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MODULE I

Unit 2

The change of paradigm and the principle of mutual recognition and its implications. The Perspective from the Lisbon Treaty

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Summary:

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1. The progressive transformation of the instruments of legal cooperation in criminal matters

1.1. Introduction

As we saw in the previous topic, the development of policies and actions in cooperation in the field of justice has traditionally followed the rules of good understanding and goodwill on the part of the states, which have placed their own means and efforts at the disposal of foreign authorities in order to facilitate the jurisdictional activity of the state requesting help.

For some time now. international legal cooperation has functioned on the basis of this idea of help or assistance for the performance of the judicial functions of each of the states, so that both the request for and the provision of assistance were based on the affirmation of the sovereignty of the state providing the help, based in turn on the idea of the reciprocity of the requesting state, either because it had undertaken to do so in an international convention or treaty, or because the application of such reciprocity was in practice standard or expected.

The initial advance took place when action merely aimed at providing aid so that the requesting state could exercise its sovereign jurisdiction power in its own territory (notifications or summons, obtaining evidence, etc.), gave way to the recognition and enforcement in a state of a foreign decision, in such a way that said decision becomes an instrument that is absolutely equivalent to the judicial decision emanating from the courts of the country that decides to grant it the *exequatur*.

This was how the idea of allowing a state to exercise its jurisdiction with the help of another, within its own borders, evolved into ensuring judicial decisions issued in another state were enforced as an act of sovereignty of a foreign country.

That is, it is not a question of providing help on a particular point when requested by another, but of ceding one's own decision-making power on a matter, to a certain degree, and allowing a decision from a foreign authority to have full effect in another state. In this sense there is a waiver of sovereignty, insofar as the foreign decision is accepted as one's own, without allowing the domestic bodies to exercise jurisdiction.

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Nevertheless, the underlying idea still resides in the watertight compartments of the exercise of state power, which explains why the reason foreign judgments were enforced is not because they in themselves have that force and authority, but because an internal decision to recognise them granted them enforceability.

Therefore, it was the judicial decision on the *exequatur*, issued in the requested country, that converted the judicial decision that was foreign to the legal system of the State in which it was to be effective, into a decision in its own right; from another perspective, the foreign judicial decision itself had no effect, unless it was followed by an act of sovereignty that granted it, so that in reality it could be said that an internal mandate was being put into effect, as the state was enforcing its own decision to make the foreign decision effective.

The regulatory source of these activities of international legal cooperation, both in order for the foreign judicial authorities to effectively exercise their own jurisdictional power, facilitating it by means of taking steps in the territory of the requested state, and to ensure the fulfilment and effectiveness of judicial decisions issued abroad, has traditionally been national provisions of the state providing the international cooperation, although conventional sources have been emerging as the processes of internationalisation of legal relations have progressed.

Precisely in the region of Europe, in the middle of the 20th century, a process of economic integration cooperation began which would go on to surpass this sphere of relations, materialising in an increase in the political relations between an increasing number of states and, at present, leading towards a peaceful process of political integration, which is unprecedented in human history. Indeed, this situation has also made it necessary to modify the instruments and sources of the legal systems and of cooperation in Europe, with the old Conventions approved by the Council of Europe being progressively overtaken.

This particular course of political and economic relations in the EU has made recognition of actions in legal cooperation in criminal matters unavoidable in relation to three types of offences: in the first place, the offences against legal assets of the European Community, which transcend the specific punitive interest of each of the states and invokes protection and response at a European level; secondly, transnational offences, i.e., those crimes that are committed in the territory of several states or affect a geographical scope that goes beyond the borders of a state, in which case the criminal response will affect two or more states that may be competent to

judge the same criminal act; thirdly, those crimes whose deeds are committed entirely within the territory of one state and affecting specific legal assets of said state, but which, due to the accused person or the victim, or to the elements and pieces of evidence, or the procurement of elements of investigation or proof, require steps to be taken abroad in order to successfully suppress such behaviour, so that initially the state providing help does so without having any particular and specific interest in the action requested of it.

In all three cases we are dealing with scenarios that fit into the definition of police and judicial cooperation in criminal matters, whose scope of application in the EU has grown in line with the social and economic relations of this region.

