

# EUROPEAN CRIMINAL LAW

## An Integrative Approach

André KLIP

2<sup>nd</sup> edition



intersentia

Cambridge - Antwerp - Portland

# TABLE OF CONTENTS

PREFACE FOR THE SECOND EDITION .....	v
PREFACE FOR THE FIRST EDITION .....	vii
LIST OF ABBREVIATIONS .....	xvii
CHAPTER 1.	
INTRODUCTION .....	1
1. European Criminal Law .....	1
2. The Structure of the Book .....	3
3. The Treaty of Lisbon and the Use of Terminology .....	7
4. Methodology and Characterisation of the Law .....	8
5. Currency of this Book .....	10
<i>PART I. THE LEGAL ORDER OF THE UNION</i>	
CHAPTER 2.	
INSTITUTIONAL FOUNDATIONS OF THE EUROPEAN UNION .....	13
1. Introduction .....	13
2. From the European Coal and Steel Community to the European Union .....	13
3. Two Converging Areas: The Internal Market and the Area of Freedom, Security and Justice .....	15
3.1. A New Legal Order .....	15
3.2. Sincere Co-Operation .....	16
3.3. The Three Pillars of Maastricht .....	17
3.4. One Legal Order for the Union .....	19
3.5. Application of Internal Market Principles on the Area of Freedom, Security and Justice .....	20
4. European Integration .....	22
4.1. European Integration .....	23
4.2. Common Policies and Co-Ordination .....	27
4.3. Tools .....	29
4.4. Harmonisation and Approximation .....	31

4.5.	The Principles of Conferral, Subsidiarity and Proportionality . . . . .	34
4.6.	Fundamental Aspects of the Criminal Justice System . . . . .	36
4.7.	The Effects of Harmonisation: A Critical Assessment . . . . .	38
5.	Institutions, Agencies, Bodies and Offices . . . . .	41
5.1.	Institutions . . . . .	41
5.2.	Agencies . . . . .	47
5.3.	Bodies and Offices in the Field of Criminal Law . . . . .	47
<b>CHAPTER 3.</b>		
<b>CONSTITUTIONAL PRINCIPLES OF UNION LAW . . . . .</b>		<b>49</b>
1.	Introduction . . . . .	49
2.	Legal Acts of the Union . . . . .	49
2.1.	Post-Lisbon Legislation . . . . .	49
2.2.	Pre-Lisbon Legislation . . . . .	52
2.3.	Choice of the Union Act . . . . .	58
2.4.	Variable Geometry: Diverging Application of the Law . . . . .	59
3.	Rules on the Enforcement of Union Law . . . . .	64
3.1.	Union Law Creates Its “Own Legal System” . . . . .	64
3.2.	The Principle of Sincere Co-Operation . . . . .	69
3.3.	Freedom of Choice of Means . . . . .	78
4.	Substantive Rules of Union Law: The Five Freedoms . . . . .	80
4.1.	Introduction . . . . .	80
4.2.	Free Movement . . . . .	81
4.3.	The Need to Fall within the Scope of the Treaties . . . . .	90
4.4.	No Discrimination upon the Basis of Nationality . . . . .	93
4.5.	Mutual Recognition and Mutual Trust . . . . .	96
4.6.	Justified Restrictions on Free Movement . . . . .	99
4.6.1.	Justifications . . . . .	100
4.6.2.	Substantive Rights in Secondary Legislation . . . . .	112
4.7.	The Stand-alone Status of Secondary Legislation . . . . .	115
4.8.	Outside the Scope of the Treaties? . . . . .	117
5.	The Interpretation of Union Law . . . . .	126
5.1.	Competence of the Court . . . . .	126
5.1.1.	The Lisbon Competence . . . . .	127
5.1.2.	The Transition Period: The First Five Years until 1 December 2014 . . . . .	128
5.2.	Admissibility of the Reference . . . . .	133
5.3.	Sources and Techniques of Interpretation . . . . .	143

