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Selected Remarks on the Limits of Consistent Interpretation of Criminal Law*

1. Introduction

There is no doubt about the fact that most frequent problems related to the correct reconstruction of the substantive criminal law norm in EU matters occur in the case of legislative omission (or improper or untimely implementation) on the part of the national legislator, which is not at all unusual in the Member States legal systems. In such a situation, the attempt of the national court to ensure the maximum effectiveness of EU law will most often be realized through the interpretation of national law in accordance with the purposes and wording of European Union law, commonly referred to as a consistent interpretation[1]. As G. Betlem and A. Nollkaemper point out, the principle of pro-EU interpretation is the most important doctrine of Community law to be used by national courts in order to ensure the effectiveness of „international law"[2]. In fact it means „a targeted process of

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[1] There is no uniform definition of the commented principle in the literature and jurisprudence. It is commonly known as: indirect effect, concurring or concurrent interpretation, loyal interpretation, harmonious interpretation, benevolent interpretation, conciliatory interpretation, consistent interpretation, interpretative obligation, principle of purposive interpretation, *Von Colson* principle, uniform interpretation, invocabilité d'interprétation. Despite of the above it is usually described as an indirect effect. See. S. Prechal, *Directives*…, p. 181; G. Betlem, *The Doctrine*…, *passim*; G. Betlem, A. Nollkaemper, *Giving*…, *passim*; P. Craig, *The legal*…, p. 349–377.

[2] G. Betlem, A. Nollkaemper, *Giving*…, p. 571.

changing or shaping national law to match him to the EU norm"[3], as developed in the CJEU case law[4].

It is widely accepted that the general basis for this type of obligation (also in the aspect referring to the directive) is art. 4 (3) TEU (former Article 10 TEC) expressing the principles of loyal cooperation and efficiency[5]. Basing consistent interpretation directly on treaties results in imposing a special legal obligation on the Member States, which affects the discretion of the judge's authority by modifying – to some extent – the rules of interpretation applied to date, as well as causing that the failing to interpret consistently with EU law may be considered as a violation of the primary law of the EU (with all the consequences resulting from that)[6].

Despite the fact that the duty of consistent interpretation in the sphere of criminal law was explicitly highlighted already in 2005 in the *Pupino*[7] case, in the literature for a long time there was no broader study devoted to this issue[8].

In the meantime, precisely on the basis of this area of law (especially substantive criminal law) the principle discussed may give rise to a series of various complications, in particular due to the need for the national court to take into consideration many specific and appropriate rules of interpretation in this field – significantly different from those commonly used by the Court of Justice[9]. Moreover, if we take into account the rulings of the Court

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[3] See A. Wróbel, *Wykładnia*…, p. 112.

[4] See in particular the CJEU judgements, C-14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153; C-106/89, *Marleasing v. Comercial Internacional de Alimentación*, ECLI:EU:C:1990:395; CJEU judgment in the joined cases C-397/01 to C-403/01, *Pfeiffer and Others*, ECLI:EU:C:2004:584.

[5] See M. Rams, *Specyfika*…, p. 151–157. See also C-14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, para. 26.

[6] See C. Mik, *Wykładnia*…, p. 125.

[7] Case C-105/03, *Pupino*, ECLI:EU:C:2005:386.

[8] It should be pointed out that the available studies on the subject of consistent interpretation were almost exclusively related to general issues, relevant to the law of the former first pillar of the European Union. In this matter see in particular G. Betlem, *The Doctrine*…; G. Betlem, A. Nollkaemper, *Giving*…; S. Haket, *Coherence*…, p. 215–246; A. Sołtys, *Obowiązek*…; S. Biernat, *Wykładnia*…; C. Mik, *Wykładnia*…; T.T. Koncewicz, *Sędziowski*…; K. Kowalik-Bańczyk, *Prowspólnotowa*…; S. Prechal, *Directives*… Regarding publications relating to the consistent interpretation of criminal law, see M. Rams, *Specyfika*…; M. Rams, *Problems*…, p. 1–24; A. Sakowicz, *The principle*…, p. 83–97.

[9] The problems that may arise in connection with the need to include the CJEU jurisprudence into national law may best be demonstrated by the broad discussion on the possibility of refusal by national courts to apply the non-notified provisions of the Polish Gambling Act. In this regard, see especially *separate opinion of the Judge*

of Justice on the inability of the state to refer to an unimplemented or improperly implemented directive[10], there is no doubt that on the basis of this law, consistent interpretation can actually fulfill one, if not the only, mechanism enabling ensuring the so-called indirect effect of the European Union Law[11].

2. Interpretation of criminal law in the previous rulings of the Court of Justice and its influence on consistent interpretation

It should be pointed out that until the Treaty of Lisbon came into force the competence of the EU (then Community) in the field of criminal law had been quite widely questioned[12], and the legal issues were in general connected with the „intergovernmental" area of cooperation on the third pillar of the European Union. At the same time, even if there had been any considerations on the interpretation of compatible EU law from the period following the adoption of the above-mentioned *Pupino* ruling, they referred more to issues on the meeting point of EU law and constitutions, and left aside practical problems associated with setting limits of interpretation in the field of criminal law (especially procedural law).

