Sources of ECL

I.
Law of the European Union

II.
Law of the Council of Europe

III.
Law of the United Nations
I.

Law of the European Union
Sources of ECL – in the EU (1/7)

“Big three” of the EU:

• **Treaty on European Union** (as amended by the Treaty of Lisbon)
  • objective No. 2 of the EU: “The Union shall offer its citizens an area of freedom, security and justice ... and the prevention and combating of crime” [Article 3(2)]

• **Treaty on the Functioning of the European Union** (as amended by the Treaty of Lisbon)
  • it contains basic legal framework for “judicial co-operation in criminal matters” (Articles 82-86), and for “Police co-operation in criminal matters” (Articles 87-89)

• **Charter of Fundamental Rights of the European Union**
  • it guaranties basic procedural rights in criminal proceedings at EU level, examples:
    • right to a fair trial [Article 47(2)]
    • presumption of innocence [Article 48(1)]
    • right of defence [Article 48(2)]
    • *ne bis in idem* = right not to be tried or punished twice in criminal proceedings for the same criminal offence (Article 50)
Sources of ECL – in the EU (2/7)

International agreements between European States
- basis of these agreements is co-operation
- examples:
  - *Schengen Agreement* of 1985 (“Schengen I”)
  - *Conventions Implementing Schengen Agreement* of 1990 (“Schengen II”)
Sources of ECL – in the EU (3/7)

International agreements between the EU and non-EU States

• basis of these agreements is co-operation
• examples:
  • Agreement on mutual legal assistance between the EU and the USA of 2002
  • Agreement on mutual legal assistance between the EU and Japan of 2010
Sources of ECL – in the EU (4/7)

Special EU secondary legislation in the area of substantive criminal law

• examples:
  • Framework Decision 2004/757/JHA on trafficking in drugs
  • Directive 2011/36/EU on trafficking in human beings
  • Directive 2013/40/EU on attacks against information systems
  • Directive (EU) 2015/849 on money laundering
  • Directive (EU) 2017/541 on terrorism
Sources of ECL – in the EU (5/7)

Special EU secondary legislation in the area of procedural criminal law

- examples:
  - Framework Decision 2002/584/JHA on the European arrest warrant
  - Framework Decision 2005/214/JHA on mutual recognition of financial penalties
  - Directive 2011/99/EU on the European protection order
  - Directive 2014/41/EU on the European investigation order
  - Directive 2010/64/EU on the right to interpretation and translation
  - Directive 2012/13/EU on the right to information
Sources of ECL – in the EU (6/7)

Special EU legislation adopted in order to establish European units facilitating co-operation of European States in criminal matters

- examples:
  - Decision 1999/352/EC on European Anti-Fraud Office (OLAF)
  - Decision 2002/187/JHA on Eurojust
  - Decision 2008/976/JHA on European Judicial Network
  - Regulation (EU) 2016/794 on Europol
Sources of ECL – in the EU (7/7)

Case-law of the Court of Justice of the EU (CJEU)
- preliminary ruling in case of interpretation of EU law and legal terms
- validity of EU legislation in the area of criminal law
Sources of ECL in the EU - Nature

- Directive
- Regulation
- Framework Decision
- International Agreement
- Decision of the Council of the EU
- Decision of the European Commission
- case-law of the Court of Justice of the European Union

+ (non-legislative documents)
Directive (1/2)

• today, directive is **standard source of ECL** adopted by the EU
• it is adopted by the European Parliament and the Council of the EU
• it is adopted **in substantive and procedural ECL**
  - substantive ECL:
    • harmonisation of euro-crimes
    • types of sanctions for committing euro-crimes
    • legal responsibility of legal persons
  - procedural ECL:
    • procedural rights
    • mutual recognition of judicial decisions
• examples (as seen in the previous slides):
  • Directive 2011/36/EU on trafficking in human beings
  • Directive 2010/64/EU on the right to interpretation and translation
  • Directive 2011/99/EU on the European protection order
  • etc.
Directive (2/2)

Legal effects:

• directive does not have *direct effect* in the national law of EU Member States
• directive shall/must be implemented by States
• directive sets exact term/date for its implementation
• **example:** the *Directive 2011/99/EU on the European protection order* shall be implemented by EU Member States by 11\(^{th}\) January 2015
  • national implementing legislation:
    • Poland – the *Act Implementing the Directive on the European Protection Order*
    • Austria – the *Federal Law on the Judicial Co-operation in Criminal Matter with the Member States of the European Union*
    • the Czech Republic – the *Act No. 140/2013 Coll. on the International Judicial Co-operation in Criminal Matters*
Regulation

• regulation **is not standard source of ECL** (and has never been), despite the fact that it is standard source of EU law
• it is adopted by the European Parliament and the Council of the EU
• it **is binding for States and has direct effect** = its implementation is not needed in States
• examples:
  • Regulation (EC) No 1987/2006 on the Schengen Information System (SIS II)
  • Regulation No 883/2013 on the European Anti-Fraud Office (OLAF)
  • Regulation (EU) 2016/794 on Europol
Framework Decision (1/3)

- framework decision is very similar to directive
- in the recent past (1999-2009) framework decision *was standard source of ECL* adopted by the EU; since 2019 replaced by directive
- it was adopted by the Council of the EU
- it was adopted in substantive and procedural ECL
  - **substantive ECL:**
    - harmonisation of euro-crimes
    - types of sanctions for committing euro-crimes
    - legal responsibility of legal persons
  - **procedural ECL:**
    - mutual recognition of judicial decisions
    - co-operation
- **examples** (as seen in the previous slides):
  - *Framework Decision 2002/475/JHA on terrorism*
  - *Framework Decision 2002/584/JHA on the European arrest warrant*
  - etc.
Framework Decision (2/3)

