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Legal Interpretation in the EU Law Perspective: General Model and the Context of Penal Law

Interpretacja prawnicza w perspektywie prawa Unii Europejskiej. Model ogólny a kontekst prawa karnego

ABSTRACT

The purpose of the study is to analyze the most important peculiarities occurring in the interpretation of EU law in the light of the general (classical) model of law interpretation developed in doctrine and judicial practice in national legal orders. This is because, despite the relationship between the two models of interpretation, the characteristics of EU law are the basis for the formation of the distinctiveness of interpretative practice. The latter, assuming that the arrangement of the interpretation process itself does not show significant differences, is analyzed both in the context of the set and role of the sources of law used in judicial interpretation, from which the norms of EU law are reconstructed, as well as the role of the individual rules of interpretation and the mutual relations between them. This analysis allows us to shed light in the last part of the study on the characteristics of the interpretation of criminal law (substantive and procedural), which, although normatively regulated mainly at the level of the law of a member state of the European Union, implements the principle of interpretation consensual with the EU law, being influenced in a significant extent by the case law of the Court of Justice of the European Union.

Keywords: European Union; rules of judicial interpretation; principle of consensual interpretation; interpretation of criminal law; influence of CJEU case law

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INTRODUCTION

The article deals with the relationship between the general model of legal interpretation (in particular judicial interpretation as the most important type of operative interpretation) and interpretative practice in the field of EU law.

The three-part layout of the study corresponds to the realization of the goal indicated above. It begins with an analysis of those characteristic features of EU law that affect the distinctiveness of interpretative practice in this law despite its reliance on a general model of interpretation regarding the course of the process and the set of rules shaping the outcome of interpretation. This will allow the essence of the peculiarities themselves to be determined later in the study in two basic contexts – first, the types of sources (carriers) of law used as validation interpretative arguments, and second, the role of particular rules of interpretation and relations between them. The last part of the study is filled with a signaling superimposition of these general characteristics on the most important components of the implementation and interpretation of criminal law.

The methodological profile of the study is based on a combination of theoretical and dogmatic-legal perspectives. The study builds its basis on the general model of interpretation of EU law, which is, in principle, compatible with the model of interpretation of national law that is primary to it, but which shows a number of distinctions in judicial practice. This relationship obtains additional value by matching the result of the analysis with the problem of interpretation in criminal law (both substantive and procedural), which, although largely left to national legislators and courts, is becoming an increasingly explicit subject of the Court of Justice of the European Union (CJEU) jurisprudence. This, in turn, leads to the conclusion that various aspects of the impact of EU law on this branch of law should also be recognized in the practice of national courts of EU member states.

The work uses the body of publications and case law to the extent that is possible to use in the designated size of the study and corresponds to its purpose. The problem of interpretation of the law of the European Union has been the subject of many studies, both in Polish[1] and foreign-language.[2] Despite the fact that there

[1] Cf. C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki*, vol. 1, Warszawa 2000, pp. 651–714; J. Helios, *Pojmowanie wykładni prawa europejskiego w orzecznictwie Trybunału Sprawiedliwości*, Wrocław 2002, passim; M. Zirk-Sadowski, *Wykładnia i rozumienie prawa w Polsce po akcesji do Unii Europejskiej*, [in:] *Polska kultura prawna a proces integracji europejskiej*, ed. S. Wronkowska, Kraków 2005, pp. 53–114; A. Kalisz, *Wykładnia i stosowanie prawa wspólnotowego*, Warszawa 2007, passim; L. Leszczyński (ed.), *Wykładnia prawa Unii Europejskiej*, Warszawa 2019, passim.

[2] Cf. L.N. Brown, T. Kennedy, *The Court of Justice of the European Communities*, London 2000, pp. 321–382; J. Shaw, *Law of the European Union*, New York 2000, especially pp. 296–325,

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is a predominance of studies on its general model, there are also works relating to individual branches of law,[3] including criminal law,[4] and this is increasing.

In the present work, the two perspectives are combined, which can contribute to a more complete characterization of the manner and scope of deepening European integration in its various spheres and segments of law. The nature of the study implies the legitimacy of only a signaling level of analysis of the issues included in it, forcing a focus on the most important and actual ones, including especially those that are not commonly seen in the previous approaches to this issue. Especially since many of them will be developed in the perspective of procedural criminal law in subsequent studies of this volume.

THE DISTINCTIVENESS OF EU LAW

The basic premise of the study, which emphasizes the relationship between the theoretical model of interpretation of EU law and the general model of legal interpretation built on the basis of national law, does not negate the separateness with regard to specific interpretative reasoning and actions, as well as the relationship of priority or importance of their particular rules and arguments. This distinctiveness is evident in the decision-making practice of the CJEU, but it cannot fail to extend to the interpretation of EU law by the national courts of the member states.

This is due to several types of factors lying both on the side of the characteristics of the EU legal order itself and its relationship with international and national legal orders.

