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THE ROLE OF EU PRINCIPLES IN CRIMINAL LAW: IS THE PRINCIPLE OF DIRECT EFFECT APPLICABLE?

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ABSTRACT

With the enactment of the Lisbon Treaty, EU law gained supremacy over national law in ten areas of criminal law (with the possibility of extension in the future) treated as particularly serious crimes with a cross-border dimension and the right to enact directives. The question arises if and when direct effect is possible in criminal law, taking account of developments and applications of this principle in other areas of EU law. To answer this question, the following tasks are necessary: (1) to discuss the role of principles in criminal law, (2) to define the principle of direct effect through the academic literature and the jurisprudence of the CJEU, (3) to discuss whether directives could have direct effect in criminal law, and (4) to analyze the EU's impact on Lithuanian national criminal law through an analysis of the jurisprudence of the Supreme Court of Lithuania.

KEYWORDS

EU, criminal law, principle of direct effect, directives

INTRODUCTION

In the opinion of experts, until the Lisbon Treaty, harmonisation of criminal law with EU requirements was minimal, as EU legislation in criminal law is usually very general and leaves much space to national legislators.[1] One reason for this is the limited jurisdiction of the Court of Justice of the European Union (CJEU) and its inability to initiate infringement proceedings against Member States.[2] Traditionally in criminal law, EU legal acts are not directly applicable, as they are implemented in national law by enacting, supplementing or changing existing national criminal law. For example, in Lithuania, where the criminal code is the only national criminal law, each time an EU legal act (framework decision or directive) is enacted, the national criminal code is reviewed and necessary changes or supplements are introduced.[3]

The situation radically changed with the enactment of the Lisbon Treaty, which supranationalized certain areas of criminal law enumerated by EU treaty.[4] The EU law gained supremacy over national law in ten areas of criminal law treated as particularly serious crimes with a cross-border dimension: terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.[5] The EU is allowed to intervene in these areas using directives as legal instruments and establishing minimum rules concerning the definition of criminal offences and sanctions.[6] As the supremacy of EU law is directly related to the principle of direct effect, it is important to determine what role it plays or could play in the sphere of criminal law, traditionally understood as the most sovereign one. This article seeks an answer to this question by analysing the following theoretical and practical aspects: 1) the role of principles in criminal law, (2) the principle of direct effect through the academic literature and the jurisprudence of the CJEU, (3) discussing whether directives could have direct effect in criminal law, and (4) analyzing the EU's impact on Lithuanian national criminal law as only multilevel analysis shows if and how EU level has shaped national criminal law. The last aspect is a barometer for measuring influence of EU law at the national level so far. The final task is implemented evaluating national references for preliminary rulings to CJEU, questioning whether there were

[1] Gintaras Švedas, "Europos Sąjungos teisės įtaka Lietuvos baudžiamajai teisei" (The Influence of EU Law on Lithuanian Criminal Law), *Teisė* 74 (2010): 18.
[2] Ester Herlin-Karnell, "The Lisbon Treaty. A Critical Analysis of its Impact on EU Criminal Law," *Eucrim* 2 (2010): 59.
[3] The final section of the Criminal Code of the Republic of Lithuania covers implemented EU acts. As of 15 January, 2020, there are thirty-five provisions due to various EU legal acts.
[4] Ester Herlin-Karnell, "The Lisbon Treaty and the Area of Criminal Law and Justice. European Policy Analysis," *Swedish Institute for European Policy Studies* 3 (2008): 9.
[5] *Consolidated Version of the Treaty on the Functioning of the European Union*, Official Journal C 202, 7.6.2016, P. 1-388, art. 83.
[6] *Ibid*., art. 83 (1).

Commission procedures started against Lithuania for improper implementation of certain EU acts in criminal matters, and finally presenting jurisprudence of the Lithuanian Supreme Court in criminal cases on the matter.

In this article, the term *criminal law* covers only material (substantial) law unless specifically indicated differently.

1. THE ROLE OF PRINCIPLES IN CRIMINAL LAW

There are no doubts regarding the importance of the general principles of EU law and their substantial implication in the areas influenced by EU law, as they fill in the gaps of EU law, are helpful for interpreting existing EU norms and are a valuable instrument for judicial review,[7] i.e., determining whether a specific national norm is violating a general principle of EU law. These aspects, and especially the first one, are significant in the field of EU criminal law,[8] as this branch of law is the least developed in comparison with common market issues. This indicates that there are still many gaps for the CJEU to fill by establishing general principles.

The impact of general principles on criminal law is threefold and reciprocal: (1) "they can be invoked to import concepts from domestic or international law into Union law, or to develop into a principle of general application a rule that may be found in only a specific context within the Treaties or secondary legislation."[9] For example, such national terms as *legal certainty* and *non-retroactivity* have been exported to the EU's legal order.[10] (2) General principles are used to interpret EU law, in this case, the interpretation of EU instruments on criminal law issues.[11] For example, in Maria Pupino's case, the CJEU indicated that while interpreting national law in accordance with the framework decision, the principles of legal certainty and non-retroactivity should be respected.[12] (3) The influence of EU general principles on national criminal law.[13] For example, in the Czech Republic, the transposition of the framework decision on the European arrest warranty forced an amendment of the Czech constitution, as it did not allow the extradition of its nationals. Such a necessity was justified by the Constitutional Court of the Czech Republic, which

[7] Samuli Miettinen, *Criminal Law and Policy in the European Union* (London and New York: Routledge, 2014), 103.
[8] *Ibid*.
[9] *Ibid*.
[10] Valsamis Mitsilegas, *EU Criminal law* (Oxford and Portland, OR: Bloomsbury, 2009), 64.
[11] Samuli Miettinen, *supra* note 7.
[12] "It should be noted, however, 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" (see *Maria Pupino*, CJEU (C-105/03, ECLI:EU:C:2005:386), 44).
[13] Samuli Miettinen, *supra* note 7.

grounded it on the EU principles of cooperation and mutual trust.[14] In Poland, using the principle of cooperation as one of its legal reasons, the Polish Constitutional Court recognised that criminal procedure law allowing the surrender of Polish nationals was unconstitutional in accordance with existing national regulations, and it postponed the entry into force of the decision for eighteen months, which is unusual procedure for this court.[15]

The principle of direct effect is probably one of the most complicated principles of EU law, as the understanding of this principle is still developing due to the ongoing jurisprudence of the CJEU. The intricacy of this principle is also due to the fact that there are several different positions regarding the meaning of direct effect and its relation to direct applicability.[16]

Notwithstanding these challenges, the principle of direct effect together with the principle of supremacy "are necessary for the efficient functioning of the European Union,"[17] as "both Member States and the institutions of the European Union are under a legal duty … to ensure that EU law is adequately applied and followed,"[18] i.e., to ensure the effectiveness of EU law in practice. This lies at the heart of the EU, as "transfer by the States from their domestic legal system to the Community [of a] legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights."[19] This principle is essential for common policy and actions in agreed areas because if "EU law were not supreme, none of the following doctrines or case law produced would be binding on Member States or affect the way national courts rule on Union matters."[20] After the changes due to the Lisbon Treaty, it is important to determine what this principle means or could mean for national criminal law in the Member States.

