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**Judicial cooperation in criminal matters in the European Union:
between disintegration and the challenge of federalism**

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ABSTRACT: The author firstly recognizes the existence of the current crisis – similar to the crisis in post-war Europe – to elaborate on the significant path that criminal judicial cooperation in the European Union undertook, sustained by the evolution of political integration. Today the European Union is at a crucial stage in regards to the construction of a full criminal jurisdiction, particularly regarding the creation of a European Public Prosecutor's Office, as parameterized by the Lisbon Treaty. This is likely to emerge as a "federal" agency, with a concentrated and uniform action throughout the territory of the European Union, as the natural area of its territorial jurisdiction.

KEYWORDS: crisis – judicial cooperation in criminal matters – political integration – federal – European Public Prosecutor's Office.

We are all aware of the originating act of the European Economic Communities and the political, social, economic and cultural substrate in which such creation was based – all that is part of history now. Nevertheless, and with this context in mind, we think that it is relevant to recall the serious crisis from the post-war period.

In the words of the European «Ombudsman», we live in «*a time when the EU is going through the worst crisis in its history*». This crisis is considered especially relevant for

those who believe, with militant pessimism, that the euro's financial crisis will lead to the disappearance of the Union. Notwithstanding, it is also seen as very significant by those who advocate that the crisis will require even more integration and a path towards federalism.

Today we have an unparalleled International Organization in the world which is founded by sovereign states, but that is beyond them. It is not itself a State, nor a Federal State, but it pursues policies that, despite being based on common grounds, are not likely to be confused with the national policies of each Member State. This organization has been increasingly strengthening its powers.

The strengthening of the Union's powers has been focused in areas that originally were not within the remit of the Communities. The case of criminal justice – especially in regards to cooperation in criminal matters – is an example of the Union's intention. There has been a giant step forward from a non-existent reference to criminal justice in the original Treaties to the current situation.

In fact, for the EEC Member States, at the time, the matter of judicial cooperation was circumscribed in bilateral legal frameworks and, mainly, in the conventional legal framework of the Council of Europe.

However, the first significant steps taken were inspired by the gradual political integration. The current scenario clearly illustrates the path taken in the last decades.

The Schengen Agreements reinforced European citizenship rights, such as free movement of people and goods. The Schengen *acquis* not only brought a new creating space but also concrete measures that seem natural to us today. That was the time when it was first possible, e.g, for a State's police authority to pursue a fugitive across the borders of another State, or to first put into practice today's natural direct contacts between judicial authorities.

For instance, the establishment of Liaison Magistrates and the European Judicial Network represents the efficiency of direct contacts and the important role of the judiciary "operators" in the Union. It also shows that the common area of justice is starting to have its own bodies dedicated to the specific cooperation area, going beyond a reductive bilateral vision. The Network, consisting of national elements of each Member State, strengthens the feeling of belonging to a common Area – the Area of Freedom, Security and Justice – set by the Amsterdam Treaty. This Area can only be built in light of the new nature of the Union as a political entity (entailed by the Maastricht Treaty).

Hand in hand with the increasing political integration, the evolutionary line of cooperation in criminal matters has also taken real steps forward, as a necessary response to the new challenges arising from the need to fight serious crime, throughout the Union.

Tampere's European Council was the highest level of political expression in favour of the strengthening of the area of justice (both at a criminal and civil level), and the most relevant example of the common desire to provide the Union with a real criminal policy entailing a concrete purpose, guidelines and its own appropriate and efficient, instruments.

Nowadays, it is very common to hear about Joint Investigation Teams, the importance of the principle of mutual recognition as the main pillar of judicial cooperation, or Eurojust's relevant contribution to effective coordination. We must consider, however, that all these new instruments are part of the original Tampere package. They are, indeed, a result of the political will to go beyond in the fight against crime without forgetting citizen's protection. This concern is particularly reflected in the rules regarding access to justice but also in the guarantee of protection of their fundamental rights in criminal proceedings.

Tampere outlines a general scheme of criminal policy and it was followed by the Hague Programme and the Stockholm Programme. We wondered, at the time, could we have gone further? Possibly. But the political framework only allowed the acceptance of small and safe steps rather than rapid progress towards what was then a distant futuristic vision of integration.