Among the most important features of the EU law are: (1) the original configuration of its sources, introducing into their system, among other things, the division into primary and secondary legislation, role of directives as a type of "effect" act, presence of the "soft law" acts in the form of recommendations and opinions, and

397–458; K. Lenaerts, J.A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, Florence 2013, pp. 1–48.

[3] Cf. J. Helios, *Wykładnia prawa prywatnego UE*, [in:] *Wykładnia prawa…*, p. 286 ff.; B. Wojciechowski, *Specyfika wykładni prawa podatkowego w orzecznictwie Trybunału Sprawiedliwości*, [in:] *Wykładnia prawa…*, p. 299 ff.; J. Napierała, *Wykładnia prawa spółek Unii Europejskiej*, Warszawa 2020, passim.

[4] Cf. T. Ostropolski, *Prawo karne domeną wspólnoty?*, "Europejski Przegląd Sądowy" 2008, no. 8, p. 39 ff.; J. Hanc, *O znaczeniu prawa unijnego dla stanowienia i wykładni wewnętrznego prawa karnego materialnego*, [in:] *Międzynarodowe i europejskie prawo karne. Osiągnięcia, kierunki rozwoju, wyzwania*, eds. J. Nowakowska-Małusecka, I. Topa, Katowice 2015, pp. 193–211; M. Rams, *Specyfika wykładni prawa karnego w kontekście brzmienia i celu Unii Europejskiej*, Warszawa 2016, passim; A. Grzelak, *Wykładnia krajowego prawa karnego w świetle prawa unijnego – wprowadzenie i wyrok Trybunału Sprawiedliwości z 16.06.2005 r., C-105/03, postępowanie karne przeciwko Marii Pupino*, "Europejski Przegląd Sądowy" 2023, no. 2, p. 56 ff.

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particular importance of the jurisprudence of the CJEU, especially of the principles of law shaped within its framework; (2) the multilingual structure of legal texts, both in the form of normative acts and CJEU rulings; (3) the bi-institutionality (at the level of the EU and member states) of the processes of applying EU law; (4) the integrative linking in EU law of its general interests with the interests of member states; and (5) the dynamics of EU law, incomparable to national orders, related to the historical broadening and deepening of integration, moving in the most general terms from economic to political and axiological integration.

The next group of features impinging on the interpretative practice of EU law is related to the complexity of the relationship of EU law with other legal systems, including, first and foremost, the legal orders of member states. Three of these features require at least signaling.

The first of these points to the specific relationship between EU law and international law, in which particular attention should be paid, first of all, to the use by the EU bodies of the interpretative rules contained in Articles 31–33 of the Vienna Convention on the Law of Treaties both in the interpretation of EU treaty law and in the interpretation of international agreements to which the European Union is a party.

The second feature concerns the complex relationship of EU law with the law of the Council of Europe and the jurisdiction of the European Court of Human Rights. This mainly concerns the jurisprudence of the CJEU after the adoption of the Charter of Fundamental Rights, although, after all, both the problem of the Union's membership in the system of the European Convention on Human Rights and the basing of the CJEU's jurisprudence on its regulations should be dated many years earlier.[5]

The most important and practically most difficult problems, however, are caused by the third feature, the essence of which is not only the extremely complex but also heterogeneous relationship of EU law with the law of the member states and the case law of their courts. Indeed, assuming that the law of the European Union is to some extent a product of the different interests of the various member states, one cannot overlook the effect of this relationship, manifested in a certain degree of actual interpretative diversity and quite natural conflicts between the EU and the national perspectives. It is expressed in judicial decisions (including especially constitutional courts), which may not easily yield not only to the principle of primacy of EU law[6] but also to the unifying action of the CJEU, set forth in Article 19 of

[5] Cf. W. Czapliński, R. Ostrihansky, P. Saganek, A. Wyrozumska (eds.), *Prawo Wspólnot Europejskich. Orzecznictwo*, Warszawa 2001, pp. 333–357.

[6] On the current status of this principle, see A. Sołtys, *Relacja zasady bezpośredniego skutku i zasady pierwszeństwa prawa Unii Europejskiej w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości*, "Europejski Przegląd Sądowy" 2022, no. 6, pp. 4–16.

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the Treaty on European Union (TEU).[7] However, this does not mean a weakening of the judicial dialogue, including preliminary rulings in the most important cases for the national judiciary.[8]

DISTINCTIVENESS OF THE INTERPRETATION OF EU LAW

1. Process and rules of interpretation

The features of EU law signaled above lead to significant distinctiveness concerning the interpretation of EU law, manifested especially within the framework of operative interpretation, including above all its most important type – judicial interpretation. As indicated above, this does not apply to the process of operative interpretation itself,[9] but to the interpretative rules used within its framework.[10]

Indeed, the process of operative interpretation in EU law includes, as in the national process of law interpretation, the establishment of a set of carriers (sources) of EU law, the reconstruction of patterns of behavior from these carriers, leading

