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## The Europeanisation of French Criminal Law\*\*

### Abstract

The influence of EU law on French criminal law is twofold: it first has an impact on substantive criminal law but also on procedural law. The Europeanisation of material criminal law has been rather limited in France in comparison to its influence on procedural criminal law, which has been far more substantial and has destabilised the national criminal-law enforcement area. Europeanisation has had varied consequences: as regards substantive criminal law, it has mainly enhanced the effectiveness of the fight against serious and cross-border crime. By approximating criminal laws, the EU has thus contributed to a hardening of certain criminal sanctions by setting a minimum common core. The Europeanisation of procedural criminal law itself results in a strengthening of the requirement for legitimacy, as the EU strives to better protect fundamental rights by imposing a common standard.

According to D. Simon, gone are the days when it seemed incongruous to raise the question of Community competence in criminal justice matters.<sup>1</sup> Criminal law, an area at the very core of national sovereignty, was long regarded as immune to the process of Europeanisation that British magistrate Lord Denning described it as “an incoming tide flowing up the estuaries of England.”<sup>2</sup> Criminal law is, however, subject to the influence of this incoming tide; its Europeanisation leads to some extent to a sharing of sovereignty<sup>3</sup> or maybe, rather, to a duplication of criminal sovereignty. We are witnessing the emergence of a European criminal justice area that is superimposed on the territories of the Member States of the European Union (EU) just as European citizenship is superimposed on the nationality of a Member State. According to E. Gindre, the notion of area implies the flexibility that characterises EU criminal law and that has the merit of not offending the sensibilities of Member States in the essential expression

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1 Simon (D.), “*Constitution, souveraineté pénale, droit communautaire*”, *Cahiers du Conseil constitutionnel*, No. 26, August 2009.

2 Lord Denning, “*Introduction to The European Court of Justice: Judges or Policy Makers?*”, London: Bruges Group, 1990, pp. 7-8.

3 Chaltiel (F.), “*La souveraineté de l'Etat et l'Union européenne, l'exemple français. Recherches sur la souveraineté de l'Etat membre*”, Paris, Paris, LGDJ, 2000, 606 p.

of their sovereignty, particularly their criminal justice sovereignty.<sup>4</sup> There is, after all, an “EU law enforcement system” that results from a progressive Europeanisation of criminal law.<sup>5</sup>

Europeanisation is a process whereby criminal law becomes European. This Europeanisation can be viewed in two ways: from a State perspective, by showing that national criminal law is influenced by European legislation, and from a European perspective, by addressing the emergence of a body of European criminal law resulting from European integration. While the concept of Europeanisation has received greater attention in political science than in legal research, some important research has nonetheless already been carried out in the area.<sup>6</sup> According to C. Verdure, Europeanisation in the legal area reflects European integration and the influence of EU law on national laws, which some have called “European naturalisation”.<sup>7</sup> One must take into consideration the interactions between the EU and Member States, without neglecting the dual nature of Europeanisation. Indeed, the “top-down” process whereby national law becomes Europeanised is supplemented by a “bottom-up” process: regulations are adopted at the European level to address national concerns, thanks to a form of “State lobbying”.<sup>8</sup>

The approach chosen here is limited in several respects. First, we focus on the “top-down” approach and emphasise the influence of the EU on national (French) criminal law, leaving aside the “bottom-up” aspect of European law integrating national concerns. Furthermore, we analyse Europeanisation through the State prism, noting the effects of European construction on national criminal law without pursuing the result of this Europeanisation as such, the emergence of a body of European criminal law. Finally, the notion of Europeanisation is restrictive to the extent that our study is limited to the EU, even though the Council of Europe and especially the jurisprudence of the European Court of Human Rights (ECHR) have significant influence on criminal procedure in France.

While our view may be restrictive as regards the concept of Europeanisation, it is broad as to our definition of criminal law, which includes not only substantive, but also procedural criminal law. We consider all three aspects of the right to punish: incrimination, judgment and sanction. The influence of European construction on French criminal law began very discreetly, substantive criminal law being impacted incidentally at first by Community law.<sup>9</sup> The Maastricht Treaty, by introducing cooperation in the area of justice and home affairs, may have accelerated the process but it was

4 Gindre (E.), “*L’émergence d’un droit pénal de l’Union européenne*”, LGDJ, 2008, 512 p.

5 According to Poelemans (M.), “*La sanction dans l’ordre juridique communautaire, contribution à l’étude du système répressif de l’Union européenne*”, Brussels, Bruylant, 2004.

6 Oberdorff (H.) ed., “*L’eupéanisation des politiques publiques*”, PUG, 2008, 136 p.

Nabli (B.), “*Eupéanisation et constitutionnalisation du droit national*”, [www.droitconstitutionnel.org](http://www.droitconstitutionnel.org).

7 Verdure (C.), “*L’eupéanisation et le droit*”, in Duez (D.), Paye (O.) and Verdure (C.) ed., *L’Eupéanisation- Sciences humaines et nouveaux enjeux*, Brussels, Bruylant 2014, p. 85-113.

8 Verdure (C.), *op. cit.*

9 Jeanclos (Y.), “*Droit pénal européen – Dimension historique*”, Economica, 2009, 581 p.

primarily the Amsterdam Treaty, which set the EU a new goal of establishing an Area of freedom, security and justice (AFSJ), which gradually led to a partial harmonisation of substantive criminal law. The establishment of this area also led to the adoption of a certain number of measures, such as the European arrest warrant (EAW), which influenced French criminal procedure. While under the Amsterdam Treaty the technique of harmonisation was not yet intended to apply to criminal procedure, that step was taken with the Lisbon Treaty, which sets out a specific legal basis for approximating national legislation on certain aspects of procedural criminal law. According to J. Pradel, the Lisbon Treaty thus constitutes a profound “metamorphosis” of the EU in the area of criminal law.<sup>10</sup>

Let us dwell for a moment on the various techniques employed by the EU along the way: from cooperation to harmonisation to unification. The first stage of Europeanisation consisted in setting up formal frameworks for cooperation between the police and judicial authorities under the Maastricht Treaty. The Amsterdam Treaty introduced mutual recognition and harmonisation as new, more sophisticated, techniques of Europeanisation. The concept of harmonisation itself refers to two methods that should be distinguished.<sup>11</sup> Harmonisation may, indeed, indicate a simple alignment between two or more legal systems that erases disparities without eliminating national characteristics.<sup>12</sup> It may also be defined as a process whereby different packages of laws are unified through the drafting of a new law that borrows from each.<sup>13</sup> According to J. Pradel, harmonisation complements cooperation. The issue, here, is not to guarantee unified norms for all European States, which would equate to federal criminal legislation. This approach, proposed by the Dutch EU presidency in 2005, was not endorsed by the Council, which considered that unification would challenge the subsidiarity principle and national legal cultures. Harmonisation in the narrower sense of an alignment of legislations allows for a balance between the need for Europeanisation and the preservation of national legal identities, which is so important when it comes to criminal procedure.<sup>14</sup> As Professor Labayle puts it, “Procedural issues reflect a society’s deep-seated balances, whether political, social or historical; it is on these issues that the

Flore (D.), “Droit pénal européen – Les enjeux d’une justice pénale européenne”, Larcier, 2009, 633 p.

