

Solutions Offered by the Lisbon Treaty

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Introduction

The Lisbon Treaty aims at further developing an area of freedom, security and justice without internal frontiers, and the prevention and combating of crime is seen as one of the premises in order to strengthen the creation of such an area (Article 3 TEU). Member States are faced with crises of criminality in the era of globalisation: following economic and social trends, crime tends to assume a transnational dimension and a complex structure, and individual States cannot manage to deal with this phenomenon. Moreover, freedom of circulation within the EU can lead to further difficulties in fighting criminality. This is the reason why the Lisbon Treaty reinforces EU powers in criminal matters. It offers a great opportunity to create a response to economic globalisation and global criminality, thereby not only dealing with the problem at an adequate (i.e., supranational) level, but also attempting to offer a more 'political' and 'democratic' solution than those originating from contingent situations or single leading countries.¹ The previous regime was often lacking in effectiveness, legitimacy, and efficiency² and its reform offers some solutions. The most important ones will be analysed in the next sections.

The Ultimate Frontier: Mutual Recognition

The main innovation introduced by the Lisbon Treaty is the explicit acknowledgment of the principle of mutual recognition of judgments and other judicial decisions. This principle had not been adopted in the Maastricht Treaty (1992) and in the Amsterdam Treaty (1997), and it had previously only been recognised in the Tampere Council (1999) and in the Hague Programme (2004). On the basis of this principle, the EU had already adopted some former third pillar measures, such as the Framework Decisions on the European Arrest Warrant and on the European Evidence Warrant.

The new Treaty presents the principle of mutual recognition as being tightly connected with the principle of judicial cooperation and the principle of approximation of national laws and regulations (Articles 82.1 and 2 TFEU). The codification of these three principles results from a compromise between two different schools of thought: according to the first one, favoured by the United Kingdom, Ireland, and the Scandinavian countries, the creation of the European legal area should be based essentially on the mutual recognition principle; according to the second one, favoured by the majority of the other Member States, the harmonisation principle should be privileged.

The recourse to mutual recognition seems to be the easiest approach, because it apparently does not require any harmonisation or collaboration efforts. However, as has been pointed out,³ no serious mutual recognition among judicial authorities can be envisaged without a previous in-depth harmonisation of criminal laws. Only mutual trust among the Member States, originating from the awareness of a substantial similarity of the national legal systems and from a strong and rooted attitude towards cooperation, can make the instrument of mutual recognition effective; otherwise, this extraneousness could easily lead to distrust and provide grounds for refusal of cooperation, as has already happened several times, for example in case of decisions rendered *in absentia*.⁴ Only a satisfactory degree of mutual trust can, for instance, justify the abolition of the traditional requirement of dual criminality for an arrest warrant.⁵ This is the reason why the new Treaty sees mutual recognition, approximation, and cooperation as complementary measures,⁶ and, in order to encourage the approval of new mutual recognition measures, it strengthens the existing harmonisation and collaboration procedures.

The Approximation of the Laws and the Adoption of Minimum Rules

As mentioned above, the Treaty also reaffirms and reinforces the principle of approximation of the laws and regulations of the Member States, which is part of judicial cooperation and the basis for it. Approximation is achieved through the establishment of minimum rules in some significant areas of substantive and procedural criminal law (Articles 83 and 82.2 and 3 TFEU). Such minimum rules shall be adopted by the European Parliament and the Council in accordance with the ordinary legislative procedure (co-decision and QMV) and shall assume the form of directives.

