Univerzitet u Novom Pazaru

PRAVNE TEME

Časopis Departmana za pravne nauke
Univerziteta u Novom Pazaru

Godina 4, Broj 8

Novi Pazar, decembar 2016. godine

Reč urednika

Poštovani čitaoci,

predstavljamo Vam osmi broj časopisa "Pravne teme", koji sadrži 19 članaka i jedan prikaz međunarodnog naučnog skupa. I u ovom broju nastojali smo da pored radova autora iz Republike Srbije imamo i radove autora iz zemalja u okruženju. Neki su i ranije pisali za naš časopis, a nekima je ovo prvi put da objavljuju svoje radove u časopisu "Pravne teme". Najnoviji broj izdanja obiluje temama koje se tiču harmonizacije zakonodavstva, evrointegracija, međunarodne saradnje i sl. Ovo je zbog toga što smo u ovom broju objavili jedan deo radova koji je prezentovan na međunarodnoj naučno-stručnoj konferenciji "Evroatlantske integracije – izazovi i perspektive" koja je u organizaciji Departmana za pravne nauke i Departmana za ekonomske nauke Univerziteta u Novom Pazaru, održana u periodu od 28. do 29. oktobra 2016. godine na Kopaoniku. Prikaz ove konferencije je takođe dat u ovom broju časopisa. Četvrtu godinu postojanja časopis "Pravne teme" okončava sa velikim brojem radova na aktuelne teme. Ono što nas posebno raduje jeste činjenica da je sve veći broj autora iz čitavog regiona koji sa svojim radovima konkurišu za naš časopis. To predstavlja potvrdu da je vizija i misija našeg časopisa prepoznata od strane autora sa ovih prostora. Koristimo priliku da pozovemo sve zainteresovane da u budućem periodu šalju svoje radove Redakciji časopisa kako bi sa praksom obrađivanja aktuelnih tema iz oblasti prava i kriminalističko-bezbednosnih nauka nastavili i u narednim izdanjima časopisa "Pravne teme.

S poštovanjem,
Aleksandar R. Ivanović

Novi Pazar, 28.12.2016. godine

PRAVNE TEME
Časopis Departmana za pravne nauke
Univerziteta u Novom Pazaru

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THE LISBON TREATY AND THE POLICE AND JUSTICE COOPERATION: SPECIAL EMPHASIS TO THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

Prof. dr Ivica Josifović*

Abstract:

Criminal law at the European Union level has traditionally been dealt through the concept of intergovernmental cooperation and gains its legal designation in the Maastricht Treaty, as part of the Justice and Home Affairs. The Amsterdam Treaty created the Area of Freedom, Security and Justice, but the Tampere Council and the Hague Programme took the notion of European criminal law through the process of mutual recognition.

This paper is two-fold. First, the purpose of this paper is to present the changes in the Area of Freedom, Security and Justice according the Lisbon Treaty, especially the Police and Justice Cooperation in criminal matters. The three pillar structure is replaced and the competences in the Area of Freedom, Security and Justice are increased and provisions transferred in the Treaty on Functioning of the European Union and within the ambit of the Court of Justice's jurisdiction. It aims to answer what is the meaning of the Lisbon Treaty for the European Criminal Law. On one side, criminal law provisions seriously endanger individual rights, and on the other side, criminal law provisions reflect the basic values of society and therefore reserved for national legislations. However, this traditional understanding of criminal law is not appropriate to the European Union integration level. Having in mind these issues, member-states transferred several competences to the European Union in order to undertake measures in the area of criminal law, criminal procedure and cooperation in criminal matters.

Second, the paper presents a comprehensive interpretation of the widely discussed issue regarding the establishment of the European Union Public Prosecutor's Office. Review and answers on several previous questions are given, opening the possibility for establishing the European Union Public Prosecutor's Office. Further, the paper makes research of the Lisbon Treaty and articles 85 and 86, as well as some of the issues necessary for consideration, not only from practical point of view, but also to reach an agreement among member-states. Having in mind that according these articles no such function was created, the conclusion contains several recommendations and directions for the perspective of the European Public

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Prosecutor by creating is as an independent entity with necessary cooperation from Eurojust. In conclusion, remarks and suggestions are pointed regarding the future of the European criminal law.

Key words: Police, Justice, cooperation, Lisbon Treaty, European Public Prosecutor.

PRECONDITIONS

The criminal law is an issue of particular sensitivity. On one side, criminal law provisions seriously endanger individual rights, not only by limitations of individual freedom and resulting with concrete penalty, but also with the effect of humiliation. On other side, criminal law provisions reflect basic values of societies and therefore are reserved for national states. However, this traditional understanding is inappropriate with the integration level of the EU and incompatible with the EU's goals as an area of freedom, security and justice.[1]

The European integration to a certain extent facilitated the transnational crime activities. While EU was promoting the free movement establishing the common market and the Schengen Agreements, at the same time criminals made good use of it. They were able to communicate across borders far easily, make use of criminal legislations shortages in member-states and to avoid prosecutions. Under these conditions, a member-state could be a safe place for crime activities. Moreover, EU's financial resources are attractive for criminals and not enough protected by domestic criminal law. Further, traditional mutual assistance system in criminal matters no longer secures efficient assets for fight against cross-border crime as it rely on diplomatic communications and national sovereignty with slow and inefficient procedures dependable on political decisions and will.

