

A New Test for Mens Rea? Safeguarding Legal Certainty in a European Area of Freedom, Security and Justice

Sabine Gless*

Abstract

Legal Certainty is considered a prerequisite for a fair criminal justice system in all European legal orders. The principle of mutual recognition puts this principle at a risk, for instance, by abolishing the dual criminality requirement. The paper analyses different remedies for this problem, and argues for a solution in substantive law: A new test for mens rea, which rests on the establishment of a reasonable duty to learn and be aware of foreign laws. Thus, the risk of ignorance of foreign laws no longer rests with the individual alone.

I. Introduction

In the process of establishing a European area of freedom, security and justice, the principle of loyalty – as laid down in Art. 10 EC-Treaty – plays a significant role. This principle has an important function serving as a hinge which obliges the Member States to aim at “good faith collaboration” and thus acts as a vehicle for the European objective of establishing an area of freedom, security and justice within the Member States’ national criminal justice system. In doing so, however, it also causes conflicts with traditional principles of criminal law and raises new questions. One of those questions concerns the meaning and implications of legal certainty in an ever-closer space of cross-border law enforcement, especially after the Member States have restricted the principle of dual criminality when implementing instruments of mutual recognition.

What relevance does the principle of legal certainty have in today’s European area of freedom, security and justice based on the principle of mutual recognition?

This paper will argue that:

1. the principle of legal certainty is a basic principle in both the national and the European criminal justice system,
2. which is put at risk by instruments of mutual recognition, such as the European Arrest Warrant (EAW),
3. thus, a remedy must be introduced to prevent an infringement of the principle of legal certainty.

There are numerous examples to illustrate the conflict between effective cross-border law enforcement and the principle of legal certainty, especially in the area of alleged economic crime on a small scale as well as on a large scale.

To simplify matters, I will use the case of a merchant selling a specific product. However, comparable cases could just as well involve stock-brokers who trade across borders, lawyers carrying out sensitive business transactions for their clients etc. – all

* Professor Dr Sabine Gless, University of Basle.

done in good faith and with a common wish to respect the law of the respective home country, but at the same time working in an area which bears the risk of criminal prosecution.

Our example involves a merchant selling hair restorer, i. e. small bottles containing blue liquid promising to stop loss of hair if applied to the scalp three times a day – 20 EUR per bottle. The merchant himself believes in the merits of his product when used on a long-term basis. In reality, the blue liquid does no harm, but there is no proof that it ever helped in any given case either.¹ Being well aware of that permanent risk of criminal prosecution, the merchant has even studied the criminal code of his country, and he is ready to reimburse the money should any of his customers complain.

According to the jurisprudence of his country, no fraud is committed should victims be too trustful and/or as long as financial damage is ruled out.

Should the merchant nevertheless fear criminal prosecution for alleged fraud, if he sells his product to individuals, and does the prosecution differ depending on whether the customers are locals or tourists?

II. The principle of legal certainty

In essence, the principle of legal certainty requires that subjects of the law must be able to clearly ascertain their rights and obligations on the basis of the body of law.² Thus, legal rules must be laid down in a clear and precise statute in order to enable the citizens to foresee legal consequences of an action. The principle of legal certainty forms part of all national legal systems as well as the EU body of law.³ It has special relevance for criminal law.

1. The principle of legal certainty in national jurisdictions – e. g. Germany

The special importance of legal certainty in national criminal justice systems is illustrated in German law, in which the implications of legal certainty for criminal law have been settled and accepted long ago (although the consequences for certain legal instruments, for example, the limitation of time for criminal prosecution, are still discussed): The principle of legal certainty ensures that everybody is able to anticipate (before acting) which behaviour is forbidden and will be punished: an act can only be punished if the illegal quality of this very act has been legally determined before its commitment. The *nullum crimen, nulla poena sine lege*-principle encompasses different fundamental guarantees: the prohibition of the retroactive effect of criminal laws, the prohibition of customary law, the prohibition of analogy, and the principle of certainty.