10 Pradel (J.), Cortens (G.) and Vermeulen (G.), “Droit pénal européen”, Dalloz, 3<sup>rd</sup> ed., 2009, 834 p.

11 Cornu (G.), “Vocabulaire juridique”, PUF, 2005, 7<sup>th</sup> ed., p. 445.

12 Delmas-Marty (M.), “Les modèles d’harmonisation”, in Delmas-Marty (M.), Pieth (M.) & Sieber (U.) eds., *Les chemins de l’harmonisation pénale- Harmonising Criminal Law, Société de législation comparée* Vol. 15, 2008, 435 p.

13 L. Galichet considers that there are two models of Europeanisation: harmonisation and unification. Cf. Galichet (L.), “Les modèles théoriques des européanisations du droit”, *Revue des Mutations du Droit* – January 2011, pp. 1-11.

14 Pradel (J.), “Les grandes tendances de l’européanisation des systèmes pénaux nationaux”, *Les Cahiers de droit*, vol. 50, No. 3-4, 2009, p. 1015-1038.

concessions required for a legal integration process to succeed are most difficult to reach.”<sup>15</sup>

The Lisbon Treaty clearly creates new opportunities in criminal matters by explicitly consecrating mutual recognition as the cornerstone of judicial cooperation in criminal matters, since the harmonisation of criminal procedure is a necessary complement. Mutual recognition can be distinguished from instruments of legal assistance inasmuch as it allows foreign criminal decisions to be considered or enforced. This technique has accelerated the process of Europeanisation, because it is much more flexible than harmonisation. Furthermore, the Lisbon Treaty’s consecration of the EU’s criminal jurisdiction has made the harmonisation of criminal law an instrument that is inseparable from the implementation of judicial cooperation. Thus, applying the internal market model, the AFSJ is proving to be an integrating law that aims at approximating national laws to promote free movement.

In fact, the influence of EU law on substantive criminal law has been rather limited in France in comparison to its influence on procedural criminal law, which has been far more substantial and has destabilised the national criminal-law enforcement area. It should also be noted that Europeanisation has had varied consequences: as regards substantive criminal law, it has mainly enhanced the effectiveness of the fight against serious and cross-border crime. By approximating criminal laws, the EU has thus contributed to a hardening of certain criminal sanctions by setting a minimum common core. The Europeanisation of procedural criminal law itself results in a strengthening of the requirement for legitimacy, as the EU strives to better protect fundamental rights by imposing a common standard.<sup>16</sup>

Thus we will show that substantive criminal law is quietly being Europeanised for the sake of effectiveness (I) while procedural criminal law is being Europeanised more openly, in a spirit of better protection of fundamental rights (II).

### *I- A quiet Europeanisation of substantive criminal law*

For a long time, neither the European Community nor the EU had any criminal jurisdiction; therefore, they could only exert indirect influence, through national criminal law (A). Criminal jurisdiction was then recognised, first at European Community and then at EU level, opening the path for direct legislative control of EU law over national criminal law (B).

15 Labayle (H.), “*L’eupéanisation des procédures pénales*”, 76<sup>th</sup> *Congrès de la Confédération Nationale des Avocats*.

16 On 11 March 2014, the European Commission adopted a communication titled “A new EU Framework to strengthen the Rule of Law”, COM(2014) 158 final.

## A- The indirect judicial influence of EU law on substantive criminal law

At first the influence was “negative”, an influence by contagion.<sup>17</sup> This indirect influence was the work of the Court of Justice of the European Union (CJEU), brought about through two techniques: negative integration (1) and positive integration (2).

### 1- Negative integration

Negative integration relates to the prohibition on Member States mutually introducing new barriers to free movement and to their obligation to remove existing barriers.<sup>18</sup> For a long time, criminal law has been affected indirectly by the consequences of Community construction, since States have been obliged to remove from their national legal systems any criminal law provisions that are contrary to Community law. This may lead to the neutralisation of an offence.<sup>19</sup> Indeed, national law may not establish or maintain offences that sanction behaviours authorised by Community law. In the *Sagulo* case of 14 July 1977, the ECJ stated that while Member States may sanction, within reasonable limits, the obligation imposed on persons subject to Community law to carry a valid identity card or passport, such sanctions may in no case be as serious as to constitute a barrier to the freedom of admission and residence under the Treaty.<sup>20</sup> Similarly, in *Auer*, the ECJ’s decision resulted in the neutralisation of a criminal offence related to the illegal exercise of the medical or paramedical profession.<sup>21</sup>

More recently, Italy found itself obliged to remove from its legal system a criminal law provision that was contrary to Community law. In the *El Dridi* case of 28 April 2011, the CJEU responded to the preliminary question referred by the Italian judge that “the Return Directive must be interpreted as precluding a Member State’s legislation, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period.”<sup>22</sup> In the *Melki* case of 22 June 2010, the CJEU considered that former article 78-2 of the French Criminal Procedure Code related to the conditions under which identity checks may be carried out in border areas was contrary to the Schengen Borders Code. The Court, based on the principle of an absence of internal frontier controls set out by the Treaties, stated that Member States may not provide for

17 Barbe (E.), “L’influence du droit de l’Union européenne sur le droit pénal français : de l’ombre à la lumière”, *Actualité juridique Pénal*, No.10/2011, pp. 438 and f.

18 Gudielli-Delage (G.) and Manacorda (S.) dir., “L’intégration pénale indirecte”, Société de Législation comparée, volume 10, Paris 2005, 384 p.

19 Pradel (J.), Cortens (G.) and Vermeulen (G.), *op. cit.*

20 Judgment of 14 July 1977, *Concetta Sagulo, Gennaro Brenca et Addelmadjid Bakhouché*, Case 8/77.

21 Judgment of 22 September 1983, *Vincent Rodolphe Auer contre Ministère public*, Case 271.

22 Luce (Y.), “L’influence du droit européen sur le droit pénal français, une évolution permanente”, *Juritravail*, 29/06/2012, <http://www.juritravail.com>.

identity checks in border areas without also providing a framework to ensure that such checks do not have an equivalent effect to border checks. France had to modify the article in question to comply with the Court's judgment.<sup>23</sup>

The States' criminal jurisdiction has thus been limited by the obligations imposed under the principle of loyal cooperation. While loyal cooperation obliges the States not to interfere with the achievement of EU objectives, it also, under certain circumstances, imposes positive obligations on the States.

