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Abstract

The area previously known as the third pillar has been significantly innovated by the Lisbon Treaty coming into force. This article aims to provide a critical overview of the most important novelties introduced by the Reform Treaty in this field, focusing on the area of police and judicial cooperation.

This piece is divided into three parts: after having explained how such innovations were anticipated by the European Court of Justice (ECJ) before the entry into force of the Lisbon Treaty, we deal with the analysis of the most significant provisions of the Treaty and, finally, in the third part, attempt to give some conclusive remarks in trying to read such reforms as a temporary step towards further forms of necessary cooperation.

Key-words

EU Criminal Justice, European Court of Justice, Reform Treaty, Criminal Law

SUPRANATIONALISM IN EU CRIMINAL JUSTICE: ANOTHER INCOMING TIDE? *

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1. PRELUDE: HOW THE ECJ PAVED THE WAY TO THE REFORM TREATY

The area previously known as the third pillar has been significantly innovated by the Lisbon Treaty coming into force. This article aims to provide a critical overview of the most important novelties introduced by the Reform Treaty in this field, focusing on the area of police and judicial cooperation.

This piece is divided into three parts: after having explained how such innovations were anticipated by the European Court of Justice (ECJ) before the entry into force of the Lisbon Treaty, we deal with the analysis of the most significant provisions of the Treaty and, finally, in the third part, attempt to give some conclusive remarks in trying to read such reforms as a temporary step towards further forms of necessary cooperation.

Thanks to the Reform Treaty, as it is commonly referred to, the EU abandoned its three pillar-based architecture, and the structural principles of EC law (i.e. direct effect and primacy) have been extended in our area of interest. Actually, such changes were partly anticipated by the ECJ in some decisions ruled during the "reflection period" (i.e. soon after the stop of the ratification process of the Constitutional Treaty and before the signature of the Lisbon Treaty); we are referring to the well-known decisions such as *Pupino* and *Segi* for instance. After *Pupino*,[1] in fact, the scholars began to write about a sort of de-pillarization caused by the ECJ case-law discussed above.

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* Forthcoming in *Civitas Europa*, Bruylant. This paper is the result of joint reflections. However, Paragraphs 1 and 2 were written by Giuseppe Martinico while Paragraphs 3, 4, 5, 6 and 7 are by Margherita Cerizza. Margherita Cerizza is PhD Candidate in Criminal Law at the Scuola Superiore Sant'Anna, Pisa; Giuseppe Martinico is EUI Max Weber Fellow (2010-2011), Researcher at the Centre for Studies on Federalism, Turin and TICOM Invited Fellow at the University of Tilburg. We would like to thank Dr. Mike Quinn for helping and supporting us.

[1]ECJ, Case C-105/03, *Criminal Proceedings against Maria Pupino* [2005], ECR, I-5285. In the Pupino case, reference was made to the Court of Justice of the European Communities by the Florence Tribunal in the criminal proceedings against Maria Pupino. The ECJ was asked to rule on the following question: "*Are Articles 2, 3 and 8 of Council Framework Decision 220 of 15 March 2001 on the standing of victims in criminal proceedings to be interpreted as precluding national legislation such as that in Articles 392(1a) and 398(5a) of the Italian Code of Criminal Procedure,*

Commenting on *Pupino,* some scholars have spoken of a third pillar's attempted "supranationalization" or "constitutionalization",[2] while other authors have correctly pointed out that the direct effect's principle has not been extended to the framework decision (as it would have been in contrast with the terms of the former Art. 35 TEU): the Court has "only" extended the obligation of the framework decision's consistent interpretation (which is a form of "indirect" effect).[3]

In other words, as Piqani[4] said, the ECJ performed a sort of scission between direct effect and supremacy (better: primacy) in the attempt to avoid a clash with the letter of the EU Treaty. In this respect, it might be said that the ECJ paved the way to the coming into force of the Reform Treaty and something similar might be said with respect to another important novelty which we are going to analyse in these pages: the EU Charter of Fundamental Rights.

