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INCHOATE CRIMES IN THE EUROPEAN UNION: THE PROBLEM OF HARMONISATION

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SUMMARY

Although while harmonising European Union and national law the changes are usually made by adjusting the articles of the Special part of the criminal code, they also affect the quality of the General part of national criminal codes, including understanding the concept of crime stages. In recent decades, the increasing number of inchoate offenses in the special parts of EU member states' criminal codes has affected the overall integrity of national criminal law systems. Notably, while some European Union countries establish criminal responsibility not only for attempt, but also for the preparation to commit a criminal act in their general parts of criminal codes, the practice shows that when implementing European Union legislation, they tend to criminalise these preliminary actions as independent offences.

In response to these tendencies, this research aims to determine, mainly using the methods of systematic, linguistic, and scientific literature analysis, whether European Union criminal law provides a clear and unambiguous requirement for Member States to criminalise inchoate actions as an independent criminal offence. The study demonstrates that the distinction between the stages of a crime is of great importance in criminal law, as it reflects the formation of a person's intention, the degree of dangerous behaviour and the corresponding relationship with the harm. Ultimately, the article also concludes that the regulation of EU law does not reveal an unequivocal conclusion as to whether actions that are essentially an unfinished criminal act must be criminalized as an independent crime, therefore further clarification is necessary.

KEY WORDS

Inchoate crime, EU criminal law, national criminal law, crime stages, harmonisation.

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INTRODUCTION

Harmonisation of legal systems is not only important for mutual recognition – it is a necessary process to facilitate mutual trust.[2] It is based on the idea that two different legal systems should become more similar by eliminating some of the differences between them.[3] On the one hand, European Union (hereinafter – EU) law recognises that its area of justice respects the diverse legal systems and traditions of its Member States (hereinafter – Member States), indicating that any harmonisation of criminal law must be necessary[4]. On the other hand, although the EU has only indirect competence when criminalizing acts – it can only set minimum standards to harmonise directives – it often includes definitions of crimes that are very precise[5]. So-called "preventive turn"[6] in criminal law has led to the EU legal acts that encourage Member States to criminalize preparatory acts occurring well before an offence is committed[7] in such areas as terrorism[8], money counterfeiting[9], corruption[10], and sexual crimes against children[11].

Notwithstanding the positions expressed in the scientific doctrine, which highlights the problems arising from the impact of EU criminal law on the general part of national criminal

[2] V. Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe, Hart Studies in European Criminal Law* (Oxford: Hart Publishing, 2016), 39.

[3] C. M. Pelser, "Preparations to Commit a Crime: The Dutch Approach to Inchoate Offences," *Utrecht Law Review* (2008): 79.

[4] S. Werner. "Limits to European harmonisation of criminal law," *Eucrim: the European Criminal Law Associations' forum 2* (2020): 144-148.

[5] I. Wieczorek, *The Legitimacy of EU Criminal Law, Hart Studies in European Criminal Law, Bloomsbury Collections* (Oxford: Hart Publishing, 2020), 51.

[6] J. H. Blomsma, "Mens rea and defences in European criminal law," [Doctoral Thesis, Maastricht University] (2012): 8.

[7] F. Molina, "A Comparison between Continental European and Anglo-American Approaches to Overcriminalization and Some Remarks on How to Deal with It," *New Criminal Law Review* 14, No. 1 (2011): 127.

[8] Council Framework Decision 2008/919/JHA of 28 November 2008 Amending Framework Decision 2002/475/JHA on Combating Terrorism, OJ L 330, 9 December 2008; Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA, OJ L.

[9] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on Attacks against Information Systems and Replacing Council Framework Decision 2005/222/JHA, OJ L 218.

[10] See Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and Council Framework Decision 2003/568/JHA of 22 July 2003 on Combating Corruption in the Private Sector, OJ L 192, 31 July 2003.

[11] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on Combating the Sexual Abuse and Sexual Exploitation of Children and Child Pornography, and Replacing Council Framework Decision 2004/68/JHA, OJ L 335.