The *acquis* in the field of criminal justice, especially in regards to cooperation in criminal matters, consists today in a set of instruments – many of which were already subjected to the enlightened and pioneering ECJ case law – which may be included in the classic stages of criminal proceedings: complaint, investigation, criminal prosecution, criminal penalties' enforcement, including the recovery of assets. A critical analysis comes across an already strong and consolidated *acquis* of guidelines for a European criminal policy.

In accordance with the principle of subsidiary, we can see a Union committed to act in four key areas:

- first, to investigate and prosecute the most serious crimes plaguing the EU, in particular terrorism, trafficking of human beings, drug trafficking, money laundering, corruption;
- second, to exercise the investigation activity, described above and the enforcement of sentences, with respect, developing the procedural safeguards and improving the social reintegration of suspects and defendants in criminal proceedings;
- third, to defend and to protect the victim;
- fourth, to promote assets' recovery.

With regard to the first area, we must consider the importance of various valuable instruments. In particular, the European Arrest Warrant, the European Judicial Network and Eurojust's coordination role and action in regards to the opening of investigations and criminal proceedings, not to mention the instruments concerning the harmonization of definitions and criminal penalties. Equally, we cannot disregard the ongoing efforts for the adoption of a Directive on the European Evidence Warrant.

As for the second area, it is worth highlighting the *acquis* already approved, following the road map of the Swedish Presidency, on the rights on document translation, interpretation and appointment of a legal counsel. We also recall three new measures containing solutions aimed at improving the situation of suspects, defendants or sentenced persons: the Framework Decision (FD) on transfer of sentenced persons, the «Probation» FD and the FD on the application of measures involving deprivation of liberty.

With respect to the third area (on victims' protection) the European Protection Order, the Directive establishing minimum standards on rights, support and protection of victims, as well as the previous FD on the standing of victims – in which Portugal played an important role – are particularly relevant.

Finally, in regards to the fourth area, on assets recovery, there are numerous instruments applicable to the stage of simple seizure and to the stage of forfeiture declaration (confiscation) that had already been translated into national laws. Currently, there are ongoing efforts aimed at adopting a global directive on the matter.

Therefore, the cherries on top of the cake for the construction of a full criminal jurisdiction of the EU will be, on one hand, the creation of a European Public Prosecutor's Office, constitutionally founded upon the Treaties and, on the other hand, the creation – sooner rather than later – of a European Criminal Court that, the Treaties currently still do not provide or allow for.

Only after these steps are taken, will we have the crucial and required elements to properly discuss European crimes: rules and European procedural guarantees, European Police (Europol), a European Public Prosecutor's Office and a Criminal Court of the Union. We must acknowledge, however, that this entire architecture is only feasible for a certain dimension or type of crime, in accordance with the principle of subsidiarity. This architecture would entail, however, more federal traits rather than purely national traits.

In this regard, the Lisbon Treaty has brought, simultaneously, new answers and new challenges. In response, we have the definition of a new common policy – known today as the «Area of Freedom, Security and Justice» – that comprises measures to harmonize the substantive and procedural law and also enhanced operational measures assigned to Eurojust and Europol. These challenges are particularly evident in regards to the legal basis for the creation of a European Public Prosecutor's Office.

The story of the creation of a European Public Prosecutor's Office for the protection of financial interests dates back to the *Corpus Juris* innovative proposal, prepared at the request of the European Commission by a group of international experts, from which Mireille Delmas-Marty stands out. This study envisaged procedural, substantive and organizational rules for what could be the first European instrument for "federal" design and action.

However, the proposal did not materialize (despite its acknowledged merits). This was because Member States were not prepared to accept measures of that scope, especially in regards to the "harmonization" of criminal definitions and penalties, and they were even less ready to welcome the operative possibility of a Prosecutor of supranational nature. Those were the main reasons why the Member States decided to reject the Commission's proposal in Nice.

The main goal was no longer just to fight crime, but to do so, in a more concentrated and coordinated manner, by overcoming the natural obstacles that a legal and operational fragmentation always entails. Some examples of operational and functional concentration entities are the Anti-Mafia Department in Italy, the Audiencia Nacional in Spain, or DCIAP (Central Department for Investigation and Penal Action) in Portugal.

The added value of these Central Departments lies in the synergies produced by the concentration and specialization of criminal prosecution when diverse and dispersed territories of criminal investigation are involved. In the case of the Union, the legal, substantive, procedural, and the operational diversity shows that, in due time, it is necessary to move forward and establish identical Departments within its area.

