

ORGANIZATION ON THE EUROPEAN UNION IN THE SPHERE OF PENAL PREPARATION

Venelin Terziev¹, Marin Petkov², Dragomir Krastev³

¹Corresponding Member of the Russian Academy of Natural History, Moscow, Russia, Prof., D.Sc.(Ec.), D.Sc. (National Security), D.Sc. (Social Activities), Ph.D., National Military University, Veliko Tarnovo, Bulgaria; University of Rousse, Rousse, Bulgaria, terziev@skmat.com

²Assoc. Professor, Ph.D., National Military University, Veliko Tarnovo, Bulgaria, marin_5kov@abv.bg

³Assoc. Professor, Ph.D., National Military University, Veliko Tarnovo, Bulgaria, drago.krastev@gmail.com

Abstract

The interaction and exchange of information between the national police of the organization on Schengen territory is much more than the scope of the subordination from the international organization for police cooperation, the co-ordination of the point-by-point contact in the framework of a nationally competent structure on the line for international police cooperation. They come along as a decisive sign on the counteraction tasks to the internationality of the world

With the development of the international police cooperation that will introduce the new stuff for the interaction, it will provide additional opportunities at the national level to the competent authority for the purpose of public administration and regional security, the guardianship of the societies of the eds in the border zones and the counteraction to the accidents with the international element.

Keywords: penal preparation, Europol, Eurojust, security, crimes, police cooperation.

1. INTRODUCTION

Security and the fight against crime has always been a topical issue in European affairs, and mechanisms to develop cooperation between national authorities in this field date back to the late 1970s. Introduced on a purely intergovernmental basis in 1993 as part of the Third Pillar, police and judicial cooperation in criminal matters (PJCCM) has become one of the fastest growing domains of EU action. EU's activities in this field have also entailed an external dimension, through which the European Union (EU) sought to establish and deepen its cooperation with third countries and international organisations.

2. ORGANIZATION ON THE EUROPEAN UNION IN THE SPHERE OF PENAL PREPARATION

The EU's activities in criminal matters have been given a new impetus with the entry into force of the Lisbon Treaty. The latter consecrated as one of the objectives of the European Union (EU) ensuring "a high level of security through measures to prevent and combat crime" (Art. 67 (1) TFEU). It also abolished the pillar structure, thus subjecting EU criminal law instruments to the Community method (albeit with few exceptions), and granted the EU new competences to develop its activities in the field of law enforcement and criminal justice. The Lisbon Treaty also singled out the two EU agencies active in the field of PJCCM, Europol and Eurojust. These two agencies, which are working alongside the other EU specialised AFSJ agencies, 2 are the only EU AFSJ agencies whose mandates are defined in EU primary law (Articles 88 and 85 TFEU).

Europol and Eurojust thus deserve further attention. Given their role of supporting and strengthening cooperation between EU Member States in criminal matters, they constitute key actors for EU's internal security and combat against crime. They possess very complementary mandates and competences. Even though this may lead to overlaps and tensions between them, it also imply that their joint participation in a case often results in a strong added-value and increase the chances of a successful outcome. The two agencies are also taking part in the EU's efforts to promote cooperation in criminal matters with external partners, like other agencies, such as Frontex, do in their respective fields of competences. Europol and Eurojust have developed within their respective mandates tools and expertise that are crucial for the success of cross-border investigations and prosecutions, and which make them interesting partners from the perspective of third countries and international organisations. Both agencies have concluded agreements with external partners, forming the basis for diverse forms of cooperation.

The research objective is to assess the legal framework organising the mandate and work of Europol and Eurojust, and more particularly the provisions regulating their external activities in order to determine whether their constitutive instruments are appropriate to meet the challenges ahead. These challenges can be political, as the agencies remain relatively new actors, still in the process of gaining the trust of national (EU and non-EU) authorities, and are not necessarily perceived as potential partners by third countries. Similarly, a third country may prefer not to cooperate with the agencies, and instead to conclude bilateral cooperation agreements with individual Member States – the latter remaining the only ones possessing operational capabilities in the sense of deployable personnel and technical means. These challenges which focuses on the legal challenges encountered by the agencies when they develop their external activities. Even though both Europol and Eurojust are guided by their desire to ensure the efficiency and effectiveness of their cooperation with their external partners, their desire is somewhat constrained by two legal challenges:

They need to accommodate the diversity existing among both EU member States and third countries, while preventing a situation in which differentiation and variable geometry compromise smooth cooperation;

As EU agencies, they are bound by the respect for the rule of the law, the protection of fundamental rights, and data protection rules, enshrined in EU primary law and applicable in the EU's external relations (Art. 20 TEU). They need to strike a delicate balance between the effectiveness of their operational cooperation with external partners and the protection of fundamental rights.