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codes[12] and criticize specific preparatory offences[13], the practice of implementing EU directives shows that Member States often choose to implement these changes automatically and verbatim in order to avoid any negative consequences from the EU mechanism[14]. Consequently, this practice impacts the quality of the general part of national criminal codes[15], which contains the rules and principles necessary for the transparent and uniform application of criminal law[16] and is a vital component of every criminal system[17]. Some researchers debate that the general part of EU criminal law framework should be established[18] while others suggest that to preserve the integrity of the legal system, Member States should abandon the regulation of preparation in the general part of the criminal code[19]. Accordingly, it is essential to investigate optimal ways to harmonise EU and national criminal law in the context of the unfinished stages of crime. In these searches, not only the compatibility of the European Union and national criminal law systems becomes important, but also the appropriate application of the principles of criminal law, as it is often emphasized that inchoate offences are not dangerous enough[20] or contradicts the principle of proportionality[21] which is relevant in criminalizing the stages of preparation and attempt.

However, notwithstanding the relevance of this topic, apart from fragmentary studies analysing the compatibility of the regulation of the stages of a criminal act in the context of EU impact on the whole general part of the criminal code and studies analysing a specific criminal act there is still a lack of research that would go deeper into the regulation of the stages of the crime in the context of the harmonisation of EU and national law. This study is significant in the context of harmonising EU and national criminal law, as the lack of legal certainty regarding the

[12] See, for example, S. Melander, "Effectiveness in EU Criminal Law and Its Effects on the General Part of Criminal Law," *New Journal of European Criminal Law* 5, No. 3 (2014); G. Švedas, and P. Veršekys. "The Tendencies and issues of transposing EU law to the General Part of Lithuanian Criminal Code," *Studia Prawno-Ekonomiczne* 99 (2016): 95.

[13] See, for example, S. Summers, "EU criminal law and the regulation of information and communication technology," *BERGEN Journal of Criminal Law and Criminal Justice* 3.1 (2015): 48-60; S. Nowak, Celina "The europeanisation of Polish substantive criminal law: How the european instruments influenced criminalisation in Polish law," *New Journal of European Criminal Law* 3.3-4 (2012): 363-380; A. Vincenzo, S. Capass, and R. K. Goel, "EU accession: A boon or bane for corruption?" *Journal of Economics and Finance* 45.1 (2021): 1-21; T. Chen, L. Jarvis, S. Macdonald, Cyberterrorism, eds. (Springer: Heidelberg, 2014): 155-171; N. Paunović "New EU Criminal Law Approach to Terrorist Offences," *EU and comparative law issues and challenges series* (ECLIC) 2 (2018): 530-552, etc.

[14] I. Wieczorek, *supra note* 5, 51.

[15] G. Švedas and P. Veršekys, "The Tendencies and Issues of Transposing EU Law to the General Part of the Lithuanian Criminal Code," *Studia Prawno-Ekonomiczne* 99 (2016): 95; S. Melander, "Effectiveness in EU Criminal Law and Its Effects on the General Part of Criminal Law," *New Journal of European Criminal Law* 5, No. 3 (2014): 276.

[16] K. Johanes, "Actus reus and participation in European criminal law," *Incertntia* (2013): 3.

[17] S. Melander, *supra note* 8, 276-277.

[18] J. H. Blomsma *supra note* 6, 8.

[19] G. Švedas, "Europos Sąjungos teisės įtaka Lietuvos baudžiamajai teisei," *Teisė* 74 (2010): 14.

[20] S. N. Bezugly et al, "Preparation for Crime: Signs, Criminalization," *Talent Development & Excellence* 12 (2020).

[21] M. Kaifa-Gbandi, "The Importance of Core Principles of Substantive Criminal Law for a European Criminal Policy Respecting Fundamental Rights and the Rule of Law," *European Criminal Law Review*, 1, No. 1 (2011): 17.

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criminalization of preparatory actions criminalization poses a risk of either over-criminalization or under-protection.

Reflecting mentioned tendencies, the main aim of this study is to determine – mainly using the methods of systematic[22], linguistic,[23] and scientific literature analysis[24] – whether, in the context of EU legislation, actions that are essentially only preparation or attempt should be criminalised as a completed, independent offences in the criminal codes of Member States. To achieve this goal, the following tasks are set: 1. identify the concept of inchoate offences; 2. analyse the EU regulation of inchoate offences in the context of EU competence limits; 3. determine EU criminal law requirements for Member States when criminalising inchoate offences.

