# AN INTRODUCTION TO THE EU COOPERATION IN CRIMINAL MATTERS*

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## I. Overview of the institutional and regulatory framework

While criminal law was a side issue in Community Law, this is not the case in Union Law. Briefly are noted the following:

**A.** With the conclusion of the Treaty of Maastricht in 1992, which introduced a three pillar structure for the European Union, criminal law was brought within the formal influence of Union Law.

The so called Third Pillar related to "*cooperation in the fields of justice and home affairs*". This included judicial cooperation in criminal matters and police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of crime. Conventions, under international law, were the main legal instrument.

Moreover, the Treaty contained a legal basis for establishing a European Police Office (Europol).

**B.** Five years later –in 1997–, the adoption of the Amsterdam Treaty brought significant changes:

**1.** Maastricht third pillar areas of immigration, asylum, borders and civil law were "communitarised" (forming part of Title IV of the EC Treaty). The third pillar itself, entitled "*provisions on police and judicial cooperation in criminal matters*", was strengthened. Criminal law was the main enforcement instrument.

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**2.** Concerning the institutional framework in the third pillar there were major changes: **a)** The introduction of a new legal instrument, the "Framework Decision" for the purposes of criminal law approximation, that was very similar to the first pillar Directive. **b)** The enhancement of the role of the Court of Justice of the European Communities. Inter alia, the Court had jurisdiction to give preliminary rules on the validity and interpretation of framework decisions, on the interpretation of conventions and on the validity and interpretation of the measures implementing them. Although this jurisdiction was subject to acceptance by the Member States, most of them have declared acceptance.

**3.** The institutional developments in the third pillar must be viewed in the context of the development of the Union as an "*Area of Freedom, Security and Justice*", as a Union objective. This "area" contains elements of both pillars:

In the Union area of freedom, security and justice, "*the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*" (Art. 2 TEU).

**4.** It is very important to mention that one major consequence of the merger of internal market with the Area of Freedom, Security and Justice was the following: Principles that have been developed under Community law for the realization of the internal market were applicable to all fields of Union law, including Third Pillar criminal law. The most important principles are those of mutual recognition and availability. This –that was decided for the first time by the Tambere European Council (October 1999)– has led to a concept of free movement for decisions, information and evidence.

However there is a great difference between internal market law and criminal law: Free movement in the internal market offers advantages to the European citizen. On the other hand, free movement in criminal matters does not directly help the citizen, but involves the recognition and execution of criminal decisions, in order to facilitate the movement of enforcement rulings. This "extraterritorial" reach of national criminal law challenges the position of the individual on the national legal order.

The relationship between the principle of mutual recognition in criminal matters and the protection of human rights remains until now the most important and challenging issue in EU Criminal Law and *praxis*.

**C.** The Treaty of Lisbon (2009) brought fundamental changes in the field of EU Criminal Law.

**1.** The Treaty has not only introduced important institutional changes, but it has also empowered the European Union to legislate in new areas of criminal law and justice.

The pillars were abolished and one institutional framework was created for the whole Area of Freedom, Security and Justice, including judicial and police cooperation in criminal matters.

According to **Art. 67 para. 1** of Treaty on the Functioning of the EU (TFEU), "*the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States*".

**2.** The protection of human rights has now a central place in the Treaty. A key development in this context is the constitutionalisation of the Charter of Fundamental Rights of the EU (Charter), which has the same legal value as the Treaties.

The Charter contains a whole Title, namely the Title VI "*on Justice*", which includes relevant rights and principles for the development of EU Criminal law: the right to a fair trial, the presumption of innocence and the right of defence, the principles of legality and proportionality of criminal offences and the right not to be tried or punished twice in criminal proceedings for the same offence in EU (transnational "ne bis in idem").

**3.** The guarantee of security is specified in **Art. 67 para. 3 TFEU**, according to which "*The Union shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for co-ordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal law*".

The principle of mutual recognition is further specified in **Art. 81 para. 1 TFEU**: "*Judicial cooperation in criminal matters in the Union 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 the areas referred to in par. 2 and in Art. 83*".