[14] Libor Klimek, *European Arrest Warrant* (London: Springer, 2015), 296-305.
[15] *Ibid*., 286-290.
[16] For a detailed discussion on the matter, see Mustafa T. Karayigit, "Are Directives Directly Applicable?" *Ankara Avrupa Calismalari Dergisi* 15, no. 2 (2016).
[17] Eleanor Gilbert, "Supremacy and Direct Effect: Necessary Measures?" *North East Law Review* 5 (2017): 15.
[18] *Ibid*., 11.
[19] *Flaminio Costa v E.N.E.L.*, CJEU (Case 6-64, ECLI:EU:C:1964), 594.
[20] Eleanor Gilbert, *supra* note 17, 12.

2. THE PRINCIPLE OF DIRECT EFFECT

2.1. MEANING OF THE PRINCIPLE OF DIRECT EFFECT IN THE EU

The doctrine of direct effect is one of the classic concepts on which the EU *sui generis* system of law is based;[21] "therefore, it is believed that direct effect is an essential characteristic of the Community order,"[22] as it "defines the relation between European law and domestic law and [is] also the basis for [the] supremacy of EC law."[23] The principle of direct effect is "judicial creation,"[24] developed by using the effectiveness argument in the famous cases of *van Gen den Loos*[25] and *Costa v ENEL*,[26] i.e., an instrument in persons' hands against authorities and their improper behaviour. Thus, it has direct vertical effect.

Traditionally, the principle of direct effect has three main features (the triad): selection–rights–application,[27] so it must satisfy three interrelated conditions:

1. clearness and unambiguity of the provision (legal act);
2. unconditionality of the provision;
3. the functioning of the specific norm must not be dependent upon further actions taken by Community or national authorities.[28]

These three aspects are linked to the principle of legal certainty—one of the fundamental principles of the law, explained as "the requirement for the law to be clear and precise so that the subjects of law may have a clear knowledge of their rights and duties and use them accordingly."[29] "It is established case-law that the principle of legal certainty requires that European Union legislation must be certain and its application foreseeable by those subject to it."[30]

The first criterion means that the norm must be sufficiently clear and precise, i.e., transparent, to ensure that individuals concerned can understand it easily. This aspect is interrelated with the second one—unconditionality, i.e., "where it sets forth an obligation which is not qualified by any condition, or subject, in its implementation or effects, to the taking of any measure either by the Community

[21] Deidvidas Soloveičikas, "Europos Sąjungos teisės tiesioginis veikimas ir jos taikymas – dvi skirtingos tapačios doktrinos dalys?" (Direct Effect and Application of European Community Law: Two Distinct Parts of the Same Doctrine?), *Jurisprudencija* 4, no. 94 (2007): 35.
[22] Radovan D. Vukadinovic, "The Concept and Faces of Direct Effect of European Community Law," *Review of European Law* 13, no. 1 (2011): 37.
[23] Anca-Magda Vlaicu, "The Direct Effect of Treaty Provisions," *Lex ET Scientia International Journal 16* (2009): 236.
[24] Samuli Miettinen, *supra* note 7, 109.
[25] *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, CJEU (Case 26/62, ECLI:EU:C:1963).
[26] *Flaminio Costa v E.N.E.L.*, *supra* note 19.
[27] Sophie Robin-Olivier, "The Evolution of Direct Effect in the EU: Stocktaking Problems, Projections," *International Law Journal of Constitutional Law* 12, no. 1 (2014): 167.
[28] Radovan D. Vukadinovic, *supra* note 22, 39.
[29] Aistė Samulytė-Mamontovė, "Principle of Legal Certainty and (In)direct Effect of Directives," *Social Transformations in Contemporary Society* 2 (2014): 58.
[30] *Alcoa Trasformazioni v Commission*, CJEU (Case C-194/09, ECLI:EU:C:2011:497), 71.

institutions or by the Member States. Moreover, a provision is sufficiently precise to be relied on by an individual and applied by national court whether it sets out an obligation in unequivocal terms."[31]

The third rule means the direct applicability of specific norms, i.e., no additional acts are required from either national or EU actors. Such norms, in accordance with Art. 249 of the EU treaty, are EU treaties and regulations themselves.

At this stage of analysis, it looks like the principle of direct effect has nothing to do with EU criminal law, as even in the Lisbon Treaty, the main instrument in criminal law remains directive, "binding, as to the result to be achieved, upon each Member State to which it is addressed, but [it] shall leave to the national authorities the choice of form and methods,"[32] giving discretion for Member States regarding the form and method of its implementation. This means that it does not correspond to the third condition taking a direct grammatical interpretation.

However, in the *Grimaldi* case, the CJEU has already stated that "whilst under Article 189 Regulations are directly applicable and, consequently, by their nature capable of producing direct effects, that does not mean that other measures covered by that article can never produce similar effects."[33] For example, in Case C-9/70 the CJEU recognised that certain clauses of Council decision are directly applicable and:

> it would be incompatible with the binding effect attributed to decisions by Article 189 to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision.… Although the effects of a decision may not be identical with those of a provision contained in a regulation, this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the courts, may be the same as that of a directly applicable provision of a regulation.[34]

Therefore, the main criteria in determining whether a particular EU legal norm has direct effect is not only the form, but also the content of the legal act: "in each particular case, it must be ascertained whether the nature, background and wording of the provision in question are capable of producing direct effects in the legal relationships between the addressee of the act and third parties," [35] underlining already discussed criteria of direct effect.