THE CONCEPT AND SIGNIFICANCE OF THE STAGES OF A CRIME

Given that EU legislation encourages Member States to criminalise acts that are essentially unfinished crime, it is appropriate to first discuss how the stages of a criminal offence are generally understood and what their significance is in criminal law. This chapter serves for theoretical understanding of the stages of a criminal offence before moving on to the analysis of EU regulation.

Legal scholars agree that the stages of a criminal act are significant for criminal law, as they indicate different types of social danger, the degree of formation of intent, potential harm.[25] For instance, Dildora Kamalova systematically distinguishes 5 aspects in which the stages of a criminal act are significant: first, they have an organic connection with the period of formation of a person's intention, second and third, they are stages that allow determining the appropriate degree of danger and identify whether a specific action causes harm (completed crime) or poses a real threat of harm (preparation or attempt); fourth, they are related to the signs of a crime, and finally, they are a legal measure in crime prevention.[26]

Delving closer to the first aspect it should be mentioned that it is the content of the intention that is a very important aspect that allows to distinguish completed and incomplete criminal acts.

[22] This method requires analyzing the phenomena of reality both as components of a certain whole and as a whole (composed of interconnected components, but not explained by them), see Rimantas Tidikis, *Socialinių mokslų tyrimų metodologija*, (Vilnius: Lietuvos teisės universiteto leidybos centras, 2003), 437-438.

[23] This method is intended to determine the meaning of concepts taking into account the content of the legal act, its context, see E. Penelope, "Ethics in linguistic research," *Research methods in linguistics* (2013): 11-26.

[24] This method is intended for the analysis of information collected during the research, see V. Žydžiūnaite, *Baigiamojo darbo rengimo metodologija*, (Kaunas: UAB Vitae Litera, 2011), 48.

[25] I. Diakiv, "Stages of crime: definition of notion," *Knowledge Transfer in the Global Academic Environment. Terminological Basis of* (2021), 83; Walker, Clive, Mariona Llobet Anglí, and Manuel C. Meliá, eds. *Precursor crimes of terrorism: the criminalisation of terrorism risk in comparative perspective*. (Edward Elgar Publishing, 2022), 34.

[26] D. Kamalova, "Criminal legal characteristics of the stages of committing crime," *Society and innovations* 1.2 (2020): 236.

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Without intent, preparation for a crime and an attempt would be impossible.[27] During the first stage of a criminal act, the intention is only being formed and this occurs even before the preparation begins[28], therefore, following the Latin principle *cogitationis poenam nemo patiturpo*[29] it does not yet fall within the boundaries of criminal law. Meanwhile, during preparation, the person directs his or her intent to the creation of certain conditions necessary for the commission of a crime or facilitating it.[30] It is generally agreed that the criminal act has not yet been committed after preparation, thus, preparation ends when the criminal act begins to be committed, i.e. the stage of attempt is entered[31]. In this final stage before the completion of the criminal act, the person's intent is directed towards initiating the criminal act itself, causing real danger. It should be noted that until a potential criminal has not achieved his or her goal, he or she realizes that he or she can still change his or her mind while in the case of a completed criminal act, the intention of the perpetrator is already fully formed, therefore, the scholarly position is supported that the content of these intents cannot be equated.[32]

When drawing a line between unfinished and completed crime, as mentioned above, the criterion of dangerousness of the actions and the proximity to harm is also important and, consequently, the main purpose of inchoate offences is the prevention of harm[33]. It might be assumed that regulation of the preparatory stage among Member States indicates a low degree of dangerousness as some of the countries have no general rule criminalizing preparation[34], while others criminalize preparation for crimes of a certain severity[35] or in exceptional cases when explicitly stated[36]. Although the concepts of unfinished crime stages vary between Member States[37], the preparatory stage is most commonly associated with actions such as gathering tools and resources and recruiting accomplices[38]. Meanwhile, when defining an attempt, there are three main pillars on which all theories are essentially based: (1) the offender must have performed actions that directly reflect the beginning of the criminal act, which helps to draw the line that it is not just preparation and does not allow the attempt to be based solely on criminal intent; (2) there must be objective external facts that allow for the creation of a proper causal connection for the intended result to occur, i.e., the attempt must be possible and real, thus eliminating an impossible attempt in terms of criminal liability; (3) despite the fact that the intended actions are

[27] N. Katarzynar, and P. Palichleb, *Criminal attempt in the Polish penal code* (2020), 204.