Minimum rules of substantive law concern 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.” Before the entry into force of the Reform Treaty, the areas of approximation were terrorism, illicit drug trafficking, and organised crime. Thanks to the Reform Treaty, new areas were introduced, namely trafficking in human beings and the sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, and computer crime. In addition, other areas can be subsequently identified on the basis of new developments in crime but, in this case, the Council must unanimously adopt a decision with the consent of the European Parliament.⁷ The area of approximation appears to be more relevant than ever and is likely to become even more consistent. Even if minor differences in national laws should not prevent Member States from cooperating, this extension is necessary in order to lay down the basis for an authentic cooperation and to create the conditions for mutual recognition, especially for crimes such as corruption, the effective prosecution of which serves to protect the financial interests of the Union. Although the area covered by approximation was extended and the legislative procedure simplified, no radical changes of the paradigm have been registered in this field. Approximation through approval of minimum rules had also been taken into account in past Treaties – a true revolution would have been embodied by a shift from harmonisation to unification, that is, from a Euro-harmonised criminal law to a European criminal law.⁸ In other words, the Union is not ready to have its own ‘criminal code,’ its own catalogue of crimes to be prosecuted in all jurisdictions. The idea of an EU code, which has already been proposed in some documents and projects such as the *Corpus Juris*,⁹ the *EuropaDelikte*,¹⁰ and the *Alternativentwurf*,¹¹ requires a degree of mutual trust and reciprocal harmonisation that EU members have not reached yet: drafting criminal code not only means identifying a catalogue of offences, but also creating a ‘general part,’ that is, finding an acceptable compromise on the very basic principles of a penal system, which continue to vary from one country to another. Moreover, the introduction of a criminal norm on a European level could create, in many national systems, a serious contrast to the principle of legality. In any case, a general referral to unification, perhaps as a mere possibility at the disposal of the Council would have been useful for at least two reasons. Firstly, it would have constituted a provision similar to that concerning the European Public Prosecutor’s Office, which will be analysed in the next paragraph. The existence of a list of ‘eurocrimes’ to be prosecuted by an EU Prosecutor would facilitate the activity of this officer, who, according to present provisions, would have to face the great diversity of the various national laws. Secondly, the Reform Treaty (especially Articles 83 and 86 TFEU) could have suggested some applicable criteria in order to identify the ‘eurocrimes:’ all crimes against the financial interests of the Union and, perhaps subsequently and in part, serious crimes of cross-border dimensions related to some strategic areas.

Minimum rules of procedural law concern the mutual admissibility of evidence between Member States, the rights of individuals in criminal proceedings, and the rights of victims. Furthermore, other areas can be subsequently identified but, in this case, the Council must unanimously adopt a decision with the consent of the European Parliament. Approximated procedural laws also serve to establish a higher degree of coopera-

tion and facilitate mutual recognition, as the Reform Treaty explicitly maintains. In any case, the cooperation policy cannot penalise the rights of a person involved in a criminal proceeding, and this is why such minimum rules as “shall take into account the differences between the legal traditions and systems of the Member States” and “shall not prevent Member States from maintaining or introducing a higher level of protection for individuals” exist. One must nevertheless take into consideration that the EU fully recognises the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms (and plans to adhere to this Convention, Article 6 TEU), and that these charters include all relevant procedural rights, such as the right to a fair trial or the right to privacy. As stated above, within this framework of common protected legal interests, the concerns of Member States regarding judicial cooperation should soon become a thing of the past.¹²

Paradigm Change in the Field of Judicial and Police Cooperation: the European Public Prosecutor’s Office

As mentioned above, judicial and police cooperation has been well strengthened: the Reform Treaty considers adopting, by means of a simplified legislative procedure, measures in fields not included in the previous regime. As for judicial cooperation, these measures are aimed at laying down rules and procedures for:

- Ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
- Preventing and settling conflicts of jurisdiction between Member States;
- Supporting the training of the judiciary and judicial staff;
- Facilitating cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters;
- The enforcement of decisions (Article 82.1 TFEU).
- As for police cooperation, these measures include:
 - The collection, storage, processing, analysis, and exchange of relevant information;
 - Support for the training of staff and cooperation on the exchange of staff, on equipment, and on research into crime detection;
 - Common investigative techniques in relation to the detection of serious forms of organised crime. (Article 87 TFEU).

