The criminal cooperation within the Area of Freedom, Security and Justice under the Treaty of Lisbon

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I. The need of EU constitutional reform

Since the agreement on rudiments of police and judicial cooperation in criminal matters under the title *Justice and Home Affairs* in the Treaty of Maastricht, an apparent discrepancy had occurred between the ambitious objectives of these policies and the inherent shortcomings in the institutional framework due to the largely intergovernmental nature of the Third Pillar: the right of legislative initiative might be enjoyed by a single Member State, not by the Commission; the unanimity voting was required in the Council, leading to a lowering of the threshold of decisions to the bottom; there was a lack of co-decision by the European Parliament; the only "reliable" instrument of this cooperation - a convention as an intra-Union regulatory act - required an approval under the respective national constitutional provisions; framework decisions or decisions had no direct effect in national legal orders; no infringement procedure against Member States was available; the access of national courts to preliminary references at the Court of Justice depended on the political option by the Member States, which has not been made until now by majority of them; the general competence of the Union to harmonise criminal sanctions, necessary for implementation of Community measures at the national level, was denied by the Court of Justice;[1] the special status under the Third Pillar policies, granted to the United Kingdom, Ireland and Denmark, fragmented the cooperation; etc.

This asymmetry has become more apparent after instituting an *Area of Freedom, Security and Justice* by the Treaty of Amsterdam and proclamation of the priorities in the European Council´s conclusions of Tampere (1999) and in the Hague Programme (2004). The *Treaty establishing a Constitution for Europe* (2004) attempted to *communitarise* the policies on police and criminal justice cooperation by redesigning their legal bases, streamlining instruments and procedures as well as by equipping them with an adequate democratic legitimacy, fundamental rights protection and access to justice.

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1 Cases C-176/03 *Commission v. Council*, [2005] ECR I-7879, C-440/06 *Commission v. Council* (not yet reported).

The successor *Treaty of Lisbon*, in spite of compromises that enabled the constitutional reform of the European Union to continue, is keeping these revolutionary achievements, without adoption of which no really credible "Europe of results" can exist.[2] There is no more promising progress in meeting the priorities of the Union among innovations, ensuing from the Treaty of Lisbon, than expectations connected with the implementation of its reinforced provisions on police and criminal cooperation. The exit from the malaise after the negative vote of the Irish referendum on the Treaty of Lisbon from 13 June 2008, whatever it will be, should have to leave these achievements intact. The only job for the political leaders in the Member States, which have not brought the ratification of this Treaty to an end yet, is to explain their peoples, that any other solution than doing away with inefficiencies of cooperation in this area, including those connected with protection of fundamental rights, could paralyse the record resulting from the integration process.

II. The reasons behind deficiencies of the current framework

The advancing removal of restrictions to movement of persons and to other circulation freedoms within the Common Market had to be accompanied by a corresponding relaxation of borders existing between the national jurisdictions since the beginning of the integration process. Otherwise, the appearance of a favourable environment for international and cross-border illegal immigration and crime would have been unavoidable.[3] Predominance of pragmatism over federalism in the initial conception of the founding Treaties necessitated later the anticipation of an implicit development, meeting also non-economic targets, political by their nature. Their latent inclusion in the portfolio of the Community manifested "the creation of an ever closer union among the peoples of Europe" (TEC, Preamble), justifying *the functional spill-over* of the Community action into new domains, linked with the economic- and competition-based mainstream of the integration.

The installation of a common judicial area was easier in the field of civil matters, whereas in the field of criminal matters and security, recalibrated by the attention paid to fundamental rights of persons involved in the respective policy action, it faced substantive objections, reflecting *the traditional doctrines of sovereignty* of the State. Instead of purposeful accompanying the market-related measures, the building up of *a European criminal justice and security area* resulted only as a mere reaction on emergency situations.

2 *Ladenburger,* Police and Criminal Law in the Treaty of Lisbon. A new Dimension for the Community Method, 4 EuConst (2008), 40.

3 *Zemánek*, Communitarisation of the Third Pillar, in: *Plechanovova/Schneider/Tichy* (eds.), The European Integration at the Crossroads, Praha (in print).