[28] Д. Камалова, "Criminal legal characteristics of the stages of committing crime," *Общество и инновации* 1.2 (2020): 237.

[29] N. Katarzynar, *supra note* 27.

[30] X. Ochilov, and D. Kamalova. "Criminal responsibility for inchoate offence according criminal code of the Republic of Uzbekistan," *International Journal of Advanced Science and Technology* 29.5 (2020): 1730.

[31] See, J. H. Beale "Criminal Attempts," *Harvard Law Review* 16, No. 7 (1903): 503; https://doi.org/10.2307/1322810.503.

[32] A. Pathak, *Inchoate offences: A critical analysis* (Doctoral dissertation, (2021)): 6.

[33] J. Keiler, „Actus reus and participation in European criminal law,": *Incertntia* (2013): 321.

[34] For example, Germany, Spain.

[35] For example, Lithuania, Netherlands.

[36] For example, Poland.

[37] F. Radoniewicz, "Cybersecurity in the European Union Law," *Cybersecurity in Poland* (Springer, Cham, 2022): 73-92; S. Summers, "EU criminal law and the regulation of information and communication technology," *BERGEN Journal of Criminal Law and Criminal Justice* 3.1 (2015): 48-60.

[38] See, for example, Criminal Code of the Republic of Lithuania, Official Gazette (2000, No. 89-2741), Criminal Code of Poland, Criminal Code of Dutch.

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performed, they must not lead to the intended result for certain reasons beyond the control of the offender, since otherwise, if the intended result occurs, it would be assessed as a completed criminal act[39].

The term inchoate is defined in the dictionary as (1) not yet completed or fully developed, elementary; (2) just begun, beginning; (3) unorganized[40]. In scientific doctrine, such a criminal act is understood as a step towards another criminal act, which (in itself) is serious enough to be punished[41]. Meanwhile, the English term "preparation" is defined as: (1) an act of preparing for something; (2) any procedure or experience perceived as preparation for the future; (3) a state of readiness; (4) making plans and arrangements in order to prepare for something; (5) a state of being ready for what is to happen or an action taken to achieve readiness,[42] and the term "attempt" is defined in English dictionaries as: (1) a try; (2) an effort to achieve something[43]. These linguistic definitions highlight that preparation involves merely getting ready for an act, whereas attempt signifies an actual effort to complete a crime. In other words, the difference between the stages of the preparation and the attempt is the difference between "gathering forces" and "launching them".[44] For instance, case law emphasizes that the stages of preparation and attempted crime differ in the nature of the perpetrator's actions, the motive, purpose, and degree of culpability realization, the moment of interruption of the criminal act, and the varying degree of proximity to the completed crime. However, the fundamental difference between these stages in the commission of a criminal act is that in the case of an attempt, there is a direct intention to commit the crime, whereas preparation only involves creating the conditions necessary to begin committing it.[45]

However, it is agreeable that the further away the actions are from causing harm, the weaker the argument for criminalizing such actions is[46]. This is why most Member States recognize the institution of voluntary refusal, which allows a person who voluntarily abandons the completion of a criminal act to avoid criminal liability.[47] Although the regulation of this institute differs, it is basically agreed that in such a case it must be assessed whether the person had the opportunity to complete the criminal act and this decision was not forced.[48] It is consistent with the scientific position that such a regulation motivates a person to cease criminal acts.[49] In this case, if the person were to receive an identical punishment, it would not prevent them from committing further criminal acts. Furthermore, it is argued that voluntary refusal reflects a lower degree of

[39] C. Contreras, Joaquín, "Conceptos fundamentales de la responsabilidad por tentative," *Anuario de derecho penal y ciencias penales* (2007): 40-41.

[40] https://www.dictionary.com/browse/inchoate, <last visited on 10.12.2024>.

[41] B. A. Garner (ed.), *Black's Law Dictionary*, 7th ed. (West Group, St. Paul, Minn., 1999), 1108.

[42] https://www.etymonline.com/word/preparation.

[43] https://www.dictionary.com/browse/attempt

[44] D. Ohana, "Desert and Punishment for Acts Preparatory to the Commission of a Crime," 20 *CAN. J. L. & JURISPRUDENCE* 113 (2007): 133.