The most important and most revolutionary innovation in the field of judicial cooperation is the possibility to establish a European Public Prosecutor’s Office in order to combat crimes affecting the financial interests of the Union as well as serious crime having a cross-border dimension (Article 86 TFEU). Such a possibility underscores the awareness that an effective contrast to these forms of criminality cannot result only from the promotion of communication and cooperation between Public Prosecution authorities of the Member States, but also that a direct action on the part of EU institutions is required.¹³ This provision has a great symbolic value, but it would be a mistake to exaggerate its practical significance: Article 86 outlines a mere possibility to establish such a body, and it provides only for generic and indefinite guidelines, the enforcement of which will likely require long and difficult negotiations.

The establishment of a European Public Prosecutor's Office is facultative and requires regulations unanimously adopted by the Council as well as the previous consent of the European Parliament. The lack of unanimity can be overcome only through a referral to the European Council or by the establishment of an enhanced cooperation among at least nine Member States: in the first case, consensus is still required; in the second case, the involvement of a limited number of States will affect the effectiveness of the Office. These regulations can only be applied to crimes affecting the financial interests of the Union; provisions concerning crime having a cross-border dimension do not necessarily have to be necessarily adopted at the same time, but can result from a subsequent amendment, and this extension of competencies requires the additional consultation of the Commission.

According to the Treaty, the European Public Prosecutor's Office shall be responsible for investigating, prosecuting, and bringing to judgment the perpetrators of, and accomplices in, the above-mentioned offences, and it shall exercise the function of prosecutor in the competent courts of the Member States in relation to such offences. The following rules have not been specified in the Treaty and shall constitute the subject of regulation:

- The general rules applicable to the European Public Prosecutor's Office;
- The conditions governing the performance of its functions;
- The rules of procedure applicable to its activities;
- The rules governing the admissibility of evidence;
- The rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.

Consequently, many issues are still open and still lacking a satisfactory solution.

Few indications concerning the structure of the new Prosecutor's Office have been provided. Two alternatives are offered: the creation of an autonomous body of prosecutors or the foundation of an office, which would direct and instruct national public prosecutors appointed by the Member States and acting in turn as the European Public Prosecutor's deputies. The second solution is considered the better one for several reasons: the European Prosecutor constantly faces national judicial authorities, not only during trials but also during investigations, and his/her action(s) would be considerably facilitated if he/she is already integrated in the national system; moreover, this consistent cession of sovereignty would be more easily accepted by Member States if the European Prosecutor is not perceived as a completely extraneous body.¹⁴ Furthermore, the only textual instruction provided by the Treaty ("Prosecutor's Office" instead of "Prosecutor") suggests the idea of a bureau of support more than that of a radically new authority.

In addition, a clear definition of the relationships between the Public Prosecutor and other EU institutions already operating in the field of criminal justice or involved in the protection of the financial interests of the Union is needed.

According to Article 86 TFEU, the Prosecutor's Office shall be established from Eurojust, as part of judicial cooperation in criminal matters. According to the new Treaty (Article 85 TFEU), Eurojust's mission shall be to provide strategic support to national authorities in investigating and prosecuting "serious crime affecting two or more Member States or requiring a prosecution on common bases" and "offences against the financial interests of the Union,"¹⁵ which is, approximately, also the operational field of the EU Prosecutor's Office. Nonetheless, it is necessary to distinguish between the two bodies: Eurojust supports and coordinates national authorities, while the EU Prosecutor's Office shall replace them in a number of specifically assigned

competencies and activities,¹⁶ that is, the latter will be directly involved in national jurisdictions and the former will have to provide assistance. Relationships between Eurojust and the EU Prosecutor will have to be regulated.

According to Article 86 TFEU, the Prosecutor's Office shall conduct its investigation in liaison with Europol, wherever appropriate. According to the new Treaty (Article 88 TFEU) Europol's mission shall be to provide for strategic support to police authorities 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,"¹⁷ that is, an area which goes far beyond the operational field assigned to the EU Prosecutor. In the future, Europol will have to assist both national and European prosecution services, presumably by using different tools: the closeness between Europol and the EU Prosecutor, both settled on the European level, could foster the introduction of more closely defined mechanisms of cooperation.