[7] The problem has been known for a long time, especially in connection with the rulings of the German Bundesverfassungsgericht in the field of human rights from the 1970s, but it also appeared recently in the judgment of this Court of 5 May 2020 (2 BvR 859/15, DE, BVerfG:2020:rs20200505.2bvr085915) challenging the effect of the CJEU's *ultra vires* judgment. See J. Barcz, J. Kranz, *Niedobry wyrok w niefortunnym czasie (uwagi na tle wyroku FTK z 5.05.2020 r.)*, "Państwo i Prawo" 2020, no. 9, p. 23 ff. A broader analysis of this phenomenon is presented in the work of A. Wyrozumska, *Wyrok FTK z 5.05.2020 r. w świetle podobnych orzeczeń sądów innych państw członkowskich*, "Państwo i Prawo" 2020, no. 9, pp. 47 ff. Also relevant in this regard is the politically motivated ruling of the Polish Constitutional Court of 7 October 2021 (K 3/21, OTK-A 2022, item 65) questioning the competence of the CJEU to rule on the Polish judicial system (in particular on the issue of the procedure for the appointment of judges) and the ruling of this Court relating to the competence of the European Court of Human Rights (judgment of 24 November 2021, K 6/21, OTK-A 2022, item 9).

[8] This is evidenced, e.g., by the CJEU judgment of 19 November 2019 (C-585/18, C-624/18 and C-625/18, EU:C:2018:117) issued as a result of a question from the Polish Supreme Court on the interpretation of Article 19 TEU and Article 47 of the Charter of Fundamental Rights in the context of the principle of independence, or the CJEU judgment of 2 March 2021 (C-824/18, EU:C-2021:153) issued as a result of a question from the Polish Supreme Administrative Court on the effects of appointing judges at the request of the National Council of the Judiciary created in 2017, as it is widely believed, inconsistent with the Polish Constitution.

[9] T.T. Koncewicz (*Filozofia europejskiego wymiaru sprawiedliwości. O ewolucji fundamentów unijnego porządku prawnego*, Warszawa 2020, pp. 113–119), however, recognizes a certain specificity of the decision-making process in the CJEU in the form of distinguishing three contexts of the reasoning of a judge of this Court: discovery, argumentation and reconstruction.

[10] In this regard, one cannot fail to see the links between the judicial interpretation of EU law and the interpretation of the European Convention on Human Rights. See M.A. Nowicki, *Wprowadzenie do interpretacji EKPCz*, "Europejski Przegląd Sądowy" 2010, no. 1, pp. 4–11.

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to the construction of normative bases for decisions on the application of law (including the competence, procedural and substantive legal basis) and being finally reduced to decision on the application of law.[11] This is forcefully evident in the interpretation of this law by the CJEU and national courts in the judicial type, but also applies to the application of law in the administrative type, as evident in individual decisions of, e.g., the European Commission.

Significant distinctions concern the use of interpretive rules. However, the differences do not extend to the set of rules (directives, methods) of interpretation itself, but to their interpretative role and the relationship between them (including, among other things, the order of their application or the impact on the result of interpretation) implemented to individual carriers of EU law, the set of which also shows significant distinctiveness.

The importance of considering the issue of the rules of interpretation is so important for the entire volume in which this study is included, because being relevant to the law of the European Union as a whole, it "breaks down" in a special way in the interpretation of criminal law, on the one hand duplicating general features, while on the other hand exhibiting additional features, affecting a more profound change in the interpretative routine in criminal law than in branches already more firmly integrated into EU law.

2. Judge Denning's general opinion

Let us begin our analysis of the specifics of the interpretation of EU law with a brief reference to the opinion of British Judge Lord Alfred Thomas Denning, as expressed in his 1974 ruling in *Bullmer v. Bollinger*. Its most pertinent passage, concerning the perception of national court judges (although Judge Denning was writing about English judges here) of treaty law as the most essential component of the then functioning law of the European Communities, indicates that: "The [EC] treaty is quite unlike any of the enactments to which we have become accustomed. (…) It lays down general principles. It expresses its aims and purposes. All in sentences of moderate length and commendable style. But it lacks precision. It uses words and phrases without defining what they mean. (…) All the way through Treaty there are gaps and lacunae. These to be filled in by the judges, or by regulations or directives".[12] Accordingly, writes Lord Denning, national judges "must follow the European pattern. (…) No longer must they argue about the precise grammatical sense. They must look to the purpose or intent. (…) The must divine

[11] Cf. L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2000, pp. 114–120.

[12] *Bullmer v. Bollinger* [1974] Ch. 401 at 425, [1974] 2 All E.R. 1226 at 1237, cited in L.N. Brown, T. Kennedy, *op. cit.*, p. 321.

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the spirit of the Treaty and gain inspiration from it. If they find a gap, they must fill it as best they can".[13]

This, it seems, somewhat "exaggerated" and certainly selective picture of Community law, characteristic of the Anglo-Saxon lawyer but to some extent of the Continental lawyer, does apply to treaty law, but it was (and still is) not entirely inadequate for this legal order as a whole. At the same time, it has not changed from the side of sources and method of implementation so radically that today we should look for a complete negation of the above theses. If we put the most important of them in a theoretical perception, we should say that they primarily point to four characteristics of the interpretation of EU law: (1) reliance in the interpretation of this law mainly on the principles of law, causing the need to refer to the "spirit" of the normative act; (2) a strong teleological orientation; (3) less linguistic precision, involving, among other things, the absence of legal definitions, which are, after all, the most powerful means of legislative influence on the linguistic interpretation of the law; and (4) the presence of normative contradictions and structural gaps in this law.