## 2- Positive integration

This hardly visible negative integration was gradually complemented by positive integration under which the European Community could be required to oblige States to adopt criminal provisions. The Community, and then the EU, started to make calls upon national criminal jurisdictions in order to sanction compliance with Community standards.<sup>24</sup> National criminal systems were thus made to serve the "armless" criminal law of the EU.<sup>25</sup> For example, in the Greek maize case, the Court stated that "where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member State to take all measures necessary to guarantee the application and effectiveness of Community law...".<sup>26</sup> The State must therefore provide effective, proportionate and dissuasive sanctions to give practical effect to Community law. In addition to this principle of effectiveness, the Court also developed a principle of equivalence. Community law may thus oblige the national legislator to adopt sanctions equivalent to those applicable under domestic law for a crime of comparable nature and gravity, and of an effective, proportionate and dissuasive nature. G. Giudicelli-Delage considers that "having developed in a creeping, surreptitious manner through the extensive, expansionary effect of European jurisdiction and the jurisprudence of the Court of Justice, criminal law is somewhat the stowaway of Community law."<sup>27</sup>

European pressures on criminal law became even more crucial with the emergence of the European Community's criminal jurisdiction and the explicit recognition of EU criminal jurisdiction. This was the turning point at which EU judicial influence on substantive criminal law evolved from indirect to direct.

23 As was accomplished by the orientation and programming law on domestic security performance of 14 March 2011, *JORF* 0062 of 15 March 2011, p. 4582..

24 Simon (D.), *op. cit.*

25 Gindre (E.), "L'émergence d'un droit pénal de l'Union européenne", LGDJ, 2008, p. 381.

26 Court judgment of 21 September 1989 – *Commission of the European Communities versus Hellenic Republic*, Case 68/88..

27 Giudicelli-Delage (G.) and Lazerges (C.) dir., "Le droit pénal de l'Union européenne au lendemain du Traité de Lisbonne", *Société de Législation comparée*, volume 28, Paris 2012, p. 17.

## B- The direct judicial influence of EU law on substantive criminal law

On the basis of the new legal foundation provided for in the Amsterdam Treaty, the EU has been able to directly prescribe the definition of the constituent elements of offences and the applicable penalties: first through the Framework Decisions (FD) adopted within the intergovernmental framework of the third pillar, and since the Lisbon Treaty through directives that may have direct impact.

### 1- Through Framework Decisions

In the Amsterdam Treaty, article 29§ 2 TEU provided for approximation, as required, of the Member States' rules of criminal law, in accordance with article 31 e) TEU. This article made it possible to adopt "measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties". It thus planned for the EU, within the framework of the third pillar, to adopt measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties. The goal of this approximation of legislations was to prevent criminal tourism within the EU. A certain number of FDs were adopted on this basis, including those on combating child pornography<sup>28</sup> or on terrorism.<sup>29</sup>

FDs have had a relatively limited impact on French criminal law, due mainly to the inherent qualities of the instrument used. Unanimously adopted FDs are binding legal instruments that must be transposed; yet they lack any direct effect and are partly removed from the scrutiny of the Court. Furthermore, since Member States are required to develop a minimum level of incrimination, they tend to revert to the lowest common denominator, leading D. Flore to speak of an "illusory harmonisation."<sup>30</sup>

The only FD that really entailed important changes in French substantive criminal law is the 2008 FD<sup>31</sup> modifying the 2002 FD on terrorism. The FD that defined terrorism had no influence on French law, since the definition chosen was widely inspired by French law. However, the 2008 FD that obliges States to criminalise six new behaviours, including public provocation to commit an act of terror, and recruitment and extortion with a view to committing an act of terrorism, has influenced the Criminal Code. Indeed, extortion, which is a criminal offence, was not expressly referred to in article 421-1 2° of the Criminal Code and therefore could not constitute an act of terrorism. Likewise, when not followed through in practice, recruitment could not qualify as terrorism, since there was no criminal conspiracy in such cases. The French legal

28 Council Framework Decision 2008/68/JHA of 22 December 2003, *OJEU*, L 13 of 20 January 2004.

29 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJEU* L 164 of 22 June 2002.

30 Flore (D.), "Une justice pénale européenne après Amsterdam", *JTDE*, p. 122.

31 Council Framework Decision 2008/919/JHA of 28 November 2008 modifying Framework Decision 2002/475/JHA on combating terrorism, *OJEU*, L 330 of 9 December 2008.

arsenal was strengthened on these two points in particular by the law of 21 December 2012 on security and the fight against terrorism.<sup>32</sup>

An additional step toward recognition of EC criminal jurisdiction was reached with the judgment of 13 September 2005 in which the CJEU stated that when it is necessary ensure compliance with Community policy through criminal law, the Community may oblige Member States, through a directive, to impose criminal sanctions for non-compliance with Community law. Thus, the CJEU recognises that “as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community’s competence... However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.” This revolutionary judgment thus recognises the Community’s criminal jurisdiction, an EU jurisdiction that was enshrined by the Lisbon Treaty in article 83§ 2 TFEU.

## 2- Through directives

By abolishing the pillars, the Lisbon Treaty placed greater European pressure on substantive criminal law. Indeed, article 83§ 1 TFEU stipulates that the EU may adopt directives by the ordinary legislative procedure establishing minimum rules concerning the definition of offences and sanctions with regard to certain forms of cross-border crime, listed exhaustively as terrorism, the trade in human beings and the sexual exploitation of women and children, illicit drug trafficking, etc. The harmonisation of other types of serious cross-border crime is possible, but in such cases the Council must decide by unanimity. The novelty in the Lisbon Treaty is the possibility of adopting such measures by qualified majority, even if this advance is subject to the “brake and accelerator” procedure.<sup>33</sup> Furthermore, the instrument has evolved: henceforth, the approximation of laws is effected through directives that may have direct impact and that are subject to judicial review by the CJEU.

Directives related to the harmonisation of criminal offences also impose common minimum penalties on the States by setting the minimum threshold for the maximum penalty. For example, the directive on combating sexual abuse and the sexual exploita-

<sup>32</sup> *JORF* 0298 of 22 December 2012, p. 20281.

<sup>33</sup> This procedure is mentioned in articles 82§ 3 TFEU and 83 § 3 TFEU which provide that where a Member State considers that a draft directive would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. The accelerator procedure allows for accelerated implementation of enhanced cooperation.



tion of children obliges EU Member States to punish sexual assault on a child under 15 years of age with a maximum penalty of at least eight years imprisonment. The French implementing law set the penalty at ten years, compared to seven previously.<sup>34</sup> As regard the trade in human beings, French legislation already largely complied with the obligations deriving from the new directive.<sup>35</sup> The law of 5 August 2013 transposing into French law the directive on the trade in human beings does stipulate, nevertheless, that organ removal is a form of exploitation qualifying as trade in human beings, which brings the legislation into full compliance with the definition provided under article 2§3 of the directive. Furthermore, while the former text only stipulated exchange or remuneration, the new law adds to the various ways in which a person may be exploited.

Today, we can point to a certain number of offences that share a common minimum definition at EU level, which some observers are quick to qualify as “euro-crimes”. Thus, the offences listed in article 83§1 TFEU as eligible for approximation at a European level are also referred to in the FD on the EAW as offences for which States may not claim the double criminality condition: terrorism, the trade in human beings and the sexual exploitation of women and children, illicit drug trafficking, illicit trafficking in arms, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime, etc. We can also establish a direct link between the thirty-two offences listed in the FD on the EAW and the list of offences appended to the Europol decision of 2009.<sup>36</sup> This harmonisation of some offences and of the applicable sanctions has prompted some experts to consider that we are seeing the progressive, subtle emergence of a European federal criminal code.<sup>37</sup>

To date, the Europeanisation of substantive criminal law merely aims at defining a minimum common basis of offences and sanctions. Yet French criminal law generally speaking covers a wide range of offences and sets out quite a wide range of penalties, which is why relatively few offences had to be modified.<sup>38</sup> However, it must be said that French law is being increasingly criminalised, in a diffused way, by small changes. The Europeanisation of procedural criminal law is much more abrupt and noticeable.