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[31] *Cooperativa Agricola Zootecnica S. Antonio and Others v Amministrazione delle finanze dello Stato*, CJEU (Joined cases C-246/94, C-247/94, C-248/94 and C-249/94, ECLI:EU:C:1996:329), 18-19.
[32] *Consolidated Version of the Treaty on the Functioning of the European Union*, *supra* note 5, Art. 288.
[33] *Salvatore Grimaldi v Fonds des maladies professionnelles*, CJEU (Case C-322/88, ECLI:EU:C:1989:646), 11.
[34] *Franz Grad v Finanzamt Traunstein*, CJEU (Case C-9/70, ECLI:EU:C:1970:78), 5.
[35] *Ibid*., 6.

If a directive is the main instrument in criminal law, could it have direct effect? The answer is complicated by the fact that these three aspects are rather subjective criteria developed by the jurisprudence of CJEU, and they leave much place for interpretations. "Criteria are … applied generously, with the result that many provisions which are not particularly clear or precise, especially with regard to their scope and application, have been found to produce direct effects." This causes the practical problem that because of unclear and sometimes ambiguous EU legal norms, it is not always easy to identify whether a particular EU legal act satisfies the enumerated conditions of direct application, which is why national courts in every case should ex officio determine whether the norm could have direct application in a particular case.

2.2. DIRECTIVES AS INSTRUMENTS OF DIRECT EFFECT IN CRIMINAL LAW?

In the literature, three different positions are expressed regarding the possibility of direct effect of directives:[36]

A. No direct application is possible considering the fact that the directive, contrary to regulation, does not automatically become a national legislative act, but requires certain implementing actions from Member States (grounded in Art. 288 of the Treaty on the Functioning of the European Union, as this is expressly indicated only for regulations and needs no additional actions from national authorities).

B. Directives may have direct application in cases when they fulfil certain conditions (clearness, unambiguity and unconditionality of the provision [legal act]), and the functioning of the specific norm must not be dependent on further actions taken by Community or national authorities allowing direct effect of the directive in cases when national authorities did not correctly transpose the directive into national law, i.e., the "direct effect of directives precedes and leads to their direct applicability."[37]

C. Treatment of the directive as an inclusive part of EU law and in such a case "an integral part of the national legal systems and so directly applicable,"[38] i.e., "transposition of directives in national law, as a requirement inherent in these instruments, is aimed not for incorporating them into the national legal orders, but for [adapting] national law to the result imposed by them."[39]

Taking the first approach, EU norms have no direct effect on national criminal law as the main instrument in this area—only directives. But the development of

[36] Mustafa T. Karayigit, *supra* note 16, 75-76.
[37] *Ibid*., 76.
[38] *Ibid*.
[39] *Ibid*., 77.

the jurisprudence of the CJEU in other EU areas indicates that this approach does not correspond to the jurisprudence. As has been revealed in previous part of the article, if a directive satisfies certain conditions, certain norms of the directive could be applied by national courts directly if the norm is not correctly transposed into national law, which corresponds to the second approach. This means that directives enacted on criminal law issues theoretically may have direct application if they are clear, unambiguous and unconditional. But criminal law is a branch of law in which certain principles should be followed, as indicated in the famous *Maria Pupino* case that even the interpretation of framework decisions in criminal cases should not infringe the general principles of law and in particular the principles of legal certainty and retroactivity.[40] This was further developed in cornerstone cases such as *Kolpinghuis Nijmegen*[41] and *Tarrico*.[42] In *Kolpinghuis Nijmegen*, the court indicated "that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, [or] have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive,"[43] as this would infringe the general principles of Community Law, in particular the principles of legal certainty and non-retroactivity. In the *Tarrico* case, the CJEU indicated that the principle *nullum crimen nulla poena sine lege* (i.e., that offences and penalties must be defined by law) "includes requirements of foreseeability, precision and non-retroactivity,"[44] while "the principle of non-retroactivity of the criminal law means in particular that a court cannot, in the course of criminal proceedings, impose a criminal penalty for conduct which is not prohibited by a national rule adopted before the commission of the alleged offence or aggravate the rules on criminal liability of those against whom such proceedings are brought."[45]

Direct application of directives in practice in criminal law area is burdened by the fact that usually such directives provide only minimum rules for certain criminal offences and some guidelines and principles related to sanctions, i.e., they do not satisfy criteria for direct applicability. For example, in Art. 3-6 of the Directive on Combating Fraud and Counterfeiting of Non-Cash Means of Payment[46] (which should be implemented by Member States by 1 May, 2021) certain deeds that should be established as criminal offences if committed intentionally are provided.

[40] *Maria Pupino*, *supra* note 12, 44.
[41] *Kolpinghuis Nijmegen BV*, CJEU (Case C-80/86, ECLI:EU:C:1987:431).
[42] *Tarrico and Others (Tarrico I)*, CJEU (Case C-105/14, ECLI:EU:C:2015:555); *M.A.S. and M.B. (Tarrico II)*, CJEU (Case C-42/17, ECLI:EU:C:2017:936).
[43] *Kolpinghuis Nijmegen BV*, *supra* note 41, 13.
[44] *M.A.S. and M.B. (Tarrico II), supra* note 42, 58.
[45] *Ibid*., 57.
[46] *Directive 2019/713 of the European Parliament and of the Council of 17 April 2019 on Combating Fraud and Counterfeiting of Non-Cash Means of Payment and Replacing Council Framework Decision 2001/413/JHA,* 2019, *OJ L 123*/18.

Important explanations on the matter are given in *Tarrico*, stating that "provisions of criminal law must comply with certain requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty,"[47] while "the requirement that the applicable law must be precise … means that the law must clearly define offences and the penalties which they attract. That condition is met where the individual is in a position, on the basis of the wording of the relevant provision and if necessary with the help of the interpretation made by the courts, to know which acts or omissions will make him criminally liable."[48] This is not the case in criminal matters.