[45] Ruling of the Supreme Court of Lithuania of April 13, 2022, in the criminal case No. 2K-43-387/2022.

[46] R. A. Duff, and Stuart P. Green, eds. *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press, 2011), 292.

[47] For example, in Germany, Spain, Netherlands, Latvia, Lithuania, and etc.

[48] See, for example, Criminal Code of the Republic of Lithuania, article 23.

[49] T., Peter JP, *The Dutch criminal justice system* (Nijmegen: Wolf legal publishers, 2008), 76.

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dangerousness on the part of the individual.[50] Even if there is no voluntary refusal, the lesser punishment is often provided for preparation and attempt to commit a crime than in the case of a completed criminal act[51]. It can be considered that such regulation complies with the principles of criminal law, since in this case actions less dangerous to society are carried out and there is a lower probability of harm.

The discussed aspects revealed that each of the stages of a criminal act has its own characteristics, differing in the content of the potential criminal's intent, the degree of danger, and the distance from causing the harm. The division of a criminal act into different stages not only allows for the establishment of the boundaries of criminal law, but also enables the selection of a proportional punishment and the enforcement of the principles of criminal law.

REGULATION OF INCHOATE CRIMES IN THE EUROPEAN UNION. DETERMINING THE REQUIREMENTS FOR CRIMINALIZATION OF INCHOATE OFFENCES

With the rise of organized crime and information technology era, ways of preparing for a crime evolved and encouraged the search for new legal measures.[52] Even before the entry into an era of the Treaty of Lisbon there were already Framework decisions calling for the criminalization of actions that are essentially an unfinished criminal act, such as, for example, promising or offering any unreasonable reward, or accepting a promise for such a reward[53], training and recruiting terrorists,[54] and etc. After the adoption of the Treaty of Lisbon and the inclusion of the directives as criminal law measures[55], the obligations of the Member States to criminalize actions which are inchoate acts only increased.

It is noteworthy that the regulation of inchoate offences in the European Union legislation can be grouped into two parts – the first one is where it is directly stated that an attempt on specific act should be punished. For example, in the Council's Framework decision on the fight against sexual exploitation of children and child pornography, the article "instigation, aiding, abetting and attempt" *inter alia* stipulates that Member States must take measures to ensure that attempt to commit crimes related to the sexual exploitation of children and the production, distribution,

[50] *Ibid.*

[51] For example, in Lithuania.

[52] P. Smith, *Strafbare voorbereiding: een rechtsvergelijkend onderzoek* (2003), 2; L. Menzie and T. Hepburn, "Harm in the digital age: Critiquing the construction of victims, harm, and evidence in proactive child luring investigations," Man. LJ 43 (2020), 391.

[53] Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192, 31/07/2003.

[54] Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330, 9.12.2008.

[55] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (OJ C 306, 17.12.2007); entry into force on 1 December 2009.

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dissemination or transmission of child pornography would be punished[56], furthermore in the directive 2017/541/EU it is stated that attempting to commit specific terrorist activities should be punished,[57] and there are also other examples in the EU Framework decisions and directives. However, as Sakari Melander notes, although EU legal acts often include articles that require to criminalise aiding, abetting and attempt, they "are not aimed at harmonising general doctrines on inchoate offences and attempt".[58] In other words, although the EU legislation in this case names the stage of attempt, no definition of what actions should fall under this concept is provided, thus each state can implement this provision differently, depending on the content of its criminal law. This leads to the conclusion that this group of regulation does not cause major implementation problems.

In the author's opinion, the situation is completely different with the second regulation group, where the stage of the crime is not detailed (i.e., criminalizes preparatory acts without labelling them as attempts or preparation), but from the nature of the specified acts it can be identified that the acts are not, in principle, a completed criminal act. In this case, specific preparatory criminal acts are not even criminalized in the section related to aiding, abetting and attempt, but are established in independent articles in EU documents. For example, directive on combating terrorism has independent articles stating that public incitement to commit a terrorist crime, recruitment and training of terrorists should be punished[59]. Other examples could be luring a child of a certain age[60], illegal access to information systems, production, sale, acquisition of tools used to commit certain criminal acts,[61] and etc. This has resulted in an increase in the number of provisions within the special part of Member States' criminal codes that criminalize inchoate offences.[62]

Having established the two categories of EU regulation on inchoate offences, it is necessary to analyse the requirements for criminalizing actions in the second group, as they are less clearly defined than those in the first group. In order to be able to determine the requirements imposed on the Member States while criminalizing acts, that were separated in the second group, in this subsection, first of all, structure and the concepts used in EU legal acts should be examined, then

[56] Council Framework decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, L 13/44.