Judge Denning's view thus captures many features of interpretative practice in EU law. However, it cannot replace a more detailed analysis, which should address both the use of different carriers (sources) and different rules of operative interpretation of EU law.

3. The role of different carriers of law

The logic of the process of operative interpretation (the arrangement of its phases) dictates that we first consider the distinctions that appear in the validation phase of interpretation, the essence of which is the construction of a set of carriers from which in subsequent phases the underlying patterns of behavior and normative bases of judicial decision will be reconstructed.

The most general statement in this regard must emphasize the role of legislation in the EU legal order, being a kind of the statutory order. This feature is not altered by the absence of strictly constitutional regulation and the differentiation of normative acts into acts of primary (treaty) law, acts of international law to which the European Union is a party, and normative acts of secondary law, which have a differentiated character (directly applicable, effect-acts, soft law). In doing so, the role of national laws as non-self-contained but "comparatively relevant" bases for judicial decision-making, especially by national courts, cannot be overlooked. However, the role of legal rules is supplemented and corrected to a higher degree than in the legal orders of the Member States by judicial jurisprudence, of course

[13] *Ibidem*, pp. 321–322.

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with the role of CJEU jurisprudence dominating in this respect. This applies to the reconstruction of all types of norms, including competence norms.[14]

The role of this jurisprudence materializes in three variants. First, in the binding role of CJEU decisions that settle a dispute or establish a right or obligation with respect to their direct addressees. Second, in the formation of a kind of precedent practice within the CJEU's jurisprudence, made evident both in the reference to its own earlier decisions or entire lines of jurisprudence by the CJEU itself and in the invocation of the CJEU's decision by the courts and other bodies as the decisions cited or adapted to their own decisions[15] (this is primarily due to respect for CJEU rulings and the importance of preliminary rulings in unifying the interpretation of EU law). Third, finally and most important from the point of view of the arguments of the validation phase of interpretation, in treating the most relevant CJEU rulings as rulings formulating principles of law. Even if there is a lack of CJEU decisions based solely on its own precedents, or if the case law principles have less argumentative force than the codified principles (e.g. in Article 2 TEU[16]), one cannot overlook the practice of forming a kind of EU common law, taking into account, moreover, by virtue of Article 6 TEU, the common constitutional traditions of the member states (which also goes beyond strictly normative regulations).

The role of jurisprudence of the CJEU and the principles of law expressed therein also expands the criteria for the test of the applicability of legal regulations, necessary for its inclusion in the set of validation arguments of a given decision-making process. Indeed, in addition to the role of such universal criteria as *desuetudo* or retroactivity, there is the criterion of contradiction of the law of a member state with EU law and, indicated for consideration by national courts, the criterion of contradiction within national law. Moreover, the applicability of national laws can be examined not only within the framework of the content of the conflicting provisions themselves but also within the framework of the realization of the goal of European integration, the threat of which may constitute grounds for refusing to apply national laws.[17]

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[14] On the peculiarities of the reconstruction of competence norms in EU law, especially in the context of distinguishing derived and immanent competences, see J. Roszkiewicz, *O technikach wykładni przepisów kompetencyjnych w prawie Unii Europejskiej*, "Europejski Przegląd Sądowy" 2021, no. 6, pp. 4–5, 8–9.

[15] For more on this topic, see T.T. Koncewicz, *Precedens w prawie europejskim*, [in:] *Wykładnia prawa…*, pp. 244 ff.; L. Leszczyński, B. Liżewski, *Argumentacje precedensowe w orzecznictwie TSUE w zakresie ochrony praw człowieka*, [in:] *Precedens sądowy w polskim porządku prawnym*, eds. L. Leszczyński, B. Liżewski, A. Szot, Warszawa 2018, p. 143 ff.

[16] On the role of the rule of law contained in this provision, see K. Lenaerts, *Rządy prawa w Unii Europejskiej*, "Europejski Przegląd Sądowy" 2023, no. 7, pp. 4–6.

[17] Cf. judgment of the CJEU of 27 February 2018, C-64/16, *Associação Sindical dos Juízes Portugueses*, ECLI:EU:C;2018:117.

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4. The role of particular rules of interpretation

As indicated above, the way in which validation arguments are selected and their role in the decision-making process impinges on the way in which individual rules of interpretation are used, especially in the phase of reconstructing patterns of behavior from these sources and the phase of constructing normative bases for decisions. Six of the peculiarities that emerge here are of the greatest importance for the picture of the interpretation of EU law.

First, there is a weakening of the role of linguistic rules in the context of their independent formation of the result of interpretation.[18] This is because the application of these rules must take into account the extensive multilingualism of legal texts, which affects the way semantic rules (which establish the autonomous meaning of individual terms and normative expressions) and syntactic rules (which establish the content of the norm) are used. Importantly, the official languages in which both normative texts and CJEU rulings are expressed, while remaining formally equivalent, are not "working" equivalent, where English and French dominate (which themselves often generate different interpretative results).