What happens if the Member State does not implement the directive correctly in time? In the classical model, it is understood that the EU directive has vertical, direct effect, i.e., "between a private person and a state."[49] As stated in the *Marshall* case, "the binding nature of a directive, which constitutes the basis for the possibility of relying on the directive before a national court, exists only in relation to 'each Member State to which it is addressed'. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person,"[50] but only as a measure of sanctioning a Member State and as a prevention measure for the state to take advantage of its own failure to comply with Community Law.[51] For example, in Case C-41/74 concerning the Directive on the Movement and Residence of Foreign Nationals which are Justified on Grounds of Public Policy, Public Security or Public Health, the CJEU answered that certain norms are directly applicable, grounding this decision on the principle of legal certainty: "legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety."[52] The same conclusion was reached in the Italian case *Pubblico ministero v Ratti*, where in the Italian courts, there was a criminal procedure against a head of undertaking who did not follow Italian national laws on the labelling of dangerous substances. The CJEU once again stated that in such a case where national law contradicts the requirements of a directive, the latter must be applied "if the obligation in question is unconditional and sufficiently precise,"[53] which is not the case in material criminal law. Material criminal law involves a certain relationship between an offender and a state, and no direct application is possible, as there is

[47] *M.A.S. and M.B. (Tarrico II), supra* note 42, 55.
[48] *Ibid*., 56.
[49] Aistė Samulytė-Mamontovė, *supra* note 29, 59.
[50] *M.H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)*, CJEU (Case C-152/84, ECLI:EU:C:1986:84), 48.
[51] *Ibid*., 49.
[52] *Yvonne van Duyn v Home Office*, CJEU (Case C-41/74, ECLI:EU:C:1974:133), 13.
[53] *Tullio Ratti*, CJEU (Case C-148/78, ECLI:EU:C:1979:110), 23.

no reason why an offender would be interested in its direct application (i.e., Member States are allowed to have more and heavier norms). This is because criminal law issues at the EU level are mostly related to increasing the efficiency and effectiveness of criminal law measures,[54] which means increasing criminal liability through the introduction of certain criminal offences, provision of common definitions and giving certain guidelines regarding criminal sanctions following the EU triad that they should be effective, proportionate and dissuasive, i.e., usually aggravating the situation of the offender.

Why in criminal law is direct effect not evidentiary? Usually, direct effect is understood vice-versa, as an instrument of legal protection against national authorities,[55] but not as an instrument for the prosecution of criminals. Again, if Member States do not implement directives on time, they are not allowed to ask for vertical applications of directives against offenders, as this would infringe the principles of legality, non-retroactivity and legal certainty, among others. "In the context of unclear regulations or unimplemented directives,"[56] these principles "could operate as a basis for avoiding criminal liability."[57]

Direct applicability of directives in criminal law is not possible because only certain guidelines regarding sanctions are provided, i.e., no legal certainty is possible. For example, Art. 9 (1) states that "Member States shall take the necessary measures to ensure that the offences referred to in Article 3, in points (a) and (b) of Article 4 and in points (a) and (b) of Article 5 are punishable by a maximum term of imprisonment of at least two years," i.e., no minimum sanctions or criteria on how sanctions should be applied are established.

The third, least developed and rather unusual approach is that direct applicability of a directive follows from the fact that it constitutes an integral part of national legal systems. This approach is grounded on the argument that directives, like regulations, either do not require incorporation into national law as the "transposition … requirement inherent in these instruments [directives] is aimed not for incorporating them into national legal orders, but for adapting … the national law to the result imposed by them,"[58] i.e., in cases when the directive requires the introduction of certain norms that exist in certain Member States, they do not have any obligation to take any additional transposition action.

Such situations could be established in practice. For example, Art. 4 of Directive 2014/42/EU requires that "Member States shall take the necessary

[54] For example, Sec. 13 of *Directive 2019/713 of the European Parliament and of the Council of 17 April 2019*, *supra* note 46.
[55] Radovan D. Vukadinovic, *supra* note 22, 46.
[56] Ester Herlin-Karnell, "What Principles Drive (or Should Drive) European Criminal Law?" *German Law Journal* 11, no. 10 (2010): 1120.
[57] *Ibid*.
[58] Mustafa T. Karayigit, *supra* note 16, 77.

measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia."[59] In Lithuania, such a norm is already in the criminal code due to the enactment of a new criminal code in 2003, which means that it has no need to transpose such parts of directives. But this argument does not mean that such directives have direct applicability—national authority in such a case would apply national law, which corresponds to the requirements of the directive. In such cases, in the opinion of the authors, it is better to use the term of consistent interpretation, i.e., national law is interpreted in the light of EU directives. However, this has certain limits, as "the principle of conforming interpretation cannot serve as the basis for an interpretation of national law contra legem. That principle does, however, require that, where necessary, the national court consider the whole of national law in order to assess how far it can be applied in such a way as not to produce a result contrary to that envisaged by the framework decision."[60]

One should agree with Mustafa's conclusion that:

> Insofar as full, timely and correct implementation is provided in the national legal systems directives … remain latent, but at the same time vigilant, elements of EU law constituting as such an integral part of the national legal systems. … Whenever any deficiency arises in the implementation of directives, the principle of direct effect is to be resorted [to] in order to render latent directives operative in themselves.[61]

Various EU legal acts, starting from founding treaties and regulations and ending with directives and decisions, could have vertical direct effect (as a protection instrument of persons against Member States) to satisfy the necessary conditions of direct applicability. This means that at least theoretically, persons may require direct applicability of certain norms of directives in criminal cases if Member States have not implemented norms properly and the established criteria are met. Directives, being the main instrument in EU criminal matters historically, introduced as an indirect source of law, mainly through the jurisprudence of CJEU practice "have acquired, from the perspective of rights rather than obligations, general application though the principle of direct effect,"[62] but in criminal law, this principle still does not play any important role because of the specificity of this branch of law. "The doctrine's reception is unique in the practice of applying the law in each

[59] *Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union*, 2014, OJ L 127/39.
[60] *Maria Pupino*, *supra* note 12, 48.
[61] Mustafa T. Karayigit, *supra* note 16, 82.
[62] *Ibid*., 62.

Member State, although EU law is an integral part of their legal system[s] and takes precedence over national law[;] that's why it is interesting to find out how it is implemented in Lithuanian legal practice."[63]

3. EFFECT OF EU LAW IN LITHUANIAN JURISPRUDENCE[64]

The influence of EU law on Lithuanian criminal law was examined analysing several aspects: (1) references for preliminary rulings to CJEU, (2) if there were Commission procedures started against Lithuania for improper implementation of certain EU acts in criminal matters, and (3) analysis of the jurisprudence of the Lithuanian Supreme Court in criminal cases.