34 Law 2013-711 of 5 August 2013, *JORF* 0181 of 6 August 2013 page 13338. This law transposes, among others, Directive 2011/92/EU, *OJEU*, L 335 of 17.12.2011.

35 Directive 2011/36/EU of the EP and Council of 5 April 2011, which replaces Council Framework Decision 2002/629/JHA, *OJEU*, L 101 du 15.4.2011.

36 Decision 2009/371/JHA of 6 April 2009 establishing the European Police Office (Europol), L 121/37 of 15.5.2009.

37 Pradel (J.), “Présentation générale du projet de Code pénal européen sur les délits d'affaires (Euro délits)”, *Revue pénitentiaire et de droit pénal*, 2003, No 2, p. 277.

38 Barbe (E.), “L'influence du droit de l'Union européenne sur le droit pénal français : de l'ombre à la lumière”, *Actualité juridique Pénal*, No 10/2011, pp. 438 and f.

## II- A clear Europeanisation of procedural criminal law

The initial impact of Community construction on the operations of the criminal justice system was the necessary cooperation between judicial authorities. This cooperation was formalised by successive treaties and, in particular, by the establishment of Eurojust in 2002. While cooperation within Eurojust had but little influence on criminal procedure as such, it did help change the attitudes of national judges, who became aware of the added value of their common work. The Amsterdam Treaty also set out some form of harmonisation, as article 31 c) TEU guaranteed the compatibility of rules applicable in the Member States to the extent necessary for improving judicial cooperation in criminal matters.<sup>39</sup> This text was an appropriate legal base for an attempted approximation of procedural law, but because of unanimity it was used only rarely.<sup>40</sup> As a matter of fact, it was on this basis that the Commission prepared a draft FD for certain procedural rights granted in criminal proceedings in the EU<sup>41</sup> following the public consultation launched by the Green Paper.<sup>42</sup> However, this proposed FD was very badly received by the Council and fell by the wayside.

In 1999, the Tampere European Council affirmed that the AFSJ must develop on the basis of mutual recognition.<sup>43</sup> The EAW was the first step in support of that objective, and it has had significant effects on criminal procedure. The second technique used is the harmonisation of criminal procedure, both a corollary and condition of mutual recognition. According to A. Weyembergh<sup>44</sup>, the harmonisation of criminal procedure is one of the most sensitive topics of the European criminal justice area, due to the “unity/diversity” dialectic and to the close relationship between criminal procedure and the State. While criminal law lies at the very heart of national sovereignty, criminal procedure itself is deeply rooted in the legal culture of the States, and its links to fundamental rights are highly complex. Finally, there existed in Europe a traditional opposition between the accusatory and the inquisitorial system, which is gradually fading, the accusatory system becoming somewhat more inquisitorial and the inquisitorial system more accusatory. We shall see that while mutual recognition has had a limited influence on national law (A), harmonisation has led to a more invasive Europeanisation of criminal procedure (B).

39 Flore (D.), “Une justice pénale européenne après Amsterdam”, *JTDE*, p. 122.

40 Barbe (E.), *op. cit.*

41 COM (2004) 328 final, 2.04.2004.

42 “Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union”, COM(2003)75 final, 19 February 2003.

43 Messina (S.), « La reconnaissance mutuelle en matière pénale entre « efficacité » et « responsabilité » », *Archives de politique criminelle* 2016/1 n°38, pp. 227-248.

44 Weyembergh (A.), *op. cit.*

### A- The limited influence of mutual recognition

The Tampere European Council has made the principle of mutual recognition a key instrument of the development of the AFSJ. While in the traditional system of mutual legal assistance a judge in the requested State would take action under domestic law at the request of a judge in the requesting State, under mutual recognition the decision of a Member State judge is directly enforced in another State. The EAW established by the FD of 13 June 2002<sup>45</sup> is the first tangible evidence of the principle of mutual recognition, and the first European overturning of criminal procedure, aiming as it does to replace the extradition procedure between EU Member States.<sup>46</sup>

In France, the FD on the EAW was transposed by the law of 9 March 2004 after constitutional review<sup>47</sup>, the Council of State having determined its incompatibility with the French Constitution.<sup>48</sup> This was based on the fact that the FD provided no compulsory or discretionary ground for non-execution of surrender related to the fact that the alleged offence was, according to the executing State, of a political nature. Indeed, the FD states that the executing State cannot refuse surrender of the wanted person to the issuing State on the grounds that the offence is political. In 2004, the law transposing the Framework Decision on the EAW introduced a new chapter on mutual legal assistance into the CPC (Criminal Procedure Code). The EAW has changed the traditional extradition procedure in several ways: first, transfers are subject to strict time limits, which speed up the procedure. Furthermore, the double criminality condition has been abolished for 32 particularly serious offences. For other offences, double criminality is an optional ground for non-execution of surrender. Yet in France, the transposing law made it a compulsory ground for non-execution of surrender (article 695-23 CPC). This occurred notably in the famous *Jeremy F.* case of 14 June 2013, which led the Constitutional Council to refer its first question for preliminary ruling to the CJEU. The case dealt with an English minor, who had fled to France with her mathematics teacher. The double criminality condition was at the heart of the legal characterisation of the facts, since the age of sexual consent is set at fifteen in France and at sixteen in Great-Britain, and the young girl seduced by her math teacher was exactly fifteen and a half. Yet the central issue in *Jeremy* had to do with the impossibility of appeal against the authorisation to extend the effects of the EAW. Indeed, article 695-46 CPC stipulated that after an individual is surrendered to another EU Member State under an EAW, the investigation chamber shall take a decision within thirty days,

45 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, *OJEU* L 190 of 18 July 2002.

46 Cartier (M.-E.) dir., *“Le Mandat d’arrêt européen”*, Brussels, Bruylant 2005, 422 p.

47 The Constituent intervened to adapt the French Constitution to the structure established by the Framework Decision of 13 June 2002. The following paragraph was added to article 88-2 of the French Constitution: “Statutes shall determine the rules relating to the European arrest warrant pursuant to acts adopted by the institutions on the European Union” by the constitutional law of 25 March 2003 2003-267 on the European arrest warrant, *JORF* 72 of 26 March 2003, p. 5344..