The issues analyzed, in particular in the aspect of observable changes in the interpretation paradigm, have not been the subject of broader deliberations so far in the sphere of substantive and procedural criminal law. This causes a quite specific, highly positivist approach to the interpretation of repressive law visible in the continental penal literature up until now, which very often does not match the current practice of application of such law[13]. Of course, this is connected with the existing understanding of concepts, rules and interpretative principles used, as well as – most importantly – the maladjustment of the developed guarantee mechanisms to the changing reality

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of the Polish Constitutional Tribunal Stanisław Biernat to the decision of the Tribunal of 11 March 2015, P 4/14, Dz.U. 2015, poz. 369 . See also M. Rams, *Problems*…, *passim*.

[10] See in particular C-80/86, *Kolpinghuis Nijmegen*, ECLI:EU:C:1987:431 and C-168/95, *Arcaro*, ECLI:EU:C:1996:363.

[11] When, through the so-called „indirect effect of the directive", similar (and sometimes even analogous) results are achieved to those resulting from its direct effectiveness.

[12] See in particular C. Mik, *Europeizacja*…, p. 85, with reference to CJEU judgements: dated 4th December 1995 in the case 387/93, *Criminal proceedings against Giorgio Domingo Banchero*, ECLI:EU:C:1995:439; C-144/95, *Criminal proceedings against Jean-Louis Maurin*, ECLI:EU:C:1996:235 and C-58/95, *Criminal proceedings against Sando Galotti and Others*, ECLI:EU:C:1996:323.

[13] See A. Wróbel, *Wykładnia*…, p. 122.

(even in the aspect of interpretation carried out exclusively on the national level). This is particularly evident in the confrontation with the typically functional (teleological) model of interpretation that dominates in the jurisprudence of the Court of Justice[14], where the main principle of interpretation – also in the context of repressive law – seems to be the postulate *in dubio pro Communitate*[15].

In this context, one cannot forget how important role interpretation of law plays in EU criminal law. This can be clearly seen, for example, in the rulings of the Court of Justice, which since the 1970s has had a huge impact on the shaping of criminal law within the Member States. Initially, this was mainly due to the imposition of an obligation on the Member States of using „effective, proportionate and dissuasive" penalties[16] for violation of EU law (which in fact meant criminalization), or the principle of „neutralizing effect" (which means that Community Law had a neutralizing effect on internal criminal law)"[17]. Then, with the help of fairly creative practice (sometimes referred to by the CJEU as „discovering the spirit of the treaties") the supposedly „intergovernmental" plane of cooperation was supplemented with ever new supranational elements appropriate to the sphere of old community law („depillarization trend")[18]. All that, including the recognition of Community competence in some criminal cases under the judgments in cases C-176/03 and C-440/05, *Commission v. Council*[19] and the simultaneous introduction of the first pillar elements to the area of judicial cooperation in criminal matters through rulings in C-105/03 – *Pupino*[20] and C-303/05 – *Advocaten voor de Wereld VZW*[21], caused that even the later treaty reform (made on the basis of the Treaty of Lisbon) was no longer so important, because it

[14] See M. Szuniewicz, *Interpretacja*…, p. 44–45.

[15] See M. Szuniewicz, *Interpretacja*…, p. 42.

[16] Case C-2/88, *Zwartveld and Others*, ECLI:EU:C:1990:440; case C-186/98, *Nunes and de Matos*, ECLI:EU:C:1999:376; case C-14/86, *Pretore di Salò v X*, ECLI:EU:C:1987:275; case 80/86, *Kolpinghuis Nijmegen*, ECLI:EU:C:1987:431; case C-168/95, *Arcaro*, ECLI:EU:C:1996:363; joined cases C-74/95 and C-129/95, *Criminal proceedings against X*, ECLI:EU:C:1996:491; joined cases C-387/02, C-391/02 and C-403/02, *Silvio Berlusconi and Others*, ECLI:EU:C:2005:270. See also R. France, *The influence*…, p. 168.

[17] M. Delmas-Marty, M.A. Summers, G. Mongin, *What*…, p. 29.

[18] See, in particular, E. Herlin-Karnell, *In the Wake*…, p. 1148.

[19] Case C-176/03, *Commission v Council*, ECLI:EU:C:2005:542; case C-440/05, *Commission v Council*, ECLI:EU:C:2007:625.

[20] Case C-105/03, *Pupino*, ECLI:EU:C:2005:386.

[21] Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, ECLI:EU:C:2007:261.

basically „codified" what it had already been achieved by the Court of Justice through various interpretative activities[22].

As already indicated above, CJEU as part of its judicial activity uses its own model of interpretation of law, where strict assignment to interpretative concepts known in the national context is probably not possible. Of course, regardless of the fact that the CJEU also begins the interpretation with the language method, even in the area of criminal law, this method is not dominant[23]. On the contrary, the special character of the EU legal order warrants frequent use of non-linguistic methods of interpretation, i.e. the systemic method (including systematic / contextual) as well as the functional-teleological methods. At the same time, they have a somewhat different character on EU soil than under national law. This is dictated in the first place by the multilingual nature of European law and the principle of equal authenticity of the national languages of the Member States (which forces the need for additional use of comparative method, as a rule not known in the national context)[24]. Secondly, if you pay attention to the specific character of the European Union in relation to international and national law, it will often be difficult to distinguish the systemic method from the functional and teleological interpretation that corresponds to it. It is this last method (containing a compilation of teleological and functional elements) – clearly dominant in the judicature of the Court – that is in a sense its hallmark, which is manifested in the above-mentioned formulation *in dubio pro Communitate*.