The general top-down method of approximation of national criminal laws and practices, supported by the standard set of principles governing the implementation and enforcement of approximated legal provisions at the national level and by the surveillance of the Commission and the Court of Justice over this process, has not been retained. Even the limited scope for minimum approximation (Art. 31(1) e/ EU) has not been exhausted yet. The Member States have given preference to a *horizontal* cooperation at the State-to-State level and the method of mutual recognition of national criminal decisions, applicable to national criminal laws and systems of justice and based on the secondary Union legislation without an explicit authorisation in the Treaty, has been exploited.

However, the Member States and the Union cannot escape their responsibilities towards their citizens – to provide them "with a high level of safety" in the globalized environment. On the one hand, the distinctions of investigative and punitive cultures between the Member States, well backed by the popular support, justify exclusivity of national powers and enable to testify different solutions and to learn from the best national practices. But, they do not represent important differences in values protected by criminal laws, because such differences as a rule do not exist. They reflect rather diverging national political – security and criminal - priorities amounting in the size and scales of punishment.

On the other hand, the existing distinctions encumber the objective to bring the national policies closer together in an area, where *the action taken would correspond – in terms of locality and time - to the occurrence* of illegal immigration and crime, as was demonstrated recently by the case of the Framework Decision on European arrest warrant and surrender procedures. Some countries, owing to the lack of effective institutional guarantees of fundamental rights at the Union level, amended their Constitutions and national legislation implementing the Framework Decision in order to provide their nationals with the equivalent protection they used to obtain before, according to the essential function of the State vis-à-vis its nationals, and not to rely only on diverse remedies available at the systems of criminal justice in other Member States (Germany, Poland).

Another approach underlined the idea of mutual procedural support between the Member States, governing the Framework Decision, and understood the prosecution of own nationals (incl. the question of his/her fundamental rights protection), who committed a crime in another Member State, as a matter of the essential functions of that State rather than of his/her homeland. Any constitutional "special treatment" of own nationals should have to be interpreted – so far as possible – in a way consistent with European law and no constitutional amendments would be necessary.[4]

4 The judgement of the Czech Constitutional Court, no. US Pl. 66/04 (no. 434/2006 Coll.), for more details see: *Zemánek*, The Emerging Czech Constitutional Doctrine of European Law, 3 EuConst (2007), 430.

The European arrest warrant case demonstrated the limits of intergovernmental cooperation, friendly to unilateral adaptations made at the national level, but hostile to flexible and efficient joint action. Single logistical and technical improvements in this field can only relieve the national perceptions, but cannot evoke any *reconsideration of the heterogeneous concept* of the Area of freedom, security and justice. It may be done only by a structural change, bringing together both – community and intergovernmental - paths towards the Area. This was already intended before Amsterdam, on the basis of democratic transparency and responsiveness of the Union law-maker, with an evaluation of the implementation of the Union policies jointly by the Commission and Member States and with a facilitated access of individuals to justice.

Such a change must escape *Scylla* of intergovernmentalism and also avoid *Charybda* of ignoring the features of Member States´ systems of criminal justice, forming part of their *national identity*. Any Union-wide common policy in criminal matters, lacking sensibility for the reaction of public opinion and related concerns, could undermine the Union´s legitimacy to respond to the existing and future challenges through a collective action. The Treaty of Lisbon is aware of both by attempting *Europe united in diversity* – paradoxically without any more mentioning it expressly.

III. The main innovations

The tension between freedom and security was – besides the tension between free undistorted competition and its social impact - one of two the most crucial and controversial topics of the debates during the period of reflection following the collapse of ratification of the Constitutional Treaty. Nevertheless, the Treaty of Lisbon demonstrates the will of Member States to establish *a security union*, without encroachments upon the freedoms of Internal Market and fundamental rights, the concurring concepts by their very nature, which may be reconciled by means of law:[5]

The Judicial cooperation in criminal matters (Chapter 4) is sharing the same General provisions (Chapter 1) with other policies forming part of Area of Freedom, Security and Justice under Title IV of the Treaty on the Functioning of the European Union (TFEU) – Policies on border checks, asylum and immigration (Chapter 2), on Judicial cooperation in civil matters (Chapter 3) and on Police cooperation (Chapter 5). It indicates the *formal abolishment* of the existing divide between them under the present pillar structure of the EU.