Although this Charter was not binding from a *stricto sensu* legal point of view, its proclamation favoured the emergence of a huge debate among scholars, especially among constitutional lawyers in Continental Europe. Even before the coming into force of the Reform Treaty, the ECJ had already begun to quote the Charter and refer to it[5] in spite of the Constitutional Treaty's failure to come into force and in the wait of the Reform Treaty, which made it legally binding (although the position of some Member States, such as the UK and Poland, is not clear because of the so-called opt-out signed by these countries[6]).

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which do not provide that, in respect of offences other than sexual offences or those with a sexual background, the testimony of witnesses who are minors under 16 may be heard at the stage of the preliminary enquiries, in a Special Inquiry ("incidente probatorio"*) and under special arrangements, for example for the recording of testimony using audio-visual and sound recording equipment?*". The ECJ argued that the children could be classified as vulnerable victims, giving them right to the special out-of-court hearing, stressing, at the same time, that the granting of such a right would have to be considered in the light of the system of criminal procedure and that the right to fair trial should not be violated.

The Court of Justice concluded its reasoning stressing that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union.

It pointed out, however, that the obligation of the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law is limited by the general principles of law, especially those of legal certainty and non-retroactivity.

[2]On this concept: C. Lebeck (2007), Sliding Towards Supranationalism? The Constitutional Status of EU Framework Decisions after Pupino, German Law Journal, pp. 501-532.

[3]M. Fletcher (2005), Extending "Indirect Effect" to the Third Pillar: the Significance of Pupino, European Law Review, pp. 862 ff.

[4]See D. Piqani (2007), Supremacy of European Law Revisited: New Developments in the Context of the Treaty Establishing a Constitution for Europe, www.enelsyn.gr/papers/w4/Paper%20by%20Darinka%20Piqani.pdf; about the relationship between primacy and direct effect, see also M. Claes (2006), *The National Court's cit*, 589; E. Spaventa (2007), Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Ruling in Pupino, European Constitutional Law Review, pp. 5-24.

[5]Among the other cases, see: C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union*, ECR [2007], I-10779 and C-341/05, C-341/05 *Laval un Partneri Ltd/Svenska Byggnadsarbetareförbundet*, ECR [2007], I-11767.

[6]Recently scholars have stressed the absurdity of the so-called opting-out by Poland and the UK with regard to the EU Charter of Fundamental Rights and the exclusion of the Charter itself from the text of the Reform Treaty.

Art. 6 TEU states that:

More generally, the proclamation of the Charter of Fundamental Rights of the EU brought new life to the debate about the drafting of a European Constitution and the possibility of a Bill of Rights at EU level, since it testified the possibility to provide rights through a written instrument at supranational level, overcoming the ECJ's logic of *ius praetorium* in this field.[7] It was rightly observed that the goal of this protocol consisted in limiting the effect of the Charter without saying – as would have been impossible to say under Art. 6 TEU – that it is not binding for the UK and Poland.

In fact, "*The opt-out is not an opt-out at all*";[8] one could find support for this hypothesis in the words of the House of Lords' Select Committee, according to which: "*The Protocol is not an opt-out from the Charter. The Charter will apply in the UK, even if its interpretation may be affected by the terms of the Protocol. The Preamble itself of the document does not use the qualification in terms of opt-out, its goal consists of the clarification of certain aspects of the application of the Charter.*"[9] This protocol will not change much as long as the two countries remain subject to those European acts that include reference to the EU Charter and the ECJ begins to quote and use the Charter of Fundamental Rights.

It is possible to foresee a considerable impact of the EU Charter of Fundamental Rights on the procedural rights side, especially keeping in mind the structure of the sixth chapter of the document which is devoted to "justice" and includes a series of important provisions (Art. 47-50) concerning the right to an effective remedy and to a fair trial, presumption of innocence and right to defence,

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"*The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*"

This article makes the Charter of Fundamental Rights part and parcel of EU primary law.