Since criminal law is used as an exclusive right of member-states, national jurisdiction rules in criminal area often overlap. This leads to a situation where more than one state may apply its criminal law for one same case. If an Italian citizen injures a British citizen in Netherlands, all concerned states may prosecute this offence. Such jurisdiction conflicts result in numerous criminal charges, not only taking time and costs, but also harmful for defence rights and therefore unwelcomed in the area of freedom, security and justice.

Bearing in mind these issues, member-states transferred competences to EU, enabling it to take certain measures in the criminal law area, criminal procedure and cooperation in criminal matters. However, the principle of transferred competence, respect of domestic criminal justice system and basic principles of proportionality and subsidiarity request careful use of these competences.

[1] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 83/1, March 30, 2010 (Consolidated Versions, 2010).

MAASTRICHT – TAMPERE – LISBON

EU's criminal law is traditionally dealt through the concept of intergovernmental cooperation and for the first time legally introduced in the Maastricht Treaty as part of the third pillar - Justice and Home Affairs (JHA).[2] Amsterdam Treaty furthermore confirms EU's goals in JHA area and created the concept of "area of freedom, security and justice"(AFSJ). As known, intergovernmental cooperation is criticised for lack of transparency and democratic deficit with minimal inclusion of the European Parliament (EP) in the legislation process and minimal jurisdiction of the Court of Justice of the EU (CJEU). From EU's perspective, the third pillar framework was never considered as an ideal part to correspond with the first pillar (EC). Anyway, member-states were concerned regarding their competences in an extremely sensitive area such as JHA. Shortly after the entry into force of the Amsterdam Treaty, the Council in Tampere and The Hague Programme[3] gave accent of the European criminal law through adoption of formula for mutual recognition in the third pillar.

Accordingly, competences for regulation of the European criminal law belonged to the third pillar. However, the CJEU concluded that there is a legislation competence of the EC in criminal law if it is necessary for the environment protection and in order to make such legislation fully effective.[4] Other cases before the adoption of the Lisbon Treaty demonstrated that a reform of the third pillar is needed and approach towards unification of pillars.[5] Regarding this, several General Advocates emphasised the need of respect for the pillar structure according article 47 of the EU and to dedicate attention on international pillars as "integrated, but separate" legal order.[6] Lisbon Treaty solves this problem with

[2] Treaty on European Union, OJ C 191/1, July 29, 1992 (Treaty on European Union, 1992)

[3] Tampere European Council, Presidency Conclusions, European Council, October 15-16, 1999 (Tampere European Council, 1999); The Hague Programme: Strengthening Freedom, Security and Justice in the EU, OJ C 53/1, 2005 (The Hague Programme, 2005).

[4] European Court of Justice, Case C-176/03, Commission of the European Communities v Council of the European Union, Action for annulment - Articles 29 EU, 31(e) EU, 34 EU and 47 EU - Framework Decision 2003/80/JHA - Protection of the environment - Criminal penalties - Community competence - Legal basis - Article 175 EC, September 13, 2005 (European Court of Justice, 2005); European Court of Justice, Case C-440/05, Commission of the European Communities v Council of the European Union, Action for annulment - Articles 31(1)(e) EU, 34 EU and 47 EU - Framework Decision 2005/667/JHA - Enforcement of the law against ship-source pollution - Criminal penalties - Community competence - Legal basis - Article 80(2) EC, October 23, 2007 (European Court of Justice, 2007).

[5] European Court of Justice, Case C-105/03, Criminal proceedings against Maria Pupino, Reference for a preliminary ruling: Tribunale di Firenze – Italy, Police and judicial cooperation in criminal matters - Articles 34 EU and 35 EU - Framework Decision 2001/220/JHA - Standing of victims in criminal proceedings - Protection of vulnerable persons - Hearing of minors as witnesses - Effects of a framework decision, June 16, 2005 (European Court of Justice, 2005b)

[6] European Court of Justice, Opinion of Advocate General Paolo Mengozzi, Case C-91/05, Commission of the European Communities v Council of the European Union, Action for annulment - Article 47 EU - Common foreign and security policy - Decision 2004/833/CFSP - Implementation of

simple merge of pillars. Doing so, Lisbon Treaty puts the third pillar area in the core of the Union and under the CJEU jurisdiction.

CRIMINAL LAW IN THE LISBON TREATY

Criminal law provisions in the Lisbon Treaty are introduced in articles 82 and 83 of the TFEU. More specifically, the former third pillar of JHA is in part 4 of TFEU and consisting in 5 chapters: General Provisions; Policies on Border Checks, Asylum and Immigration; Judicial Cooperation in Civil Matters; Judicial Cooperation in Criminal Matters; and Police Cooperation.

Accordingly, one of the changes is the transition from traditional unanimity requirement in the third pillar towards qualified majority in the Council and co-decision with Commission having the right of initiative. However, the Lisbon Treaty keeps the instruments of the first pillar, such as regulations, directives and decisions. Still, the abolition of pillar structure does not mean that everything shall be governed automatically through the community method (qualified majority voting in the Council and co-decision with the EP). The criminal law has its own regime with possibilities for member-states to opt-out from sensitive issues through emergency brake, while other member-states may proceed with the integration further through enhanced cooperation. Also, unanimous voting is required regarding approximation of criminal procedure and establishment of the European Public Prosecutors Office.