## PART II. CRIMINAL LAW IN THE EUROPEAN UNION

### CHAPTER 4.

EUROPEAN SUBSTANTIVE CRIMINAL LAW .....	159
1. Introduction .....	159
2. Legislative Competences of the European Union in Criminal Law. ....	165
3. Fragments of the General Part of Criminal Law .....	178
3.1. Legality .....	179
3.2. Jurisdiction .....	191
3.2.1. Territorial Jurisdiction .....	191
3.2.2. The Flag Principle .....	193
3.2.3. The Active Nationality Principle .....	194
3.2.4. The Passive Nationality Principle .....	196
3.2.5. The Domicile Principle .....	196
3.2.6. The Principle of Complementary Jurisdiction .....	197
3.2.7. The Protective Principle .....	197
3.2.8. The Principle of Universal Jurisdiction .....	198
3.2.9. The Prevention of Conflicts of Jurisdiction .....	198
3.2.10. Jurisdictional Principles in the European Union .....	199
3.3. The Objective and Subjective Element of the Crime .....	200
3.3.1. <i>Actus Reus</i> .....	201
3.3.2. <i>Mens rea</i> , Intent and Strict Liability .....	202
3.4. Participation and Inchoate Offences .....	205
3.4.1. Participation .....	206
3.4.2. Inchoate Offences .....	207
3.5. Legal Entities .....	208
3.6. Justifications and Excuses .....	210
4. Special part – Eurocrimes .....	211
4.1. Crimes Against Fair Competition .....	212
4.2. Crimes Against (the Integrity of) the Financial Sector .....	213
4.3. Crimes Against the Financial Interest of the Union .....	215
4.4. Crimes Against Human Dignity .....	215
4.5. Crimes Against the Democratic Society .....	215
4.6. Crimes Against the Integrity of Public Administration .....	216
4.7. Crimes Against Public Health .....	217
4.8. Crimes Against the Fair Administration of Justice .....	217
4.9. Crimes Against the Environment .....	218
5. A European Criminal Policy? .....	218
6. Implementation into National Criminal Law .....	221

<b>CHAPTER 5.</b>	
<b>EUROPEAN CRIMINAL PROCEDURE</b> .....	<b>225</b>
1. Introduction .....	225
2. The General Principles of Union Law .....	228
2.1. Fundamental Rights .....	229
2.2. General Principles of Criminal Procedure .....	233
2.3. The Accession of the European Union to the ECHR .....	247
2.3.1. Complaints Against the European Union .....	247
2.3.2. The Protocol on the Accession .....	249
3. The Right to Prosecute .....	251
3.1. Introduction .....	251
3.2. <i>Ne Bis in Idem</i> .....	251
3.2.1. Article 54 CISA .....	251
3.2.2. “Finally Disposed of” .....	253
3.2.3. The Same Act .....	258
3.2.4. Two Types of Mutual Recognition .....	261
3.3. Other Reasons Restricting the Right to Prosecute .....	262
3.3.1. Time Bars to the Prosecution .....	262
3.3.2. Immunity .....	263
3.3.3. Other Formalities .....	267
4. To Prosecute or Not to Prosecute? .....	268
5. Investigations, Coercive Measures and Evidentiary Matters .....	272
5.1. Investigations .....	272
5.2. Evidence Collected by National Authorities .....	274
5.3. Evidence Collected by the Commission .....	276
5.4. Weight of Evidence/Degree of Proof .....	280
5.5. Detention on Remand/Eligibility for Bail .....	281
5.6. Provisional Arrest .....	284
5.7. Data Protection .....	285
6. <i>Sui Generis</i> Measures: Freezing Orders, Sanctions and Boycotts .....	286
7. The Scope and Form of the Criminal Proceedings .....	291
8. National Implementation and Preliminary References .....	296
8.1. Implementation .....	296
8.2. Interpretation in Conformity with the Directive or Framework Decision .....	296
8.3. The Procedural Consequences of a Finding that National Law Must Be Set Aside .....	302
8.4. A Question of Interpretation .....	303
8.5. Reference to the Court .....	307
8.6. Proceedings before the Court .....	311
8.7. The Answer of the Court .....	313

**CHAPTER 6.**

<b>EUROPEAN SENTENCING AND PENITENTIARY LAW</b> .....	315
1. Introduction .....	315
2. Penalties to be Provided under National Law .....	316
3. Sentencing Criteria .....	324
4. The Character of Punishment and the Treatment of Sentenced Persons .....	330