[57] DIRECTIVE (EU) 2017/541 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, L 88/6.

[58] S. Melander, "Effectiveness in EU Criminal Law and Its Effects on the General Part of Criminal Law," *New Journal of European Criminal Law* 5, No. 3 (2014): 291.

[59] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88.

[60] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, L 335/1.

[61] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, L 218/8.

[62] See, for example E. Gruodytė and U. Urbšytė. "Criminalization of the Promise and Offer to Give or Accept a Bribe as a Completed Criminal Offense: Compliance with the Principle," *Baltic Journal of Law & Politics* 14.2 (2021): 123-141.

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the objective pursued by the directives should be evaluated and, finally, the limits of competence of the European Union should be briefly taken into account.

It should be emphasized when starting the analysis that none of the discussed EU legal acts explicitly classify the relevant conduct as a completed crime, an attempt, or mere preparation. For instance, in the Directive of the European Parliament and the Council, aimed at harmonising national legislation in the context of online child grooming, the term "criminal offense" is not even used when mandating the criminalization of establishing contact with children for sexual purposes[63]. Instead, Member States are merely required to take measures to ensure that the specified "intentional acts" are punishable.[64]Although the structure of the directives demonstrates that preparatory actions are established in independent articles (different from regulation in the first group), this alone does not mean that the aforementioned actions should be punished only as an independent act. Such regulation could have been chosen since not all Member States have established a general rule on the criminalization of preparation for a criminal act in the general parts of their criminal codes. Furthermore, this could have been motivated by the desire to criminalize specific detailed actions, while in the section dedicated to attempt, specific actions are not detailed and depend on the Member States.

While looking at the concepts of preparation and attempt, it becomes obvious that some of the actions that Member States are encouraged to criminalize should not be perceived as a completed criminal act from a criminal law perspective[65]. For example, in many Member States, luring a child is criminalized as a completed offence, which Oleg Fedosiuk critiques as an artificial criminalization and an illusion of protecting children's rights[66]. Considering that in the scientific doctrine such actions are perceived only as an intermediate step to prepare for child sexual abuse[67], furthermore, that the directive itself states that connections are made when, for

[63] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA.

[64] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, replacing Council Framework Decision 2004/68/JHA.

[65] See, for example F. Radoniewicz "Cybersecurity in the European Union Law," *Cybersecurity in Poland* (Springer, Cham, 2022): 73-92; S. Summers, "EU criminal law and the regulation of information and communication technology," *BERGEN Journal of Criminal Law and Criminal Justice* 3.1 (2015): 48-60; O. Fedosiuk, "Artificial Criminalization as a Pathology of Legal Practice," *Law Review* 2, 14 (2016): 28–47; R. Marcinauskaitė, "Issues in the Qualification of Unlawful Possession of Devices, Software, Passwords, Access Codes, and Other Data (Article 198 of the Criminal Code)," *Jurisprudencija* 26, no. 2 (2019): 352–369, etc.

[66] O. Fedosiuk, "Dirbtinis kriminalizavimas kaip teisinės praktikos patologija," Teisės apžvalga Nr. 2(14), (2016) p. 32.

[67] L. Klimek. "Solicitation of children for sexual purposes: the new offence in the EU (under the Directive 2011/92/EU)," *International and Comparative Law Review* 12.1 (2012): 143.

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example, specific preparations or attempts are made to commit a criminal act[68], it is debatable whether such actions should be qualified as a completed criminal offence. There are more similar discussions in scientific doctrine regarding preparatory criminal acts. Another example could be the promise and offer to give or accept a bribe. It has been discussed whether the actions when a person, who has promised to give a bribe but has not yet fully realized his or her intention, voluntary decides to stop his or her actions and does not cause harm, should be seen "as completed crime without the possibility of avoiding criminal liability by voluntarily refusing to complete the crime"[69]. Furthermore, the question whether an attempt to increase security against terrorism by facilitating early intervention, the values of the rule of law and human rights are not unreasonably sacrificed is also being raised in scientific doctrine[70].