Before considering criminal law provisions, accent should be put that one of the most interested changes in the Lisbon Treaty is the fact that the previous second pillar regime of economic sanctions is transferred in the JHA and by that set in the General Provisions. In Article 67 of the TFEU is stipulated that the Union shall constitute an area of freedom, security and justice and shall endeavour to ensure a high level of security through measures to prevent and combat crime. Shortly, this means that the Court shall have jurisdiction to review the legality of EU instruments which implemented so-called sanctions for terrorist even if they are

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Joint Action 2002/589/CFSP - Combating the proliferation of small arms and light weapons - Community competence - Development cooperation policy, September 19, 2007 (European Court of Justice, 2007b); European Court of Justice, Opinion of Advocate General Poiares Maduro, Case C-402/05, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities, Common foreign and security policy (CFSP) - Restrictive measures taken against persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban - United Nations - Security Council - Resolutions adopted under Chapter VII of the Charter of the United Nations - Implementation in the Community - Common Position 2002/402/CFSP - Regulation (EC) No 881/2002 Measures against persons and entities included in a list drawn up by a body of the United Nations - Freezing of funds and economic resources - Committee of the Security Council created by paragraph 6 of Resolution 1267 (1999) of the Security Council (Sanctions Committee) - Inclusion of those persons and entities in Annex I to Regulation (EC) No 881/2002 - Actions for annulment - Competence of the Community - Joint legal basis of Articles 60 EC, 301 EC and 308 EC - Fundamental rights - Right to respect for property, right to be heard and right to effective judicial review, January 16, 2008 (European Court of Justice, 2008).

adopted by the UN. Therefore, the issues raised regarding the limitations of the Court's jurisdiction in inter-pillar conflicts, with the Lisbon Treaty shall no longer appear.

MUTUAL RECOGNITION AND APPROXIMATION OF CRIMINAL LAW

In order to overrun traditional obstacles of mutual assistance in criminal matters, at the EU Summit in Tampere in 1999, member-states declared the principle of mutual recognition of judgements as a foundation of judicial cooperation. Lisbon Treaty in article 82 stipulates that the judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the member-states. In general, paragraph 1 of article 82, requires judgements issued from one member-state to be executed in other member-state without additional formalities. In the context of criminal matters, this principle may have harmful effects for individual freedoms as it leads towards recognition of judgements without further examination. Whether or not the preconditions for criminal procedure measures are met is evaluated only by the state issuing the judgement, while the state executing the judgement is only obligated to recognize and execute it according their procedural rules.

Paragraph 2 of article 82 stipulates that "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the member-states." This provision further declares a list of areas in EU's competence such as mutual admissibility of evidence between member-states; the rights of individuals in criminal procedure; and the rights of victims of crime. Additionally, the article contains so-called "general clause" stressing that any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the EP. Finally, it stipulates that the adoption of the minimum rules shall not prevent member-states from maintaining or introducing a higher level of protection for individuals. This is particularly important, as the principle of mutual recognition attracted criticism from the perspective of fair trial and legal protection.

The first piece of legislation implementing the mutual recognition is the Framework Decision on European Arrest Warrant (EAW) of 2002[7], which is meant to simplify the long and complex extradition procedure. The EAW refers to offences

[7] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States OJ L 190/1, July 18, 2002 (Council Framework Decision, 2002).

for which is anticipated for the person whose return is sought is accused of an offence for which the maximum period of the penalty is at least one year in prison or has been sentenced to a prison term of at least four months. The Court's decision ordering arrest and return of the individual for undertaking the criminal procedure, executing sentence or take into custody shall be executed without delays within a maximum of 90 days. Basically, EAW obliges EU member-states to surrender its own citizens and to abolish double incrimination for list of 32 serious crimes. Similarities may be found in the European Evidence Warrant (EEW)[8] regulating mutual recognition of warrants for search and seizure, as well as transfer of evidence. The most recent project in this area is the European Investigation Order (EIO)[9], replacing EEW and applicable on all kinds of investigation measures and all kinds of evidence. Where the above mentioned measures mainly serve for strengthening the prosecution through mutual recognition, the same mechanism has certain advantage also for the accused when applying the *non bis in idem* principle. EU competences go further in implementation of the mutual recognition principle, but also allow additional measures for strengthening the judicial cooperation. Among others, EU, according article 82, paragraph 1 may adopt measures for prevention and settle conflicts of jurisdiction among member-states and, according paragraph 2, EU may harmonize national criminal procedure rules.

SUBSTANTIVE CRIMINAL LAW

Regarding substantive criminal law, EU may harmonize criminal law provisions of member-states in certain areas. These competences are two-fold: on one side, article 83, paragraph 1 of TFEU permits measures for harmonization of serious crime offences with cross-border dimension and stipulates that "the European Parliament and the Council may … establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis." This provision establishes a list of crime offences for which EU shall have legislation competence, such as terrorism, organized crime and money laundering. On other side, article 83, paragraph 2 of TFEU stipulates that there is a possibility for approximation of criminal laws and regulations of the Member States if it proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. In this case the same ordinary or special legislative

[8] Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, OJ L 350/72, December 30, 2008 (Council Framework Decision, 2008).