¹ See ECJ C-220/98 Judgment of 13. 1. 2000 *Lancaster* deciding a case of allegedly misleading sales promotion.

² European Criminal Policy Initiative, Manifesto no. 4.1 (<http://sites.google.com/site/eucrimpol/manifest>).

³ See e. g. *D. Wyatt & A. Dashwood's*, *European Union Law*, 5th ed. 2006, no. 7-010.

Thus, the principle of certainty serves different purposes: it obligates the legislator to define the elements of an offence and to set the sanction in a parliamentary statute, and (as a consequence) it guarantees the individual that only those acts which fall under such a criminal statute may be punishable.⁴ The citizen shall have the option to adapt his or her behaviour to the criminal laws in power and thus avoid punishment. Such a potential effect on the individuals' behaviour is also the (pre-)condition for criminal law to achieve the objective of deterrence.

Thus, the merchant selling useless hair restorer for good money (but in good faith and with the intention to reimburse displeased customers) shall only face criminal prosecution as laid down in the German criminal code, if his act carries all the features of fraud at the time of selling. Even if his conduct is improper, he is shielded from criminal prosecution and may continue in his business as a salesman as long as it is not incriminated by the law.

2. The principle of legal certainty in European case law

Long before the European area of freedom, security and justice was introduced, the case law of both European institutions important for the national criminal justice systems, the European Court for Human Rights in Strasbourg and the European Court of Justice in Luxembourg, had also put emphasis on the implication of the principle of legal certainty for law enforcement.

a) Case law of the European Court of Human Rights (ECtHR)

The relevant case law of the European Court of Human Rights (ECtHR) emphasizes the close relationship between the principle of legal certainty guaranteed by Article 7 and the "quality of law" requirement concluding that an interference with an individual's fundamental rights must be governed by clear legal principles:

"When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using the term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of accessibility and foreseeability."⁵

The case law stresses the importance of these two closely connected principles in various judgements⁶ focusing on the key issue: the individual's ability to foresee whether (a certain) conduct will contravene the criminal law.⁷ This was clearly spelled out long ago, for instance in the *Sunday Times* case in 1979:⁸

"First, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a 'law' unless it is formulated

⁴ See Entscheidungen des Bundesverfassungsgerichts (BVerfGE) 75, 329, at 340–341.

⁵ *SW v. UK* (1995) A.335-C, at 32; see also: *A. Ashworth*, Human Rights, Criminal Law, and the Principles of Legal Certainty and Non-Retroactivity, in: Arnold u. a., Festschrift für Eser, München, 2005, p. 50.

⁶ See *Steel and others v. UK* App. No. 24838/94 with further references.

⁷ *Silver v. UK* (1983) A.61.

⁸ *Sunday Times v. UK* (No.1) (1979) A.30, at [49].

with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”

The crucial factor in order to judge whether the principle of certainty is abided by is the criterion of foreseeability.

b) Case law of the European Court of Justice (ECJ)⁹

The case law of the European Court of Justice (ECJ) adopted the principle of legal certainty as a basic principle:

”It has consistently been held that the principle of legal certainty [...] requires that rules imposing obligations on persons must be clear and precise so that they may know without ambiguity what are their rights and obligations and take steps accordingly...”¹⁰

The principle of legal certainty does not only shield the individual from a direct application of EU law,¹¹ but also ensures foreseeability in the implementation of EU law: according to the case law of the European Court of Justice, individuals must be able to ascertain their rights and obligations with regard to the body of law relevant to their actions and accordingly, in a case of criminal prosecution with regard to the criminal statutes. The ECJ follows the ECtHR case law, which emphasizes the criterion of foreseeability.¹² This feature has to be integrated into the concept of a European area of freedom, security and justice.