As regards the requirements for the Member States, both the directives and the framework decisions state that the specified actions must be punished "with the application of effective, proportionate and dissuasive criminal sanctions". Therefore, in the legal system of a Member State, where there is an opportunity to recognize specific actions as preparation or attempt and punish them effectively, proportionately, and dissuasively, such regulation could theoretically be seen as meeting the requirements of EU law.[71] This statement is further strengthened by the fact that, based on the practice of the Court of Justice, in the context of the principle of proportionality, EU legislation and actions must be necessary and appropriate for the goals pursued and proportionate to the negative effects, if there are several measures, the ones that are the least invasive and burdensome for the Member States must be chosen[72]. Furthermore, while analysing the impact of Member States on the formation of EU criminal law, it should be noted that they can play an important role in the harmonisation process by raising an objection[73]. Although in scientific discourse, the emergency brake mechanism is considered a significant legal safeguard that allows Member States to protect the basis and integrity of their criminal legal systems,

[68] Directive 2011/92/EU of the European Parliament and the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, L 335/1.

[69] E. Gruodytė, and U. Urbšytė. "Criminalization of the Promise and Offer to Give or Accept a Bribe as a Completed Criminal Offense: Compliance with the Principle," *Baltic Journal of Law & Politics* 14.2 (2021): 125-126. Also, A. Abramavičius, et al., *Europos Sąjungos teisės įtaka Lietuvos teisinei sistemai: mokslinių straipsnių, skirtų Europos Sąjungos teisės įtakai Lietuvos konstitucinei, administracinei, aplinkos apsaugos, baudžiamajai, civilinei ir civilinio proceso, darbo ir socialinės apsaugos bei finansų teisei, rinkinys* (Vilnius: Vilniaus universiteto leidykla, 2014).

[70] T. Chen, L. Jarvis, S. Macdonald, Cyberterrorism, eds. (Springer: Heidelberg, 2014), 155-171.

[71] E. Gruodytė, and U. Urbšytė. "Criminalization of the Promise and Offer to Give or Accept a Bribe as a Completed Criminal Offense: Compliance with the Principle," *Baltic Journal of Law & Politics* 14.2 (2021): 123-141.

[72] Cf. the ECJ ruling in Schräder v. Hauptzollamt in Gronau, 265/87, 2237.

[73] I. Wieczorek. The Legitimacy of EU Criminal Law. Oxford: Hart Publishing, 2020. Hart Studies in European Criminal Law. Hart Studies in European Criminal Law. Bloomsbury Collections. Web. 2 Apr. 2024. <http:// dx.doi.org/10.5040/9781509919772>: 57.

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practice reveals that member states are reluctant to use it[74]. However, looking at the implementation of EU legislation in the Member States, it can be seen that the provisions of the directives are often transposed automatically[75], without trying to reconcile them with the existing legal system. This not only potentially poses a risk of overcriminalization, but also does not conform to the idea of a unified criminal legal system, when essentially identical actions are criminalized in both the general and special parts of the criminal code.

These findings indicate that while EU directives aim to harmonise substantive criminal law, Member States, in implementing EU legal acts, should also take into account the general part of the criminal code. Given that EU law prioritizes the least restrictive measures, Member States should have flexibility in classifying and punishing inchoate offences under the general part of their criminal codes, provided they impose effective, proportionate, and dissuasive sanctions.

CONCLUSIONS

The distinction between the stages of a crime is of great importance, as it reflects the formation of a person's intention, the degree of dangerous behaviour and the corresponding relationship with the harm. Differentiation of criminal liability considering the stage of a criminal act allows not only to ensure the implementation of the principle of proportionality and impose an appropriate punishment, but also to encourage a potential criminal to cease criminal actions.

The European Union encourages Member States to criminalize preparatory actions by providing detailed and specific regulations. As a result, Member States often transpose these provisions into national law automatically, without making efforts to align them with the existing legal system. In many cases, these actions are criminalized in the special part of the criminal code as completed criminal offences, without assessing whether they could instead be punished under the general part of the criminal code.