The same provision gives the Union the mandate to adopt measures, in order to:

"*a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions,*

*b) prevent and settle conflicts of jurisdiction between Member States,*

*c) support the training of the judiciary and judicial staff,*

*d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions*".

**4.** With regard to approximation, it is important to mention that:

According to **Art. 82 para. 2 TFEU**, Directives establish "*minimum rules*" in criminal procedure law. The rules should aim "*to facilitate mutual recognition of judgments and judicial decisions, as well as police and judicial co-operation in criminal matters*" and concern: a) mutual admissibility of evidence between the Member States, b) the rights of individuals in criminal procedure, c) the rights of victims of crime and d) any other specific aspects of criminal procedure added by a decision of the Council.

Art. **83 TFEU** creates two legal bases for criminalization of conduct by means of Directives:

- **a) Para. 1** states that the Union may establish "*minimum rules concerning the definition of criminal offences and sanctions in the area of particularly serious crime with a cross-border dimension resulting from the nature of impact of such offences, or from a special need to combat them on a common basis*". These areas of crime are: "*terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime*".
- **b) Para. 2** relates the same competence when the approximation of substantive criminal law "*proves essential to ensure the implementation of the Union's policy in an area that is already subject to harmonization*".

**5.** Finally, concerning the institutional framework in this field, i.e. in the judicial cooperation in criminal matters, the most important changes are the following: **a)** Legal acts are Regulations, Directives and Decisions, which take place in co-decision between the Council and the European Parliament. **b)** The Court of Justice of the EU (CJEU) has full jurisdiction to rule on infringement proceedings in criminal matters, including the field of preliminary rulings. The Court also assumes jurisdiction to review the legality of acts of the European Council and bodies, offices or agencies of the Union. **c)** The European Commission has full powers as "guardian of the Treaties" to monitor the implementation of EU Criminal Law by Member States.

## II. Main EU Bodies and Agencies in the field of Criminal Law

**A.** In 1998 **Europol** was established. This Agency, based in The Hague, was formed in order to handle criminal intelligence and to combat serious organized crime and terrorism through cooperation between competent authorities of Member States. It has no operational authority and may not conduct investigations, make arrests or use any other coercive measures itself.

The Agency's activities include analysis and exchange information, coordination of investigative and operational actions, such as the joint investigation teams, preparation of threat assessment, strategic and operational analysis.

The Regulation (EU) 2016/794 specifies the new legal framework.

**B.** In 2002 **Eurojust** was established. This Agency, based in The Hague, was created in order to improve handling of serious cross-border and organized crime. It may act when two or more Member States are affected by crimes in which Europol is entitled to act. Eurojust has not the competence to investigate or prosecute crimes itself, but instead it is coordinating investigations or prosecutions between the Member States.

With the Treaty of Lisbon Eurojust has evolved. Art. 85 TFEU extends its scope including serious crime not only affecting two or more Member States, but also requiring prosecution on a common basis.

Eurojust cooperates, *inter alia*, with Europol and the European Judicial Network (EJN). The **EJN** works in order to facilitate national courts' mutual cooperation or to obtain specific information on criminal law issues.

**C.** The Treaty of Lisbon (Art. 86 TFEU) allows –for the first time– the establishment of the **European Public Prosecutor's Office** (EPPO), with the authority to investigate and prosecute EU-fraud and other crimes affecting the Union's financial interests. Until recently, only national authorities can investigate and prosecute EU-fraud. Their competences stop at their national borders.

By now, twenty two Member States, using enhanced cooperation, have agreed on establishing the EPPO: In October 2017 the Council Regulation (EU) 2017/1939 was adopted.

Its functional competencies will take place 3 years after the entry into force of this Regulation, namely in November 2020.

The European Prosecutor will be an independent Union body and is based in Luxemburg. The establishment of the European Public Prosecutor's Office brings a substantial change in the way the Union's financial interests are protected, as this body will combine European and national law-enforcement efforts in a unified approach to counter EU-fraud. Namely, this Union body has competence to carry out investigative measures and to gather evidence.