Of course, the approach described above will not be equally applicable in every case of criminal-law norms. In particular, with regard to substantive criminal law, CJUE seems to retain greater restraint by referring to key principles in this regard, such as, for example, *nullum crimen, nulla poena sine lege,* or *lex retro non agit* (however specifically understood)[25], but it is different in relation to procedural rules[26]. At the same time, it is not

[22] See M. Rams, *Specyfika*…, p. 50–77.

[23] See C. Gulman, *Methods*…, p. 198–199.

[24] In this matter see in particular A. Doczekalska, *Interpretacja*…; A. Doczekalska, *All Originals*…

[25] See in particular CJEU judgments C-14/86, *Pretore di Salò v. X*, ECLI:EU:C:1987:275; C-80/86, *Kolpinghuis Nijmegen*, ECLI:EU:C:1987:431; C-168/95, *Arcaro*, ECLI:EU:C:1996:363; joined cases C-74/95 and C-129/95 *Criminal proceedings against X*, ECLI:EU:C:1996:491.

[26] It should be noted that CJEU in its judgements consequently distinguishes substantive criminal law from procedural criminal law, nevertheless this division is not always clear, as CJEU wanted. See F. Giuffrida, *The limitation*…, p. 105. With reference to A. Dashwood, M. Dougan, E. Spaventa, D. Wyatt, *European*…, p. 2440.

a clear method on the basis of which such a division is made by the Court, especially because it sometimes seems to be purely functional (among others, in the perspective of the above-mentioned principles, provisions of the statutes of a procedural nature whose specific application may lead to the perpetrator being prosecuted are not taken into consideration). In particular, if you look at the judgment of the Court in *Pupino*[27], *Advocaten voor de Wereld*[28] or the last (widely commented) ruling in the *Taricco* case[29], there is no doubt that such a strict – and not entirely clear – division very often serves the Court as a tool to use extending interpretation (at a *contra legem* border) in many places, which is aimed at ensuring the effectiveness of EU law in places where there has been untimely or incorrect implementation[30]. The obvious confirmation of such a position is, for example, the judgment of CJEU in *Pupino*, where the Court authorized the national court to apply a given provision of national law in a factual situation that was not included in the enumerative catalog of conditions under which such a provision of national law could be applied[31].

In the light of the above-mentioned remarks, there is no doubt that any considerations regarding consistent interpretation in the sphere of criminal

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[27] Case C-105/03, *Pupino*, ECLI:EU:C:2005:386.

[28] Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, ECLI:EU:C:2007:261.

[29] Case C-105/14, *Ivo Taricco and Others*, ECLI:EU:C:2015:555, para. 58. Concerning this judgment see in particular F. Giuffrida, *The limitation*…, p. 100–112; E. Billis, *The European*…, p. 20–38; F. Grisostolo, L. Scarcella, *'Trouble*…, p. 701–713; G. Rugge, *The Italian*…, p. 21–29.

[30] There is no doubt that the methods of interpretation described above with time have penetrated the national law of the Member States, for example through the so-called „serviceable interpretation", which consists in the CJEU's providing the national court with the criteria to ensure compliance with EU law in the event of a specific interpretation national law on EU law. Although the obligation to give a consistent interpretation rests solely with national authorities and within the methods of interpretation recognized by national law, they are at the same time a commitment to ensure full effectiveness of EU law, inter alia in accordance with the indications of the Court of Justice. It also causes that more and more often in the so-called EU matters, the „purpose" of introducing a given regulation tries to overtake its „wording". Such a penetration of the Tribunal's interpretation into national law causes that a consistent interpretation should also be described as an interpretation in accordance with the purposes and wording of the law of the European Union – where „the purpose" is sometimes put before the „wording".

[31] See M. Rams, *Specyfika*…, p. 222. See also the *Opinion of Advocate General D. Ruiz-Jarab Colomer in the case C-392/04* – i-*21 Germany GmbH, Arcor AG & Co. KG v Bundesrepublik Deutschland*, ECLI:EU:C:2006:586.

law should be carried out primarily from the negative side – that is, by examining the limits of this interpretation (it must be remembered that criminal law is a kind of „boundary law"). If the national court is obliged to interpret national law in the light of EU law, then the rules developed under EU law and the interpretation made in this area by the Court of Justice will in any case constitute the first and obvious point of reference for such court[32]. It is also worth remembering that by providing the domestic court with assistance in the sphere of interpretation in compliance with EU law (the so-called „serviceable interpretation"), the Court very frequently indicates how it should be carried out in the sphere of national law, so that it is possible to achieve the result intended by the EU legislature. This in EU issues will lead to a gradual transfer of methods and boundaries of interpretation applied by the CJEU in a given field of law to the national ground.

With this in mind, I will attempt to reconstruct the most important of them in the remainder of this article, so as to ultimately attempt to define the principle of consistent interpretation in the perspective of the limits of this interpretation.

In the first place, I will refer to the situations where there is compulsory consistent interpretation at all. Next, I will analyze in detail the problem of boundaries of consistent interpretation, starting with the prohibition of *contra legem* interpretation, to the limitations arising from the most important, selected criminal law principles, such as *nullum crimen sine lege*, *lex certa, lex retro non agit, lex mitior*, and finally the right to a fair trial.