1.2. From Maastricht (1992) to Tampere (1999)

The first two important landmarks in the recent history of the European Union should be highlighted, as they have represented substantial differences in relation to the phase that had just occurred one before: the Treaty of Maastricht and the Treaty of Amsterdam.

a) In the Treaty on European Union (TEU, signed in Maastricht in February 1992), the purely economic idea of the old European Economic Community is surpassed, and a decided push is made towards a vocation of political integration. The European Union is more than, and indeed different to, the European common market and is based on three pillars: the European Communities, the common foreign and security policy and police and judicial cooperation.

The first pillar, the community pillar, covers those areas in which the Member States exercise their sovereignty jointly, through community institutions and using community methods and procedures, with the European Commission, the Council and the European Parliament intervening and under the supervision of the Court of Justice, which interprets and applies Community law. The second pillar refers to the common foreign and security policy (CFSP), and allows the States to take joint action by means of intergovernmental decisions, with limited intervention of the Commission and the Parliament and outside of the jurisdiction of the Court of Justice.

Finally, the third pillar refers to cooperation in the areas of Justice and Home Affairs

(JHA), also with an intergovernmental decision-making process and without the intervention of the Court of Justice (except when necessary to interpret the conventions according to express provisions of the latter), and aims to achieve better protection of citizens in an area of freedom, security and justice, suppressing border controls and facilitating the free movement of persons so as to progress in line with the effectiveness of the actions of the courts of justice and the monitoring of the movement of persons.

b) The 1997 Treaty of Amsterdam modifies cooperation in the areas of justice and home affairs in order to create an area of freedom, security and justice. As a result, the "free movement of persons", "external border controls", the topics of "asylum, immigration and protection of the rights of third-country nationals", as well as "judicial cooperation in civil matters" are established and become part of the Treaty establishing the European Community, so that they are communitised and cease to have third-pillar status, which as of that moment comprises police and judicial cooperation in criminal matters.

In accordance with what was decided as of Amsterdam, police and judicial cooperation in criminal matters, which is not communitised, is aimed at preventing and combating racism and xenophobia, terrorism, trafficking in human beings and crimes against children, drug trafficking, arms trafficking, corruption and fraud.

The two main instruments designed to fulfil these objectives are, on the one hand, cooperation itself, either between police forces, customs authorities and other authorities of the Member States, or between the courts and other competent authorities of the Member States, which can be carried out directly or by the European Police Office (Europol); on the other, the other main instrument is the approximation of the legislations of the Member States in criminal matters and procedural safeguards.

In this regard, together with this Treaty several new specific regulatory instruments appear aimed at applying Chapter VI of the TEU: the *Framework Decisions,* for the approximation of the legal and regulatory provisions of the Member States, which bind them in relation to the result that should be obtained, leaving the national authorities to choose the form and the means; and the *Decisions*, with different objectives to those of the approximation of the regulatory provisions of the Member States, which are obligatory.

Competence for police and judicial cooperation in criminal matters (the sphere of

Chapter VI) resides at this point almost exclusively with the Member States who, nevertheless, may establish strengthened cooperation, in the way they did in the case of the Schengen Agreement of 1985 and the Convention on the Application of the Schengen Agreement of 1992.

On the other hand, the competence of the Court of Justice (which the Treaty of Maastricht restricted to the interpretation of the conventions that expressly so established) is extended, so that it can also decide on the validity and interpretation of framework decisions, decisions and the conventions.

c) In any event, the keeping of everything that related to police and judicial cooperation in criminal matters within the third pillar and, as such, independent of the community mechanisms and instruments to a certain degree, in a manner that is unique in relation to the sources of legislation and judicial control of cooperation activities, has not impeded advances via other avenues, broadening the elements of unification in this field even further, including the regulatory ones, as we will be able to analyse later.

The conclusions of the European Council of Tampere, October 1999, represented a watershed in this area, as it was considered that the principle of mutual recognition was to become the cornerstone of judicial cooperation in both civil and criminal matters in the European Union.