The essential characteristics of EU law arising from its multilingualism, requiring the correct translation of texts or sometimes difficult-to-implement comparative confrontation of different language versions in the course of applying EU law (especially by national courts, which usually begin their interpretation from the text in the native language) affect not only certain shifts in the order of reference to these rules of interpretation (especially when reconstructing patterns of behavior from earlier court decisions or open criteria) but also, more generally, the abandonment of adherence to the formula *clara non sunt interpretanda* (despite the assumption of the autonomy of the concepts of this law and the importance of the institutions of *acte clair* and *acte eclaire*).

Second, there is a weakening of the role of classical systemic-structural rules.[19] If it focuses on the systematics of the normative act (consideration of which is not fundamentally different to the classical *argumentum a rubrica*) and on the vertical relationship between the various segments of EU law (which can give rise to conflicts resolved also with the help of rules other than systemic-structural), the properties are not radically different from the interpretation of national law. The role of these rules, on the other hand, is due to the weaker structuring of EU state law in its horizontal dimension. Historically, this has consisted of leaving certain classical branches of law outside of Community law. That is then subject to, admittedly, an evolutionary

[18] For more on this topic, see W. Jedlecka, *Reguły językowe wykładni prawa UE*, [in:] *Wykładnia prawa…*, p. 137 ff.

[19] For more on this topic, see A. Kalisz, *Reguły systemowe wykładni prawa UE*, [in:] *Wykładnia prawa…*, p. 153 ff.

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expansion of the subject of regulation into new areas, but this does not usually happen through the creation of comprehensive acts. The position of these interpretative rules is also not favored by the role of the CJEU case law in the system of sources of this law, which has a weaker connection with the systemic context.

Third, the second property mentioned above is accompanied by a strengthening of the role of systemic-axiological rules. This is primarily related to the importance of the arguments from the principles of law.[20] The reference to them consists not only in the introduction into the interpretation of the values expressed in the texts of treaty provisions or secondary legislation. For here enters the reconstruction of intra-legal axiology from the leading rulings of the CJEU, but the principles formed in the traditions of European legal culture are also taken into account, not excluding the common constitutional traditions of the Member States.

Fourth, the general weakening of the systemic-linguistic dimension in the interpretation of EU law is balanced by the strengthening of the role, presenting in principle the dynamic option of interpretation, of the purposive and functional rules.[21] They can be taken into account in the form of reference both to the purpose of issuing a given normative act and to the general purpose of integration as well as to the functions that the interpreted provision is supposed to perform. However, they can also occur in interpretation as rules of preference[22] and refer to sources other than legal regulations. This is due to a number of factors, but is related to, among other things, the presence in the system of sources of secondary EU law of specific program-norms[23] in the form of directives and, operating in the third pillar of the EU, framework decisions (as acts of "effect", aimed not at independent action, but at "action transferred" by indicating specific rules in the national legislation of the Member State, which are to be the means of their implementation), and recommendations and opinions as soft law acts.[24] The position of the argument from the purpose of regulation is also related to the conditioned and politically motivated dynamics of the variability of the scope of the integration project (the "stage of integration"), while the position of the argument from function (related to the role of the *effet utile* formula, taking into account the impact of EU law on the social,

[20] For more on this topic, see A. Kalisz-Prakopik, L. Leszczyński, *Zasady prawa w stosowaniu prawa wspólnotowego*, "Europejski Przegląd Sądowy" 2005, no. 1, pp. 23–33.

[21] For more on this topic, see A. Szot, *Reguły celowościowe i funkcjonalne prawa UE*, [in:] *Wykładnia prawa…*, pp. 172 ff.; A. Kalisz, *Klauzule generalne w wykładni prawa UE*, [in:] *Wykładnia prawa…*, p. 225 ff.

[22] For example, in the case of ensuring the effectiveness of a provision if different interpretations are possible. See judgment of the CJEU of 24 February 2000, C-434/97, *Commission v. France*.

[23] On the subject of program-norms, see T. Gizbert-Studnicki, A. Grabowski, *Normy programowe w Konstytucji*, [in:] *Charakter i struktura norm Konstytucji*, ed. J. Trzciński, Warszawa 1997, p. 95 ff.

[24] For a broader discussion of this topic, see M. Grochowski, *Soft law w wykładni prawa UE*, [in:] *Wykładnia prawa…*, p. 339 ff.

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political and economic environment), is due both to the variability of this law and to the recourse to judicial jurisprudence.

Fifth, purposive and functional rules are usually used in the interpretation process in conjunction with arguments from extra-legal axiology. To a large extent, this is related to the inclusion in the EU order to an increasing extent of the protection of human rights.[25] However, due to the sparing use in EU law of the construction of general reference clauses, which would indicate the type of extra-legal axiology, there is a lack of independent role of these rules and the expansion of the so-called axiological edge, combining legal and extra-legal axiology in the interpretation,[26] and thus combining the construction of legal principles and reference clauses.