III. The principle of legal certainty and the European area of freedom, security and justice

Today’s European area of freedom, security and justice relies on mutual recognition: a judicial decision legally rendered in one EU-Member State is a valid decision in all other Member States. Instruments based on the principle of mutual recognition allow for cross-border enforcement of a judicial decision issued in one Member State. Roughly speaking, such a decision – for instance a European Arrest Warrant – will be executed in all Member States without further restrictions.

1. The principle of legal certainty and mutual recognition

The concept of mutual recognition has modified various features of cross-border cooperation; first of all (and especially) it has triggered an ambition to abolish dual

⁹ For further information, see: J. Raitio, *The Principle of Legal Certainty in EC Law* 2003.

¹⁰ ECJ C-439/01 Judgment of 16. 1. 2003 *Cipra and Kvasnicka*, para. 47; ECJ C-169/80 Judgment of 9. 7. 1981 *Gondrand Frères and Garancini*, para. 17; ECJ 257/86 Judgment of 21. 6. 1988 *Commission v. Italy*, para. 12; ECJ 325/85 Judgment of 15. 12. 1987 *Ireland v. Commission*, para. 18.

¹¹ A. Klip, *European Criminal Law (ECL)* 2009, p. 170.

¹² See also ECJ C-76/06 Judgment of 7. 6. 2007 P, *Britannia Alloys & Chemicals Ltd v. Commission* [2007] ECR I-4405, in which the Court adhered to the requirement of foreseeability. Advocate General Bot in his Opinion of 1 March 2007 in this case explicitly discussed the requirements of Article 7 ECHR.

criminality. Whereas traditional cooperation requires that the act for which mutual legal assistance is sought after constitutes a crime punishable in both countries, by the requesting as well as by the requested parties, the new instruments of mutual recognition follow a different approach: they all work with a list of – rather vaguely formulated – categories of offences for which dual criminality does not apply anymore. Consequently the law of the requesting state always determines incrimination.

a) Assessment in the case law of the ECJ

Does mutual recognition breach the principle of legality – or rather legal certainty – in criminal matters?

This question was raised in the case of *Advocaten voor der Wereld*.¹³ Is it true that a person deprived of his or her liberty on the basis of an EAW loses protection from the principle of legal certainty? Under the EAW regime, a person who wants to benefit from the guarantee that criminal legislation must satisfy conditions as to precision, clarity and predictability must know the laws of the 27 (Member) States cooperating in the EAW framework, otherwise it is impossible to determine whether an act performed at a particular time does or does not constitute an offence.

The example of cross-border merchandise illustrates this very well:

A merchant selling useless hair restorer for good money (albeit in good faith and despite the readiness on his part to reimburse displeased customers) could face criminal prosecution in other European jurisdictions according to which his sales qualify as fraud. He is not shielded from criminal prosecution, because the principle of dual criminality no longer protects him.

Nevertheless, the ECJ deciding *Advocaten voor der Wereld* denied that mutual recognition in the EAW-framework infringes the principle of legal certainty. It declared that

“[it] is common ground that [the basic principles of Art. 6 TEU] include the principle of the legality of criminal offences and penalties”.¹⁴

Subsequently the court explained the principle of legality

”implies that legislation must define clearly offences and the penalties which they attract. That condition is met in the case where the individual concerned is in a position, on the basis of the wording of the relevant provision and with the help of the interpretative assistance given by the courts, to know which acts or omissions will make him criminally liable”.¹⁵

Legal scholars assessed the court’s ruling to be ”sound”, because ”the abolition of double criminality does not affect the legality. Alleged criminal liability will be based

¹³ See Opinion of Advocate General Ruiz-Jarabo Colomer of 12. 9. 2006 in Case 303/05 *Advocaten voor der Wereld*, para. 14.

¹⁴ ECJ C-303/05 Judgment of 3. 5. 2007 *Advocaten voor der Wereld*, para. 46.