48 Council of State, 26 September 2002, opinion 368-282.

“without appeal”, on a request to extend the effects of this warrant to other offences or to authorise the surrender of the individual to a third State. The applicant argued that the impossibility of appealing the decision of the investigation chamber infringes, among others, the right to effective legal remedy. Drawing the consequences from the CJEU *Jérémy F.* case of 30 May 2013 and of the Constitutional Council’s decision on the question for preliminary ruling on constitutionality of 14 June 2013, which stated that the words “without appeal” in article 695-46 paragraph 4 CPC were contrary to the Constitution, the law complemented article 695-46 CPC by specifying that the decision on an additional request for surrender “may be appealed to the Court of Cassation, by the Attorney General or the person wanted, under the conditions laid down in articles 568-1 and 574-2.”<sup>49</sup>

Another judgment of the CJEU on the EAW led to a reform of criminal procedure. The FD authorises non-execution of surrender for execution of a sentence if the individual is a national of the executing State or resides in that State and if the executing State undertakes to enforce the sentence. The transposition of this provision into French law was sanctioned by the CJEU in the *Lopes Da Silva Jorge* case of 5 September 2012, because the CPC dealt only with French nationals.<sup>50</sup> In its Grand Chamber judgment 2012, the CJEU considered that article 695-24, 2° CPC ran contrary to the principle of non-discrimination on grounds of nationality guaranteed by article 18 TFEU, by reserving the benefit of non-execution of an EAW for French nationals only, with a view to enforcement on the French territory of a prison sentence ordered in another Member State. Article 695-24 2° CPC therefore had to be modified on this point to extend the possibility of non-execution of an EAW for enforcement of a sentence to foreigners, whether EU nationals or not, who “have regularly and continuously resided on the national territory for at least five years.” Henceforth, no distinction is made whether they are nationals of another Member State or of another non-EU Member State.<sup>51</sup> Thus the CJEU is acting as a vector of criminal procedure Europeanisation and, as stated by D. Panke, it is also an “agent of Europeanisation.”<sup>52</sup>

The legislator remains distrustful, notably because the transposition has distorted two grounds of non-execution by making them compulsory: the respect of double criminality for offences other than those listed as the 32 most serious offences, as we

49 Law 2013-711 of 5 August 2013 concerning several implementing provisions with regard to justice in line with European Union law and the international obligations by France, *JORF* 0181 of 6 August 2013 page 13338.

50 Case C-42/11.

51 Beauvais (P.), “La Cour de justice, le mandat d’arrêt et les droits fondamentaux constitutionnels et européens”, *RTDEur.* 2013, p. 812.

Thellier de Poncheville (B.), “Tour d’horizon de la jurisprudence de la Chambre criminelle de la Cour de Cassation relative aux motifs de refus d’exécution d’un mandat d’arrêt européen”, *RTDEur.*, 2014, p. 465.

52 Panke (D.), “The European Court of Justice as an Agent of Europeanization? Restoring Compliance with EU Law”, *J.E.P.P.*, 2007/6, p. 847.

Giudicelli-Delage G. and Manacorda S., “*Cour de Justice et justice pénale en Europe*”, Association de recherches pénales européennes, Collection of the Paris comparative Law UMR, vol. 19, 2010, 323 p.

saw above (art. 695-23. 1° CPC). Furthermore, the CPC prevents execution of an EAW concerning facts that could be judged in France and for which the criminal prosecution or punishment are statute-barred (art. 695-22. 4° CPC), while the FD makes this an optional ground for non-surrender of an individual.

The EAW is doubtlessly the most resounding expression of the principle of mutual recognition, which involves mutual trust between Member States. The CJEU moreover insisted, in its *Mantello* decision of 16 November 2010, on the mutual trust to be given the authority emitting the warrant. Only the judge who issues an EAW is empowered to establish whether a previous judgment in his or her legal system was “final” or not. The EAW thus leads to automaticity of surrender, based on mutual trust, which does raise the issue of the respect of fundamental rights. The CJEU has had the occasion of pronouncing itself on that question, in its *Melloni* judgment of 26 February 2013, where the issue was the conditions under which an EAW issued for the purpose of enforcing a judgment in absentia may be executed if the laws of the executing State require another ruling in the issuing State. The Court was thus confronted with a disparity in the protection of fundamental rights that might undermine the mutual trust on which mutual recognition is based. The Court clearly confirmed that surrender is mandatory under the EAW, regardless of any disparity in the protection of fundamental rights, to ensure uniformity and the rule of EU law<sup>53</sup>. According to C. Achaintre, “this FD, which seemed rather minor, was in fact the starting point of a revolution... The EAW is the result of a hybrid system... a careful blend of supranationality and intergovernmental cooperation.”<sup>54</sup>

Other instruments also have also been implemented on the basis of mutual recognition, that cornerstone of the AFSJ, such as the FD on the European Evidence Warrant of 2009, which was replaced by the European Investigation Order in criminal matters, created by the directive of 3 April 2014.<sup>55</sup> The European Investigation Order implements the principle of mutual recognition in the area of evidence collection. It may be issued both to launch a specific investigation in the executing State, and to obtain evidence already in the possession of the executing State. At the EP’s request, the directive introduced for the first time a ground of refusal based on fundamental rights; Member States must transpose it into national law by 22 May 2017.<sup>56</sup>

While mutual recognition has been recognised as the cornerstone of the European criminal law-enforcement area, the Lisbon Treaty also puts the harmonisation of crim-

53 Labayle (H.), “Mandat d’arrêt européen et degré de protection des droits fondamentaux, quand la confiance se fait aveugle”, *www.gdr-AFSJ.eu*, 3 March 2013.

Benlolo Carabot (M.), “Mandat d’arrêt européen: la protection des droits fondamentaux subordonnée aux exigences de la primauté du droit de l’Union européenne”, *Lettre Actualités Droits-Libertés of the CREDOF*, 22 March 2013.

54 Achaintre (C.), “La France face au mandat d’arrêt européen” in *Regards sur le droit de l’Union européenne après l’échec du Traité constitutionnel*, p. 265-294.

55 Directive 2014/41/EU, *OJEU* L 130, 1.05.2014, p. 1–36. Transposition deadline: 22 May 2017.

56 Cassuto (T.), “La directive concernant la décision d’enquête européenne en matière pénale”, *J Pénal*, 2014, p. 338.

inal procedure at its centre. Adjustments to criminal procedure resulting from mutual recognition only concern a limited number of cross-border cases.<sup>57</sup> While the EAW only applies to rather serious offences<sup>58</sup>, the approximation of laws on criminal procedure might affect far more offences. The Lisbon Treaty brings about a real revolution in criminal procedure by setting a legal basis for the approximation of Member States' criminal procedures for all investigations, cross-border or not.

## B- Pervasive Europeanisation of the harmonisation of criminal procedure

We can distinguish two types of harmonisation of criminal procedure: minimum harmonisation, which simply consists in an approximation of State legislation to facilitate mutual recognition (1) and maximum harmonisation, which aims at the unification of legislation (2).

### 1- Minimum harmonisation through approximation of legislations

Each year, there are more than eight million legal proceedings in the EU; hence, many individuals may be affected by the approximation of laws on criminal procedure. The approximation of criminal procedure is a further step toward Europeanisation, the main purpose of which is to ensure better protection of fundamental rights. It was really the Lisbon Treaty that opened the way by providing an ambitious legal foundation in article 82§ 2 TFEU, which states "To the extent necessary to facilitate mutual recognition of judgments and judicial decisions ... the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules ... (that) shall concern: a) mutual admissibility of evidence between Member States; b) the rights of individuals in criminal procedure; c) the rights of victims of crime; d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament."