## III. Main Instruments of Mutual Recognition in Criminal Matters and Protection of Human Rights

Due to the importance of the above mentioned issues concerning the relationship between the principle of mutual recognition in criminal matters and the protection of human rights, let's see now two examples:

### A. European Arrest Warrant

#### *1. The meaning of the European Arrest Warrant*

The European Arrest Warrant (EAW) was introduced by the Council Framework Decision 2002/584/JHA. It is a judicial decision issued by a judicial authority of a Member State with a view to the arrest and surrender by another Member State of an individual for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

This means that the Warrant is a national judicial decision, which must be recognized and executed by the requested State. It has the form of a common Order, which contains a series of information on the requested person and the offence committed.

Very limited grounds are provided to the requested authority for the refusal to recognize and execute the EAW (Art. 3-5 of the Framework-Decision).

The main problem concerning the EAW relates to a general non-execution clause on the grounds of fundamental rights. Or, in other words, the limits of mutual trust in the criminal justice systems of Member States.

### *2. General fundamental-rights-clause*

**2.1.** While implementing the above mentioned Framework Decision, many Member States have enabled grounds for refusing to execute an EAW on the basis of breach of fundamental rights, such as breach of the European Convention of Human Rights (ECHR) or of the Charter (EUCFR).

The most common ground concerns the prison conditions in the issuing state, though not *per se* or in general, but rather in conjunction with other factors like health condition of the requested person, his age as well as the impact of his detention to his family.

**2.2.** At first, the CJEU did not recognize the above mentioned clause. In its judgment on the case "Laningan" (C- 237/15) of 16.7.2015, the Court has pointed out that: "*the executing judicial authority may refuse to execute a EAW only in the case, exhaustively listed, of obligatory non-execution or of optional non execution, laid down in Art. 3, 4, 4a and 5 of the Framework-Decision*" (par. 36).

But the Court case-law has significantly changed with the "*Aranyosi"* ruling. The Court has accepted with this judgement of particular importance the existence of "*exceptional circumstances*", which set limits on mutual trust and hence on mutual recognition in criminal law.

**2.3.** For this reason, the judgment of 5.4.2016 in the cases "Aranyosi and Caldararu" (C-404/15 and 659/15 PPU) is very important. In particular, the Court has ruled that: "*Article 1(3), Article 5 and Article 6(1) of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, must be interpreted as meaning that, where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Article 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be*

*provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Article 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.*".

**B. European Investigation Order: An overview**

Since May 2017 the Directive 2014/41 of the EU had to be transposed into the national legislations of the Member States. This Directive concerns the European Investigation Order and offers to the investigating and prosecuting authorities a plethora of means in order to achieve their goal in fighting crime. This Directive generally allows the exchange of any evidence. According to the Directive, the executing authority shall in principle recognize a European Investigation Order without any further formality being required, and ensure its execution in the same way and under the same modalities as if the investigative measure concerned had been ordered by an authority of the executing State. As we can all understand, the opportunities to investigate crime go far beyond the traditional regime of the European Convention on Mutual Assistance in Criminal Matters of the Council of Europe, dated 1959 and being, until now, the "mother" convention of cooperation in mutual legal assistance. Evidently, with such a tool the competent authorities can operate without restrictions since they can very easily cooperate directly and efficiently. As it always happens when the EU legislates a new means of cooperation in the sector of criminal law, several concerns are raised about human rights. Respectively, such was the case with the European Arrest Warrant. However, the directive –fortunately– includes at least a fundamental rights clause [Article 11 § 1 f)].

Now, I will focus on the protection of individuals, pointing out *some* essential human rights and legal principles provided in favor of the individuals.

## IV. The protection of individuals

### *1.* *The right to a fair trial*

The right to a fair trial is of outmost importance. This right, which is one of the cornerstones of a just society, means that people should be sure that every process will be fair and certain. It prevents governments from abusing their powers. Without this right, the rule of law and public faith in the justice system collapse. The right to a fair trial is internationally recognized as a fundamental human right and states have to respect it.