[9] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/1, May 1, 2014 (Directive 2014/41/EU, 2014).

procedure shall, as was followed for the adoption of the harmonisation measures in question.

Regarding directives according article 83, special legislation procedure applies, thus strengthening the member-states role in the Council: first, 1/4 of member-states may initiate legislation procedure. Second, for the rest of the member-states oriented on sovereignty approach, the emergency break mechanism exists regulated in paragraph 3 of article 83. Where a member-state considers that a draft directive would affect fundamental aspects of its criminal justice system, it may suspend the legislative and, at the end, for its legal system to avoid commitments arising from the draft directive. In that case, the procedure shall be referred to the European Council. If no consensus is reached, the draft directive is not going to be binding for the member-state concerned, while other member-states may adopt the draft directive by means of enhanced cooperation.

Accordingly, the question that needs to be addressed in present concept is: What the provisions means from perspective of harmonization? Article 82 allows the possibility for approximation of criminal procedure if it is necessary in order to facilitate the mutual recognition of judgements and police and judicial cooperation in criminal matters with cross-border dimension. However, in article 83, paragraph 2, the expression is partly different. First, paragraph 2 does not explicitly underline that cross-border dimension or crime of serious nature needs to exist in order to be qualified for adoption of legislation, if the area concerned previously was not a subject to harmonization and if such legislation proves essential to ensure the effective implementation of a Union policy. Further, contrary to article 82, paragraph 2, in article 83, paragraph 2, there is no unanimity requirement, but the same procedure as the previous harmonization scheme, respectively the ordinary legislative procedure or qualified majority voting in the Council. From where does this difference come from? Really, having in mind that mutual recognition is considered as a basic rule and considering the obvious need of basic rules in an area based on mutual trust, this seems somehow unnecessary.

In any case, more interestingly, it is important to discuss the constitutional extent of article 83, paragraph 2. As pointed above, this provision anticipates legislation in an area that was already a subject to harmonization. On one side, this may be interpreted as a lack of repetition of paragraph 1 regarding the need of cross-border dimension and serious crime and that there is no limitations to this legislation mandate. On other side, it may be argued that there is no need to show that the crime in question is particularly serious or that it has cross-border dimension or that there is a special need for it. Still, in light of attribution of powers principle and analogously to the jurisprudence of the internal market, for this issue a Union dimension is needed – precisely for the terms "cross border nature" and "serious crime", thus making the legislation at supranational level. This is particularly true, having in mind the consideration that the criminal law is probably the most sensitive area in more and more growing law of the EU. Further, from the internal market provisions it is well known that the differences among member-

states are insufficient in order to sustain the attribution of powers principle. However, even if article 83, paragraph 2 shows certain inconstancy, principles of proportionality and subsidiarity shall continue to apply.

Finally, article 84 confirms that the "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of member states in the field of crime prevention, excluding any harmonisation of the laws and regulations of the member states". As previously implied, it remains unclear how this provision is connected with General Provisions from Chapter 1, stipulating that the crime prevention and the approximation of criminal law represent one of the Union's goals. Alternatively, article 84 simply means that the EU shall have its own crime prevention programme, meaning, in return, existence of criminological issues of effectiveness.

POLICE COOPERATION

The police cooperation and the establishment of instruments for enforcement of EU law in this area were firstly considered outside the EU's supranational frame. Regarding criminal law, member-states considered that the maintenance of the public order crime offence investigations are areas that belongs to the national sovereignty and therefore were careful not to allow direct application of the EC law. Besides this, member-states choose to develop its own cooperation through traditional means of international law: they created the Schengen area; created the third pillar to confront with issues regarding the police and justice cooperation in criminal matters based on intergovernmental cooperation; and establishment of Europol. All these measures were, to a larger extent, integrated in the EU frame and came under the influence of the EU law. Regarding these efforts for strengthening the cooperation and EU influence, the member-states kept its exclusive responsibilities and competences, as it is regulated in article 72 of TFEU regarding the maintenance of law and order and the safeguarding of internal security.

Today, several police cooperation dimensions exist in Europe and are reflected in the TFEU. However, they do not have to be always clearly prominent: first, law enforcement authorities in member-states mutually cooperate (horizontal cooperation). Such form of cooperation is dominated by activities which enable measures in preventing and combating serious forms of crime according article 87 of TFEU. This concerns, especially, on managing with relevant information, common investigation techniques related with detection of serious forms of organized crime and, to a certain extent, operational cooperation such as joint investigation teams or cross-border observations. Applicable legislative procedures in this area are complex and could not be identified in details. However, measures regarding operational cooperation needs to be unanimously adopted by the Council after consulting the EP. Second, law enforcement authorities of member-states

cooperate with Europol, a supranational police network (vertical cooperation). EU may establish the handling of personal information and enables it to coordinate investigative and operational activities carried out jointly with the member-state's competent authorities or in the context of joint investigative teams according article 88 of TFEU. Till today, Europol does not have the competence for conducting investigations and operations independently, but may assist in operations undertaken by member-states. Third, member-states and EU raised the police cooperation on international level through conclusion of bilateral agreements with third states.