Nevertheless, the approximation of procedural legislation is not a goal in itself but rather a tool at the service of mutual recognition and cooperation, which reveals a certain caution on the part of the States. Furthermore, approximation through ordinary legislative procedure may only deal with those areas listed under article 82§ 2 a), b), c) TFEU. In all other areas, the Council must act unanimously, and article 82§ 3 TFEU also provides for a brake and accelerator procedure, whereby if a Member State considers that a draft directive may affect fundamental aspects of its criminal justice system, it may request that the matter be referred to the European Council. In that case,

<sup>57</sup> In France, there are approximately 1,000 EAWs issued and 1,000 received each year.

<sup>58</sup> Offences for which the sentence incurred is at least two years imprisonment, in the case of transfer for judgment, and offences for which the sentence pronounced is at least four months imprisonment, in the case of transfer for sentence enforcement.

the legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure. The accelerator procedure, which allows for accelerated implementation of strengthened cooperation, is then made possible.

On 30 November 2009, the Council adopted a “roadmap” aimed at strengthening the rights of suspected or accused persons to promote mutual trust within the EU.<sup>59</sup> The roadmap recognised the need to adopt a horizontal approach to promote the mutual recognition of court judgments, and identified five areas in which approximation was imperative. Based on this roadmap, all five directives have now been adopted on, respectively, the right to translation and interpretation in criminal proceedings in 2010<sup>60</sup>, on the right to information in criminal proceedings in 2012<sup>61</sup>, and on the right of access to a lawyer in criminal proceedings in 2013<sup>62</sup>, on procedural guarantees for children<sup>63</sup>, and on criminal legal aid.<sup>64</sup> Some authors have raised the question whether these legislative proposals respect the principle of subsidiarity and whether the EU should limit its action in the area of procedural guarantees to ensuring that the mechanisms of criminal law cooperation created by the European legal order respect individuals’ procedural rights?<sup>65</sup> Notwithstanding, national parliaments have not yet implemented the early warning mechanism with regard to these draft directives.

The main way criminal proceeding law is evolving today is under the pressure of the EU.<sup>66</sup> The first directive, on the right to translation and interpretation, did not present any specific problems of transposition in France, but the second and third directives require a total change of criminal procedure, to make it adversarial at all stages.<sup>67</sup> The

- 59 Council resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, (2009/C 295/01), *OJEU* C 295 of 4 December 2009, p. 1-3.
- 60 Directive 2010/64/EU of the EP and Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, *OJEU*, L 280 of 26 October 2010, p. 1.  
Beauvais (P.), “Procédure criminelle : droit à l’interprétation et à la traduction dans le cadre des procédures pénales”, *RTDEur.* 2011, p. 642.
- 61 Directive n° 2012/13/EU of the EP and Council of 22 May 2012 on the right to information in criminal proceedings, *OJEU* L142 of 6 June 2012, p. 1.
- 62 Directive n° 2013/48/EU of the EP and Council on the right of access to a lawyer in criminal proceedings, *OJEU* L 294 du 6 November 2013, p. 1.
- 63 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings *OJEU* L 132, 21.5.2016.
- 64 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *OJEU* L 297, 4.11.2016, p. 1-8.
- 65 De Bondt (W.) & Vermeulen (G.), “The procedural rights debate. A bridge too far or still not far enough?”, *Eurocrim*, 4/2010, p. 163.
- 66 Vergès (E.), «La réforme par transposition: la nouvelle voie de la procédure pénale », *Rev. Sc. Crim.*, 2015, p. 683.
- 67 Tell (O.), “Les directives relatives à la procédure pénale: quelle protection du droit des personnes?”, *Revue de l’Union européenne*, No 579, Juin 2014, pp. 364-369.

law of 5 August 2013 successfully transposed the directive of 20 October 2010 on the right to translation and interpretation in criminal proceedings in France.<sup>68</sup> French law was already largely in line, in particular with regard to the obligation of interpretation, from the police stage to the end of the trial. The obligation of translation had to be added to the CPC alongside interpretation.

The second directive, on the right to information in criminal proceedings, opts for an adversarial criminal justice system.<sup>69</sup> This supposes the creation of a status of “free suspect” during the investigation. The ECHR had initiated an earlier move in favour of the suspect’s status in its *Salduz*<sup>70</sup> and *Dayanan*<sup>71</sup> decisions, which lay the European foundations for the suspect’s right to protection. In the first case, the ECHR stated that the “suspect” must benefit from the right of access to a lawyer from the moment of first interrogation. In the second case, the Court considered that the “accused” must benefit from “the whole range of services specifically associated with legal assistance”. However, according to the impact assessment carried out by the Commission ahead of the draft directive, indicted individuals were only informed effectively and fully in a third of the 27 Member States.<sup>72</sup> Until then in France, an individual freely interviewed by investigative services had no specific rights under the law; the directive recognises a certain number of rights. In its preamble, directive 2012/13/EU links mutual recognition of judicial decisions and the protection of fundamental rights. The third recital of the preamble explains that the recognition of decisions “presupposes that Member States trust in each other’s criminal justice systems.” The seventh recital furthermore states, “Although all the Member States are party to the ECHR, experience has shown that that alone does not always provide a sufficient degree of trust in the criminal justice systems of other Member States.” Principally, directive 2012/13/EU provides for two broad categories of rights: information and access to the file. It obliges Member States to extend the right to be assisted by a lawyer to free hearings and the right for the free suspect to confront the victim, as well as to create a right for the parties to access the file, said access being limited during the preliminary investigation.

The transposing law of 27 May 2014 thus introduces the status of free suspect, strengthens the rights to information of suspected or accused individuals deprived of liberty, whether in police custody, pre-trial detention or under a national or European arrest warrant, and establishes a right of access to the file after indictment or referral to a court.<sup>73</sup> Indeed, article 4 of the directive consecrates the right for an individual arrested and detained, and his or her lawyer, to access the documents related to the case so as to be able to effectively challenge the legality of this coercive measure. Yet article 114

68 OJEU L 280/1.

69 Great Britain and Ireland participate in the directive on the right to information but not Denmark.

70 ECHR *Salduz vs. Turkey* case, 27/11/2008.

71 ECHR *Dayanan vs. Turkey* case, 13/10/2009.

72 Jehl (J.), “Citoyens européens de l’Union européenne : droit à l’information dans les procédures pénales”, *JCP G.*, 19, 7 May 2012, p. 584.

73 Law 2014-535 of 27 May 2014, *JORF* 0123 of 28 May 2014, p. 8864.



CPC only provided for access to the file through a lawyer. Henceforth, parties who are not represented by a lawyer have the same right of access. Transposition on this point was actually only minimal. Indeed, the transposing law stipulated that while in police custody, the individual may only access the rights information form, the notification of police custody and rights attached thereto, the health certificate and the report on the hearings of the assisted individual (article 63-4-1 CPC). These documents are insufficient for the lawyer to challenge the legality of the custody measure, yet the directive does state that this access must be sufficient to challenge the legality of the custody. The association *Les Jeunes Avocats* intends to claim the direct effect of the directive and invites all lawyers to lead before the national courts that the law contravenes the directive. The law has transposed the directive *a minima*, which demonstrates a certain degree of resistance toward Europeanisation. According to E. Vergès, the transposing law has adopted “a legislative approach with no global vision.”<sup>74</sup> In doing so, France is exposing itself to a potential judgment by the CJEU for failing to meet its obligations. Furthermore, the law of 27 May 2014 also partially anticipates the transposition of the directive on access to a lawyer in criminal proceedings.<sup>75</sup> Its article 15 states that the right to a lawyer shall be notified to a freely interviewed suspect as of 1 January 2015.