This meant radically modifying the traditional perspective of cooperation, which was based on the principle of demand, in such a way that there always had to be a state that asked, the requesting state, and another whose collaboration was sought, the requested state. Precisely with mutual recognition, which marks a new system of relations in cooperation in criminal matters, the element of a request from a state disappears, giving way to the (direct or indirect) application of a decision that while foreign, has come from an EU Member State.

The Hague Programme approved by the European Council in November 2004, formed part of this initiative, which listed what the ten priorities of the EU were to be in order to strengthen the space of freedom, security and justice for the following five years. As for the guarantee of the European space of justice, the Hague Programme stressed access to justice and the introduction of reciprocal trust between states, through the approval of minimum procedural rules that would safeguard the rights of the defence, in particular. Specifically in relation to criminal justice and strengthening mutual trust, it was decided to push for the approximation of legislation and the creation of minimum

criminal procedure rules, considering that Eurojust was the key to developing judicial cooperation in criminal matters.[1]

1.3. The new perspectives from the Treaty of Lisbon (2007)

We are all aware at this stage that the Project for the Treaty establishing a Constitution for Europe, the European Constitution, resulted in a failed attempt to perform a substantive modification of the current political structures of the EU, after the citizens rejected the Project in the French and Dutch referendums.

However, the European institutions continued working with a view to achieving substantive advances in European integration, meaning that at the Council of Lisbon in December 2007 it was possible to approve what has become known as the Treaty of Lisbon, which amends the Treaty on European Union and the Treaty establishing the European Community (OJEU 2007/C 306/07 of 17 December) and that sought to selectively recover some the main advances contained in the Constitutional Treaty, albeit at the cost of renouncing others[2].

It is true that the modifications introduced in the Treaties are not a question of mere detail; the Treaty of Lisbon contains wholesale changes to both the current legal structures and the organisation of the EU itself, due to a substantial change in the bases and the powers of the EU.

There is no need for us to go into the vicissitudes of the complex ratification process here; it is sufficient to say that the Treaty eventually entered into force on 1 December 2009 and it is important that we devote a few pages of this course to setting out the new developments affecting the area of interest to us, even if only in a concise manner.

If we concentrate on the text of the Treaty of Lisbon, first of all, the current Treaty establishing the European Community disappears and is replaced by the Treaty on the Functioning of the European Union, nevertheless maintaining the Treaty on European

[1] The implementation of this programme was translated into the approval of several instruments that we will look at in due course.

[2] In this regard, in relation to justice and home affairs (JHA) the most important new developments were maintained. See GARCÍA MORENO "La cooperación judicial penal en el espactio de libertad, seguridad y justicia después del Tratado de Lisboa", in *Aranzadi Unión Europea,* no. 10/2009.

Union, but with new contents.

The TEU, which gave the European Union a legal personality (Article 47), is comprised of 20 articles, which include the common provisions (Title I); establish the democratic principles of the EU (Title II); regulate the institutions of the EU (Title III), and refer to strengthened cooperation (Title IV). The most important part of the Treaty from a quantitative point of view is the part on the foreign action of the EU, as well as the specific provisions on foreign policy and the common foreign and security policy (Title V; Articles 21 to 46), in addition to the Final Provisions (Title VI). It should be highlighted that the new Article 6 of the TEU contains an express reference to the Charter of Fundamental Rights, which becomes a legally binding instrument for both the community institutions and the Member States.
Thus, all the rules that comprised the old Title VI are removed in this new TEU (Provisions regarding police and judicial cooperation in criminal matters), which is repealed, so that in the old system of three pillars, the community one, the foreign policy one and the police and judicial cooperation in criminal matters one (which started out as asylum, visas and judicial cooperation), only the rules on the common foreign and security policy, to which defence is added, are left outside the community sphere[3]. This means that only foreign and security policy is to be governed by specific rules and procedures, outside of the decision-making channels and general regulatory instruments, so that the Court of Justice of the EU will have no power in relation to these provisions (Article 23.1.II)[4].

As for the institutions of the EU, and for our purposes, the TEU establishes (Article 13) the following: i) the European Parliament; ii) the European Council; iii) the Council; iv) the European Commission; v) the Court of Justice of the European Union; vi) the European Central Bank, and vii) the Court of Auditors.