**PART III. EUROPEAN CO-OPERATION AND EUROPEAN ENFORCEMENT****CHAPTER 7.**

<b>BILATERAL CO-OPERATION IN CRIMINAL MATTERS</b> .....	335
1. Introduction .....	335
2. The Historical Development of Co-Operation in Criminal Matters .....	336
2.1. The Network of Multilateral Treaties Created by the Council of Europe .....	336
3. Models of Co-Operation .....	342
3.1. The Request Model .....	343
3.2. The Mutual Recognition Model (Order Model) .....	356
3.3. The Availability Model .....	357
3.4. Vertical Co-Operation .....	358
3.5. Extra-Territorial Investigations and Self-Help .....	361
4. Mutual Recognition as a Cornerstone Principle .....	362
4.1. What Does Mutual Recognition Mean? .....	362
4.2. What Triggers Mutual Recognition? .....	369
4.3. The Absolute Character of the Obligation to Recognise .....	371
4.4. The Character of Mutual Recognition .....	387
4.5. The Consequences of Mutual Recognition .....	392
5. Forms of International Co-Operation .....	395
5.1. Mutual Assistance .....	395
5.1.1. The Exchange of Information .....	396
5.1.2. The Collection of Evidence .....	399
5.1.3. The Facilitation of Criminal Proceedings .....	401
5.1.4. Serving the Interests of Third Parties .....	402
5.1.5. The Building of Skills and Expertise .....	402
5.1.6. The Building of Liaisons .....	403
5.2. European Supervision Order in Pre-Trial Procedures .....	404
5.3. The Transfer of Proceedings, the Resolution of Conflicts of Jurisdiction and the Concentration of Proceedings .....	406
5.4. Extradition or Surrender of Persons .....	411

5.5.	The Transfer of the Execution of Judgments. . . . .	413
5.6.	Supervision of Decisions Other than Unconditional Imprisonment	417
6.	The Position of the Defence in Co-Operation in Criminal Matters. . . . .	419
6.1.	The Possibilities of Requesting International Co-Operation. . . . .	419
6.2.	The Rights of the Defence in International Co-Operation. . . . .	420
6.3.	Legal Remedies and the Responsibility of Co-Operating Member States . . . . .	421
6.4.	Human Rights and International Co-Operation in Criminal Matters . . . . .	422

**CHAPTER 8.**

**MULTI-LATERAL CO-OPERATION AND DIRECT ENFORCEMENT . 431**

1.	Introduction . . . . .	431
2.	Multi-Lateral Co-Operation. . . . .	432
2.1.	The Police Level. . . . .	432
2.1.1.	Automated Computerised Systems . . . . .	432
2.1.2.	Europol: Intelligence Centre for Strategic Analysis . . . . .	435
2.1.3.	Multi-Lateral Investigations: Joint Investigation Teams . . . . .	445
2.2.	Prosecutorial Level: Eurojust . . . . .	448
2.3.	The Judicial Level: the European Judicial Network. . . . .	452
2.4.	Common Prevention of Piracy . . . . .	453
3.	Direct Enforcement . . . . .	454
3.1.	Competition Law. . . . .	454
3.2.	The European Public Prosecutor's Office . . . . .	459
4.	The Position of the Defence in Multi-Lateral Co-Operation and Direct Enforcement . . . . .	464
5.	The Emergence of Co-Ordinated European Investigations. . . . .	465

**PART IV. THE CHALLENGES FOR EUROPEAN CRIMINAL LAW**

**CHAPTER 9.**

**RETHINKING EUROPEAN CRIMINAL LAW . . . . . 469**

1.	Introduction . . . . .	469
2.	The Convergence of the Internal Market and the Area of Freedom, Security and Justice . . . . .	469
3.	Rights for Citizens and Rights for Member States . . . . .	470
4.	Freedom of Movement and Equal Treatment as the Fifth Freedom . . . . .	472
5.	Mutual Recognition: From a State Approach to a Union Approach . . . . .	473
6.	The Added Value of Transfer of Proceedings. . . . .	475
7.	Sincere Co-Operation and Enforcement Through Criminal Law . . . . .	476
8.	The General Principles of the Union's Criminal Law. . . . .	476

9. The Uniform Interpretation of the Law and the Diverging Application of the Law. ....	477
10. Fundamental Aspects of the National Criminal Justice System. ....	478
11. Union Law as Common Law .....	479
12. The Emergence of a European Criminal Justice System .....	479
13. Human Rights Protection as a Collective Responsibility .....	481
14. The Model for the European Public Prosecutor's Office .....	483
15. Building Mutual Trust in Times of Upcoming Nationalism. ....	483

## **ANNEXES**

<b>TABLE OF CASES</b> .....	487
<b>TABLE OF LEGISLATION</b> .....	531
<b>SELECTED BIBLIOGRAPHY ON EUROPEAN CRIMINAL LAW</b> .....	547
<b>LITERATURE ON EUROPEAN CRIMINAL LAW IN THE MEMBER STATES</b> .....	553
<b>RELEVANT WEBSITES</b> .....	569
<b>INDEX</b> .....	571