¹⁵ ECJ C-303/05 Judgment of 3. 5. 2007 *Advocaten voor der Wereld*, para. 50, with reference to ECtHR judgment of 22 June in *Coëme and Others v. Belgium*, Reports 2000-VII, §145.

upon the applicable law of the Member State issuing the European Arrest Warrant”.¹⁶

Such reasoning, however, is very formalistic and unworldly, and it does not fully consider the impact of the principle of legal certainty.¹⁷ The key question is not whether in the national justice systems criminal statutes are formulated precisely or if law enforcement agents adhere to basic principles, but whether a person “may know without ambiguity what are [her or his] rights and obligations and take steps accordingly”.¹⁸

The reasoning in *Advocaten voor der Wereld* is surprising, because the ECJ demonstrated greater prudence in other cases. For instance, it held that “if a legal act is not available in the language version of the Member State, it cannot be held against an individual until the date in which the issue of the Official Journal is actually available”.¹⁹

According to this doctrine, a person may only be subject to the EAW framework if she or he knows the relevant criminal statutes of all cooperating states, as otherwise he or she cannot avert prosecution or rather the issuing of an EAW.²⁰ However, being knowledgeable of 27 (+2) criminal justice systems is a rather unreasonable and unaccomplishable demand.

b) Assessment in the case law of the German Constitutional Court

The risk of infringing on legal certainty has also been a constant threat concerning the rulings of the German Constitutional Court on cases involving the specific instrument of mutual recognition, which is heavily applied in practice, namely the European Arrest Warrant (EAW).

Recently, in a judgment of 3 September 2009, for instance, the Court has impeded the extradition of a German Greek national to Greece (for charges of money laundering and corruption)²¹ with the following statement being the first of its kind, after the judgment declaring the German European Arrest Warrant Act unconstitutional and void:²²

”Legal certainty is a basic requirement for freedom, i. e. for the self-determination of a citizen to realize his or her vision of one’s own life.” (“Die Verlässlichkeit der Rechtsordnung ist wesentliche Voraussetzung für Freiheit, das heißt für die Selbstbestimmung über den eigenen Lebensentwurf und seine Umsetzung.“)²³

¹⁶ *Klip*, ECL 2009, p. 173.

¹⁷ See also *V. Mitsilegas*, ELJR (2007) 303; *E. Herlin-Karnell*, 14 *Maastricht J. Eur. & Comp.L.* 15 2007.

¹⁸ ECJ C-439/01 Judgment of 16. 1. 2003 *Cipra and Kvasnicka*, para. 47; ECJ C-169/80 Judgment of 9. 7. 1981 *Gondrand Frères and Garancini*, para. 17; ECJ 257/86 Judgment of 21. 6. 1988 *Commission v. Italy*, para. 12; ECJ 325/85 Judgment of 15. 12. 1987 *Ireland v. Commission*, para. 18.

¹⁹ ECJ C-98/78 Judgment of 25. 1. 1979 *A. Racke v. Hauptzollamt Mainz*. ECJ C-88/76 Judgment of 31. 3. 1977 *Société pour l’exportation des sucres SA v. Commission*, it was published and distributed later because of a strike.

²⁰ See also: *E. Guild*, *European Law Journal* 10 2004, 218, and Special issue on EU Criminal Law in 12 *Maastricht J. Eur. & Comp.L.* 115 2005; *E. Herlin-Karnell*, *German Law Journal* 8, 1147, 1152.

²¹ BVerfGE of Sept. 3rd, 2009 (2 BvR 1826/09).

²² BVerfGE of July 18th, 2005 (2 BvR 2236/04), para. 85 (published in BVerfGE 113, 273).

²³ BVerfGE of Sept. 3rd, 2009 (2 BvR 1826/09), para. 18.