Within the European legal frame, this right is provided in article 6 of the ECHR. In cases in which this right is violated, the entitled applicant can file an application against the responsible State – Member of the Council of Europe. Additionally, especially for the EU Member States, the right to a fair trial is also provided in the articles 47 and 48 of the Charter of Fundamental Rights of the EU. As for these two Articles of the Charter, the affected individuals can file a motion concerning an alleged violation of these articles by the EU bodies, based on Article 340 para. 2 of the TFEU. Such may be the case in the future regarding the activities of the European Public Prosecutor's Office –the body that I have previously described.

According to the European Court of Human Rights (ECtHR), the guarantees provided for in article 6 apply not only to the court proceedings, but also to the stages which precede them. Thus, the guarantees cover pre-trial investigations carried out by the police. The Court stated in the case "Imbroscia v. Switzerland" [24.11.1993, para. 36] that the reasonable time guarantee starts running from when a charge comes into being. Furthermore, other requirements of Article 6 may also be relevant before a case is sent for trial, if and in so far, as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them.

The fairness of the judicial proceedings is of course related to the evidence gathered. According to the ECtHR case law, "[*w*]*hile Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law* […]. *It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence –for example, unlawfully obtained evidence– may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the 'unlawfulness' in question and, where violation of another Convention right is concerned, the nature of the violation found.*"

[*Khan v. the United Kingdom*, 12.5.2000, para. 34]. Of course this position leaves a lot of freedom to the Member States concerning what kind of evidence can be considered as lawfully obtained.

Finally, one important component in order to have a fair trial is that the suspect or accused must know the context of the criminal case-file materials. This aspect could be seen as part of the right to be informed of the accusation, which is provided in para. 3 of Article 6 of the Convention and derives from the right to a fair trial. If national security is endangered by such disclosure, a more effective balance between the interest of national security and the right to a fair trial can be achieved with a partial disclosure of documents essential to the case, evidence etc.

### ***2.*** *The right to have access to a lawyer*

The right to have access to a lawyer derives from the right to a fair trial. When a suspect or a person charged with a criminal offence faces the overwhelming power of the state, the right to a fair trial therefore requires that he is given a fair chance to present a defence, in order to counteract this imbalance. This requirement for equality of arms is inherent to the presumption of innocence and to the rule of law. Access to a lawyer is crucial to this and this right starts at least from the point of arrest and through the trial itself. People need access to legal advice so that they can understand the case against them and have a fair chance to exercise effectively all other procedural rights and to present a defence.

The right to have access to a lawyer is provided in the third paragraph of Article 6 of the ECHR, as well as in the Articles 47 and 48 of the Charter. In that regard, the European legislator has adopted the Directive 2013/48 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, that is now part of the national legislations of the Member States. Additionally, the European legislator has adopted the Directive 2016/1919 on legal aid for suspects and accused persons in criminal proceedings. These Directives are important and go a step further than the ECHR, as they contain special provisions and, in my opinion, they provide in general a higher level of protection than the case law of the ECtHR.

Concerning the context of the right, a person facing criminal charges must have the time and facilities to prepare a defence. This right exists at all stages of the proceedings and encompasses the right to have access to documents, files and information against him, as well as a guarantee of confidential communication with a counsel. The ECtHR, in its important judgement of 2008 "Salduz v. Turkey" [27.11.2008, para. 55], has noted that "*Article 6 para. 1*

*requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police* […]. *The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.*".

If a defendant has the means to pay, she/he should be able to choose her/his own lawyer. If the person cannot afford to pay for her/his own lawyer, the state should provide free legal assistance where the interests of justice require. This is explicitly provided in Article 47 of the Charter. In Greece, currently and until the mentioned Directive 2016/1919 on legal aid is transposed to the national legislation, legal aid is obligatory to any accused exclusively for a major crime –no matter if he has the financial capacity to afford it. Unfortunately though, in complicated cases in which the appointed lawyer cannot deal alone but needs the assistance of an expert –for example a digital evidence professional–, the state does not provide one. Such is the case, for example, when cell phone evidence is tendered to 'prove' the location of a person at a point in time (i.e. with the "GPS").