Finally, the European Anti-Fraud Office (OLAF) is already engaged in the fight against fraud, corruption, and other irregular activities within the European institutions in order to protect EU financial interests: at the moment, it is an administrative body and it provides support to national administrative, police, or judicial authorities as well as to Europol and Eurojust. If a European Public Prosecutor's Office were to be established, OLAF could provide it with appropriate assistance and documentation, and its efforts in administrative investigations could finally be treated more rationally and promote a direct and significant feedback in a judicial proceeding.¹⁸ In order to reach this goal, appropriate communication and cooperation mechanisms between OLAF and the Prosecutor's Office should be implemented; otherwise OLAF's participation and expertise could be irretrievably wasted.

In addition, a clear definition of the relationships between the Public Prosecutor and the national jurisdictions is needed. Representatives of the Prosecutor's Office will have to interact with national judges and national police forces in order to abide by national laws and procedures: this means, on the one hand, that EU Prosecutors will have to be adequately prepared to face these situations; on the other hand, it means that national authorities will have to be ready to accept the intervention of this 'extraneous body' within the system. This problem requires a solution because the idea of EU crimes entirely prosecuted on a European level, i.e., in front of a European criminal court, is not even mentioned in the Treaty and, at the moment, appears unrealistic, so that the EU Prosecutor will have to act on a national level for a long time to come. Any organisational deficits in this field could seriously affect the effectiveness of the prosecution of 'eurocrimes.'

In conclusion, Article 86 TFEU offers a great opportunity for Member States to consolidate the area of freedom, security and justice and to strengthen the instruments in the fight against the most serious and widespread forms of criminality. Indeed, the special legislative procedures required for the approval of the regulations, the potentially restricted field of offences to which these provisions shall be applicable, and the wide range of solutions offered to States in defining the concrete methods of operation of the new body could jeopardise the future of the European Public Prosecutor: the risk is that this Office may not even be established or, if established, could prove itself substantially ineffective and thus constitute a sharp deviation from the model represented by existing bodies.

Criticism and Conclusions

It is unquestionable that the Lisbon Treaty, by acknowledging the mutual recognition principle, by extending the area of approximation, and by reinforcing judicial and police cooperation, constitutes an extraordinary improvement of EU involvement in criminal matters. There are still many concerns regarding the relinquishment of sovereignty, and mutual trust often seems to be insufficient. Moreover, there are many procedural obstacles, such as the need for approving all the implementation measures and the unanimity rule, that still

remains in certain cases.¹⁹ The Lisbon Treaty provisions are nothing more than a temporary goal and create an institutional and organisational system that is still fragmented and somehow incoherent. The importance of the liberties and rights of the players requires a gradual and cautious approach: security cannot prevail over freedom and justice, but these three principles must be reconciled. In other words, the aim of the EU is not only to combat crime, but also to protect people. The Union is not a mere repressive mechanism and, unless it denies its own nature, its criminal policy has to assume the form of a penal democracy.