5 *Ruffert*, Der Raum der Freiheit, der Sicherheit und des Rechts nach dem Reformvertrag – Kontinuierliche Verfassungsgebung im schwierigem Terrain, in: *Pernice* (ed.), Der Vertrag von Lissabon: Reform der EU ohne Verfassung?, 2008, 164.

The creation of *true Union security policy instruments* is made feasible, a.o., by the gradual establishment of an integrated management system for external borders and introduction of the common policy on visas and residence permits, supported – as the case may be – by a special clause on flexibility (Art. 77 (3) TFEU), by the development of a common policy on asylum (Art. 78 TFEU) and immigration (Art. 79 TFEU), governed by the principle of solidarity and fair sharing of responsibility between the Member States (Art. 80 TFEU), by a common framework for administrative measures with regard to capital movements and payments (Art. 75 TFEU), preventing and combating terrorism, as well as by establishment of a European Public Prosecutor´s Office within the framework of Eurojust (Art. 86 TFEU).

The *mutual recognition* of judgements in criminal matters, complemented, if necessary, by the approximation of criminal laws, is upgrading – besides coordination and cooperation between national law-enforcement authorities – to a constitutional principle of Union law in this field (Arts. 67 (3), 82 (1) TFEU).[6]

The extension of the *general method of law-making* (ordinary legislative procedure), the emancipation of legal instruments with Community ones, with the same rules on their effective and uniform implementation and application in Member States (direct effect, primacy etc.), the subjection of legal instruments, incl. acts of Europol and Eurojust under the general jurisdiction of the Court of Justice, with the equal reference criteria of judicial review (incl. the Charter of Fundamental Rights) at the Union and national levels, and the introducing of equal, ECJ case-law-based rules for the Union competence on external action by the Treaty of Lisbon signify *communitarisation* of this policy and put an end to its characteristics as largely intergovernmental.

IV. The price for communitarisation

However, the above-mentioned innovations were instituted in exchange for concessions in favour of Member States that might feel restrained to join some advancing measures, agreed during the Intergovernmental Conference 2004 and refined during the IGC 2007, which made the adoption of the Treaty of Lisbon possible. This approach also demonstrates *a fair balance* between common standards and the respect to specific features of national legal traditions and judicial systems. In effect, the Area is lacking full coherency, indeed.

The new regulatory framework is assigned to – remarkably enlarged – *shared competence* (Art. 4 (2) lit. j) TFEU), but the position of national parliaments in political control of the observance by the Commission of *the principle of subsidiarity* within the legislative process will be strengthened, since only a quarter of them -

6 The numbering of the articles follows the comparative tables annexed to the Treaty of Lisbon according to Article 5.

instead of one third required by *early warning mechanism*[7] - can initiate the re-examination of the Commission´s proposal (Art. 69 TFEU).

The repetition of non-affectation of the exercise of the *Member States´ responsibilities* for the maintenance of law and order and the safeguarding of internal security (Art. 72 TFEU) has its pendant in the exclusion of the jurisdiction of the Court of Justice concerning the validity and proportionality of the Member States´ police and other law-enforcement measures (Art. 276 TFEU) and only an advisory body - a standing committee - facilitating coordination of operational action of competent national authorities, reminding the comitology method, may be set up within the Council (Art. 71 TFEU). Moreover, the Member States are declared entirely free (it would go without saying!) to organise between themselves any forms of administrative cooperation and coordination for safeguarding national security as they deem appropriate (Art. 73 TFEU); their actions may be supported or supplemented by the Council´s measures (Arts. 74, 6 lit. g) TFEU).