3. When is there an obligation to interpret consistently?

There is no doubt that any broader considerations about the subject of interpretation should be started by indicating in which cases the obligation in question will rest on the domestic court. As already stated, the obligation resulting from the *von Colson* formula to achieve the result provided for in the EU law acts extends not only to cases where the implementation did not take place, or was made in an untimely or incorrect manner, but also those where the provisions serving the execution of EU law have been implemented correctly into the domestic legal order[33]. This is justified because – as rightly emphasized in the literature – the process of the pro-EU

[32] It is not only about the method used by the CJEU, but also about how far the interpretation of the law in the jurisdiction of the CJEU can be.

[33] Case C-334/92, *Wagner Miret v Fondo de garantía salarial*, ECLI:EU:C:1993:945.

interpretation of national law should always include not only the wording, but also the context, system, function and purpose, which the regulation serves, the systematics of the act in which the interpreted provision is included (including its preamble), and finally the case law related to the standard and its normative environment[34]. It is also aptly pointed out that the omission of this obligation in cases where the implementation was carried out in a correct manner can lead to a „de-implementation" through case law[35]. If the commonly accepted interpretation of such a statute is too far from the EU paragon, it can sometimes be compared with such a situation, as if the implementation had not taken place at all.

There is no doubt as to the fact that the issue of a consistent criminal law is also closely related to the issue discussed above. If there is an obligation on the part of authorities of a Member State to interpret in the light of the objectives and the wording of the European Union, it would undoubtedly be necessary to indicate the initial moment of such an order. However, the ruling of the Court of Justice of 4 July 2006 in case C-212/04 – *Adeneler and others*[36] seems crucial, however, its closer analysis brings sometimes more questions than answers. The Court indicates there as a rule that consistent interpretation should be applied only when the deadline for implementation of the directive to the domestic legal order expires ineffectively. At the same time, it was stated in the same verdict that it would be incumbent on the national court since the entry into force of the Directive to exclude (as far as possible – and thus probably to the boundaries of *contra legem*) such methods of interpretation that would jeopardize the achievement of the result provided for in the current already, but not yet implemented directive[37]. Of course, it is not fully known what is the difference between the obligation to refrain from making a specific interpretation and the interpretation itself, understood in a simplified way, as determining the meaning of a legal norm. On the contrary, it seems that the „directional" lack of activity indicated in the *Adeneler* ruling may be regarded as an expression of a teleologically oriented interpretation of national law. This kind of „reverse" interpretation of the law leads, in effect, to the implementation of the result assumed by EU law in the period after the entry into force of the directive and based on the provisions of national law existing at that time (despite the fact that the implementation obligation is not formally created yet).

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[34] See C. Mik, *Wykładnia*…, p. 130–131.

[35] S. Prechal, *Directives*…, p. 188, quoted after: J.D.N. Bates, *The Impact*…, p. 185.

[36] Case C-212/04, *Adeneler and Others*, ECLI:EU:C:2006:443.

[37] Case C-212/04, *Adeneler and Others*, ECLI:EU:C:2006:443, para. 121–123.

Of course, from the point of view of the considerations discussed here, one should ask about the obligation arising from the *Adeneler* judgment in the context of the principle of *nullum crimen sine lege* or the prohibition of retroactive action of law. In the light of the consistent position of the Court, including in particular C-80/86 – *Kolpinghuis Nijmegen BV*[38], consistent interpretation is inadmissible „once the Community legal instrument to be implemented enters into force"[39] if, as a result, the criminal liability of an individual was created or bolstered. In my view, it is irrelevant whether or not the result of such a „directional" interpretation would even be within the „possible linguistic meaning of the legal text" if a particular interpretation would be justified by the need to ensure its compliance with EU law.

The slightly different conclusions can of course be reached when referring to procedural criminal law, however, in this respect, due to the nature of some norms, it is difficult to make any unambiguous conclusions. It is more likely that the final result of the interpretation will be determined only by the result of the weighing process being carried out *ad casu*. At the same time, it seems that in cases where the possibility of achieving the desired result of the directive would be considered seriously threatened *in concreto*, and if the EU paragon would act in favor of the accused and would not go beyond the minimum standard of protection of the victim under EU law, a solution should be chosen that opts for the „corrective interpretation" referred to in the *Adeneler* ruling.

4. Consistent interpretation cannot be made *contra legem*

It is worth reminding that in its previous rulings, the Court has pointed out that national courts should make consistent interpretation of national law „in so far as it is given discretion (…) under national law"[40], or should „do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it"[41].

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[38] Case C-212/04, *Adeneler and Others*, ECLI:EU:C:2006:443.

[39] Case C-212/04, *Adeneler and Others*, ECLI:EU:C:2006:443, para. 123.

[40] Case C-14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, ECLI:EU:C:1984:153, para. 28.

[41] Case C-378/07, *Angelidaki and Others*, ECLI:EU:C:2009:250, para. 200.

Starting from the *Wagner Miret* case[42], up to the latest case law, the Court also states that „the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*"[43] and „It is for the national court to determine whether, in this case, a conforming interpretation of national law is possible"[44]. Nevertheless, there is a whole range of judgments, where the manner of respecting (or perhaps even understanding) this prohibition by the Court does not appear at all that obvious. In particular, in the *Marleasing* judgment[45], the Court omitted direct reference to the interpretation rules created under domestic law, which according to some commentators would mean that EU law itself sets the rules for interpretation and their limits[46]. Similarly, in rulings passed under the former Third Pillar of the EU, where CJEU very frequently used a highly teleologically targeted approach, an expanding interpretation of law (or even omitting national law provisions that are incompatible with EU law, as a part of an consistent interpretation)[47].

