

The application of European Law in the Criminal Procedures of Greece

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1/ Since the creation of the European Union the internal security field has been one of the most sensitive issues in the cooperation of the Member States. With the Lisbon Treaty in force as of 1 December 2009 a new framework of developments and prospects are created in the European internal security¹.

The present paper seeks to examine the scope of the European Union (EU) competence in the field of criminal law and emphasis is given on the new provisions of the Treaty of Lisbon, according to which the rules of criminal nature fall within the Union's competence.

It is clear that the EU produces criminal laws and according to the article 69 TFEU (Treaty on Functioning of the European Union) competence is given to the EU Parliament and to the Council to make decisions through the directives which constitute primary criminal laws, effective across the borders of the member states².

For instance laws about Terrorism, Human trafficking, drugs, weapons, money laundering, corruption, information technology, organized crime, etc³.

¹ Kaiafa-Gbanti, M. "The New Draft for the European Constitution and the Challenges in the Field of Criminal Law at the Beginning of the 21st Century." *Criminal Justice*, no. 5, May 2004, p. 567.

² Kaiafa-Gbanti, M. "The CJEU Case-Law on the European Arrest Warrant: Basic Directions and Current Tendencies." *Criminal Justice*, no. 1, Jan. 2019, p. 1.

³ Zimianitis, D. "The New Institutional Architecture for the European Criminal Policy: The Dialog for the Creation of the European Public Prosecutor's Office." *Criminal Justice*, no. 5, May 2013, p. 439.

2/ Nevertheless, the European law is also applied indirectly, as the facts of the constituent elements of criminal offences.

These are two characteristic examples⁴:

2A/ The company LETONIA S.A. send to Thessaloniki 10 builders for the construction of two blocks of apartments in 2013. During the inspection by the Employment Agency it was proved that the workers were not paid under the minimum wage limit in accordance to the Greek National Collective Employment Agreement. Therefore, the Employment Agency pressed charges against the representative of the company for not paying the minimum wage according to the law 690/1945.

Before the criminal court hearing, the company LETONIA S.A., through its representative who had already been accused, claimed that the builders were paid according to the laws of Latvia and that the wages of the workers in Latvia, according to their national law, are lower than the Greek ones. How should the Greek domestic courts decide?

2B/ Mr Popof, citizen of Bulgaria, is a certified electrician, who is established in a town near the borders of Greece. He is professionally connected to Bulgaria where he also pays contributions to the social security organization. Since 2006 he is engaged professionally in Serres and other towns of northern Greece. In 2014 the Greek Social Security Organization asked him to pay 22.000 euros and, at the same time, he was taken before the criminal court for a repeated breach of law 86/1967 (as modified) “on the penalties imposed to those delaying the payment and of contribution to the Social Security Organizations”,

How should the Greek domestic court decide?

3A/ In order to reply to the first question one needs to research which of the liberties of the Treaty of Functioning of the European Union is exercised

⁴ Margaritis, L. “The Shaping Effect of the International and European Law on the Indictability and on the Criminal Trial Procedure.” *Criminal Justice*, no. 8-9, Aug. 2015, p. 705.

in this case. Should we examine the liberty of mobility of working people and the liberty to organize and provide services to others? In this particular case sending employees (construction workers) from the Latvian company to Thessaloniki, Greece took place under a collective employment agreement that was signed in Latvia, an EU member-country. The employees came to Greece for a temporary period of time, more specifically for the time required to construct two apartment buildings. Thus, in this case, the rules for free mobility of employees are applied in relation to the Latvian company. This company provides for a temporary period of time construction services to Greek customers for an agreed price.

Nevertheless, when in such cases the (dispatch of employee or mobility with employees to another member-state) the liberty of rendering of services is exercised, one can raise the question on which is the law that governs the employment and social security relations. The EU Commission on 2004 created a Directive so as to raise all relevant obstacles on the liberty of rendering services and to utilize all the forgotten economic prospects that would rise through **free competition**. The main goal of Directive was to establish a single rule for rendering services, this of the service renderer to comply to the country of origin. According to this Directive the service renderers are obliged, during their temporary activity in another country, to **abide by the laws of the country where they are permanently established** and not to the laws of the country where they are temporarily present.

In contrast to the above, on 22-23 May 2005 at the Brussels EU Summit the European Council demanded from the EU Commission, following pressure exerted by Germany, France, Belgium and Sweden, that **changes are introduced** in the above Directive, so as **to protect the European Social Model**. These states were worried that the principle to abide by the laws of the country of origin combined with the significant differences in the minimum wage and with the differences in the social security system of different EU member-states could lead to a **competition without a social aspect** and to a **social damping**. This would happen as a service renderer could select to establish in the country that has the **less strict and less costly legal system**

(including lower minimum wage, lower social care/welfare contribution), resulting to cheaper and more competitive services. This would inevitably harm the local service renderers (e.g. local construction companies) and would lead to greater unemployment rates and to greater damage to the social security system. This led to the Directive 2006/123 of the European Parliament and of the EU Commission for rendering services in the internal market of the EU where the principle of the country of origin was **abandoned**. It is important to note that the Article 1 paragraph 6 of the Directive (initially known as the Bolkenstein Directive) states that **all labour and social security laws of the country of activity/presence** are to be fully applied and observed. This Directive was integrated in the Greek legal system under Law 3844/2010.