In order to escape the risk of being subject to this document's provisions, the UK and Poland insisted on signing a specific protocol (n. 30), to the effect that:

"Art. 1:

1. The charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. *In particular, and for the avoidance of doubt, nothing in Title IV of the charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.*"

"Art. 2:

To the extent that a provision of the charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom".

[7]ECJ, C-540/03, Parliament / Council, ECR [2006], I-5769.

[8]C. Barnard (2008), The 'Opt-out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?, paper presented at the Conference "The Lisbon Treaty and the Future of European Constitutionalism", 11-12 April 2008, EUI, Fiesole.

[9]House of Lords EU Select Committee (2008), The Treaty of Lisbon: An Impact Assessment, www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf.

principles of legality and proportionality of criminal offences and penalties and, finally, the right not to be tried or punished twice in criminal proceedings for the same criminal offence.

The issue of the EU Charter allows us to mention another important novelty introduced by the Reform Treaty: the possible adhesion of the EU to the European Convention of Human Rights. As we know, Art. 6 provides that: "*The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*" Obviously it will be a long-run process although the Council recently gave the mandate to the Commission for negotiating such an accession; in the meantime, partly at least, the impact of the ECHR on EU criminal justice will probably be anticipated by the application of the EU Charter of Fundamental Rights since in this field, this document drew inspiration from the ECHR and there is no visible discontinuity between these two documents.

2. THE IMPACT ON THE ECJ

Another important novelty is given by the enlargement of the ECJ's jurisdiction, which is a direct consequence of the abandonment of the three pillars structure. The Court of Justice has been empowered with the task of a general control over all matters of Justice and Home Affairs except for the evaluation of the validity and proportionality of police operations and other operations carried out in order to maintain the peace in a given Member State (Art. 240b TFEU).

As for the specific cooperation in criminal matters, the ECJ will be empowered with the control of breaches of their trust in Member States only in 2014. Moreover, after 2014 the UK will be able to benefit from a special scheme in this field.

Again, the recalled case-law on de-pillarization had partly anticipated the effects of such a novelty, although the Lisbon Treaty will give the ECJ new powers that could not be inferred from the existing provisions in an interpretive way.

For instance, in the *Pupino* case the lack of direct effect itself with regard to the framework decisions and the ECJ-limited jurisdiction – according to the former Art. 35 TEU – provided the consistent interpretation principle with a very peculiar role in this pillar at that time.

Although Advocate General Colomer defined the framework decisions as a sort of directive "surrogate"[10] the Court's role in the third pillar was different, as the ECJ itself has admitted in the *Segi* case:[11] "*It is true that, as regards the Union, the treaties have established a system of legal*

[10]AG Conclusions of 12 September 2006, C-303/05, *Advocaten voor de Wereld,* ECR [2007], I-3633.
[11]ECJ, Case C-355/04 P *Segi and other/ Council*, ECR [2007], I-1657.

remedies in which, by virtue of Article 35 EU, the jurisdiction of the Court is less extensive under Title VI of the Treaty on European Union than it is under the EC Treaty."

Stressing existing similarities and differences between the first and the third pillar, some scholars tried to compare the mechanism of the preliminary ruling described by Art. 234 TEC and Art. 35 TEU.[12]

The general impression is that a confirmation of the ECJ's different interpretative positions in the third pillar could be found through a comparison between these two provisions: undoubtedly the jurisdiction of Art. 234 TEC seemed to be wider than that of Art. 35 TEU.[13]

Even if in *Dell'Orto*[14] the ECJ strongly stressed the analogy between control mechanisms, scholars[15] had recently insisted on the non-perfect continuity between *Pupino* and *Dell'Orto* (going through *Advocaten voor der Wereld*[16]).

In Herlin-Karnell's words: "*Dell'Orto is much more cautious, although it is true that this does not rule out a more extensive application of a Pupino dogma, should the setting be different.*"[17]

Obviously the mere extension of the ECJ's jurisdiction operated by the Reform Treaty does not necessarily imply the absence of interpretive collisions with the national courts: on the contrary, as recalled above, the former third pillar has been the arena of many judicial clashes in the past few

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[12]See F. Munari, C. Amalfitano (2007), Il 'terzo pilastro' dell'Unione: problematiche istituzionali, sviluppi giurisprudenziali, prospettive, in Il Diritto dell'Unione Europea: pp. 773-809, pp. 780-784

[13]*Ibidem*, p. 780 ff.