There are also some other *institutional deviations*, which remind of intergovernmental method:

a) the right of legislative initiative may be executed by a *quarter of the Member States* besides the Commission (Art. 76 TFEU); it seems to be - compared with the present execution of this right by a single Member State – a reasonable change, because the chance to win the support for the proposal within the Council (at least when it will be voting by qualified majority) and the European Parliament will be higher;

b) the scope of approximation of procedural and substantive laws and regulations is limited to minimum rules on matters having a cross-border dimension (Arts. 82 (2), 83 (2) TFEU), leaving more strict measures to the Member States and underlying expressly the respect to their *legal traditions and systems* as well as their responsibility for crime prevention, excluded from approximation (Art. 84 TFEU);

c) exceptionally, the *special legislative procedure* with unanimity in the Council and consent of the European Parliament will be employed for a possible extension of the scope of the Union competence on (specific *clause passerelle*): legal approximation (Arts. 82 (2) lit. d), 83 (1) TFEU), defined more narrowly as compared with the present, rather open-ended list in Art. 31 lit. e) TEU-Nice, in case of a conversion of Eurojust in a European Public Prosecutor´s Office (Art. 86 (1) TFEU) and when the conditions and limitations for the operation of police or other law-enforcement authorities of a Member State in another Member State might be laid down (Art. 89 FEU); an extension of the Union competence on legal approximation on the basis of the *flexibility clause* is explicitly excluded there (Art. 352 (3) TFEU);[8]

7 Protocol on the application of the principles of subsidiarity and proportionality.

8 This did not prevent the Senate of the Czech Parliament from submitting the Treaty of Lisbon to the Czech Constitutional Court for an ex ante review of its compatibility with the Czech

d) the most "heavy" compromise with restrained States, instituted already in the Constitutional Treaty, are four (!) clauses, allowing to escape from a draft act by a Member State, when it will consider fundamental aspects of its criminal justice system affected and no agreement would have been reached by consensus in the European Council (known as *emergency brake*); the notion of "fundamental aspects", close to "national identity" that is to be respected by the Union (Art. 4 (2) TEU), should have to be interpreted by the Court of Justice in a (narrower) way, which could prevent the abuse of this provision; an important improvement, made by the IGC 2007 and inspired by the Prüm Convention on police cooperation, is an immediate and unblocked passage to an *enhanced cooperation* by other Member States, which will be willing to progress in the adoption of the draft act (Art. 82 (3), 83 (3) TFEU);

e) the extended (as compared with the Constitutional Treaty) opt-out/opt-in in favour of the United Kingdom and Ireland can release them from any obligation, even when it already existed prior to the Treaty of Lisbon (like European arrest warrant);[9]

f) also the new transition clauses freezing the effects of 'old' legal acts and setting aside competencies of the Commission and the Court of Justice in the field of security and criminal justice for period of next 5 years must be mentioned here.[10]

V. Final remark

The structural irregularities or derogations of criminal cooperation within the Area of Freedom, Security and Justice, intended for the protection of essential functions of Member States - maintaining public order and guaranteeing internal security - should not be abused. Too many appeals to affectation of "fundamental aspects" of national systems of criminal justice and too high number of enhanced cooperations could undermine consistency of the whole project by its fragmentation and "infect"

constitutional order prior to its ratification (Art. 87 (2) CzConst.), referring especially to "a carte blanche" characteristics of the new division of competences and the flexibility clause under TFEU, to "a sensitive nature" of criminal cooperation and "insufficient procedural guarantees of fundamental rights" in this respect. Another objection raised by the Czech Senate was critical to the lack of democratic legitimacy of the special *clauses passerelle*, as the absence of consent by national parliaments (required, on the other hand, by the general *clause passerelle* of Art. 48(7) EU) cannot be compensated by an involvement of the European Parliament (decision no. 379 of the Senate of April 24, 2008). The judgement of the Constitutional Court is expected in autumn 2008.

9 Protocol on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice.

10 Protocol on Transitional provisions, Art. 10.

even other policies within the Union. Therefore, certain self-restrained approach from both sides would be desirable.[11]

The Treaty of Lisbon reinforces democratic legitimacy and accountability, transparency, comprehensive and efficient response by the Union action and – last but not least – contributes to trust-building among the Member States and to increasing legal certainty expected from EU citizens. Therefore, the early entry into force of this Treaty has no equivalent alternative.

11 See also: *Carrera/Geyer*, The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice, in: *Guild/Geyer* (eds.) Security versus Justice? Police and Judicial Cooperation in the European Union, 2008, 305-306.