Recognizing the obvious threat that this kind of uncertainty as to the outcome of interpretative activities may give rise to in the sphere of criminal law (and at the same time being aware of the difficulties associated with a precise answer to the question what such a border actually means), it seems that the *contra legem* should be clearly binding only to the acceptable linguistic meaning of the legal text, i.e. the meaning that can still be justified according to the rules of use of a given language[48].

Of course, there is no doubt about the fact that the Court's statement that the interpretation cannot lead to *contra legem* boundaries will largely depend on how the concept of interpretation will be understood, i.e. whether it is an interpretation of *sensu stricto* meaning, or an interpretation of *sensu largo*

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[42] Case C-334/92, *Wagner Miret v Fondo de garantía salarial*, ECLI:EU:C:1993:945.

[43] Case C-105/03, *Pupino*, ECLI:EU:C:2005:386. See also case C-80/86, para. 47; C-212/04, *Adeneler and Others*, ECLI:EU:C:2006:443; C-268/06, *Impact*, ECLI:EU:C:2008:223.

[44] Case C-105/03, *Pupino*, ECLI:EU:C:2005:386, para. 48.

[45] Case C-106/89, *Marleasing v Comercial Internacional de Alimentación*, ECLI:EU:C:1990:395.

[46] See S. Prechal, *Directives…,* p. 195–198.

[47] It should be remembered that such action in the CJEU jurisprudence is considered acceptable even in the context of the judgment in Case C-144/04, *Mangold*. For more on this issue see M. Rams, *Specyfika*…, p. 175–177.

[48] By the term „acceptable linguistic meaning of the legal text" I mean the lexical meaning, which is still possible according to a given language rules. Thus I will distinguish them from a narrower natural linguistic meaning, referred in this case to the typical meaning of a given expression. In this matter see also T. Spyra, *Granice*…, *passim*.

meaning[49]. However, it should be agreed with A. Wróbel that, at least within the Polish legal system, „dominated by the positivist and neo-positivist approach to law and its application", the formula proposed in the *von Colson* judgment can be understood as „prohibiting the court from going beyond its proper judicial functions (the administration of justice) in the process of making interpretations in accordance with the directives and taking functions of law-making by the court or interpreting *contra legem*"[50].

The above does not resolve all perceivable problems but clearly signals that interpretation activities conducted according to the as far as possible principle can never go beyond the limit acceptable under the rules of language use – even if it would lead to a violation of EU law. Such an assumption allows in particular to avoid a situation where a functional (teleological) interpretation displaces language meaning due to various types of legislative deficiencies perceived by the interpreter, or in some cases it would require a usage completely different regulation through analogy conducted in reality to the disadvantage of one of the parties[51].

While this does not constitute such a threat in the sphere of substantive criminal law[52], however, in cases treated as procedural, the Court repeatedly suggested to the national court an interpretation which certainly raised doubts from the point of view of the linguistic meaning of the legal text[53]; the lack of a clearly defined border of *contra legem* made it difficult to take the right interpretative decision in the case. Meanwhile, it should be remembered that also here such activities seem to be doubtful, in particular due to the right to a fair trial and the related principle of respecting legal expectations.

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[49] Where, in relation to the interpretation of *sensu stricto*, the interpretation of *praeter legem* will have to be treated as an unacceptable analogy.

[50] See A. Wróbel, *Wykładnia*…, p. 122.

[51] See, in particular, C-397/01, *Pfeiffer and Others*, ECLI:EU:C:2004:584, para. 115 – „Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive".

[52] See, in particular, C-80/86, *Kolpinghuis Nijmegen*, ECLI:EU:C:1987:431.

[53] See, in particular, the *Pupino* judgment cited above.

5. Consistent interpretation and the general rules of EU law

Since the 1970s, the case law of the Court of Justice drew attention to the need to respect fundamental rights[54]. Today, as general principles of the Union, they are finally reflected in the Charter of Fundamental Rights of the European Union. As far as the sphere of criminal law is concerned, there is no doubt that such fundamental rights recognized by the European Union include, among others the most important:

1. The principle of legal certainty.
2. The principle of *nullum crimen, nulla poena sine lege*.
3. Principle of *lex certa*.
4. The principle of *lex retro non agit*.
5. The principle of *lex mitior*.
6. The right to a fair trial.

This was clearly pointed out in the judgment of the CJEU in *Pupino* case, where it was stated that „the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by general principles of law, particularly those of legal certainty and non-retroactivity"[55].

Referring briefly to the impact of the abovementioned principles on the obligation of consistent interpretation of the national law, first of all one should refer to the most important of them, that is the principle of legal certainty. Although this principle is invoked more often as an interpretative principle than serves as a basis for evaluation, there is a consensus on the approach that community measures (today – EU measures), which violate this principle, may not be applied by the court[56]. Also the CJEU in its existing case law clearly signalised that „the effect of Community legislation must be clear and predictable for those who are subject to it"[57]. CJEU emphasises that „the principle of legal certainty requires that legal rules to be clear and precise,

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[54] See, in particular, C-11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, ECLI:EU:C:1970:114; C-4/73, *Nold KG v Commission*, ECLI:EU:C:1974:51; C-36/75, *Rutili v Ministre de l'intérieur*, ECLI:EU:C:1975:137; C-44/79, *Hauer v Land Rheinland-Pfalz*, ECLI:EU:C:1979:290.