Europol and Eurojust both pre-exist the Lisbon treaty, yet with this new instrument, the two agencies are for the first time mentioned in Articles 85 and 88 TFEU, and their roles and mandates are enshrined in EU primary law. The two agencies can be described as sister agencies involved in the fight against serious cross-border crime affecting two or more EU Member States.

Europol's mission is to "support and strengthen action by the Member States' police authorities and other law enforcement services and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy" (Art. 88 (1) TFEU). Europol was set up to gather police and law enforcement information from national authorities and to provide strategic and/or operational analyses on the basis of this information. It has been compared to a 'mega-search engine'. It also coordinates law enforcement authorities' actions, and may support operational activities with its mobile office, analysis in real-time of information gathered on actions days, forensic tools, etc.

Eurojust's mission is to "support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases" (Art. 85 (1) TFEU). Eurojust is a 'facilitator' of judicial cooperation, which

intervenes to smoothen the effective functioning of judicial cooperation instruments (such as the European Arrest Warrant), to resolve legal issues arising in complex cases (such as conflicts of jurisdiction) and/or to stimulate the coordination of judicial authorities. It has been compared to a 'control tower', whose members will intervene when they notice the need to investigate in a coordinated manner cross-border and/or complex cases. It is important to stress that none of these agencies possesses operational powers. Europol has no vocation of being a European FBI its members have never been enabled to perform investigative acts on the ground. Similarly, Eurojust has no vocation of becoming a European prosecutor, and cannot directly perform investigative or prosecution acts. Nevertheless, they play a key role in assisting national authorities, especially for the coordination of investigations and prosecutions of the multilateral dimension of criminal cases.

The evolution of the two agencies' legal frameworks follows parallel paths, as the Commission proposed back in 2013 two proposals for Regulations. Whereas the Regulation for Europol has been adopted in May 2016 and entered into force on May 1st 2017, the negotiations on the Regulation for Eurojust are not yet finalised. A general approach had been adopted by the Council in February 2015, and the negotiations had been put on hold, pending progresses in the negotiations of the regulation establishing the European Public Prosecutor's Office. The analysis of the future legal framework of Eurojust will thus be based on the text of the General Approach. However, given the recent adoption of the Regulation establishing the European Public Prosecutor's Office, the negotiations on the Eurojust regulation could reach their end soon. These new legal instruments pursue several objectives. They not only „lisbonise” the functioning of the agencies, i.e. adapt it to the post-Lisbon Treaty legal framework, but they also give them new tools and competences to further support cross-border cooperation in criminal matters. Such evolution is to be welcomed especially considering the globalisation of crime, and the frequency and scale of crossborder criminal activities. Indeed, if the globalisation of our economies and societies has created economic growth and wellbeing, it has also given rise to massive opportunities for criminal enterprise and leads to the globalisation of crime. Criminals, working either in groups or in networks, operate across continents. Those involved in traditional cross-border criminal activities, such as trafficking in drugs or arms, may produce the illicit substances or weapons in one continent, traffic them across another and market them in a third. Yet, these patterns are also now present in “modern” criminal activities, such as cybercrime, a field in which criminals commit crime anonymously over the Internet, anywhere and anytime, regardless of physical location.