Legal effects:

- framework decision does not have *direct effect* in the national law of EU Member States
- framework decision shall/must be implemented by States
- framework decision sets exact term/date for its implementation
- example: the *Framework Decision 2002/584/JHA on the European arrest warrant* shall be implemented by EU Member States by 31\(^{st}\) December 2003
  - national implementing legislation:
    - Belgium – the *Act on the European Arrest Warrant*
    - Poland – the *Code of Criminal Procedure*
    - the Slovak Republic – the *Act No. 154/2010 Coll. on the European Arrest Warrant*
Framework Decision (3/3)

Legal effects – case-law:

• (as seen in the previous slide) framework decision does not have direct effect in the national law of EU Member States

• case-law of the Court of Justice on the direct effect of directives (case 26-62 - van Gend & Loos, case 41-74 – van Duyn, etc.) does not apply to framework decisions

• CJEU: case C-105/03 – Pupino:
  • the Court accepted the obligation to interpret national legislation in conformity with framework decisions: "the national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the framework decision"
International Agreement

- international agreement in the EU context is known as *treaty, convention or agreement*
- it is standard source of ECL
- ratification is needed – often problematic

**examples:**
- *Schengen Agreement* of 1985 (“Schengen I”)
- *Conventions Implementing Schengen Agreement* of 1990 (“Schengen II”)
- *Agreement on mutual legal assistance between the EU and the USA* of 2002
- *Agreement on mutual legal assistance between the EU and Japan* of 2010
Decision of the Council of the EU and/or Decision of the European Commission

- decision is **standard** source of ECL
- it is adopted by the of the Council of the EU and/or by the European Commission
- **legal effects**: it is binding for States (similarly to regulation), but it has not **direct effect**
- implementation is not needed in States
- examples:
  - *Decision 1999/352/EC on European Anti-Fraud Office (OLAF)*
  - *Decision 2002/187/JHA on Eurojust*
  - *Decision 2008/976/JHA on European Judicial Network*
Case-law of the Court of Justice of the European Union

Cases:
• preliminary rulings in case of interpretation of EU law and legal terms
• validity of EU legislation in the area of criminal law
• despite the fact that some documents of the EU have not legislative nature, they are very important, for example:

• **action plans**
  • these documents are general documents for ECL policy on the top level of the EU
  • they introduce ideas for new legislation of ECL
  • examples:
    • *Action Plan to Combat Drugs* of 1994 and of 1999
    • *Action plan to combat organized crime* of 1997

• **opinions/views of Advocates General**
  • Advocates General introduce to the Court of the Justice of the EU (CJEU) in proceedings their opinions/views
  • they are source of legislation analyses
  • CJEU often accepts them and its rulings in decisions follow them
Web Servers

EU legislation
http://eur-lex.europa.eu

Case-law of the Court of Justice of the European Union
https://curia.europa.eu
II. Law of the Council of Europe
Law of the Council of Europe (1/2)

• part of ECL is also law of the Council of Europe (CoE)
• relevant are criminal law related documents
• examples:
  • Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (“European Convention”)
  • European Convention on Extradition of 1957
  • European Convention on Mutual Assistance in Criminal Matters of 1959
  • Convention on the Transfer of Sentenced Persons of 1983
  • Convention on Cybercrime of 2001
  • Convention on Action against Trafficking in Human Beings of 2005
• the EU accepts and follows the Council of Europe in case of criminal law legislation
  • example: the EU follows the Convention on Cybercrime of 2001
• moreover, the Court of Justice of the EU (CJEU) accepts and follows case-law of the European Court of Human Rights (ECHR),
  • example: in case of Pupino (C-105/03) the CJEU accepted case-law of the ECHR in case of case of S. N. versus Sweden (application No. 34209/96) and in case of Accardi and others versus Italy (application No. 30598/02)
• on the other hand, law of EU often “attacks” law of the CoE
  • law of the EU often replaces legal documents of the CoE
  • example: the EU adopted the Framework Decision 2002/584/JHA on the European arrest warrant in 2002, which replaced the European Convention on Extradition of 1957 (law of the CoE)
Web Servers

International treaties
www.coe.int/en/web/conventions/full-list

Case-law of the European Court of Human Rights
https://hudoc.echr.coe.int
III.
Law of the United Nations
Law of the United Nations

- relevant are **criminal law related documents**
- examples:
  - *International Covenant on Civil and Political Rights of 1966*
  - *Single Convention on Narcotic Drugs of 1961*
  - *Vienna Convention on Psychotropic Substances of 1971*
  - *Convention against Transnational Organized Crime of 2000, a*
- the EU accepts and follows the UN in case of criminal law legislation
  - example: the EU follows the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children of 2000
Web Server

International treaties
https://treaties.un.org
Opinion of European States about ECL

- as seen, ECL is adopted by the EU, the CoE and the UN
- in other words: ECL is adopted by representatives of European States in the EU, the CoE and the UN – it means that European States adopt ECL
- example: directives of the EU are adopted by the European Parliament and the Council of the EU – these institutions have representatives from EU Member States
- general problem: European States adopt ECL, but they have often problems accept and understand it
- individual problems:
  - weak knowledge about ECL in European States
  - weak implementation
  - weak translation and interpretation of ECL in national languages
  - complicated “ideas” of the EU
  - two-speed EU