1. For these considerations, see Donini, M. (2002), L'armonizzazione del diritto penale nel contesto globale, *Rivista Trimestrale di Diritto Penale dell'Economia*, pp. 477-492.↵
2. For a detailed analysis, see Ladenburger, C. (2008), Police and Criminal Law in the Treaty of Lisbon. A new Dimension for the Community Method, *European Constitutional Law Review*, No. 4, pp. 20-40.↵
3. Inter alios, Ladenburger, C. (2008), Police and Criminal Law in the Treaty of Lisbon. A new Dimension for the Community Method, *European Constitutional Law Review*, No. 4, pp. 20-40, at pp. 35-36.↵
4. See Mitsilegas, V. (2009), The third wave of third pillar law: Which direction for EU criminal justice?, *European Law Review*, Vol. 34, No. 4, pp. 523-560, at p. 546.↵
5. See Herlin-Karnell, E. (2008), The Lisbon Treaty and the Area of Criminal Law and Justice, *European Policy Analysis*, No. 3, pp. 1-10, at pp. 4-5.↵
6. On the theme of cooperation and integration as fundamental but not mutually exclusive political choices, see also Monar, J. (2008), What kind of EU policy regarding criminal matters? The question of the balance between cooperation and integration, in: G. Grasso and R. Sicurella (ed.), *Per un rilancio del progetto europeo. Esigenze di tutela degli interessi comunitari e nuove strategie di integrazione penale*, Milan: Giuffrè, pp. 531-560.↵
7. Moreover, "if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76."↵
8. On this subject, see Gómez-Jara Díez, C. (2010), Models for a System of European Criminal Law: Unification vs. Harmonization?, published online: 27 March 2010, available at <http://ssrn.com/abstract=1579422>.↵
9. Delmas-Marty, M. (ed.) (1997), *Corpus Juris portant dispositions pénales pour la protection des intérêts financiers de l'Union*, Paris: Economica.↵
10. Tiedemann, K. (2001), Europa-Delikte. Vorschläge zur Harmonisierung des Wirtschaftsstrafrechts in der EU, in: *Festschrift für Dionysios Spinellis*, Athen: Sakkoulas, pp. 1097 ff.↵
11. Schünemann, B. (2004), *Alternativentwurf Europäische Strafverfolgung*, Köln: Heymanns.↵
12. For the relationship between criminal law and fundamental rights in the EU, see also Grasso, G. (2007), La protezione dei diritti fondamentali nella Costituzione per l'Europa e il diritto penale: spunti di riflessione critica, in: G. Grasso and R. Sicurella (ed.), *Lezioni di diritto penale europeo*, Milan: Giuffrè, pp. 633-672.↵
13. Conde-Pumpido, C. (2009), National prosecution authorities and European criminal justice system: the challenges ahead, published online: 11 September 2009, *ERA-Forum*, Vol. 10, No. 3 (1 October 2009), pp. 355-368.↵
14. For similar considerations, see Conde-Pumpido, C. (2009), National prosecution authorities and European criminal justice system: the challenges ahead, published online: 11 September 2009, *ERA-Forum*, Vol. 10, No. 3 (1 October 2009), pp. 355-368, at p. 365.↵
15. Art. 85 TFEU adds that "in this context, the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include: (a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union; (b) the coordination of investigations and prosecutions referred to in point (a); (c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network. These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities."↵
16. For these considerations, see Conde-Pumpido, C. (2009), National prosecution authorities and European criminal justice system: the challenges ahead, published online: 11 September 2009, *ERA-Forum*, Vol. 10, No. 3 (1 October 2009), pp. 355-368, at pp. 364-365.↵
17. Art. 88 TFEU adds that "the European Parliament and the Council, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine Europol's structure, operation, field of action and tasks. These tasks may include: (a) the collection, storage, processing, analysis and exchange of information, in particular that forwarded by the authorities of the Member States or third countries or bodies; (b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust. These regulations shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments."↵
18. OLAF has always supported the Commission's proposal of creating a European Prosecutor in order to protect EU financial interests, Green Paper from the Commission, on "Criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor", Brussels, 11.12.2001 COM (2001) 715 final, http://ec.europa.eu/anti_fraud/green_paper/document/green_paper_en.pdf, reasoning that the establishment of a European Prosecutor, instead of providing Eurojust with more competences, would be a more effective instrument in the fight against criminality, because the prosecutor could directly intervene in a criminal proceeding carried out in a national court; see also the open letter of the Director-General of OLAF and the OLAF supervisory committee to the President of the Convention for the Future of Europe, http://ec.europa.eu/anti_fraud/green_paper/document/lettrevge_en.pdf.↵
19. Furthermore, the so-called "emergencies brake" to be invoked if a minimum rule contrasts with a basic principle of a national system (Art. 82 and 83 TFUE), the disparities created by enhanced cooperation, and the "opt-in" and "opt-out" regimes can be considered other procedural obstacles.↵

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