ENHANCED COOPERATION AND EMERGENCY BREAK

Provisions of articles 82 and 83, paragraphs 3, also anticipates the possibility for instigation of the so-called "emergency break" if the legislation in question influence the fundamental aspects of member-states criminal justice system. If emergency break scenario emerges, a member-state "may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure." It is obvious that this possibility looks attractive for member-states with strong connection between the criminal law and nation state and concern regarding withdrawal of their sovereignty on issues of criminal matters.

Whether or not a member-state initiates the emergency brake, the Lisbon Treaty, however, secures the possibility for enhanced cooperation for other member-states. More specifically, paragraph 4 of articles 82 and 83 stipulates: Within the same timeframe, in case of disagreement, and if at least nine member-states wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in article 20, paragraph 2 of the Treaty on European Union and article 329, paragraph 1 of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply. In short, this does not mean that there is an obligation to "address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed." Also, there is no obligation that the Council is the last resort for adopting the decision. This anticipates two considerations. First, it is possible to argue that the mere fact that there is no need for member-states to indicate the requirement of last resort as pointed out in article 20, paragraph 2 could be seen as disharmony with the sensitive character of the criminal law as *ultimo ratio*. Second, it looks less apparent how the enhanced cooperation shall work in practice. There may be a risk that such cooperation may lead to more speeds of varying degrees. It is true that the two-

Europe phenomenon exists, where some member-states are willing to continue with the integration by establishing highest possible standards of cooperation, especially by means of information exchange, in fight against terrorism, cross-border crime and illegal immigration.

EUROPEAN PUBLIC PROSECUTOR

First previous question: What is Corpus Juris? The original model of European Public Prosecutor (EPP) was introduced in the Corpus Juris study published in 1997.[10] The study endorsed a set of supranational rules for possible creation of European criminal law.[11] The document identifies several offences connected on the fraud of the European budget and establishes comprehensive procedure for investigation and prosecution of these offences, as well as issues of criminal responsibility and penalties.

The study defines the fraud in a very broad manner covering expanding and taking from the budget. For the investigation, prosecution, trial and penalty purposes, according the study, the territory of an EU member-state represents a sole legal area and depends from the criminal and legal systems of EU member-states, while the criminal acts shall be prosecuted through national courts.

Second previous question: What is OLAF? European Anti-fraud Office (OLAF) is as an independent entity within the European Commission conducting "administrative investigations on offences against financial interest of the EU"[12], but with "no influence on member-states competences in initiating criminal procedures".[13] OLAF is competent to investigate illegal activities conducted by European official and economic operators when the EU budget is at stake. The first category refers to investigations inside the EU institutions, while the second category covers external investigations. OLAF's operational activity is closely connected with the criminal legislation, national police and judiciary authorities.

Third previous question: What is Eurojust? Eurojust is established in 2002 with Council decision for justice and police cooperation, comprised of judges, prosecutors and police officers from member-states competent for strengthening the fight against serious forms of crime.[14] The establishment is inspired by the need

[10] Delmas-Marty, Mireille, Corpus Juris: Introducing penal provisions for the purpose of the financial interests of the European Union, Paris, Economica, 1997 (Delmas-Marty, 1997).

[11] Kuhl, Lothar., The future of the European Union's financial interests: Financial criminal law investigations under the lead of a European Prosecutor's Office, EUCRIM 3-4/2008, p. 187, (Kuhl, 2008: 187)

[12] Commission Decision 1999/352/EC of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ L 136, May 31, 1999, (Commission Decision, 1999)

[13] Regulation 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-fraud Office (OLAF), OJ L 136, May 31, 1999, Art. 2, (Regulation 1073/1999, 1999: Art. 2)

[14] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, March 6, 2002, p. 1 (Council Decision 2002/187/JHA, 2002:

for mutual and efficient measures for acceleration and simplification of police and judicial procedures in member-states, especially through judicial assistance and extradition.

Many see the Eurojust as a forerunner of the EPPO. Still, the tasks of Eurojust according the Council decision emphasize its role as a facilitator: to ask national authorities (a) to initiate investigation or prosecution for specific acts; (b) to mutually coordinate when facing cross-border cases; (c) to admit when other state is in better position for conducting investigation or prosecution, in case of conflicts of jurisdiction; and (d) to establish joint investigation teams. In contrast to the EPPO, Eurojust is not limited only towards offences that include fraud on the EU budget, but also on cyber crime, money laundering, environment offences and organized crime. In December 2008 new Council decision was adopted with the purpose of strengthening the role and capacities of Eurojust in the fight against organized crime. Further strengthening and extension of Eurojust competences is enabled with the Stockholm Programme, a five-year plan with guidelines for justice and home affairs of the member states of the EU for the period 2010-2014.[15]

From Eurojust to European Public Prosecutor. Since the Lisbon Treaty is in force and created the possibility for establishing the EPPO, at least from constitutional point of view, according the Article 86 of the TFEU, it is normal to have a political will to establish such body. The EPPO idea challenged discussions regarding its status and institutional set up, range of competences, applicable rules of procedure and potential organization chart. Issues were also raised regarding the accessibility of the evidences gathered by the EPPO in front of the national courts and the judicial review of its actions. In this direction, article 86 of the TFEU should be observed along with the article 85 regarding the influence on Eurojust.