The transposition of the directive on the right of access to a lawyer, or *Salduz* directive, as the ECHR case was known<sup>76</sup>, had to be completed by 27 November 2016. This directive represents an improvement compared to previous ECHR requirements, inasmuch as it sets out clear obligations regarding active assistance by a lawyer for any interviewed suspect, even if the individual remains free. This directive was a minima and literally transposed by the law adopted on June 3<sup>rd</sup> 2016.<sup>77</sup> There were criticisms expressed about this directive, as it deals with the right to a lawyer being present without tackling the issue of legal aid. This second aspect is treated in the Directive of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.<sup>78</sup> The purpose of

74 Vergès (E.), “Le statut juridique du suspect : un premier défi pour la transposition du droit de l’Union européenne en procédure criminelle. – À propos de la loi n° 2014-535 du 27 mai 2014 portant transposition de la directive 2012/13/UE du Parlement européen et du Conseil, du 22 mai 2012, relative au droit à l’information dans le cadre des procédures pénales”, *Droit pénal*, n° 7-8, July 2014, Study 15.

75 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *OJEU* L 294, 6.11.2013, p. 1–12.

76 ECHR 27 November 2008, *Salduz vs. Turkey*.

77 Law n° 2016-731 of 3 June 2016 on strengthening the fight against organized crime, terrorism and their financing and on strengthening the efficiency of criminal proceedings JORF n° 0129 of 4 June 2016. Vergès (E.), « La procédure pénale à son point d’équilibre », *RSC* 2016, p. 551.

78 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *OJEU* L 297, 4.11.2016, p. 1–8.

this Directive, which has to be transposed by 25 May 2019, is to ensure the effectiveness of the right of access to a lawyer by making available the assistance of a lawyer funded by the Member States for suspects and accused persons in criminal proceedings and for requested persons who are the subject of European arrest warrant proceedings. This defines legal aid as funding and support by Member States with a view to ensuring the effective exercise of the right of access to a lawyer. Criteria for access to legal aid are however referred to a recommendation. We must therefore conclude that on this point, harmonisation is very weak.

On 9 March 2016, the Directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings has been formally adopted and should be transposed by 1 April 2018.<sup>79</sup> The purpose of this Directive, not mentioned in the roadmap of 2009, is to enhance the right to a fair trial in criminal proceedings by laying down common minimum rules concerning certain aspects of the presumption of innocence and the right to be present at the trial. For instance, Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution and any doubt should benefit the suspect or accused person. Furthermore, the right to remain silent has to be respected. The last directive of the roadmap is the Directive of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings not yet transposed in France as the transposition deadline is 11 June 2019.<sup>80</sup> It recognizes a certain number of rights to persons under 18 years old such as the right to have the holder of parental responsibility informed, the right to be assisted by a lawyer, the right to protection of privacy, and the right to a medical examination. All these measures have to be taken in the child's best interests.

In France, the inquisitorial procedural tradition tends to distinguish between the investigation phase, during which the suspect has practically no rights, and the judicial phase, during which the accused has certain rights. The influence of European rules has created some porosity between the two phases, making it necessary to reflect upon how the initial French investigation should adapt to the requirements of European law. Indeed, criminal law directives systematically link the notions of “suspect” and “accused” individuals. Furthermore, as the speed of transposition of the directives had been criticised, on 3 February 2014 the Minister of Justice entrusted J. Beaume, attorney general at the Court of Appeal of Lyon, with the mission of reviewing the entire structure of the criminal investigation with a view to finding the correct balance between European requirements regarding the rights of the defence and the adversarial principle, on the one hand, and the need to effectiveness of the investigation, on the

79 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings to be transposed by 1 April 2018, *OJEU L* 65, 11.3.2016, p. 1.

80 Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings *OJEU L* 132, 21.5.2016.

other hand. Yet the report submitted on 10 July 2014 is fairly moderate, as it favours improvements to the current procedure rather than an absolute change.

Thus, as Y. Galmot had already stated in 1992, “Community law seems to be a motor of progress toward better protection of individual rights and freedoms.”<sup>81</sup> The recitals of the directive on the right of access are clear on this matter: mutual recognition can only occur if all States provide an equivalent level of protection of fundamental rights in their criminal procedure. Criminal procedure is undergoing an upheaval that may be further exacerbated by the imminent establishment of the European Public Prosecutor’s Office, via the technique of maximum harmonisation.

## 2- The establishment of the European Public Prosecutor’s Office: an example of maximum harmonisation

Initially, Common Law States did not support the establishment of a European Public Prosecutor’s Office on the grounds that it would be a totally foreign concept to their adversarial tradition. In the civil law States’ inquisitorial system, the public prosecutor generally plays two functions. He or she has the power to initiate prosecution and to control police activity. One long-envisaged solution was to “establish a European Prosecutor as an independent body responsible for protection of the Union’s interests against fraud throughout EU territory.” In the Maastricht and Amsterdam treaties, simple judicial cooperation in criminal matters was foreseen as there was no mention of any integrated judicial cooperation structure. The Nice Treaty provided for a legal basis for the creation of Eurojust as judicial response to police cooperation within Europol. Nevertheless, being a strictly cooperative judicial body, Eurojust does not have real implication on national criminal proceeding. Ever since its creation in 2002, Eurojust has allowed coordination of European criminal policy-making, which has also caused some national reluctance. While the Eurojust decision was modified in 2008, the Lisbon Treaty introduced new modifications to Eurojust’s legal regime. Article 85 TFEU bolsters its coordination role and improves operational cooperation with Europol, OLAF, notably through joint investigation teams. With its law of 5 August 2013, France introduced with much delay the amendments required by the 2008 decision modifying the powers of Eurojust to allow it to ask attorneys general to initiate a criminal investigation.