[14]ECJ, Case C-467/05, *Giovanni Dell'Orto*, ECR [2007], I-5557. "*First of all, it should be noted that, in accordance with Article 46(b) EU, the provisions of the EC and EAEC Treaties concerning the powers of the Court of Justice and the exercise of those powers, including the provisions of Article 234 EC, apply to the provisions of Title VI of the Treaty on European Union under the conditions laid down by Article 35 EU. Contrary to what is argued by the United Kingdom Government, it therefore follows that the system under Article 234 EC is capable of being applied to the Court's jurisdiction to give preliminary rulings by virtue of Article 35 EU, subject to the conditions laid down by that provision (see, to that effect, Pupino, paragraphs 19 and 28).*" In Dell'Orto the ECJ was asked (the preliminary reference was made by the Tribunale of Milan) to rule on the meaning of Articles 2 and 9 of Council Framework Decision of 15 March 2001, on the standing of victims in criminal proceedings and Article 17 of Council Directive 2004/80/EC of 29 April 2004 relating to compensation for crime victims.

It is interesting to note that several governments had submitted observations questioning the admissibility of the reference for a preliminary ruling; for example, the UK said that the reference for a preliminary ruling was inadmissible, arguing that, in such a case, the reference should be based exclusively on Article 35(1) EU, whereas Article 234 EC was not applicable.

According to the ECJ, the fact that the order for reference did not mention Article 35 EU, but referred to Article 234 EC, could not make the reference for preliminary ruling inadmissible, saying that:

"*In those circumstances, and regardless of the fact that the questions referred for a preliminary ruling also concern the interpretation of a directive adopted under the EC Treaty, the fact that the order for reference does not mention Article 35 EU, but refers to Article 234 EC, cannot of itself make the reference for a preliminary ruling inadmissible. This conclusion is reinforced by the fact that the Treaty on European Union neither expressly nor by implication lays down the form in which the national court must present its reference for a preliminary ruling (see, by analogy, with regard to Article 234 EC, Case 13/61 De Geus [1962] ECR 45, 50).*"

[15]See E. Herlin-Karnell (2007), In the Wake of Pupino: Advocaten voor der Wereld and Dell'Orto, *German Law Journal*, pp. 1147-1160.

[16]ECJ, C-303/05, *Advocaten voor de Wereld*, ECR [2007], I-3633. In *Advocaten* the Belgian *Arbitragehof* made reference to the Court of Justice of the European Communities concerning the assessment as to the validity of Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

[17]*Ibidem*, p. 1160.

years as the "European Arrest Warrant saga" shows, and even looking at the very recent case-law in this field one can notice the "tension" existing between the ECJ and the German and Romanian Constitutional Courts (note that the German Constitutional Court had been the main protagonist of a very tough decision on the EAW) on the data retention issue.[18]

Finally, it will be interesting to see whether the preliminary ruling mechanism will be accepted by the Constitutional Courts: national Constitutional Courts have traditionally preferred to level the playing field by avoiding referring cases to the ECJ for the preliminary ruling, with the well-known exceptions of the Belgian,[19] Austrian,[20] Lithuanian[21] and Italian[22] Constitutional Courts. Given the fact that the game within the ambit of the preliminary ruling is governed by the European treaties, which represent the fundamental charters of the competitor (the ECJ), this would have implied loss of interpretative sovereignty by the national courts. This also applied to the former third pillar as the decision of the Spanish Constitutional Court on the EAW[23] confirms.

Much will depend on how the Reform Treaty's provisions will be implemented and interpreted and that is why the side of judicial dialogue will still be of crucial importance in the next few years.

