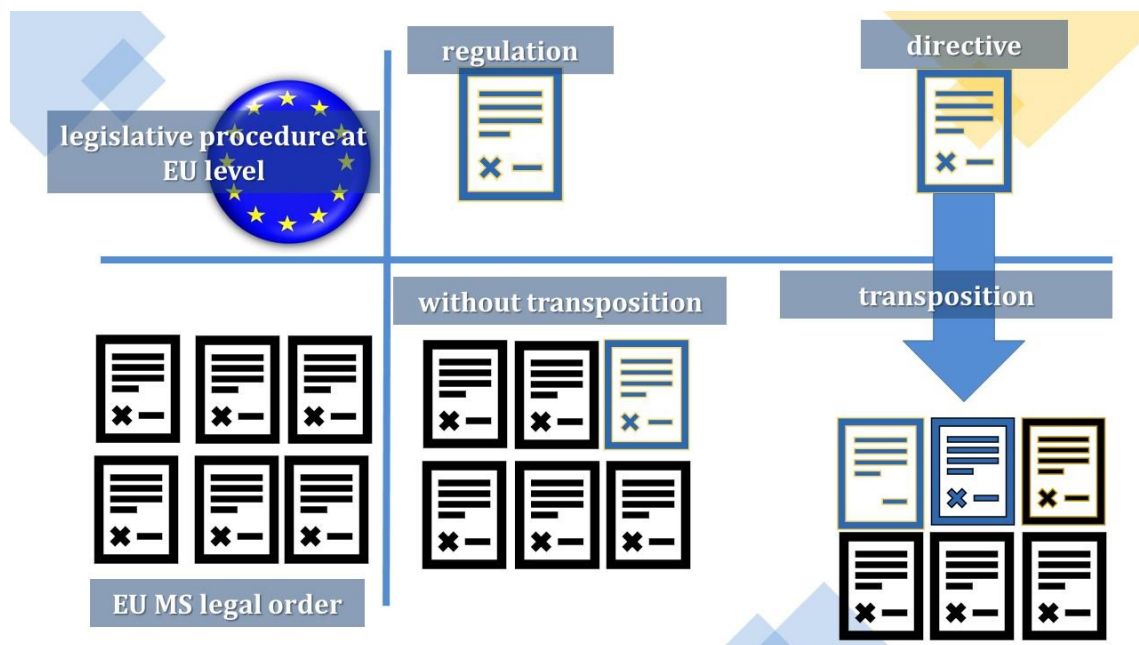


The legal base for the obligation to approximate laws is laid down in the Treaty Establishing the European Community (the Treaty of Rome which was amended in 2007), and is regulated by the legal principles developed by the CJEU (such as the primacy of union law over national legislation, direct applicability, direct and indirect effect). Approximation of laws thus can be defined as a legislative activity that aims to reconcile the regulations of a national and EU legal system.³

The most common task of approximation of legislation is **the transposition of EU directives** (before Lisbon also framework decisions) into domestic law. The directive forms part of the EU's secondary law. It is therefore adopted by the EU institutions in accordance with the founding treaties. Once adopted at EU level, it is then incorporated — or transposed — by EU countries so it becomes law in their countries.

Check the following graph! Explain the different colours of the national legislative pieces based on your knowledge about secondary legislation with the EU.

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Article 288 of the TFEU states that a **directive is binding in the countries to whom it is addressed (one, several or all of them) as to the result to be achieved**, while leaving national authorities the competence as to form and means. The directive is adopted

³ https://www.parlament.hu/biz39/eib/angol/jogharm_en.htm



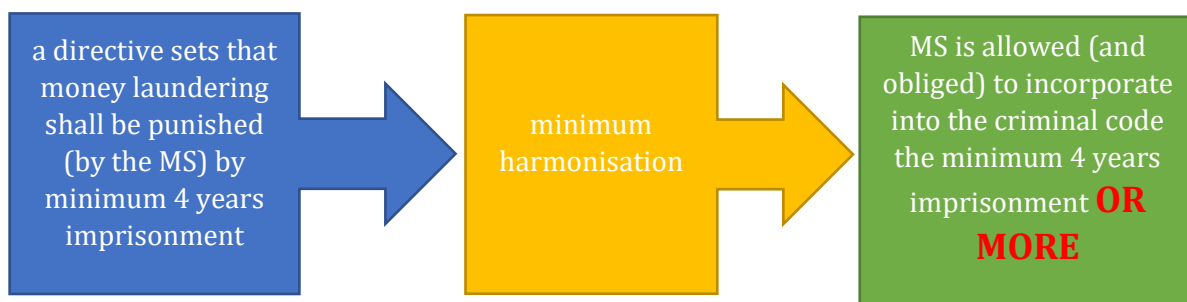
following a legislative procedure. It is a legislative act adopted by the Council and the Parliament under the ordinary legislative procedure or only by the Council under the special legislative procedures; in that case, the Parliament should consent or be consulted.⁴

For a directive to take effect at national level, EU countries **must adopt a law to transpose it**. This national measure must achieve the objectives set by the directive. National authorities must communicate these measures to the European Commission. Transposition must take place by the deadline set when the directive is adopted (generally within 2 years). When a country does not transpose a directive, the Commission may initiate infringement proceedings and bring proceedings against the country before the Court of Justice of the EU (the non-enforcement of the judgment on this occasion can lead to a new conviction which may result in fines).

Maximum and minimum harmonisation

It is important to distinguish between minimum and maximum (or full) harmonisation requirements in directives. In the case of minimum harmonisation, a directive sets minimum standards, often in recognition of the fact that the legal systems in some EU countries have already set higher standards. In this case, EU countries have the right to set higher standards than those set in the directive. In the case of maximum harmonisation, EU countries may not introduce rules that are stricter than those set in the directive.

Within the Area of Freedom, Security and Justice – mainly – the minimum harmonisation is the rule, criminal laws of the MS can be approximate through directives.



What do you think, would it be in conformity with EU law, if the MS codifies only 3 years imprisonment (possible) penalty for the given case of money laundering?

⁴ Meanwhile a regulation is a binding legislative act which must be applied in its entirety across the EU, has direct effect and directly becomes part of the national legal order (without any contribution of the national parliament).



Protection of individuals in the event of incorrect transposition of directives

In principle, the directive only takes effect once transposed. However, the CJEU considers that a **directive that is not transposed can produce certain effects directly when**: the transposition into national law has not taken place or has been done incorrectly; the terms of the directive are unconditional and sufficiently clear and precise; the terms of the directive give rights to individuals. When these conditions are met, individuals may rely on the directive against an EU country in court. However, an individual may not rely on making a claim against another individual with respect to the direct effect of a directive if it has not been transposed. CJEU also allows, under certain conditions, individuals the possibility of obtaining compensation for directives whose transposition is poor or delayed.

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3. Approximation of Criminal Laws: Substantive

As Article 83 TFEU sets: "1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish 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.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. If the approximation of criminal laws and regulations of the Member States proves essential **to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures**, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

approximation
of criminal
laws

'Euro-crimes'

there is an ongoing
public debate on
including here hate
crime as well

functionality of
Art 83!

for example: insider
trading





4. Questions for review

1. What is the approximation of legal norms?
2. What is the harmonisation of legal norms?
3. What is secondary legislation?
4. What kind of norms can be issued in connection of 'eurocrimes'?
5. What would be the aim of such legal norms?

References

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Further Readings

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This teaching material has been drafted at the University of Szeged and supported by the European Union. Project identification number: EFOP-3.4.3-16-2016-00014