The Lisbon Treaty makes a step toward Europeanisation by enabling the establishment of a European Public Prosecutor’s Office (EPPO). Article 86 TEU officially provides that the EPPO has to be created on the basis of Eurojust, this formulation being a compromised between States supporting the development of Eurojust and States favouring the creation of an integrated European Prosecutor. Based on article 86 TFEU, the Commission proposed, on 17 July 2013, a regulation to establish a Euro-

<sup>81</sup> Galmot (Y.), “Évolutions récentes du droit administratif français sous l’influence du droit communautaire”, *E.D.C.E.Études État*, La Documentation Française, Paris, 1992, p. 305 and f.

pean Public Prosecutor's Office, mainly responsible for fighting fraud against the EU's financial interests.<sup>82</sup> The Commission's proposal aims at setting up a centralised, highly hierarchical structure around a European Public Prosecutor. The document provides that the European Public Prosecutor's Office be established as a new body of the EU with legal personality. It will be mainly responsible for fighting fraud against the EU's financial interests, but the document originally distinguishes between two categories of offences: criminal offences against the EU's financial interests that are automatically the purview of the European Public Prosecutor's Office, and offences that are inextricably linked together, and which, in the interest of the proper administration of justice, should be jointly investigated and prosecuted. The Public Prosecutor's Office must establish its jurisdiction when there are certain links between such offences and offences of the first category. The European Public Prosecutor's Office shall be comprised of a European Prosecutor, assisted by four European Deputy Prosecutors and delegated European Prosecutors in the Member States. When the European Public Prosecutor triggers an investigation, he or she shall assign the case to a European Deputy Prosecutor unless he or she wishes to carry out the investigation personally.

This proposal was poorly received by national Parliaments, which raised a yellow card claiming that it infringes the principle of subsidiarity.<sup>83</sup> According to the French National Assembly, it was the centralised and highly hierarchical nature of the Office, along with its power of investigation regarding national judicial authorities, which prompted the most reservations by Member States and chambers of the national parliaments that issued reasoned opinions on grounds of subsidiarity.<sup>84</sup> On 27 November 2013, the Commission nevertheless decided to maintain its proposal<sup>85</sup> and clearly stated, furthermore that, "A federal budget needs a federal protection."<sup>86</sup> Indeed, EUR 159.5 billion in value-added tax (VAT) revenues was lost across the EU in 2014.<sup>87</sup> The European Council of 26 and 27 June 2014, in defining the strategic guidelines for legislative and operational planning within the AFSJ, stressed the need to reach an agreement on the European Public Prosecutor's Office (EPPO). Since then, a compromise has been found on the structure of the EPPO with the creation of a collegial

82 Draft Council regulation on the establishment of the European Public Prosecutor's Office (*COM (2013) 534 final*), 17 July 2013.

83 Common declaration on the draft Council regulation on the establishment of the European Public Prosecutor's Office (*COM [2013] 534 final*), personally signed by parliamentarians of national parliaments of the European Union.

84 Report issued on behalf of the Commission of Constitutional Law, of the Legislation and General Administration of the Republic of the National Assembly on the draft European resolution (1658) on the draft Council regulation of 17 July 2013, on the establishment of the European Public Prosecutor's Office (*COM [2013] 534 final*) by Mrs. Marietta Karamanli.

85 Communication from the European Commission on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office with regard to the principle of subsidiarity, in accordance with Protocol No 2, *COM (2013) 851*.

86 Labayle (H.), "Parquet européen et contrôle de subsidiarité: premier carton jaune pour l'Espace de liberté", 8 January 2014, <http://www.gdr-AFSJ.eu>.

87 Study and Reports on the VAT Gap in the EU-28 Member States: 2016 Final Report (TAX-UD/2015/CC/131).

structure which shall be responsible for strategic matters and shall have a global competence to monitor the activities of the Office. Nevertheless, the College shall not be involved in operational decisions in individual cases. EPPO should have a concurrent competence with national prosecution services to investigate offences against the financial interests of the Union.<sup>88</sup> There are still discussions on the ventilation of this jurisdiction notably the inclusion of a right to exercise its competence to deal with certain cases of VAT fraud and to offences related to EU funds even in cases where the damage caused to the EU's financial interests does not exceed the damage caused to another victim.<sup>89</sup> Eurojust and the EPPO should therefore co-exist as two parallel structures to protect the EU's financial interests. A strong cooperation between the two structures is foreseen in the draft regulation.

In case unanimity is not reached, the regulation could eventually be adopted within the framework of enhanced cooperation by a limited number of States. Indeed, the second paragraph of article 86§1 TFEU provides that in the absence of unanimity, a group of at least nine Member States may initiate enhanced cooperation on the basis of the draft regulation at issue, after referral to the European Council. Such enhanced cooperation, also called “accelerator clause”, is easier to implement than the “common law” enhanced cooperation under article 329 TFEU, which must be approved by the European Parliament. Europeanisation through the unification of law appears to be meeting with national resistance.

The delay in the transposition of the initial framework-decisions manifests the reluctance to accept this Europeanisation, often using the technique of sweeping transposition.<sup>90</sup> France had to catch up the delay in transposing, among others, the third-pillar instruments before the final deadline of 1 December 2014. Since that date, the CJEU has had full competence regarding former third-pillar instruments, including through infringement proceedings under article 10§2 of protocol 36 on transitional provisions of the Lisbon Treaty. We must therefore conclude that the Europeanisation of criminal procedure is widely an endured process, since procedural criminal law, even more so than substantive criminal law, reflects national legal traditions.<sup>91</sup>

88 Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Consolidated text, Council document 15200/16 of 2016-12-02.

89 The last discussions took place during the JHA Council on December 8th 2016.

90 The law n° 2013/711 of 5 August 2013 transposes three Directives and two FDs: the Directive 2011/36/EU on preventing and combating the trade in human beings; the Directive 2010/63/EU on the right to interpretation and translation in criminal proceedings; the Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography; the FD 2008/947/JHA aimed at improving mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty and their enforcement in the EU; and finally the FD 2009/299/JHA on the fundamental guarantees that must be observed for the recognition of foreign judgments in absentia.

The Law n° 2015/993 of 17 August 2017 transposes FD 2009/948/JHA, FD 2009/829/JHA, FD 2008/947/JHA, Directive 2011/99/EU and Directive 2012/29/EU.

91 Vergès (E.), « La réforme par transposition : la nouvelle voie de la procédure pénale », *RSC* 2015, p. 683.

### Conclusion

While article 67 TFEU states that the EU is an AFSJ based on the respect of fundamental rights and of the Member States' various legal systems and traditions, the States' legal traditions have been somewhat blended through Europeanisation. This play of reciprocal influences is nothing new: more than two hundred years ago, France was "importing" the jury system from England and "exporting" its investigating judge through most of Continental Europe.<sup>92</sup> But the constraints of the EU have accelerated this process and led to hybridisation of national criminal laws. This horizontal or circular Europeanisation, born of reciprocal influences, should incite one to study comparative European criminal law with a view of establishing a common criminal law.<sup>93</sup> For his part, A. Bernardi has identified seven different manifestations of State criminal law traditions being overcome with the prospect of Europeanisation of criminal sciences.<sup>94</sup> Among these manifestations, he highlights in particular the erosion of the pyramidal criminal law model and the parallel assertion of a "network" legal model, a new, pragmatic attitude inspired by the "conceptual syncretism" under which EU Member States' principles and rules must be filtered to determine which can provide the best results at EU level, and finally increased comparison with a view to harmonising the different criminal law systems.

92 Pradel (J.), *op. cit.*

93 Guiraudin (V.), "Les effets de l'eupéanisation des politiques d'immigration et d'asile", *Politique européenne*, No 2, 2010, pp. 7-32.

94 Bernardi (A.), "L'eupéanisation de la science pénale", *Archives de politique criminelle*, 2004/1 (No 26), pp. 3-36.