3. THE IMPACT OF THE LISBON TREATY ON EU CRIMINAL JUSTICE

The Lisbon Treaty aims to create 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 (Art. 3 TEU). Member States have to face the emergency of criminality in the era of globalization: following the trends of economic and social changes, crime tends to assume a transnational dimension and a complex structure, and individual States cannot manage to deal with the phenomenon. Moreover, the freedom of circulation within the EU can lead to further difficulties in contrasting criminality. This is the reason why the Lisbon Treaty reinforces EU powers in criminal matters. There is a great opportunity to create a response to economic globalization and global criminality, which not only deals with the problem at an adequate (i.e.

[18]Data Retention Case, BVerfG, 1 BvR 256/08, from 2 March 2010, available at www.bverfg.de/entscheidungen/rs20100302_1bvr025608.html and Romanian Constitutional Court, decision 1258 /8.10.2009, available at www.ccr.ro/default.aspx?lang=EN.

[19]*Cour d'Arbitrage*, 19 February 1997, no. 6/97, www.arbitrage.be/fr/common/home.html.

[20]*VfGH*, 10 March 1999, B 2251/97, B 2594/97, www.vfgh.gv.at/cms/vfgh-site.

[21]*Lietuvos Respublikos Konstitucinis Teismas*, decision of 8 May 2007, www.lrkt.lt/dokumentai/2007/d070508.htm.

[22]*Corte Costituzionale*, sentenza no. 102/2008, www.cortecostituzionale.it.

[23]*Tribunal Constitucional*, sentencia no. 199/2009, www.tribunalconstitucional.es. For a comment see: F. Fontanelli (2010), A Comment on Tribunal Constitucional's Judgment no. 199/2009 and Czech Constitutional Court's Judgment no. 29/2009. How Interpretation Techniques can Shape the Relationship between Constitutional Courts, STALS Research Paper no. 1/2010, http://stals.sssup.it/files/stals_Fontanelli_012010.pdf. One should recall the interesting dissenting opinions delivered by judges Perez Tremps and Rodríguez-Zapata, stressing the necessity of accepting the formal dialogue provided by the former Art. 35 TEU.

supranational) level, but also tries to offer a more "political" and "democratic" solution than those originated from contingent situations or single leading countries.[24] The previous regime was often lacking in effectiveness, legitimacy and efficiency[25] and its reform has tried to offer some solutions. The most important ones will be analysed in the next paragraphs.

4. THE ULTIMATE FRONTIER OF 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) nor in the Amsterdam Treaty (1997), and it had previously been recognised only in the Tampere Council (1999) and in the Hague Programme (2004). On the basis of this principle, the EU had already adopted some third pillar measures, such as the Framework Decisions on European Arrest Warrant and on European Evidence Warrant.

The new Treaty presents the principle of mutual recognition as being closely connected with the principle of judicial cooperation and the principle of approximation of the laws and regulations (Art. 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 UK, 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 harmonization principle should be privileged.

The recourse to mutual recognition seems to be the easiest way, because apparently it does not require any effort of harmonization or collaboration. As has been pointed out,[26] no serious mutual recognition among judicial authorities can be envisaged without a previous strong harmonization of criminal laws. Only a 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 to cooperation, can make the instrument of mutual recognition effective; otherwise this extraneousness could easily lead to distrust and give grounds for refusal of cooperation, as has already happened several times, for example in the case of decisions rendered *in absentia*.[27] Only a satisfactory degree of mutual trust can, for example, justify the abolition of the traditional requirement of dual

[24]For these considerations see M. Donini (2002), L'armonizzazione del diritto penale nel contesto globale, Rivista Trimestrale di Diritto Penale dell'Economia, pp. 477-492.
[25]For a detailed analysis see C. Ladenburger (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.
[26]*Inter alios*, C. Ladenburger (2008), pp. 20-40, at pp. 35-36.
[27]See V. Mitsilegas (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.

criminality for an arrest warrant.[28] This is the reason why the new Treaty sees mutual recognition, approximation and cooperation as complementary objects,[29] and, in order to encourage the approval of new mutual recognition measures, does not forget to strengthen the existing harmonization and collaboration procedures.