From a predominantly horizontal cooperation among the concerned States' authorities, to the primary forms of vertical cooperation (as it is the coordination framework provided by the intervention of Eurojust), we find ourselves increasingly faced with the questions: how should we act in order to tackle new criminality? Establishing more and better forms of mutual cooperation? Alternatively defining and enacting more concentrated platforms,

unique, in their operability? That is, defining and providing a "federal" action which goes beyond and differs from the Member States' one?

To pursue this goal, we need more politics and more law. Above all, we need a new paradigm. Paradoxically, it is interesting to consider that, this paradigm might already exist in what regards to the supranational investigation by the Prosecutor provided by the Rome Statute and established under the International Criminal Court. The Portuguese delegation, which included elements of the Republic's General Prosecutor's Office, chaired at the time by the renowned Judge Cunha Rodrigues, contributed greatly to this provision.

There is a need for more politics in light of the torn horizons expected in the future. These politics must be conducted with feet firmly set on the ground and having in mind that the European citizen increasingly calls for more freedom in security. This also means more demands in regards to the effectiveness of prosecution, and when crimes which undermine the foundation of the Union take place. Incapacity and inability from the national authorities to collaborate with European partners or to repress such crimes can no longer be accepted as an excuse by the European citizen.

To the need for more law, the Lisbon Treaty responds by providing the legal basis for the creation of a European criminal law structure, a European criminal procedural law system – including the rights of defendants and victims – and a new and dedicated legal organization in the context of the fight against crime, as support for the judicial activity of the European Public Prosecutor's Office (EPPO).

We believe that we really need a new paradigm. So far, cooperation in criminal matters has either been seen from a horizontal point of view (cooperation between authorities of different states) or from a vertical one (cooperation of several states with supranational bodies such as Eurojust).

The Lisbon Treaty clearly sets a model that goes beyond the said classical cooperation in the two dimensions referred to. This is particularly evident in regards to the future and

possible European Public Prosecutor's Office, its DNA entails a concentrated and uniform action throughout the territory of the European Union, as the natural area of its territorial jurisdiction.

The Lisbon Treaty is, in relation to the creation of the European Public Prosecutor's Office, the reference point, if we consider the “before” and the “after”. As far as the “before” we have already described it in the above paragraphs. As for the “after”, i.e., the future, there are still many unanswered questions.

Article 86 of the Lisbon Treaty provides guidance and formulates a set of specifications, it is now up to the various bodies (Commission, Council and Parliament) to act in order to achieve this new objective.

To create a European Public Prosecutor's Office from Eurojust – pursuant to Article 86 (1) of the Treaty – is a giant challenge for it might simultaneously involve, acting upon and eventually modifying Eurojust’s structure. There are different perspectives on the matter, from incorporating Eurojust in the EPPO, maintaining Eurojust and the EPPO or even creating a multi-functional body, able to act on investigation and coordination matters.

Moreover, regarding the status and procedural intervention, pursuant to Article 86(3), there is an ongoing debate, fomented by the draft «Model Rules» proposed by the University of Luxembourg. This draft, broadly proposes the EPPO to be an independent authority, an indivisible supranational body, with powers to investigate, prosecute and to present authors and accomplices to trial, within the Union. The EPPO would act within its substantive jurisdiction according to the principles of primacy and exclusivity of investigation.. The draft also proposes that the judicial control should be made by the European Court or, in the case of precautionary measures, by a national dedicated judge with the principle of impartiality observed at all times.

The rights of defendants are not forgotten, in fact, six articles are devoted to their procedural status.

Unfortunately, the «Model Rules» do not summon the part relating to the crimes on which the EPPO can act upon. This is another concern in regards to the definition of the core of the jurisdiction of the EPPO. The first line is the consecration of the offences to the EU's financial interests as the subject crime, *par excellence*, of the EPPO's action.

However, EU's concerns do not end here. Firstly, because Article 86 (4) states that, simultaneously or subsequently, the Council can extend the scope of the jurisdiction on serious international crimes with cross-border dimension. On the other hand, Article 83 refers to a set of crimes for which the legislative harmonization are especially needed. Notwithstanding, in our view, that set of crimes is a catalogue that may well be part of the EPPO's substantive jurisdiction.

There is still a lot to be done and it would be unrealistic to say or think that the political conditions required for the EPPO to see the light of the day were already met. But we may say, like Galileo, *Eppur si muove!*