First of all, article 85 (1) of the TFEU confirms the role of the Eurojust in horizontal cooperation regarding the strengthening of the coordination and cooperation between national investigation and prosecution authorities. In this context, the European Parliament and the Council through regulations shall determine the structure and tasks of Eurojust, as well as the arrangements for inclusion of the European Parliament and national parliaments in evaluation of the Eurojust activities. Article 85 (2) stipulate that in the prosecutions and with no prejudice of article 86, formal acts of judicial cooperation shall be conducted by competent national authorities.

Further, in article 86 of the TFEU is stipulated that "In order to combat crimes affecting the financial interests of the Union, the Council, by means of

1); Council Decision 2003/659/JHA of 18 June 2003 amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 245, September 29, 2003, p. 44 (Council Decision 2003/659/JHA, 2003: 44); Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138, June 4, 2009, p. 14 (Council Decision 2009/426/JHA, 2009: 14).

[15] European Council, The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, OJ C 115, 2010 (European Council, 2010).

regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament. In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended … In case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption."

Questions arise regarding the future role of Eurojust, as the phrase "from Eurojust" evokes ambiguity. Bearing in mind the potential power in initiating crime investigations, Eurojust could transform in to EPPO according the article 85 (1) of the TFEU. Contradictory interpretation may result in dissolution of Eurojust if the competences are entrusted to a completely new institution. The insecurity in this language is with the purpose to leave free manoeuvre space for the creators regarding the consensus that needs to be achieved for the final perspective of the EPPO.

Having in mind the complexity of the issue, different legislative and political thoughts in member-states, it is difficult to assume that the EPPO shall be established by unanimous decision. Therefore, the EPPO, most probably, shall be established through enhanced cooperation on the basis of articles 20 and 329 of the TFEU. Furthermore, the Office shall perform its duties in a highly complex context, with different actors for coordination (national judicial authorities, member-states and third countries) and with the use of different legal frameworks (future rules of procedure, mutual recognition, agreements with third countries).

In paragraphs 2 and 3 of article 86 are quoted the competences and responsibilities of the EPPO. But, the provision stipulating that the EPPO "shall exercise the functions of prosecutor in the competent courts of the Member States" again leaves additional space for questions. First, how shall the EPPO investigate if it is not a part of the national police authorities? Second, does the prosecution and bringing to judgment means instigation of a case, demanding sanctions and filling appeals?[16] Third, how shall the evidences be collected and evaluated and how shall the rights of the accused be protected? Fourth, but not the last, how shall the judicial review of the EPPO be affirmed (through national courts or by creating EU-level judicial system)? From the other side, article 85 (1) explicitly refers to the role of Eurojust in initiating crime investigations regarding the offences against the Union's financial interests, thus raising the question of EPPO's competences and shall the two institutions mutually overlap or act separately?

The main competence of the EPPO in the fight against offences that violate the financial interest of the EU, according article 86, indicates that such offences must also be defined in the regulation during its adoption. Also, question remains open regarding the jurisdiction; shall it be according the European or national

[16] Zwiers, Michael, The European Public Prosecutor's Office Analysis of a Multilevel Criminal Justice System, Insertia, Antwerp, 2011, p. 398, (Zwiers, 2011: 398).

legislation? Paragraph 4 from article 86 make repress not only on offences connected with the financial interests of the EU, but also on the possibility to extend the powers of the EPPO to include serious crime having a cross-border dimension, again with unanimous act of the European Council after obtaining the consent of the European Parliament and after consulting the Commission, including the consent of those member-states that do not wish to be part of the enhanced cooperation, thus more and more heating the issue regarding the influence on Eurojust. However, if the EPPO is established through enhanced cooperation, its competences, most probably, will be limited on offences against the financial interest of the EU. Such initial restriction of the range in the EPPO's activities, also could contribute in prevention of jurisdiction conflicts with national prosecution authorities.

Despite the legal basis for the creation of the EPPO according the Lisbon Treaty, still it is not about a completely standard procedure from several reasons. First, there is no commitment according the Treaty for the creation of the EPPO, although the possibility is stipulated. Second, it is not about common legal procedure that enables the creation of the EPPO, but special procedure that according the article 289 (2) of the TFEU, the legal act is adopted by one institution (the Council) with the consent of other institution (the European Parliament), and not as it is common in the co-decision procedure. This mean that since the article 86 is invoked, the European Parliament cannot influence in the draft-regulation. Third, the procedure for the establishment of the EPPO refers to the point that not all members will be willing for an enhanced cooperation in the criminal area, because the limitations in article 86 (1) calls for consent by nine member-states. Since the question for establishing the EPPO is instigated in front of the European Council and in case of disagreement, the nine member-states may approach to drafting a proposal for enhanced cooperation according article 329 (1) of the TFEU. The special legal procedure is laboured by the fact that unanimity is needed by the Council, and there will always be member-states publicly opposing the creation of the EPPO, which means that, at the end, every proposal will move in the direction of enhanced cooperation.