Criminal activities are thus very often limited neither to a single member State nor to the territory of the EU. Terrorism, cyber-crime, migrant smuggling or trafficking in human beings are often mentioned among the most severe transnational criminal threats, especially since they lead to serious violations to their victims' fundamental rights. These changes in the criminal landscape constitute new challenges for national law enforcement and judicial authorities. They increasingly have to investigate and prosecute cases with cross-border elements and links with neighbouring countries and/or more geographically distant countries. An effective cooperation in criminal matters is thus essential to ensure effective prosecution and conviction of criminals (and thus to ensure the dissuasive effect of criminal law), and to protect the fundamental rights of victims of crime. This necessity in turn impacts the EU and the EU criminal justice agencies Europol and Eurojust. Taking into account the above mentioned evolutions of the criminal landscape, the EU developed the external dimension of its Area of Freedom, Security and Justice, which mainly aims at serving the internal EU security policy by creating a secure external environment in order to combat illegal immigration, terrorism and organised crime. This has led to the emergence of a whole set of instruments, provisions and mechanisms aimed at favouring cross-border cooperation in criminal matters between the European Union, the national authorities of its Member States and its external partners (third countries as well as international organisations). Europol and Eurojust, as EU agencies, participated in this development of the external dimension of the AFSJ. The agencies have benefited from the possibility to develop their cooperation with external partners, notably on the basis of EU secondary law. Their external activities take different forms: the signature of cooperation agreements, allowing or denying the exchange of personal data, the appointment of liaison officers or contact points, or the appointment of liaison magistrates. In practice, even though they remain service providers to the national authorities, and are not automatically involved in all cross-border operations, the two agencies regularly publish press releases detailing the support they offered in cases investigated and prosecuted in cooperation with non-EU Members States. The two agencies are often perceived as the EU structures which come closest to an EU operational capability, which adds to their attractiveness as interlocutor for third countries.

Europol and Eurojust have thus become key players in the development and deepening of cross-border cooperation in criminal matters, not only between national authorities operating in EU Member States, but also between these authorities and those operating in third countries. Their importance has been

acknowledged by the EU institutions and the Member States, which have - during the negotiations of the two Regulations - substantially amended the provisions on the agencies' cooperation with third countries and international organisations. These amendments have not only placed the agencies under the general legal framework applicable to the EU's external relations, but they have also introduced new provisions, such as those allowing the exchange of information under derogation clauses. They testify the importance given to the security and the effectiveness of international cooperation in criminal matters in a context where crime prevention sometimes requires real-time transfer of information. These changes are all the more relevant considering that the UK, a key Member State in the field of security, will soon become a third country to the EU, and will rely on the legal framework governing Europol's and Eurojust's external cooperation to continue to cooperate with them.

3. CONCLUSION

In the current security context, the cooperation with third countries and international organisations is of crucial importance for the EU's objectives of preventing and combating crime. The issue will also be an important point of discussion during the Brexit negotiations, as once the United Kingdom will have withdrawn from the EU, new modalities of cooperation between British authorities and EU agencies will have to be identified. The current modalities of cooperation between Europol, Eurojust and their external partners, which have been analysed in this paper, may serve as a source of inspiration for the EU and UK negotiators. They also reveal the potential limits that may be faced in developing the future modalities of cooperation between the EU and the UK, and the need to reflect on developing specific modalities eventually drawing on the UK's status of former Member State. These issues are of crucial importance, since insufficient cooperation in criminal matters between the EU and the UK may reduce the safety of the people of the UK and of EU citizens.

The two agencies face challenges, starting with the need to accommodate diversity within and outside the European Union. However, their main challenge probably lies in the sensitivity of the exchange of data with third countries that are not bound by the EU norms on the protection of fundamental rights and data protection, and thus potentially entailing severe violations of fundamental rights. The two agencies are not the only actors faced with this challenge, which promises to test the effectiveness of crime prevention against legal considerations, prohibiting the processing of information when it has been obtained in violation of fundamental rights. In today's security reality, marked by regular terrorist attacks, some advocate for looser human rights standards, considering for instance that information preventing an attack shall be used, even though it may have been obtained through torture. In a European Union founded on the respect of the rule of law, such arguments are difficult to uphold. One can welcome in this regard the references in Europol's and Eurojust's regulations to the respect for data protection as a pre-requisite for the reception of personal data from third countries and the transfer of personal data to third countries. In addition, the mechanisms set up to hold both agencies accountable before democratically elected bodies and before judges shall be essential in this regard, in order to ensure that no red lines are crossed. As the Europol Regulation entered into force just a few months ago, and the Eurojust regulation is still under negotiations, it is still too early to provide a definitive answer on whether they are effective and sufficient, and a close attention will need to be paid to their practical implementation (Busuioc, 2010a, p.39; Curtin, 2017a, p.199; De Bruycker, Weyembergh, 2009, p.210; De Moor, Vermeulen, 2010b, p.1089; Heimans, 2008a, p.369; House of Lords, 2008b, p. 78-115; Mihov, 2010c; Mitsilegas, 2017b, p.222; Monar, 2012, p.59; Monar, 2015a, p.346; Monar, 2004a, p.414; Nikolov, 2015b; Peers, 2015c, 22p.; Peers, 2004b, p.5; Roberston, 1997, p.12; Trauner, Willems, 2016; Van den Wyngaert, 2004c, p. 215; Vitorino, 2003; Vlastnik, 2008c; Wechsler, 1952, p. 1098; Yanev, Mihov, Nikolov, 2010d; Yanev, 2013).