3.1. REFERENCES FOR PRELIMINARY RULINGS

From the entry of Lithuania to the EU until the end of 2018 (i.e., 14 years), as Table 1 and Figure 1 show, Lithuania applied for 61 preliminary decisions in total (including civil and administrative cases), which is a rather moderate number of cases compared with the total number of applications over this period and represents on average only one percent of all referrals.

Table 1: References to CJEU for preliminary rulings[65]

Year	All EU Countries	Lithuania	%
2019	641	7	1.09
2018	568	6	1.05
2017	533	10	1.87
2016	470	8	1.7
2015	436	8	1.83
2014	428	6	1.4
2013	450	10	2.22
2012	404	2	0.49
2011	423	1	0.24
2010	385	2	0.52
2009	302	3	0.99

[63] Deividas Soloveičikas, *supra* note 21, 35.
[64] Certain aspects of the same Lithuanian jurisprudence are revealed in Edita Gruodytė, Saulė Milčiuvienė, and Neringa Palionienė, "The Principle of Direct Effect in Criminal Law: Theory and Practice," forthcoming in *European Studies – The Review of European Law, Economics and Politics* 7 (2020).
[65] Data for 2015-2019 collected from Court of Justice of the European Union, *Annual Report of Court of Justice 2019, Judicial Activity*, Luxembourg (2020): 169-170 // https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/qd-ap-20-001-en-n.pdf; data for 2003-2014 collected from Court of Justice of the European Union, *Annual Report of Court of Justice 2017, Judicial Activity*, Luxembourg (2018): 116-120 // https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-06/ra_2017_lt_web.pdf.

Year	All EU Countries	Lithuania	%
2008	288	3	1.04
2007	265	1	0.38
2006	251	1	0.40
2005	221	0	0
2004	249	0	0
2003	210	0	0
Total:	5,883	61	

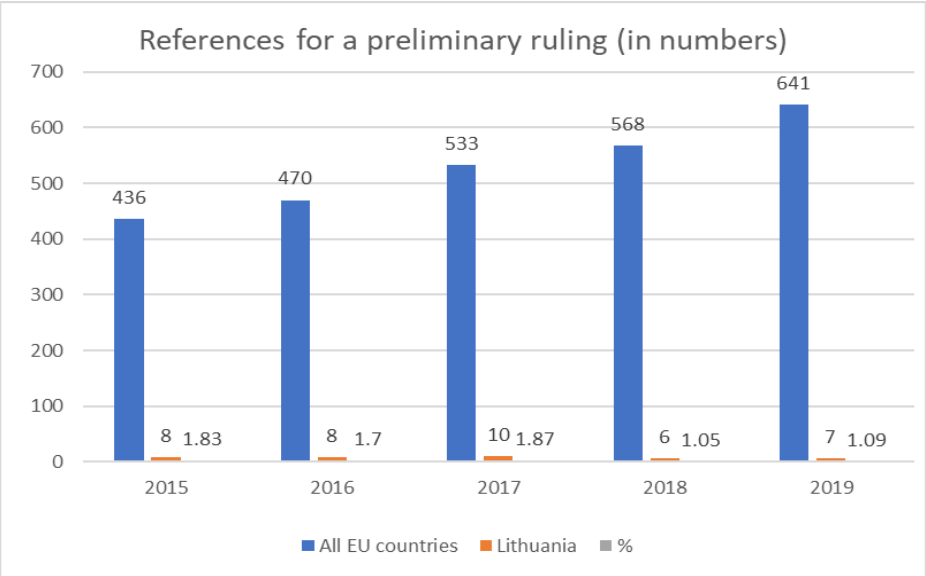

Figure 1: References to CJEU for preliminary rulings

The largest numbers of applications were from the highest national courts: the Supreme Administrative Court (22 applications) and the Supreme Court of Lithuania (22 applications), with two applications from the Constitutional Court.[66] The remaining applications came from other courts, including the Vilnius Regional Administrative Court, the Lithuanian Court of Appeal, the Vilnius City Court of First Instance and the Tax Disputes Commission.[67] The first application was made in 2006 (two years after Lithuania became a member of the EU), and on average the procedure is used several times a year. The highest number of references was made in 2010 and 2013: 10 times per year. In criminal matters, the procedure was used only once during the entire period analysed here, and it relates to EU legal acts enacted before the Lisbon Treaty, as explained in detail below.

[66] Data collected from Court of Justice of the European Union, *Annual Report of Court of Justice 2018, Judicial activity*, Luxembourg (2019): 134-139 // https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/_ra_2018_lt.pdf.
[67] Data collected from the InfoCuria webpage: http://curia.europa.eu/juris/liste.jsf?num=C-359/14&language=lt.

In 2008, the Panevėžys District Court applied for a preliminary ruling in criminal proceedings against Edgar Babanov.[68] The reference was related to EC competence in the free market: agriculture and free movement of goods. In this case, Babanov legally purchased 300 kg of Felina-32 cannabis seed from France at the Central Cooperative for Hemp Seed Producers in France and sowed it in leased ground. Babanov claimed he would have used the seeds for hemp breeding and paper production. It was found to be hemp grown for fibre containing 0.04% of the active ingredient in cannabis (Δ-9-tetrahydrocannabinol). Art. 265 of Lithuania's criminal code declares that it is a crime if a person in violation of the established procedure, grows a large quantity of poppies, hemp or other plants listed as narcotic or psychotropic substances and is punishable by community service or by a fine or by restriction of liberty or by arrest or by imprisonment for a term of up to five years.[69] The national court asked two questions: "1. Does Article 265 of the Criminal Code of the Republic of Lithuania, which provides for criminal liability for cultivation of all cannabis, regardless of the amount of the active substance in it, contravene European Union legislation, and exactly against which EU acts? 2. If so, can a court of the Republic of Lithuania apply Article 265 of the Criminal Code in the case—if the active substance in cannabis does not exceed 0.2 percent?"[70] The CJEU answered that Council Regulation (EC) No. 1782/2003, 2003 September 29 does preclude national legislation prohibiting the cultivation and storage of hemp grown for fibre covered by this Regulation and that Community Law precludes a court of a Member State from applying national law which, contrary to Regulation No 40/94, Regulation (EC) No 1782/2003 prohibits the cultivation and storage of hemp grown for fibre covered by this Regulation.[71] This preliminary ruling, even though it arose from common market regulation, indicates the supremacy of EU law even over national criminal law when it contradicts EU regulations. The result—the national criminal case was dismissed, but national law experienced no changes in accordance with CJEU decision: only in 2015 when the law on fibrous hemp[72] was introduced was the issue resolved.