Considering that EU legal measures should be as minimally restrictive as possible, it can be argued that Member States could implement EU mechanisms by criminalizing such actions under the general part of their criminal codes, as long as the penalties imposed are effective, proportionate, and dissuasive, which is the ultimate objective of EU directives. However, as the EU regulatory framework reveals a lack of clear references to the stages of crime and Member States remain insufficiently proactive in the harmonisation process, it cannot be unequivocally concluded that the current EU legal framework mandates the punishment of preparatory actions as incomplete criminal offences. Therefore, it is recommended that EU directives criminalizing inchoate crimes should include a provision stating that such acts may also be punishable as either preparation or attempt to commit a criminal offense.

[74] J. Öberg, "Exit, Voice and Consensus-A Legal and Political Analysis of the Emergency Brake in EU Criminal Policy," November 24 (2020): 76-77.

[75] G. Švedas, "Europos Sąjungos teisės įtaka Lietuvos baudžiamajai teisei," *Teisė* 74 (2010): 14.

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SANTRAUKA

PARENGTINĖS NUSIKALSTAMOS VEIKOS: ES IR NACIONALINĖS TEISĖS HARMONIZACIJA

Nepaisant to, kad derinant ES ir nacionalinę teisę, pakeitimai dažniausiai daromi koreguojant valstybių narių baudžiamųjų kodeksų specialiosios dalies straipsnius, jie turi įtakos ir bendrosios dalies kokybei. Pastaraisiais dešimtmečiais, įgyvendinant ES baudžiamosios teisės reikalavimus, valstybių narių baudžiamųjų kodeksų specialiojoje dalyje padaugėjo straipsnių, kuriuose kaip savarankiška nusikalstama veika kriminalizuojami veiksmai, iš esmės esantys rengimusi ar pasikėsinimu atlikti nusikalstamą veiką. Viena vertus, ES teisėje teigiama, jog yra gerbiamos skirtingos valstybių narių teisinės sistemos bei tradicijos, todėl bet koks baudžiamosios teisės derinimas turi būti būtinas ir privaloma atsižvelgti į šiuos skirtumus. Kita vertus, nepaisant to, jog ES direktyvomis gali nustatyti tik minimalius standartus, teisės aktuose pateikiamos išsamios nusikalstamų veikų apibrėžtys, kurios apima ir parengiamuosius veiksmus. Tuo tarpu net ir valstybės, kurios savo baudžiamųjų kodeksų bendrojoje dalyje numato atsakomybę ne tik už pasikėsinimą, bet ir už rengimosi stadiją, įgyvendindamos ES teisės aktus, šias nuostatas automatiškai perkelia į specialiąją baudžiamojo kodekso dalį.

Atsižvelgiant į šias tendencijas, tyrime, daugiausiai pasitelkiant sisteminės, lingvistinės bei mokslinės literatūros analizės metodus, siekiama nustatyti, ar ES baudžiamojoje teisėje egzistuoja aiškus ir nedviprasmiškas reikalavimas valstybėms narėms įgyvendinant ES teisės aktus parengtinius veiksmus kriminalizuoti kaip savarankišką nusikalstamą veiką. Šiam tikslui pasiekti keliami 3 uždaviniai: 1. identifikuoti parengtinių nusikalstamų veikų sampratą; 2. Išanalizuoti ES reglamentavimą parengtinių veiksmų atžvilgiu ES kompetencijos ribų kontekste; 3. Nustatyti ES baudžiamosios teisės reikalavimus, keliamus valstybėms narėms kriminalizuojant parengtinius veiksmus.

Tyrime atskleista, jog nusikalstamos veikos stadijų atskyrimas turi ypatingą reikšmę baudžiamojoje teisėje – tai ne tik atspindi asmens tyčios formavimąsi, pavojingo elgesio laipsnį ir atitinkamą santykį su žala, tačiau taip pat padeda užtikrinti baudžiamosios teisės principų įgyvendinimą. Taip pat nustatyta, jog ES teisės aktų reglamentavimas neleidžia daryti vienareikšmiškos išvados, ar veiksmai, kurie iš esmės yra nebaigta nusikalstama veika, turi būti kriminalizuoti kaip savarankiškas nusikaltimas.

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RAKTINIAI ŽODŽIAI

Nebaigta nusikalstama veika, nusikalstamos veikos stadijos, ES baudžiamoji teisė, harmonizacija.