5. 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 the judicial cooperation and basis of it. Approximation is provided through the establishment of minimum rules in some significant areas of substantive and procedural criminal law (Art. 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 (codecision 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 organized crime. Thanks to the Reform Treaty new areas were introduced, namely trafficking in human beings and sexual exploitation of women and children, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment and computer crime. Moreover, other areas can be identified subsequently on the basis of new developments in crime, but in this case the Council has to unanimously adopt a decision with the consent of the European Parliament.[30] The area of approximation appears to be more relevant than before and is susceptible to become even more consistent. Even if minor differences in national laws should not prevent Member States from cooperation, this extension is necessary in order to put the basis of an authentic cooperation and to create the conditions for mutual recognition, especially for those crimes, such as corruption, whose effective prosecution serves to protect the financial interests of the Union.

[28]See E. Herlin-Karnell (2008), The Lisbon Treaty and the Area of Criminal Law and Justice, European Policy Analysis, No. 3, pp. 1-10, at pp. 4-5.

[29]Regarding the theme of cooperation and integration as fundamental but not mutually exclusive political choices see also J. Monar (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.

[30]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.*"

Although the area covered by approximation is extended and the legislative procedure is simplified, no radical changes of paradigm are registered in this field: approximation through approval of minimum rules was taken into account also in past Treaties, while a true revolution would have been embodied by a shift from harmonization to unification, that is, from a Euro-harmonized criminal law to a European criminal law.[31] In other words, the Union is not ready to have its own "criminal code", its catalogue of crimes to be prosecuted in all jurisdictions. Apparently the idea of a EU code, which has already been proposed in some documents and projects such as the *Corpus Juris*, the *EuropaDelikte* and the *Alternativentwurf*, requires a degree of mutual trust and of reciprocal harmonization that EU members have not yet reached: drafting a criminal code does not only mean 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 still vary consistently 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 with the principle of legality. In any case a general referral to unification, perhaps as a mere faculty at the disposal of the Council, would have been useful for at least two reasons. Firstly, it would have constituted a provision symmetrical to that concerning the European Public Prosecutor's Office, that will be analysed in the next paragraph: the existence of a list of "eurocrimes" prosecuted by an EU Prosecutor would facilitate the activity of this officer, who, according to present provisions, will have to be faced with the great diversity of the various national laws. Secondly, the Reform Treaty (especially Art. 83 and 86 TFUE) would have suggested some criteria applicable in order to identify the "eurocrimes": all crimes against the financial interests of the Union and, perhaps subsequently and partly, serious crimes of cross-border dimensions related to some strategic areas.

On the other hand, minimum rules of procedure law concern mutual admissibility of evidence between Member States, the rights of individuals in criminal procedure, and the rights of victims. Moreover, other areas can be identified subsequently, but in this case the Council has to adopt a decision unanimously with the consent of the European Parliament. Also, approximated procedure laws serve to reach a higher degree of cooperation and to facilitate mutual recognition, as the Reform Treaty explicitly admits. Anyway the cooperation policy cannot penalize the rights of a person involved in a criminal proceeding, and that is why such minimum rules "*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 individual*One must in any case consider that the EU fully recognizes the Charter of Fundamental

[31]On this subject see C. Gómez-Jara Díez (2010), Models for a System of European Criminal Law: Unification vs. Harmonization?, published online: 27 March 2010, available at http://ssrn.com/abstract=1579422.

Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms (and plans to adhere to the ECHR, Art. 6 TEU), and these charters include all the relevant procedural rights, such as the right to a fair trial or the right to privacy; as said above, within this framework of common legal protections, concerns of Member States related to judicial cooperation should soon become inconsistent.[32]

6. CHANGE OF PARADIGM IN THE FIELD OF JUDICIAL AND POLICE COOPERATION: THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE

As mentioned above, the judicial and police cooperation has been significantly strengthened: the Reform Treaty considers the faculty of adopting, with a simplified legislative procedure, measures in fields not included in the previous regime. As for the 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 and the enforcement of decisions (Art. 82.1 TFUE); as for the 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 organized crime (Art. 87 TFUE).