Options available – pros and cons. The establishment of the EPPO may be summarized as a possibility for vertical judicial cooperation in criminal matters, with wide EU-competences or to act as a supranational body in the area of freedom, justice and security. Several options are possible for the design of the EPPO and its connection with Eurojust; also will it be a centralized or decentralized structure.

The first option is Eurojust to become EPPO. As regard the organizational transformation, the easiest scenario is to make transfer from Eurojust to EPPO. Eurojust may continue to function with its horizontal role and to act in the framework of the EPPO for the offences against the financial interest of the EU. The advantage of this option is excluding the possibility of competing capacities if the structures acted separately. The only problem in conducting this option is how to

adjust the vertical integration of the EPPO in the existing horizontal cooperation of Eurojust and the national authorities of the member-states.

According the second option, the EPPO may be established as a separate entity in the frame of Eurojust, but to function independently. In such manner, EPPO in organizational sense will become part of Eurojust, but the horizontal and vertical functions would not unite. However, if the EPPO is only a unit in Eurojust, it remains unclear who will perform the EPPO functions and who will be responsible in front of the Eurojust. The advantage of this model is that the infrastructure of Eurojust may be utilised by the EPPO. The risk is that the Eurojust might be overshadowed by a smaller entity and with a potential to be outgrown.

If the EPPO is established as separate and independent entity, at the same time using the Eurojust expertise, then this represents the most pure option regarding the responsibility and the internal organization, as the two entities will be completely separated. While the entire structure is going to be clearer if there is one unit for judicial corporation and other for investigation and prosecution of frauds in the EU, the tasks would overlap and as a result the tasks of Eurojust will have to be reduced with a view to the tasks of the EPPO. The risk that the two bodies will compete, instead of mutual cooperation, is very important and might create problems in the information exchange area.

The final scenario anticipates mergence of the EPPO and Eurojust in one single entity with the execution of the Eurojust tasks – cooperation and coordination – and the new tasks of the EPPO – investigation and prosecution. That will be a requirement for a completely new body with internal structure and decision mechanism different than what Eurojust has at the moment. In effect, merging would bring Eurojust to an end, and an essentially new body would emerge from it.

In all options, the creation of EPPO will have a bearing on the internal organization and the existing structure of Eurojust. The option in which Eurojust becomes EPPO will entail minimal changes in the existing structure of Eurojust, where radically new body emerges with the unification of Eurojust and the EPPO. Although, the prerequisite is the mutual cooperation, the manner this is going to be put in practice will depend on the compatibility of their structures. This is of absolute essence in order to avoid existence of the competing institutions.

Influence on Eurojust and national judicial authorities. Regarding the effects that the eventually establishment of the EPPO may have on Eurojust, several things must be considered.

First, the EPPO is designed to adapt a supranational character and embody a vertical kind of integration in its area of competences with respect on the member-states. Should Eurojust move in the same direction through the use of article 85 (1) and with powers to initiate investigations and resolve conflict of jurisdiction, there will be inherent competition regarding which body is more supranational and have bigger powers. This may cause Eurojust to opt-out frequently from its formal competences and, most probably, move forward towards

a vertical model. For the EPPO, this shall mean to be constantly under pressure from Eurojust, causing it to use its powers in higher level.

Second, since the EPPO is established and competent in the fight against offences attacking financial interest of the EU, the powers of Eurojust in the same area should be adequately adjusted. As there is a higher chance that not all member-states may participate in the creation of the EPPO, this most probably mean that the priority crime area will not completely be separated from Eurojust competences. Accordingly, connected with the member-states that will not be a part of the EPPO creation, Eurojust shall keep its competences on offences against the financial interest of the EU. Although this looks like a clear division, the story does not end here, as other complications appears. For instance, which body will confront with cases that include member-states that participate in the creation of the EPPO and those that not participate? Shall that be the EPPO or the Eurojust or the both? Because of this reason, the EPPO is mostly discussed as to be condemned only on fight against offences affecting the financial interest of the EU.

For Eurojust, the establishment of the EPPO will entail cooperation with another body having parallel competences, but enjoys bigger vigorous powers. While the sort out of the parallel competences in limited sphere of the criminal law – offences affecting the financial interest of the EU – seems quite complex challenge, still the confrontation with the challenge is possible. The same cannot be said if the EPPO is competently created regarding other offences. Development behind these lines will lead to a degree of exceeding the functions and parallel competences, thus making both institutions, in large scale, incapable in conducting its tasks.

The circle of relevant actors will be incomplete without paying attention of the EPPO's relations with the national justice authorities. This is one of the deciding reasons regarding the difficulty of creating an ideal model for the future EPPO.

Important question in this context is how and whether the gathered information will circulate? Are the national authorities obliged to give information to the EPPO regarding a case? What will happen with the gathered information if the EPPO decides not to instigate a prosecution in a certain case? Is it possible for the national authorities to obtain the gathered information from the EPPO for instigating a prosecution on national level?