Following all of the above any solution to a legal issue should be searched under the laws of the country of activity and presence. Thus, employees who are dispatched to other EU member-states from a service renderer of another member-state **should be payed e.g. in Greece according to the collective employment agreement that is valid for all Greek employees**. Thus, the criminal courts should decide towards declaring the representative of the Latvian Construction Company as guilty of not paying the employees for work that they have offered to the company.

3B/ For the second question we would need to clarify the liberty that the Bulgarian (EU member-state) citizen Popov exercises. Possible liberties are those of establishment, of mobility of employees and of rendering services. For the liberty of rendering services the European Law discusses the cases when during cross-border relations, services are rendered for a set fee and when the service renderer travels to another EU member-state temporarily and without aiming to a permanent or of long-period establishment (this is the key difference between the liberty of rendering services and the liberty of establishment) and under the condition of the person acting by himself and independently of the exercise of any managerial right. These services include: 1) industrial activity, 2) commercial activity, 3) small-medium company scale activity, 4) self-employment activity. In this specific case,

Popov does not act under any directions from the recipient of the service, but as an independent person under his own free will. Thus, Popov does not act as an employee, so he could be acting as a self-employed professional or as a service renderer. He does not have any permanent establishment in Serres, Greece or any location around this town. He has not even created any support facilities in Greece (office, laboratory, shop, etc) that would be the minimum necessary condition to exercise the liberty of establishment. On the contrary, **he is established in a Bulgarian city** near the border with Greece, where he has a shop with five trainees. He is professionally related to Bulgaria and has paid his social contributions to the relevant Bulgarian organization. Thus, he is **does not** exercise the liberty of establishment, but he **does** exercise the liberty of rendering services, given that he **occasionally** and temporarily comes to Greece (one to four days every two weeks) and conducts electrician's works by himself or with his trainees on buildings under construction.

According to articles **52** and **62** of the Treaty of Functioning of the European Union any limitations on the liberty of rendering services are not allowed in the internal EU market, while exception are allowed only on reasons of public order, public safety, health protection etc. or for extraordinary reasons or extraordinary needs of the public or general interest. A **limitation** to the liberty of rendering services could exist when a renderer originating from another EU member-state **is obliged to enlist in the local social security system**. In any case it would constitute an unfair and adverse treatment toward Popov to be obliged to a **double payment** social security contributions, meaning to pay **both** the Bulgarian and the Greek contribution when he has not established himself permanently in Greece.

Thus, the **Greek criminal court** to which Popov was brought for a repeated breach of Law 86/1967 (as modified) "on the penalties imposed to those delaying the payment and of contribution to the Social Security Organizations", should consider the obligation to enlist to the Greek Social Security Organization and to pay all relevant contributions as a **limitation** to the liberty of rendering services. Such a limitation cannot be justified by

reason of public order, public safety, health protection etc. **The Greek Law**, to the extent that it obliges all foreign citizens (including Popov) to enroll in the Greek Social Security Organization should be considered as being against to the European Law, as **ineffective** and inapplicable. Since the Greek Law does not mention when a foreign national should not enroll to the Greek Social Security Organization, **the criminal court is obliged to produce a ruling based and in accordance to the European Law** and to exclude all EU-nationals from enrolling in the Greek Social Security system and from paying the relevant contributions. In parallel, if the court has any doubts about the correct interpretation of the Treaty of Functioning of the European Union, the court could issue a question for a preliminary ruling towards the Court of the European Union, according to article 267 of the Treaty of Functioning of the European Union.

4/ The above discussed cases, highlight the need to secure the functional integration of the European Union and the need **for a secure, without borders internal economic market/area**. These two need lead to the gradual establishment of a member-states collaboration in criminal law matters. At the same time, it is absolutely necessary to ensure that all human rights are protected and safe-guarded. Thus, the Lisbon Treaty grants binding power to the **European Chart of Human Rights** and has **restored the confidence** of the citizens of Europe to the institutions and to the values that determine this special and **multi-country** State of Law⁵.

⁵ Nikolopoulos, G. "The Process of Building an Area of 'Freedom, Security and Justice': 'The Hague Programme' and the Methods and the Content of the Interventions Exercised by the EU into the National Processes of Social Control." *Criminal Justice*, no. 3, Mar. 2005, p. 323.