### ***3.*** *The principle of legality*

The principle of legality of evidence is one of the most essential guaranties of the individual: whether the evidence is collected electronically or abroad, it is crucial that it is legal –meaning legally gathered. Of course, the "forbidden apple" *id est* illegal evidence is in many cases the easiest one to obtain. Indeed, the investigating authorities can sometimes disregard this right. Such could be the case for instance in Greece, if the details of specified bank accounts were used by the investigating authorities in cases of misdemeanors, while they can only be legally used concerning major crimes. This is also the case with the use of malware by law enforcement, although there is no legal basis for it.

According to Article 8 of the ECHR any interference with the right to privacy by public authorities must be provided by law, in a way that affords adequate and effective guarantees against abuse. Some guidance as to the kind of guarantees the law must foresee, can be found in the Strasbourg case law. In analyzing surveillance measures, the Court identified the following minimum safeguards: "*a definition of the categories of people liable to have their telephones tapped by judicial order, the nature of the offences which may give rise to such an order, a limit on the duration of telephone tapping, the procedure for drawing up the summary reports containing intercepted conversations, the precautions to be taken in order to communicate the recordings intact and in their entirety for possible inspection by the judge and by the defence and the circumstances in which recordings may or must be erased or the tapes*

*destroyed, in particular where an accused has been discharged by an investigating judge or acquitted by a court*" [*Valenzuela Contreras v. Spain*, 30.7.1998, para. 46].

In any way, properly circumscribing the conditions under which competent authorities may resort to coercive investigative measures is an indispensable ingredient of any legal framework that wishes to comply with the requirements of the ECHR. Moreover, restricting law enforcement's access to intrusive investigative techniques to certain offences improves the quality of the law; which is one of the objectives of the legality provision. As a result, the discretion conferred on the competent authorities is framed and individuals can better foresee the consequences of their conduct.

***4.*** *The principle of proportionality*

Another essential element of the investigative measure is to assure its proportionality. All Member States require that the proportionality condition is met in order to justify recourse to coercive investigative measures. Nevertheless, there are some variations in the applicability of the principle of proportionality due to the existing differences between the national legislations.

According to the second paragraph of Article 8 of the ECHR, there shall be no interference by a public authority with the exercise of the right to respect private and family life except when it is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

According to the ECtHR case law "*an interference will be considered 'necessary in a democratic society' for a legitimate aim if it answers a 'pressing social need' and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are relevant and sufficient*" [*S. and Marper v. the United Kingdom*, 4.12.2008, para. 101].

Moreover, even since 1978, the Court has pointed out that "*the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field* […]. *Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle*

*against espionage and terrorism, adopt whatever measures they deem appropriate.*" [*Klass and others v. Germany*, 6.9.1978, para. 49].

From another point of view, the EU legislator has recently adopted the Directive 2016/680 "*on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data*". According to the first paragraph of Article 15, "*Member States may adopt legislative measures restricting, wholly or partly, the data subject's right of access to the extent that, and for as long as such a partial or complete restriction constitutes a necessary and proportionate measure in a democratic society with due regard for the fundamental rights and legitimate interests of the natural person concerned, in order to avoid obstructing official or legal inquiries, investigations or procedures*" etc. Concerning these issues, the EU Agency for Fundamental Rights has suggested in its Fundamental Rights Reports that the Member States should include proportionality checks and appropriate procedural safeguards so that the essence of the rights to privacy and the protection of personal data are guaranteed.

Currently and under the European Investigation Order, a judge of a given Member State may consider it proportionate to monitor a suspect's bank transactions and allow this measure to be executed, while a judge of another Member State would not allow so.

Regardless, we must accept that the principle of proportionality is part of the common constitutional traditions of the Member States, within the meaning of Article 6 paragraph 3 of the Treaty of the European Union. Thus, the investigating judge, the prosecutor in charge and every competent authority should always favor the less intrusive investigative measure in order to ensure the enforceability of the principle of proportionality.

## V. <u>Concluding Remark</u>

As members of modern society it is important for us to ask ourselves what kind of criminal justice we would like for Europe: In particular, if *Justice*, within the Area of Freedom, Security and Justice [article 67 of the TFEU], should mostly be oriented towards *Security* or *Freedom*. In any way, at least in my point of view –and I hope in yours too–, the protection of the individual's rights is absolutely essential for a true "Area of Justice". As the EU is evolving, so fundamental rights do and their protection and efficacity must also evolve.

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