Sixth, the relationship between the above rules of interpretation can be seen with its segment, which consists of resolving normative conflicts. If they concern contradictions between EU law and national law, the systemic type of conflict argument *lex superior* determines the relationship of primacy of EU law, established within the framework of CJEU jurisprudence, although differently framed at the level of the legal orders of the Member States.[27] In principle, however, the adoption of the decisive role of the method of construction of compromise patterns of behavior, based on the obligation to interpret the state law in accordance with EU law,[28] presupposes the use of extra-systemic rules also within the framework of the "system of vertical supremacy". The result of such an approach is the treatment of the relationship between European law and national law based on the concept of multicentricity or the replacement of the relationship of structural supremacy with a functional relationship of priority of application.[29] On the other hand, in terms of EU law itself, normative conflicts are resolved on the basis of the rules developed for national legal orders, except that the principles of law make stronger argument for resolving conflicts between the norms of this law, and, contrary to the national legal orders, the content of the CJEU rulings has a stronger position in relation to the content of the legal provisions.

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[25] For more on this topic, see B. Liżewski, *Prawa człowieka w wykładni prawa UE*, [in:] *Wykładnia prawa…*, p. 274 ff.

[26] On the relationship between these two types of axiology, see M. Kordela, *Inter- and Extra-Legal Axiology*, "Studia Iuridica Lublinensia" 2020, vol. 29(3), pp. 29–38.

[27] Cf. C. Mik, *op. cit.*; J. Helios, *Pojmowanie wykładni prawa…*; M. Zirk-Sadowski, *op. cit.*; A. Kalisz, *Wykładnia…*; L. Leszczyński (ed.), *op. cit*.

[28] With regard to the Polish legal order, see A. Sołtys, *Obowiązek wykładni zgodnej w kontekście wykładni prawa UE przez sądy polskie*, [in:] *Wykładnia prawa…*, p. 483 ff.

[29] Cf. E. Łętowska, *„Multicentryczność" systemu prawa i wykładnia jej przyjazna*, [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, eds. L. Ogiegło, W. Popiołek, M. Szpunar, Kraków 2005, pp. 1127–1146.

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5. The dimension of judicial interpretative freedom

The above-determined roles of the various rules of interpretation consolidated with the roles of the various carriers of EU law lead to the conclusion stating the formation of an attitude of interpretative activism in the EU legal order, consisting in a strong influence of the CJEU on the content of this law and on the jurisdiction of national courts. The latter may lead to asymmetry in the dialogue between EU law courts and the realization of the principles of loyal judicial cooperation, of uniformity in the interpretation and application of EU law, as well as the principles of effectiveness of EU law and of interpretation of national law in accordance with it.

This leads to the realization of interpretive holism, expressing the formula *omnia sunt interpretanda* and practically excluding not only such an understanding of the formula *clara non sunt interpretanda*, which assumes the possibility of a judicial decision without any interpretation, but also the so-called discontinuous option of the formula *interpretatio cessat in claris*, assuming the possibility of terminating the interpretation before verifying its result on the basis of all types of its rules, and in the extreme version – the sufficiency of the application of linguistic rules for a satisfactory result of interpretation.

On the other hand, as for the general relations between the rules of interpretation, it should be noted (compared to the classical model of relations) the lesser role of linguistic and systemic-structural rules at the expense of the arguments from teleology, functionality and open-ended axiology. That is related to the above-mentioned practice of not ending the interpretation on the application of linguistic rules, even if it begins with the use of them. This presupposes the possibility of narrowing or expanding its result as an effect of the application of extra-linguistic rules, which from a theoretical point of view changes the category of clarity of law despite the recognition of the *acte eclaire* formula.

In sum, this results in a balanced treatment of all the rules of interpretation, in a more symmetrical, as it seems, relationship than is the case in the interpretation of domestic law. That allows to harmonize more clearly in the process of interpretation the roles of the various rules in the different phases of interpretation. In particular, this designates stronger contextual and complementary-corrective roles for systemic-axiological, purposive and functional rules in relation to the primary roles of linguistic rules in the reconstructive phase, and such a role for systemic--structural rules in the validation and construction phases of classical model of operative legal interpretation.

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THE CONTEXT OF CRIMINAL LAW INTERPRETATION

1. Criminal law in EU law

The starting assumption of this part of the study assumes that criminal law, despite the expanding evolution of the subject matter of EU law, is generally regulated by the national law of the member states.[30] This is especially true in the case of substantive law, although in certain areas of it the criminal law standards may become the subject of EU regulation and the criterion for adjudication by the CJEU.[31]

On the other hand, criminal procedural law has stronger links with European law. This is because it combines, sometimes directly, with human rights concerning especially the right to a court and a fair trial in the broadest sense. This makes it possible to relate this connection to both the legal system of the Council of Europe (in particular to Articles 5–7 of the European Convention) and the system of EU law (in particular to Articles 107–110 of the Charter of Fundamental Rights).