REFERENCE LIST

- Busuioc, M. (2010a). The Accountability of European Agencies – Legal Provisions and Ongoing Practices, p. 39.
- Curtin, D. (2017a). "Brexit and the EU Area of Freedom, Security and Justice, Bespoke Bits and Pieces" in F. Fabbrini, *The Law and Politics of Brexit*, OUP, pp. 199.

- De Bruycker, A. and A. Weyembergh. (2009). "The external dimension of the European Area of Freedom, Security and Freedom", in M. Telo, *The European Union and Global Governance*, (Routledge, 2009), p. 210.
- De Moor, A. and Gert Vermeulen. (2010b). "The Europol Council Decision: Transforming Europol into an agency of the European Union", *Common Market Law Review*, Vol. 47, 2010, p. 1089.
- Heimans, D. (2008a). "The external relations of Europol – Political, legal and operational considerations", in Bernd Martenczuck and Servaas van Thiel (eds), *Justice, Liberty and Security, New challenges for EU external relations*, VUB Press, p. 369.
- House of Lords, EU Committee. (2008b). *Europol: coordinating the fight against serious and organised crime*, Nov. 2008, p. 78-115.
- Mihov S. (2010c). *Transgranichno presledvane v Shengenskoto prostranstvo*, sp. Professional, br. 5, S.
- Mitsilegas, V. (2017b). *EU Criminal Law after Brexit*, *Criminal Law Forum* (2017) 28, p. 222.
- Monar, J. (2012). *The external dimension of the EU's Area of Freedom, Security and Justice, Progress, potential and limitations after the Treaty of Lisbon*, Swedish Institute for European Policy Studies, p. 59.
- Monar, J. (2015a). *The EU as an International Counter-terrorism Actor: Progress and Constraints, Intelligence and National Security* (2015) 30:2-3, p. 346.
- Monar, J. (2004a). "The EU as an International Actor in the Domain of Justice and Home Affairs", *European Foreign Affairs Review*, Vol. 4, Issue 3, p. 414.
- Nikolov, P. (2015b). *Teoretichni i prilozhni aspekti na vzaimodeystviето mezhdu politseyskite organi na sasedni darzhavi pri transgranichno presledvane*, V: *Byuletin na AMVR, Fakultet „Politsiya“*, br. 33, S.
- Peers, S. (2015c). *Trends in differentiation of EU Law and lessons for the future*, In *Depth Analysis for the AFCO Committee of the European Parliament*, 22 p.
- Peers, S. (2004b). *Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?*, *CMLR* 41, 1, 2004, p. 5.
- Roberston, S. (1997). *Intelligence-Led Policing: a European Union View*, in IALEIA, *Intelligence Led Policing, International perspectives on policing in the 21st century*, p. 12.
- Trauner, F. and Auke Willems, (2016). 'The internal-external nexus: Cross-border criminal justice', Brief Issue n° 29, European Union Institute for Security Studies (EUISS), October 2016.
- Van den Wyngaert, C. (2004c). *Eurojust and the European Public Prosecutor*, In: *European Area of Freedom, Security and Justice*. Oxford: Oxford University Press, p. 215.
- Vitorino, A. (2003). *JNA Commissioner, Improving Cross-Border Cooperation between Investigating and Prosecuting Authorities*. Speech 03\219, The Hague, 29.04.2003.
- Vlastnik, J. (2008c). *Eurojust – A Cornerstone of the Federal Criminal Justice System in the EU?*, In: *Security versus Justice Police and Judicial Cooperation in the European Union*. Farnham, Surrey and London: Ashgate Publishing Limited.
- Wechsler, H. (1952). 'The challenges of a Model Penal Code' *Harvard Law Review* 65 (1952) p. 1098.
- Yanev, R., S. Mihov, P. Nikolov. (2010d). *Politseysko satrudnichestvo v Shengen*, V: *Byuletin na AMVR, Fakultet „Politsiya“*, br 27, S.
- Yanev, R. (2013). *Politseyskoto satrudnichestvo v shengenskoto prostranstvo - chast ot vissheto spetsialno obrazovanie v Akademiyata na MVR na Republika Balgariya.*, *Byuletin „Politsiya“*, br. 31, S., AMVR.