[55] Case C-105/03, *Pupino*, ECLI:EU:C:2005:386, para. 44.

[56] T. Tridimas, *The General…*, p. 163–169.

[57] CJEU judgement in the joined cases 212 to 217/80, *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and Others*, ECLI:EU:C:1981:270.

and aims to ensure that situations and legal relationships governed by Community law remain foreseeable"[58].

The principle of *nullum crimen, nulla poena sine lege*, which refers to the requirement of legal certainty of crimes and penalties, is undoubtedly connected with the principle of legal certainty. The literature emphasizes that the essence of the discussed principle is to ensure that the citizen would be guaranteed with the existence of criminal liability boundaries as well as the limits of a possible punishment[59]. For these reasons, inter alia, the case law of the Court has consistently pointed to the significance of the discussed principle also for the EU legal order, confirming in particular that „a directive cannot, of itself and independently of a national law adopted by a member state for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive"[60].

At the same time, taking into account the differences between individual legal systems in Europe, EU law departs from a strictly positivist understanding of the principle in question, perceiving it in a manner analogous to that of the interpretation developed on the basis of art. 7 ECHR. In this way, the possibility of defining the features of a prohibited act also by court decisions is expressly allowed[61]. It is also clearly confirmed in art. 49 of the Charter of Fundamental Rights, where the principle of legal certainty refers to „law" and not to a specific act of law (as, for example, on the Polish ground, to the „statute"). Among others, Advocate General Y. Bot in paid attention to this in his opinion to case C-76/06, *Britannia Alloys & Chemicals*, claiming that „the clarity of a law is assessed having regard not only to the wording of the relevant provision but also to the information provided by existing and published case-law". What is more, in the opinion of the Advocate General, the „requirement of foreseeability" does not even exclude „if the person concerned has to take advice to assess such consequences"[62].

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[58] Case T-33/02, *Britannia Alloys & Chemicals Ltd v Commission of the European Communities*, ECLI:EU:T:2005:428.

[59] See P. Wiliński, *Konstytucyjna*…, p. 609.

[60] Case C-80/86, *Kolpinghuis Nijmegen BV*, ECLI:EU:C:1987:431, para. 13.

[61] C.C. Murphy, *The Principle*…, p. 194. See also E. Claes, M. Królikowski, *The Limits*…, p. 99.

[62] See *Opinion of Advocate General Y. Bot delivered on 1 March 2007 in the case T-33/02*, *Britannia Alloys & Chemicals Ltd v Commission of the European Communities* (and the judgment of the ECtHR cited therein in the case of *Cantoni v. France*, Reports of Judgments and Decisions, 1996-V, § 35). See also *Opinion of Advocate General*

The above leaves no doubt as to the fact that granting the European Union a clear competence in the field of criminal law will gradually have to affect the modification of the interpretative paradigm shaped in some systems, also with regard to the perception of this principle. This is particularly about cases where the criminalization of certain behaviors will occur as a result of the implementation of EU minimum standards in the field of crime and penalties into national law, or where it is necessary to read the provisions of the criminal law correctly it will be necessary to refer directly to the provisions of the regulation. At the same time, when interpreting national law consistently, national courts will be forced to take into account – as far as possible – the meaning of the provisions given to them under EU law, including the case law of the CJEU. At the same time, it cannot be ruled out that the Court of Justice alone will increasingly demand that EU issues[63] be dealt with by the EU understanding of the principle of *nullum crimen sine lege*, even if only to ensure the uniform application of EU law in individual Member States. This is particularly a matter for indicating to national courts (within the framework of the above-mentioned serviceable interpretation) that a certain way of understanding a provision that implements EU law (or executes EU law) was foreseeable, even if it went beyond the strictly literal interpretation of such a provision, but it was within its broadly understood language meaning.

In the perspective of the requirement of „foreseeability" of the law, it should also be pointed out that a consistent interpretation should also be made with respect to the *lex certa* principle. At the same time, there is no doubt that there is also a gradual departure from the traditional perception of the discussed principle. Although traditionally the requirement of the maximum specificity of a prohibited act was addressed to the legislator, the change in the interpretative paradigm seems to be gradually leading to this position gradually being revised[64].

This is connected with the gradual displacement of the linguistic method of interpretation in favor of the more and more important method of

D. Ruiz – Jarab Colomer delivered on 12 September 2006 in the case C – 303/5, para. 102 – „The protection requires a strict, unambiguous definition of offences (lex certa), so that, from the time those offences are created, and, where applicable, with the assistance of the courts, (99) individuals know with a reasonable degree of foreseeability the acts and omissions which will give rise to criminal liability, and it precludes the provisions concerned from being extensively construed by analogy, to the detriment of the accused, and from being applied retrospectively".

[63] Regarding the meaning of the term „EU issues" see, in particular, M. Wąsek-Wiaderek, *Samodzielność…*, p. 224–228.