In any case, the most important and most revolutionary innovation in the field of judicial cooperation is the possibility of establishing a European Public Prosecutor's Office, in order to combat crimes affecting the financial interests of the Union and serious crime with a cross-border dimension (Art. 86 TFUE). Such a possibility reveals the awareness that an effective contrast to these forms of criminality cannot result only from the promotion of the intercommunication and the cooperation between Public Prosecution Ministries of the Member States, but that a direct action of EU institutions is required.[33] This provision has a great symbolic value but it would be a mistake to amplify its practical significance: Art. 86 delineates a mere faculty to establish such a body and it

[32]Regarding the relationship between criminal law and fundamental rights in the EU see also G. Grasso (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.

[33]C. Conde-Pumpido (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.

provides only for generic and indefinite guidelines, whose enforcement will probably require long and difficult mediations.

The establishment of a European Public Prosecutor's Office is facultative and requires regulations unanimously adopted by the Council and 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 refer to crimes affecting the financial interests of the Union; provisions concerning crime with a cross-border dimension do not 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 offences abovementioned, and it shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences. 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, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions are not specified in the Treaty, and shall constitute the subjects of the regulations. Consequently, many issues are still open and still needing a satisfactory solution.

Few indications concerning the structure of the new Prosecutor's Office are 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 superior for several reasons: the European Prosecutor has to constantly face national judicial authorities, not only during trials but also during investigations, and his/her action would be considerably facilitated if he or 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 were not perceived as a totally extraneous body.[34] 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.

[34]For similar considerations, C. Conde-Pumpido (2009), pp. 355-368, at p. 365.

Moreover, 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 Art. 86 TFEU the Prosecutor's Office shall be established from Eurojust, being part of the judicial cooperation in criminal matters. According to the new Treaty (Art. 85 TFEU) Eurojust's mission shall be to provide for 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*",[35] which is, approximately, also the operational field of the EU Prosecutor's Office. Anyway 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 some specifically assigned competencies and activities,[36] that is, the latter will be directly involved in national jurisdictions, and the former will have to provide for assistance. Relationships between Eurojust and the EU Prosecutor will have to be regulated.

According to Art. 86 TFUE, the Prosecutor's Office shall conduct its investigation in liaison with Europol, where appropriate. According to the new Treaty (Art. 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*",[37] 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 encourage the introduction of narrower mechanisms of cooperation.

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[35]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.*"

[36]For these considerations see C. Conde-Pumpido (2009), pp. 355-368, at pp. 364-365.

[37]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.*"

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 and to Europol and Eurojust as well; 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 find a direct and significant feedback in a judicial proceeding.[38] In order to reach this goal, appropriate communication and cooperation mechanisms between OLAF and the Prosecutor's Office should be implemented, otherwise OLAF's engagement and expertise could be irremediably 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, 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 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. Any organizational lack in this field could seriously affect the effectiveness of the prosecution of the "eurocrimes".

In conclusion, Art. 86 TFEU offers a great opportunity to Member States to consolidate the area of freedom, security and justice and to strengthen the instruments for fighting against the most serious and widespread forms of criminality; in any case, 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 ways of operating of the new body, could jeopardize the future of the European Prosecutor: the risk is that this Office will not even be established or, if established, could prove itself as substantially

[38]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 OLAF supervisor committee to the President of the Convention for the Future of Europe, http://ec.europa.eu/anti_fraud/green_paper/document/lettrevge_ en.pdf.

ineffective and would not constitute a sharp deviation from the model represented by existing bodies.

7. 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 giving up 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 remain in certain cases.[39] The Lisbon Treaty provisions are nothing more than a temporary goal and create an institutional and organizational system which is still fragmented and somehow incoherent. In any case, the importance of the liberties and the rights on the playground requires gradualness and caution: security cannot prevail over freedom and justice, but these three principles have to conciliate. In other words, the aim of the EU is not only to fight against 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.

[39]Furthermore, the so-called "emergency brakes" 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 as other procedural obstacles.