The main means of ensuring the effectiveness and uniformity of the EU legal order, which is the principle of consensual interpretation, acquires, despite the evolution noted above, a special significance in relation to criminal law. Shaped initially only by the jurisprudence of the CJEU,[32] allowing its scope to gradually expand (covering, among other things, framework decisions in the Community's third pillar of integration and later also prosecutor's action), it lived to see a normative basis in Article 4 (3) TEU. Thus, it takes on the characteristics of an increasingly effective integration measure. For, being part of the principle of loyal cooperation between the European Union and the Member States and the obligation to refrain from taking any measures that could jeopardize the realization of the EU's objectives, indicated in this provision, it accentuates the connection of the results of a consistent interpretation not only with the content of provisions but also with the objectives of the EU.[33]

The role of this principle, seen in the context of the weaker effect of other integrative measures in criminal law than, e.g., in administrative law, influences changes in the application and interpretation of national criminal law more strongly

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[30] T. Ostropolski, *op. cit.*, p. 39 ff.

[31] Cf. J. Bojarski, P. Chrzczonowicz, A. Ornowska, *Europeizacja prawa karnego materialnego – niektóre aspekty teoretyczne i praktyczne (trójgłos)*, "Studia Prawnoustrojowe" 2009, no. 10, p. 7 ff., especially pp. 10–11.

[32] Cf. judgment of the CJEU of 10 April 1984, C-14/83, ECR 1984, p. 01891, *Von Colson*, judgment of the CJEU of 13 November 1990, C-106/89, ECR 1990, p. I-04135, *Marleasing*, judgment of the CJEU of 16 May 2005, C-105/03, EU:C:2005:386, *Pupino* (crucial in this regard) or (reinforcing this line of case law) judgment of the CJEU of 4 July 2006, C-212/04, ECR 2006, p. I-06057, *Konstantinos Adeneler et al*.

[33] For a detailed analysis of this connection, see M. Rams, *op. cit.*, p. 135 ff.

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with regard to both the classical roles of individual sources of reconstruction of norms and particular rules of interpretation of criminal law. This determines the scale of the effectiveness of the CJEU rulings in providing national courts with criteria and arguments to ensure that their interpretation is consistent with EU law, thereby limiting the scope of their interpretative and decisional discretion.[34] It also raises questions dealing with significant practical consequences in terms of the interpretation of criminal law. These are, e.g., problems of the scope of discretionary decision-making and judicial activism of the CJEU, of the law-making character of the CJEU's rulings, of suggesting *preater legem* and even *contra legem* interpretations in the context of the relation to the regulations of national law, as well as of the reality and scope of the prohibition on interpreting criminal law to the detriment of its addresses.[35]

2. Basic characteristics of interpretation

The lack of space does not allow for a detailed analysis of the characteristics of criminal law interpretation in light of the objectives and process of integration within the European Union. Limiting ourselves to signaling the most important issues is also justified by the fact that a number of important characteristics of this interpretation are raised in the context of the subject matter of other studies in this volume (e.g. the role of artificial intelligence, the fact-finding process and the role of e-evidence in it, the relationship of criminal law to human rights, the protection of the interests of parties and participants in criminal proceedings, the determination of the situation of the suspect and the accused, or the role of international law). What should be raised in a study that opens, as it were, the relationship of criminal law with EU law, is to point out the most important modifications of classical interpretative reasoning of criminal law that arise as a result of the increasing links between this law and EU law as well as the role of the principle of consensual interpretation and the principle of loyal cooperation, which also applies to judicial dialogue. This is important if only for the reason that it can lead to more precise "measurement" of these links in relation to specified criminal law institutions or implementation activities.

The three most important general modifications are not surprising in the context of the differences indicated at the level of the EU legal order as a whole, but they change more with regard to interpretation in criminal law.

First, the proportions of the importance of reconstructing criminal behavioral patterns from legislation and from previous judicial decisions change in favor of

[34] *Ibidem*, pp. 441–442.

[35] *Ibidem*, p. 446 ff. The author lists a number of other interpretative consequences in the field of criminal law, resulting from the jurisprudential practice of the CJEU.

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strengthening the role of the latter, especially if they are decisions of the CJEU and formulate principles of law. Indeed, despite the absence of the rule of *stare decisis*, creating a strong precedent practice, certain CJEU decisions in criminal cases become actual precedents not only for the CJEU itself but also for national criminal courts, thus influencing national judicial practice.

Second, there is a weakening of the role of linguistic rules in reconstructing patterns of behavior from provisions or court decisions and the role of systemic-structural rules in constructing the full normative basis of decisions to apply the law. The modification of the proportion of roles consists in strengthening the role of systemic-axiological rules[36] and both purposive and functional rules for the reasons already enumerated earlier. Even if it does not have such scope and depth as in the case of, e.g., administrative law or consumer law, it should not go unnoticed mainly because of the dominant role of the linguistic and systemic perspective in criminal interpretive practice of state courts.