[64] See W. Hassemer, *Einfuhrung…*, p. 256 or Ch. Peristeridou, *The Principle…*, p. 800.

teleology. This is all the more evident in the axiologically entangled case law of the CJEU, which, pointing to the need to comply with the general principles of law, strives at the same time to ensure maximum effectiveness of EU law. All this results in perceptible degradation of the principle, according to which the individual must be able to recognize the class of punishable behavior only on the basis of the statute. In such a situation, the assessment of the risk of criminalization is more and more dependent on the knowledge of sometimes rich and variable court decisions in a given matter[65].

All this means that also within the framework of a consistent interpretation, one should look at the principle of *lex certa* in a dynamic way, i.e. as a relationship between a citizen, legislator and court, where the latter using a certain margin of freedom would be able to use the methods of interpretation available to him, „adapt" national legislation to changing circumstances[66], and thus ensure that Union law is as effective as possible (fr. *effet utile*), within the limits set by the wording of law (i.e. the limit of possible linguistic meaning of the legal text defined within this work). Today, it cannot be argued that every result of interpretation that deviates from the literal meaning of a legal text should be considered as „creative"[67], it should be recognized at the same time that the aim of the principle has been to protect the „foreseeability" of law, not its „precision" which at this stage, including especially the specificity of EU law, is impossible to be achieved anyway.

Interestingly, such a proposal cannot be considered as innovative, since it is in fact a consequence of the already mentioned compromise solutions of the ECHR and CFR (which, to some extent, defy the states of common and civil law culture), where the term „law" also holds a place for interpretive activities of courts in the sense described above.

The consequence of a dynamic look at the *lex certa* principle must, of course, be a gradual change in attitude towards the institution of mistake (error) in criminal law, including, in particular, mistake as to the features of a criminal act and the unlawfulness of a behavior. The problem of its possible justification should also be borne in mind. The more so as more and more often the interpretation will be made on the basis of regulations described in various legal acts (national, but also EU), but also to do it properly, the knowledge of the rich jurisprudence of the CJEU will be necessary.

Of course, the last fragment is connected with the problem of the retroactivity of the law, which should be looked at from the other side in EU issues.

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[65] M. Rams, *Specyfika*…, p. 285–302.

[66] E. Claes, M. Królikowski, *The Limits*…, p. 99.

[67] M. Rams, *Specyfika*…, p. 285–302.

In particular, this is related to the importance of the preliminary rulings of the Court, as a clear and binding paragon in the process of reconstructing a norm subject to be applied in matters with an EU element[68]. In particular, the doctrines developed by the *acte éclairé* and *acte clair*[69] strive to give the CJEU case law a generalized and universally binding value, regardless of the context and specific decisions.

Although the Court's rulings cannot be treated in a similar way to precedents under common law, they also have a very similar function, in particular if one looks at the potential possibility for the court of a Member State to withdraw from the interpretation of EU law proposed by the CJEU. It seems that this way of the Court's decision acquires a very similar character to the concept of corrective and explanatory acts[70] that was once developed in Poland. There, too – in relation to the rulings of the Polish Constitutional Tribunal – it was pointed out that they may in certain situations be regarded as such acts of law application, which, by themselves, do not establish and do not contain any rules, but give a binding interpretation of already issued and binding provisions, or „affect their validity, thus «correcting» the content and scope of the relevant provisions"[71]. Likewise, as in the case of interpretative case law of the Constitutional Tribunal, the Court of Justice seems to be conducting interpretation applicable to an indefinite class of behavior, where in certain situations it may perform functions similar to those of the statute. Consequently – its possible change may have similar consequences for the citizen, for example leading to the achievement of such an interpretation result that would give grounds to the punishability of behaviors previously considered legal.

This is particularly the case when:

1. CJEU for the first time clarifies the legal definitions, general clauses, phrases that are not specified or other issues relevant to the application of the law used under EU law that were previously interpreted differently within a fixed interpretation national law for the implementation or execution of EU law.
2. When the Court makes a different interpretation of European law than made so far.

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[68] See footnote 63.

[69] C-283/81, *CILFIT v Ministero della Sanità*, ECLI:EU:C:1982:335; C-28/62, *Da Costa en Schaake NV and Others v Administratie der Belastingen*, ECLI:EU:C:1963:6. See also, E. Piontek, *Doktryna…*, *passim*; J. Skrzydło, *Doktryna…*, *passim*.

[70] See M. Cieślak, *Polskie…*, p. 66.

[71] M. Cieślak, *Polskie…*, p. 66.

It seems that if the impact of the interpretative case law of the European Commission on consistent interpretation on EU issues is indeed significant, then it should be considered to refer in the case of the situations described above to the prohibition of retroactivity of the law. Bearing in mind that the obligation to preserve the specificity of acts is now shared between the legislator and the courts, the change in the long-standing interpretation of the law should be subject to equal protection as in the case of amending a statute. The Court of Justice of the EU itself in a recent ruling in case C-42/17[72] – criminal proceedings against *M.A.S. and M.B.* indicated that the principle of prohibiting the deterioration of the conditions of criminal responsibility retroactively applies also with reference to its preliminary rulings. It thus breaks with a quite widely expressed position that the interpretation of law does not, as a rule, have a law-making character, and thus does not create new standards, but only decodes them from legal provisions. On the contrary, the nature of the case law is increasingly pointed to, as it is more and more law-making, including its decisive character for offenses defined in national law, where there will also be a possibility of invoking the prohibition of deterioration of the accused's situation with retrospective effect, as it is with the statute.