There were more attempts to initiate applications to the CJEU; however, national courts reasonably and in accordance with the jurisprudence of the CJEU rejected such requests. which indicates that at least at the Supreme Court, judges are qualified and follow the practice of the CJEU. These applications related

[68] *Edgar Babanov*, CJEU (Case C-207/08, ECLI:EU:C:2008:407).
[69] Art. 265 of the *Criminal Code of Republic of Lithuania*, Official Gazette (2000, no. 89-2741).
[70] *Edgar Babanov*, *supra* note 68, 16.
[71] *Ibid*., 37.
[72] *Fibre Hamp Law of Republic of Lithuania*, Official Gazette (2013, no.61-3025).

indirectly to criminal law, as they touched issues of non-pecuniary damages in road traffic accident cases.[73]

There were no cases against Lithuania initiated by the Commission for improper implementation of EU acts in criminal matters.

3.2. APPLICATION OF DIRECTIVES IN JURISPRUDENCE

The following search criteria for decisions of the Supreme Court of Lithuania[74] in criminal cases were used: (1) the time covered in analysis: 1 May 2004[75]-31 December 2019, (2) only decisions in which the term "directive" (without ending) was found were selected, and (3) the court decisions were searched in the commercial database Infolex.[76] Initially, 57 entries were found, while after content review, only 51 court decisions remained,[77] and they are analysed in this section. These cases account for just over half a percent of all Supreme Court decisions in criminal cases during the analysed period,[78] which indicates that references to directives in criminal law cases are still rare in practice.

References to directives in the decisions of the Supreme Court started in 2007 (three years after Lithuania became a member of the EU) and there has been a significant increase in the number of cases in the last two years (Figure 2).

[73] These cases also illustrate the fact that the interpretation of EU law has certain limits. In all three cases, offenders (or civil defenders) challenged decisions of lower courts as national regulation at that time established a maximum limit for non-pecuniary damages, which was rather small, and the guilty person had to pay the difference. The main argument was that national authorities improperly implemented the EU directive, which established no limit for non-pecuniary damages [until 11 December 2009, 1,000 euros, until 10 June 2012, 2,500 euros, until 31 October 2018, 5,000 euros; only from 1 November 2018 was no concrete sum of non-pecuniary damages provided in the law], and in such a case national law should be interpreted in accordance with the requirements of the EU directive, i.e., applying consistent interpretation. In all three cases, the person applied to CJEU for a preliminary ruling to determine whether the particular norm of the EU directive (2005/14/EB) was to be interpreted as not conferring on the Member State the right to limit the amount of damages to be awarded to a person on the basis that the damage to the person is pecuniary or non-pecuniary. The Supreme Court of Lithuania rejected these requests in all three cases, indicating that "the national court shall not be obliged to refer to the Court of Justice if the question of the interpretation of European Union law which is raised in the case is irrelevant, i.e., the answer to this question, no matter what, cannot affect the outcome of the case." This was grounded in two interrelated legal arguments: (1) the impossibility of interpreting national law in accordance with directive (as their content is different and in such a case it would infringe the principles of legal certainty and non-retroactivity), (2) there is no horizontal application for the directive (as the dispute is between two private parties, an insurance company and a natural person). The court also indicated that "if, in the opinion of the persons concerned, they have suffered harm as a result of the Republic of Lithuania's alleged failure to implement the relevant provisions of the Directives, the issue of liability of the Republic of Lithuania may be settled in separate civil proceedings." It should be indicated that such a decision is in accordance with jurisprudence of CJEU (*State v R.N.*, Supreme Court of the Republic of Lithuania (2011, no. 2K-239); *P.Ž. v State*, Supreme Court of the Republic of Lithuania (2014, no. 2K- 317); *D.L. v State*, Supreme Court of the Republic of Lithuania (2014, no. 2K-389)).

[74] This is the highest court, and it investigates only cassation, not factual issues. See Supreme Court of Lithuania: https://www.lat.lt/en.

[75] The date Lithuania became a member of the EU.

[76] See Infolex: http://www.infolex.lt/portal/start.asp.

[77] Two documents were Supreme Court reviews, and the remaining four decisions either did not indicate any directive or had other irrelevant facts, for example, information about certain directives in the Netherlands.

[78] The total number of Supreme Court decisions in the system was 9,185.

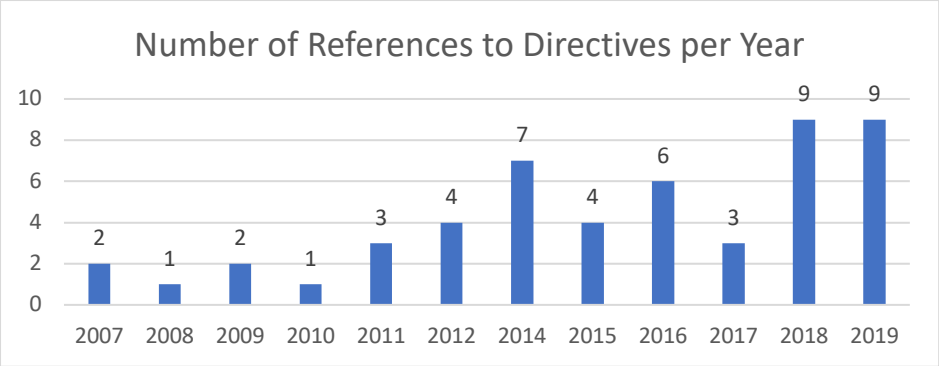

Figure 2: References to EU directives in the decisions of the Supreme Court of Lithuania[79]

Table 2 indicates that in Supreme Court decisions, two questions dominate. Trafficking in human beings (Directive 2011/36/EC) occurs most frequently (nine times) in court decisions. In second place is Directive 84/5/EEC, with its amendments Directive 2005/14/EC and Directive 2009/103/EC, relating to questions on insurance against civil liability in respect of the use of motor vehicles, which together appear eight times, and which have only an indirect relationship with criminal law. Directive 2005/60/EC, on the prevention of money laundering and terrorist financing occurs four times.