In the earlier judgment, the Court basically vested a citizen with the right to trust in the validity of the national law, at least as long as the action had taken place in his or her home country, claiming that otherwise he or she would be made subject to a law, would have to face prosecution based on criminal statutes, which were basically unknown and unfamiliar to him or her, thus making it difficult or even impossible for the citizen to ascertain relevant rights and obligations („...bindet ihn auch im Ergebnis an ein materielles Strafrecht, das er demokratisch mitzugestalten nicht in der Lage war, das er – anders als das deutsche Strafrecht – nicht kennen muss und das ihm in vielen Fällen wegen mangelnder Vertrautheit der jeweiligen nationalen öffentlichen Kontexte auch keine hinreichend sichere Parallelwertung in der Laiensphäre erlaubt.“).²⁴

The German Constitutional Court has emphasized its doubts towards European criminal law, or rather criminal law determined by European specifications in its judgment on the Lisbon Treaty. In this decision it holds: Criminal punishment must be based on guilt, which “presupposes human beings who themselves determine their actions and can decide in favour of right or wrong ...”.²⁵ Clearly such a decision is impossible without a knowledge of the relevant law.²⁶

2. Possible solutions?

Is there a remedy for the infringement on the principle of legal certainty, which is functionally linked to the culpability principle, – either on the procedural level or by establishing a new substantive requirement for cross-border prosecution?²⁷

a) Territoriality proviso

Could a territoriality proviso provide sufficient protection for the individual?

The Framework Decision on the European Arrest Warrant (as well as those frameworks and decisions establishing other instruments of mutual recognition) consider such provisos: judicial authorities of an EU-Member State may refuse extradition when the warrant relates to offences which “are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State”. This territoriality-based prevailing jurisdiction played an important role during the implementation of the instruments of mutual recognition in the EU Member States – aiming at preserving sovereignty in criminal law enforcement in certain cases, but also (at the same time) taking into account the principle of legal certainty.

²⁴ BVerfGE of July 18th, 2005 (2 BvR 2236/04), para. 85 (published in BVerfGE 113, 273).

²⁵ BVerfGE of June 30th, 2009, – 2 BvE 2/08 – 2 BvE 5/08 – 2 BvR 1010/08 – 2 BvR 1022/08 – 2 BvR 1259/08 – 2 BvR 182/09, para 364 (published in BVerfGE 123, 267).

²⁶ *Ch. Safferling*, A Criminal Law for Europe: Between National Heritage and Transnational Necessities, 10 German Law Journal 2009, p. 1386.

²⁷ For further approaches to solutions see *P. Asp/D. Frände/A. von Hirsch*, Double Criminality and Transnational Measures in EU Criminal Proceedings, *Zeitschrift für Internationale Strafrechtsdogmatik* 2006, 512 as well as European Criminal Policy Initiative, Manifesto no. 4 (<http://sites.google.com/site/eucrimpol/manifest>).

Both arguments emerge from the German Constitutional Court's ruling on the EAW. The Court explained that in cases in which a significant domestic connecting factor is established, the "trust of German citizens in their own legal order shall be protected".²⁸ The judges in Karlsruhe, therefore, obliged the German lawmaker to put special emphasis on this consideration when drafting a new law implementing the European Arrest Warrant. German legal scholars criticized the Constitutional Court for overemphasizing the legal interdependency between the German state and its citizens.²⁹ However, while reading the judgment and keeping the threat to the principle of legal certainty in mind, a different opinion, which is justified by the Court's explanation on how to handle alleged perpetrators being accused of crimes committed abroad, prevails:

„People, who take actions in another jurisdiction, must know that they will be judged according to the law of that jurisdiction.”³⁰ Consequently, even if the perpetrator of a crime succeeded in escaping to his or her home country, the judges did not consider his or her nationality to impede extradition.

Territoriality provisos, however, have certain drawbacks. First of all, the national jurisdictions provide differing concepts with regard to an act having been committed in whole or in part in the territory of its state.