Of course, apart from the *lex retro non agit* principle, the Court's rulings also drew attention to the need to respect the principle of *lex mitior*, which was particularly evident in the case C-457/02 – *Niselli*[73] or C-387/02 and C-403/02 – *Berlusconi and others*[74]. It is worth remembering that the latter case clearly indicates that the principle of retroactive action of more lenient penalty should be applied only if the penalty provided for in the national law is not contrary to other norms of Community law[75].

Finally, consistent interpretation cannot be made in a way that would violate the guarantee of a fair trial. A fair trial is understood in the category of a right and not a principle, which is essentially due to its special relation with other rules in force within the criminal trial[76]. Such an assignment of a fair trial may indicate its quite general character, manifested in the multiplicity of procedural rules subjected to the protection. This is particularly evident in the situation where, as part of the suggestions to the courts of

[72] Case C-42/17, *M.A.S. & M.B*, ECLI:EU:C:2017:936.

[73] Case C-457/02, *Niselli*, ECLI:EU:C:2004:707.

[74] Joined cases C-387/02, C-391/02 and C-403/02, *Silvio Berlusconi and Others*, ECLI:EU:C:2005:270.

[75] More on this subject see M. Rams, *Specyfika*…, p. 319–331.

[76] See P. Wiliński, *Rzetelny*…, p. 25.

the Member States as to the correct direction of the pro-EU interpretation of national law, CJEU more and more often gives such interpretation tips, which in turn may lead to a lower standard of fair trial guarantees for the accused. This was the case, for example, in the case of *Pupino*, which explicitly suggested that the court should accept evidence unfavorable to the accused through interpretative actions raising fundamental doubt.

However, it is worth remembering that, probably having full awareness of the „collisions" of interests of various parties to the proceedings, the Court of Justice usually signals that it is only at the stage when the national court settles a given case when it will be possible to assess possible violation of the right to a fair trial (thus transferring the risk arising from the use of indications provided in the preliminary ruling onto national authorities). In such a situation, however, there is a fear that the courts of the Member States, striving to avoid allegations related to a possible violation of EU law, will usually follow the suggestions of the CJEU. It should be remembered, however, that also activities undertaken in this matter may be important from the point of view of the possibility of bringing the perpetrator to criminal responsibility. This is even the case when it comes to the interpretation of provisions on evidence proceedings, where the predictability of specific procedures seems to be necessary from the point of view of the accused's rights of defense. If we take into account other regulations combined with procedural law – in principle excluding typically technical provisions – one may risk the assertion that also as a result of consistent interpretation of those provisions, there may be results similar to those related to an unlawful broadening interpretation of substantive law. For this reason, it seems that also in this case it would be inappropriate to consider the possibility of free broadening interpretation or analogy in the process – also in relation to the so-called „neutral" proceedings, including, in particular, evidence proceedings.

6. Conclusions

There is no doubt as to how extensive and extremely complicated issue the interpretation of national law in accordance with the wording and objectives of European Union law is. If you look at the recent high-profile cases found in the case law, it should be agreed that the national courts face an important task related not only to the need to respect EU law in their rulings, but also to the necessity to pay special attention to the need to respect

fundamental rights and proportionality inherent to criminal law. In particular, it is impossible to accept a situation where enthusiasm resulting from specific EU law instruments contributes to the omission of extremely important guarantee mechanisms provided for in the same legal order.

Looking at the numerous complications associated with the interpretation of criminal law in the context of the wording and purpose of European Union law (especially in the perspective of the limits of this interpretation) it is impossible to share the view that consistent interpretation should be treated only as a method of interpretation, or the mechanism similar to the second-level interpretative directive. It seems that at present it has gained the status of a separate, specific model of legal interpretation, within which a number of activities (in particular a separate decoding of the EU and national paragons) is necessary in order to finally shape the applicable EU norm. The function of a kind of second level directive is carried out by the interpretative paragon reconstructed on the basis of the relevant provisions of EU law and on the basis of interpretation methods developed in the rulings of the Court of Justice. It is only the confrontation with interpreted regulations of individual Member States, which shows how to use the methods of interpretation shaped on the national basis, how to determine their order and selection criteria – in order to achieve a norm that meets the requirements of EU law, and consequently one compatible with consistent interpretation.

Selected Remarks on the Limits of Consistent Interpretation of Criminal Law

Summary

There is no doubt about the fact that most frequent problems related to the correct reconstruction of the substantive criminal law norm in EU matters occur in the case of legislative omission (or improper or untimely implementation) on the part of the national legislator, which is not at all unusual in the Member States legal systems. In such a situation, the attempt of the national court to ensure the maximum effectiveness of EU law will most often be realized through the interpretation of national law in accordance with the purposes and wording of EU law, commonly referred to as a consistent interpretation. At the same time, there is no doubt that any considerations regarding consistent interpretation in the sphere of criminal law should be carried out primarily from the negative side – that is, by examining the limits of this interpretation. It must be remembered that criminal law is a kind of „boundary law". With this in mind, I will attempt to reconstruct the most important of them in the remainder of this article, so as to ultimately attempt to define the principle of consistent interpretation in the perspective of the limits of this interpretation.

Keywords

European Union Law, substantive criminal law, consistent interpretation, European criminal law

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