Table 2: The frequency and titles of the directives used in Supreme Court decisions

Number of Directive	Title of Directive	Frequency of Citation
76/114/EEC	On the approximation of the laws of the Member States relating to statutory plates and inscriptions for motor vehicles and their trailers, and their location and method of attachment	1
84/5/EEC	On the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles	1
90/269/EEC	On the minimum health and safety requirements for the manual handling offloads where there is a risk particularly of back injury to workers	1
91/250/EEC	On the legal protection of computer programs	1
91/477/EEC	On control of the acquisition and possession of weapons	1

[79] The concrete number indicates in how many court decisions there was reference to EU directives. In some court decisions enacted in 2018 and 2019, more than one directive was mentioned in the court decision. In this diagram, this fact is not considered.

Number of Directive	Title of Directive	Frequency of Citation
92/12/EEC	On the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products	1
92/83/EEC	On the harmonisation of the structures of excise duties on alcohol and alcoholic beverages	2
95/46/EC	On the protection of individuals with regard to the processing of personal data and on the free movement of such data	1
2002/90/EC	Defining the facilitation of unauthorised entry, transit and residence	2
2003/6/EC	On insider dealing and market manipulation (market abuse)	1
2004/18/EC	On the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts	1
2004/83/EC	On minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted	1
2005/14/EC	Amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council relating to insurance against civil liability in respect of the use of motor vehicles	4
2005/60/EC	On the prevention of the use of the financial system for the purpose of money laundering and terrorist financing	4
2006/42/EC	On machinery, and amending Directive 95/16/EC	2
2006/112/EC	On the common system of value added tax	1
2008/78/EC	Amending Directive 98/8/EC of the European Parliament and of the Council to include propiconazole as an active substance in Annex I thereto	1
2008/99/EC	On the protection of the environment through criminal law	1

Number of Directive	Title of Directive	Frequency of Citation
2009/103/EC	Relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability	3
2010/64/EC	On the right to interpretation and translation in criminal proceedings	3
2011/36/EC	On preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA	9
2011/93/EU	On combating the sexual exploitation of children and child pornography	1
2012/29/EC	Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA	1
2013/40/EC	On attacks against information systems and replacing Council Framework Decision 2005/222/JHA	2
2013/48/EC	On the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty	1
2014/41/EC	Regarding the European Investigation Order in criminal matters	1
2014/42/EC	On the freezing and confiscation of instrumentalities and proceeds of crime in the European Union	1
2014/62/EC	On the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA	2
TOTAL:		51

The most active party to the proceedings (i.e., the one that refers to the EU directives), as Table 3 shows, is the court—it refers to directives in thirty-six cases out of fifty-one. In second place is the offender (who refers to EU directives eleven times). There are cases where only the offender refers to the directive. For example, one of the convicts, referring to the term *organizer*, refers to Directive

"2002/90 EC (organizers are foreigners who intend to cross the border illegally, in this case citizens of the Republic of Belarus)."[80] In another case, the convict questions the confiscation of computers because in accordance with requirements of the directive it is sufficient to delete a computer program.[81] The most passive party is the victim of the crime. Only in one case is the reference made only by the victim: the relatives of the victim of a road traffic crime (who was killed) asked a very abstract question, among other things, to indicate how to harmonise the laws of the Republic of Lithuania with the EU directives in court decisions. The court did not address this issue, as it is not a matter of cassation proceedings and it is outside the powers of the cassation instance court.[82] In many cases, more than one party in the proceedings refers to EU directives. For example, in Case 2K-317/2014,[83] related to criminal liability for infringement of traffic rules causing serious damage (severe bodily injury to a passenger), four parties in the proceedings (court, prosecutor, defendant and victim) referred to EU directives. The data illustrate that legal society in Lithuania knows EU law and CJEU practice, and lawyers and their clients apply it in practice.

Table 3: The party in proceedings making reference to EU directives[84]

Year	Number of Court Decisions	Court	Prosecutor	The Accused/ The Convict[85]	Plaintiff/Defendant[86]	Victim
2007	2	-	1	1	-	-
2008	1	1	-	-	-	-
2009	2	1	-	1	1	-
2010	1	1	-	-	-	-
2011	3	1	-	1	1	-
2012	4	2	1	1	-	-
2014	7	5	3	3	1	-
2015	4	3	1	-	2	-
2016	6	4	-	3	1	-

[80] *S.S., S.G., R.P. v State*, Supreme Court of the Republic of Lithuania (2012, no. 2K-332).
[81] *R.K. v State*, Supreme Court of the Republic of Lithuania (2007, no. 2K-531).
[82] *State v J.A.G.*, Supreme Court of the Republic of Lithuania (2010, no. 2K-383).
[83] *P.Ž. v State*, *supra* note 73.
[84] In some cases, more than one party in the proceedings refers to EU directives, and the numbers of court decisions do not correlate with the numbers of parties.
[85] Usually, the reference is made not by the convicted person, but by the attorney representing the interests of the offender.
[86] Victims of crime are not covered. Usually, it is the insurance company that is required to pay damages. Examples include cases of road traffic accidents and industrial accidents.

Year	Number of Court Decisions	Court	Prosecutor	The Accused/ The Convict[85]	Plaintiff/Defendant[86]	Victim
2017	3	2	0	-	2	2
2018	9	9	1	1	-	1
2019	9	7	2	-	-	-
Total	51	36	9	11	8	3

After analysing the content of the selected court decisions several aims for references to the EU directives are established:

a) strengthening national regulation;

b) questioning existing national regulations;

c) citing EU norms to explain certain national aspects.

Strengthening national regulations

This category dominates in Court decisions and means that the EU directive is cited as a supplementary legal act, grounding the necessity of certain national legal regulations, i.e., both national law and an EU directive cover the same aspects. For example, in Case 2K-281-489/2019, the court states that in the case law of the Court of Cassation, recruitment of the victim to exploit her for the purpose of committing a crime also includes the suggestion of going abroad to steal from shops, promising to take her there, to accommodate her, to feed her, etc. [87] In another case, the court refers to the EU directive among other things to counter the argument that because prostitution is legal in a certain country, the organiser could not be held guilty for exploiting the person for prostitution.[88] In another case, a reference is made to a directive (without, however, explaining it specifically), and to a resolution of the Securities Commission of the Republic of Lithuania interpreting the meaning of "insider information on material events of the issuer."[89] In these cases, references to directives could be seen as usage of additional sources strengthening and grounding national regulation, respect for EU law and general values, but there was no visible direct impact on national criminal law.