Secondly, territorial exemptions could lead to the establishment of a national safe haven. If – for instance – a country is lenient when it comes to fraudsters, they would operate from that country being protected in the middle of the (appointed) area of freedom, security and justice.

b) New test for mens rea?

If one rejects the procedural remedy of a territorial clause, substantive law could provide a solution instead. Criminal liability requires “a guilty mind”: “Actus non facit reum nisi mens sit rea” (an act does not make [a person] guilty unless the mind be guilty). This basic principle applies world-wide.

A person who is ignorant about his or her legal obligations, which we assumed is the case after the abolishment of dual criminality, cannot have a “guilty mind”. However, ignorance of law is no excuse, except in very rare cases.

A merchant who sells useless hair restorer, but takes precautions to go unpunished under the law of his home country, does not break the law of that country – he may, however, still commit a crime in other countries.

This problem is not unknown in European law, which often deals with cross-border activity. Again, the case law of the ECJ shows that – depending on their professional activity – individuals may have to proceed with a high degree of caution.³¹ Consistent with the reasoning in *Advocaten voor der Wereld*, the

²⁸ BVerfGE of July 18th, 2005 (2 BvR 2236/04), para. 86–87 (published in BVerfGE 113, 273).

²⁹ See e. g. U. Hufeld, *Juristische Schulung* 2005, 865, 866.

³⁰ BVerfGE of July 18th, 2005 (2 BvR 2236/04), para. 86 (published in BVerfGE 113, 273).

³¹ ECJ C-189/02 P Judgment of 28. 6. 2005 *Dansk Rørindustri v. Commission*. Joined Cases: ECJ C-202/02 P Judgment of 28. 6. 2005 *Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH v. Commission*, ECJ C-205/02 P to ECJ C-208/02 P and ECJ C-213/02 P Judgment of 28. 6. 2005 *KE KELIT Kunststoffwerke GmbH v. Commission*, para. 219.

Luxembourg Court has held before that the principle of legality is satisfied “where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable”.³²

The emphasis of the Luxembourg Court is rather on the element of *lex certa* than on the element of (de facto) foreseeability. In criminal proceedings against X, the Court considered:

“the principle that a provision of the criminal law may not be interpreted extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable in law.”³³

This approach to legal certainty offers only restricted leeway to consider the importance of individual knowledge.

IV. Conclusion

It is true that ignorance of the law can be – in principle – no excuse in criminal law.

This finding, however, may be one of the key factors in order to solve the problem of a constricted principle of legal certainty in a framework merging various national criminal justice systems: an explanation as to why – or rather when – ignorance cannot be an excuse is the following: “The [...] rule that ignorance is not a valid excuse, must be valid in most cases, because [...] to admit the excuse [...] would be to encourage ignorance”.³⁴ Whereas a person who takes reasonable steps to learn the law, but is de facto unable to eliminate the risk of error should be excused.³⁵

The establishment of a reasonable duty to learn and know the law, potentially leading to punishment in case this obligation should be violated, might provide a possibility to create a more complex system of allocating the risk that ignorance of foreign laws brings about, thus balancing the interests of the individual by means of a protection based on the principle of certainty of law against the objective of effective cross-border law enforcement in a European area of freedom, security and justice based on the principle of mutual recognition.

³² ECJ C-308/06 Judgment of 3. 6. 2008 *The Queen on the application of: International Association of Independent Tanker Owners (Intertanko), International Association of Dry Cargo Ship owners (Intercargo), Greek Shipping Co-operation Committee, Lloyd’s Register, International Salvage Union v. Secretary of State for Transport*, not yet reported, para. 71.

³³ Joined Cases ECJ C-74/95 and ECJ C-129/95 Judgment of 12. 12. 1996 *Criminal proceedings against X*, para. 25.

³⁴ O. Wendell Holmes, *The Common Law* 48, 1881, at 48.

³⁵ See D. Kahan, 96 *Michigan Law Review* 127, 1997, at 134.