One of the most sensitive issues regarding the EPPO's relations with the national judicial authorities is the judicial review of its actions? Which acts of the EPPO should be subject to judicial review and through which forum? Member-states national legislations may be divided in two equal groups based on the judicial review of decisions for submitting a case for trial. Only half of the member-states ask for judicial review of the decisions on pressing charges. Such review mostly covers formal and substantial needs, such as obstacles in the procedure or whether the indictment is based on sufficient evidences. These assessments mostly result in a) accusation, b) sending back the charges, c) stoppage of the procedure. If the EPPO's indictment shall underlie the judicial review of national courts, it will secure higher level of legal certainty.

Based on the above mentioned, the EPPO's activities may lead towards a proposal for direct accusatorial competences without further judicial assessments. Finally, it remains open the key procedural question regarding what forum will secure the judicial review. Should it be at European level (special chambers in the ECJ frame) or at national level (national judges)? From one side, such special chamber in the ECJ frame in this moment does not exist; from the other side, it is not clear whether the model of a national court reviewing decisions to a partly supranational body is logical in the necessary hierarchy system.

CONCLUSION

1. The political aim must be to establish a coherent system of substantive criminal law, based on rational European principles. In order to conduct cross-border criminal proceedings within the EU, the principle of mutual recognition has to be re-evaluated. Only if the EU develops into a *genuine* AFSJ, where the stress is not put only on "security" but also on "freedom" and "justice", then the conditions for acceptable European criminal justice system are put in place. Also, further improvements of judicial and police cooperation will be desirable and even necessary for the sake of crime prevention and effective prosecution within the EU.
2. In order to create a coherent system of criminal law throughout the EU and on European level a rational criminal policy has to be followed. This can be accomplished by taking into account general principles, derived from EU law and acceptable to all member-states.
3. The implementation of the principle of mutual recognition was the origin of an unacceptable approach to cross-border proceedings. More balanced approach to European criminal proceedings is needed:
   - In order to (re)establish balanced cross-border proceedings within the EU the position of the suspect must be emphasised;
   - All other legal instruments implementing the principle of mutual recognition should take into account the interests of the concerned individuals and the interests of the executing state.
   - Another possibility would consist in the additional harmonisation of procedural law. If incompatibilities between the member-state's legal systems in this field were reduced, this would considerably facilitate mutual recognition.
4. A better coordination of national criminal jurisdictions is needed and EU should take further legislative measures aiming at the determination of the state which shall be competent to investigate and prosecute a case at an early stage of proceedings. This decision needs to be binding upon all member-states concerned in order to make sure that simultaneous proceedings are effectively prevented. Finally, the criteria for the determination of the forum state must be defined by the European

legislator, not only on a case-by-case basis. They have to ensure that the question of which member-state will prosecute a case and which substantive and procedural law apply is no longer a matter of chance.

5. The European Parliament is no longer a minor character in criminal law legislation. The powerful position especially in relation to the Council, member-states and the Commission offers new possibilities to shape criminal policy and care for a balanced criminal procedure which on the one hand strives for upholding public security but on the other hand protects civil liberties of all individuals involved.

The idea of establishing the EPPO is a subject of detailed discussion and still remains a controversial proposal with difficulties to contribute for the fight against frauds on EU budget. With the possibility of giving bigger competences to Eurojust, it could be argued that the Eurojust needs more time to demonstrate its ability before considering the possibility of establishing the EPPO. Having in mind the reaction of some member-states, it is difficult to achieve unanimity from the European Council regarding the creation of such body on short and medium term. In the absence of unanimity, a group of at least 9 member-states may establish the EPPO on the basis of enhanced cooperation. However, EPPO may act only on the territories of those member-states and in cooperation with Eurojust.

Articles 85 and 86 cover more questions than answers. Perhaps the Lisbon Treaty is a major step towards the creation of the EPPO, but as long as the issues regarding its functioning remain unanswered, the considerations of its establishment are unreal or inappropriate.

Besides the existence of several projects in the past over this issue, not a single study so far have focused on objective evaluation for the efficiency of the existing system for the protection of the EU's financial interest. Having in mind the abovementioned problems, arguments and certain options, even the arguments regarding the creation of the EPPO are not completely convincible. The option that foresee the creation of separate and independent entity, but with the need of cooperation with Eurojust, so far is the best offered solution, although not perfect because of the different competences pointed out in articles 85 and 86. The risk that could emerge because of the duplication of competences may be avoided if the both institutions operate in its areas and according the Lisbon Treaty competences. The most useful scenario, but not the perfect, if the possibility of establishing the EPPO is achieved, whether by article 86 or by activating the enhanced cooperation mechanism, is where the EPPO is created as a separate and independent entity along with the cooperation of Eurojust. In order to avoid duplication of competences, it is necessary for the both institutions to operate in their own areas and to use all advantages of the abovementioned scenarios *vis-à-vis* the risks.

If some of the abovementioned scenarios or some fusion among them fails, in that case, and as a result of the existing legal diversity in the EU, the unique solution regarding the protection of EU's financial interest is through strengthening the mutual cooperation and data exchange, not only among member-

states, but also among member-states and EU bodies. Therefore, the EU should make some evaluation of this alternative and reconsider if the purpose of establishing the EPPO may be realized in a different way - a way that would present a smaller burden to the EU's budget and member-states.

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