[87] *A.G., M.P. v State*, Supreme Court of the Republic of Lithuania (2019, no. 2K-281-489): 24.
[88] The court indicates that the appellant's argument that his defendant could not be found guilty under Article 307 CC because where the alleged offenses were committed, prostitution is legal is unfounded, since legalisation of prostitution does not eliminate responsibility for the exploitation of a person for prostitution. The court expressly states that the offender has profited from the victims of human trafficking and that such acts are prohibited by both European Union Directive 2011/36/EU and international law (supplementary protocol of the United Nations Convention against Transnational Crime) (*K.J. v State*, Supreme Court of the Republic of Lithuania (2019, no. 2K-278-697): 7.5).
[89] *State v A.R.*, Supreme Court of the Republic of Lithuania (2007, no. 2K-319).

Questioning existing national regulations

This category is rather rare. During the analysed period, national regulations were questioned just in five cases[90] and they relate to criminal law only indirectly as an issue of improper implementation of EU directives (84/5/EEC, 2005/14/EC, 2009/103/EC) relating to compensation due to violations of the regulations governing road traffic safety or the operation of vehicles and causing damages (Art. 281 of the Criminal Code). Basically, as already analysed in Section 3.1, in all five cases, the parties were raising the same issue from different angles: that Lithuania, being a member of the EU, must ensure that all injured parties are compensated for their damage and that the amounts of insurance under national law are not lower than the minimum amounts laid down in the directives for personal injury and damage to property. However, in all five cases, the complaints were rejected on the ground that the provisions of these directives cannot be applied in cases where the parties are only individuals (i.e., there is no direct horizontal effect), and even getting positive preliminary rulings from the CJEU would not impose on the individual an obligation to make good any non-pecuniary damage. These cases clearly indicate the limits of direct effect and the lack of possibility of applying them horizontally, between private insurance company and individual.

Citation of EU norms

This category covers cases when a directive is transposed into the national criminal code, but certain EU definitions are not defined by national law and the court cites definitions directly from directives, reasoning and strengthening decisions in certain cases. This is the rarest category so far. During the analysed period, this occurred in only three court decisions. In Case 2K-290-489/2019, which deals with trafficking in human beings and fictitious marriage, the Supreme Court indicates that the legislator amending Article 147 (1) of the national criminal code by extending the list of specific forms of exploitation of human beings to forced and fictitious marriage provided no definition of exploitation of a person for "other purposes of exploitation." However, the provisions of Directive 2011/36/EU provide the definition of other purposes of exploitation, and they refer to any other form of dangerous exploitation of a victim that constitutes a serious violation of fundamental human rights, dignity and physical integrity.[91] In another case the court again refers to Directive 2011/36/EU to define the term of "exploitation of

[90] *State v R.N., supra* note 73; *P.Ž. v State*, supra note 73; *D.L. v State*, *supra* note 73; *State v A.L.*, Supreme Court of the Republic of Lithuania (2015, no. 2K-242-511); *M.M. v State*, Supreme Court of the Republic of Lithuania (2016, no. 2K-52-942).
[91] *J.V., A.Z. v State*, Supreme Court of the Republic of Lithuania (2019, no. 2K-290-489): 15.

criminal activities" (the exploitation of a person to commit, inter alia, pickpocketing, shoplifting, drug trafficking or other similar activities, which are subject to penalties and imply financial gain),[92] as national law gives no definition. The most important example is the decision in Case 2K-199-648/2019, as this case referred not only to the directive, but also to exact articles of the directive, which are cited as a basis for grounding understanding and reasoning activities provided in the national criminal code and used as one of the arguments for responding to the arguments of the cassation appeal:

> Last but not least, the interception act is primarily linked to the receipt of electronic data transmitted in the information system (Article 6 of Directive 2013/40/EU, Article 3 of the Convention on Cybercrime). That nature of the data must be proved in the case by which the offense is alleged.… Electronic (computer) data is any representation of facts, information or concepts in a form that can be processed by a computer system as well as a program by which a computer system can perform a specific function (Article 2 (b) of Directive 2013/40/EU).… In that regard, it should be noted that the automatic processing of computer data in an information system is based on the software installed in it; this equipment may be considered as part of an information system when considered as a whole (Article 2 (a) of Directive 2013/40/EU).[93]

These examples illustrate the obligation of national authorities to apply the method of consistent interpretation, i.e., that national law must be interpreted in accordance with the norms of EU law, however, there are no examples of jurisprudence where the question of direct effect is at least theoretically discussed.

CONCLUSIONS

The role of principles in EU criminal law is developing and plays a role through legislation and the jurisprudence of CJEU, as they are used to explain EU norms by the CEJU and interpretation of national law in accordance with EU law by national authorities. They can also stimulate changes in national law. The importance of principles should increase in future, as this area of law is developing. This means that there are still many legislative gaps, which could also be filled using general principles.

The necessity of the principle of direct effect in EU criminal law is grounded by the principle of effectiveness, which is crucial for criminal law either and means that if the EU norm meets three interrelated conditions, it could have direct effect and

[92] *A.G., M.P. v State*, *supra* note 87, 24.
[93] *E.J. v State*, Supreme Court of the Republic of Lithuania (2019, no. 2K-199-648): 28-29.

could be used by individuals for enforcement of their rights in national courts against State authorities (vertical direct effect) arising from EU legislation.

Direct application of directives in national courts in criminal cases is possible in theory if certain conditions are met, but it is nevertheless difficult in practice because of the specificity of the criminal law and the obligation not to infringe certain general principles such as legal certainty, foreseeability, non-retroactivity etc.

Analysis of national jurisprudence illustrates that the role of EU directives is slightly increasing, as they are being used as an additional source strengthening and grounding national regulations, expressing respect for EU law and general values, but no direct impact on national criminal law is established. There was only one application for a preliminary ruling in a criminal case, and none after the Lisbon Treaty, which could indicate two alternatives: either national regulation is clear and in accordance with EU law or national lawyers are still too passive, perhaps due to a lack of quality and experience. However, answers to such questions require additional investigation.

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