Third, the above features indicate the promotion in criminal law interpretation of the so-called interpretative holism, corresponding to the formula *omnia sunt interpretanda*. It presupposes the need to apply in a given interpretation process the entire set of sources of the law in order to reconstruct the underlying norm (pattern of behavior), so not limiting oneself to taking into account only legal provisions, and using in it the entire set of rules of interpretation, so not applying only linguistic and systemic-structural rules to reconstruct the underlying pattern of behavior and construct the normative basis for the decision.

3. Potential implications

This raises the question of whether these modifications may lead to instability in the interpretation of criminal law at the level of domestic criminal judicial practice. After all, as it seems, in addition to the lower degree of integration in this branch of law, it is characteristic of it that in many cases there are hardly reversible (and even sometimes irreversible) effects on the addressees of judicial decisions. This may simply not be conducive to the rapid formation of compatible methods of interpretation and may cause at least a reticence in strict following of the line set by the CJEU and thus a stronger reliance on the developed methods of criminal law interpretation, formed in domestic doctrine and judicial practice.

This is all the more important for the process, since under the CJEU's jurisprudence there is a potential effect of violating EU law as a result of a national criminal court's failure to comply with the principle of consensual interpretation, which gives this principle the character of a conflict rule, defining a general priority of EU law.

[36] Which is related to the role of legal principles in the interpretation of criminal law (*ibidem*, p. 231 ff.).

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An indirect component of this relationship is also, arising from the principle of uniformity of EU law and the principle of loyal cooperation, the issue of mutual recognition of criminal judgments in the EU states, which, although its content and scope are not directly expressed in EU law, results from the CJEU's case law.[37]

The additional legitimacy of this question relates to criminal procedural law.[38] As a result of the influence of the CJEU's jurisprudence and its interpretative practices, certain modifications in the implementation of criminal law emerge, which may not be fully accepted by national practice due to the procedural principles formed within its framework. It is pointed out in this context,[39] among other things, the modification of the essence and role of such classical principles as the principles of *nullum crimen* and *nulla poena*, the principles of non-retroactivity (affecting the scope of protection of individual rights, including in particular the rights of the victim) or the principle of a fair criminal trial (of cardinal importance for the entire criminal process). They affect the realization of the fundamental values of the whole law – the principle of legal certainty and its application, as well as the principle of clarity of the law (also in the context of the definiteness of the criminal act). Despite the importance of the opinion that the CJEU is more restrained in influencing the principles of substantive criminal law than procedural law, the promotion of the formula of interpretation *in dubio pro Communitate* affects both sub-branches of criminal law.

Consequently, and regardless of the above doubts, with regard to the harmonization of the interpretation of national criminal law with the interpretation of law by the CJEU, the most important thing seems to be the use of the formula of judicial dialogue implemented at both main decision-making levels (EU and national) by means of various instruments of harmonizing the application and interpretation of law in the European Union (e.g. preliminary questions, precedential practice, etc.), as well as doctrinal and jurisprudential elaboration and development of such components of the methodology of interpretation of national criminal law, which, while maintaining the essential standards developed on its grounds, would however also take into account the jurisprudential practice of the CJEU.

[37] A. Grzelak, *Wzajemne zaufanie jako podstawa współpracy sądów państw członkowskich UE w sprawach karnych (uwagi na marginesie odesłania prejudycjalnego w sprawie C-216/18 PPU Celmer)*, "Państwo i Prawo" 2018, no. 10, p. 50 ff.; R. Kierzynka, *Regres wzajemnego zaufania we współpracy wymiarów sprawiedliwości w sprawach karnych w Unii Europejskiej*, "Europejski Przegląd Sądowy" 2022, no. 3, pp. 7–14.

[38] The differences between the two types of criminal law in the context of their relationship to EU law are indicated, among others, by J. Hanc (*op. cit.*, p. 205 ff.).

[39] M. Rams, *op. cit.*, pp. 231–368.

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ABSTRAKT

Celem opracowania jest analiza najważniejszych odrębności występujących w wykładni prawa Unii Europejskiej w świetle ogólnego (klasycznego) modelu wykładni prawa wypracowanego w doktrynie i praktyce sądowej w krajowych porządkach prawnych. Mimo związków obu modeli wykładni właściwości prawa UE stanowią podstawę kształtowania się odrębności praktyki interpretacyjnej. Ta ostatnia, przy założeniu, że sam układ procesu wykładni nie wykazuje istotnych różnic, analizowana jest zarówno w kontekście zbioru i roli wykorzystywanych w wykładni sądowej źródeł prawa, z których rekonstruowane są normy prawa UE, jak i roli poszczególnych reguł wykładni i wzajemnych relacji między nimi. Analiza ta pozwoli rzucić światło w ostatniej części opracowania na właściwości wykładni prawa karnego (materialnego i procesowego), które mimo że normatywnie regulowane jest głównie na poziomie prawa państwa członkowskiego UE, realizuje zasadę wykładni zgodnej z prawem UE, ulegając w istotnym zakresie wpływom orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej.

Słowa kluczowe: Unia Europejska; reguły wykładni sądowej; zasada wykładni zgodnej; wykładnia prawa karnego; wpływ orzecznictwa TSUE