The name of the Court of Justice is changed, it is now called the Court of Justice of the European Union, and so is its composition, as it now comprises the Court of Justice (with one judge from each Member State, assisted by advocates general), the General

[3] It is thus established (Article 23.1.I) that the Union's competence in common foreign and security policy will cover all aspects of foreign policy and matters related to the security of the Union, including the progressive definition of a common defence policy which may lead to a common defence.

[4] According to Article 275 of the TFEU, the Court of Justice of the EU will not be competent to decide on provisions related to the common foreign and security policy, nor on the acts taken on the basis of the same.

Court (which will have at least one judge from each Member State) and the specialised courts (Article 19 TEU). The Court of Justice of the EU is competent to hear appeals filed by a Member State, by an institution or by individuals or legal entities, and on the preliminary matters regarding the interpretation of EU law (Article 19.3 TEU); meanwhile, the Treaty on the Functioning of the European Union grants it competence for legislative initiatives (Articles 289.4 and 294.15 TFEU)[5].

In addition to this, the TFEU envisages the creation of a European Public Prosecutor's Office by a unanimous decision of the Council, on the basis of Eurojust, with the approval of the European Parliament, in order to combat offences that harm the EU's financial interests (Article 86.1)[6], and to that end it will be competent to investigate the perpetrators of offences, in order to bring criminal proceedings and request that a case be brought against them, exercising the criminal action[7].

But it is undoubtedly the treatment of judicial cooperation in criminal matters in the Treaties (TEU and TFEU) on which we must concentrate. As mentioned earlier, with the entry into force of these Treaties, the "third pillar" came to an end, although this does not mean that cooperation in criminal matters has disappeared; quite the opposite, it has become a community matter, i.e., it has become part of the Third Part of the TFEU "Internal policies and actions" (like the internal market, agriculture and fisheries or free movement).

Judicial cooperation in criminal matters is included in Chapter 4 of Title IV, entitled "Area of freedom, security and justice"[8] and comprises Articles 82 to 86 of the TFEU, governed by the provisions adopted *pursuant to ordinary legislative procedure*, whose regulatory instruments are regulations, directives, decisions, recommendations and opinions (Article 288 TFEU) and in relation to which the Court of Justice has full competence.

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[5] In any event, it should be remembered that the opportunity to implement a true European judiciary was not grasped. On the new developments affecting the Court of Justice introduced in the Treaty of Lisbon, see RUIZ-JARABO COLOMER, "El Tribunal de Justicia de la Unión Europea en el Tratado de Lisboa", in *Noticias de la Unión Europea*, no. 291, 2009.

[6] If unanimity is not possible, at least nine states may establish strengthened cooperation in relation to the planned regulation in question.

[7] It is also set out that the European Council may extend the powers of the European Public Prosecutor's Office to include the fight against serious forms of crime that have a cross-border dimension.

[8] As opposed to the current one entitled "Visas, asylum, immigration and other policies related to free movement of persons".

It should be highlighted that the TFEU begins by establishing that judicial cooperation in criminal matters in the EU will be based on the principle of mutual recognition of judgments and judicial decisions and includes the approximation of the legal and regulatory provisions of the Member States, adopting measures to establish rules and procedures that guarantee the recognition of all forms of judgments and judicial decisions all over the EU; that prevent and resolve conflicts of jurisdiction; that support the training of the judiciary and judicial staff and facilitating judicial cooperation in criminal proceedings and enforcement (Article 82.1).

Together with this it envisages that, by means of directives adopted under ordinary legislative procedure, taking into account the differences between the legal traditions and systems of the Member States, *minimum rules* can be established in *criminal procedure* on the *mutual admissibility of evidence*, the rights of individuals in criminal procedure, the rights of victims and other specific aspects of criminal procedure[9].

It also envisages the approval of *material criminal law rules*, establishing, also by means of directives, minimum rules regarding the *definition of criminal offences and sanctions* in the areas of particularly serious crime with a *cross-border dimension*, and the Treaty refers to terrorism, the 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 organised crime (Article 83.1).

According to the decision of the CJEC in its judgment of 13 September 2005, in the *Commission versus Council* case (C-176/03), the TFEU establishes that the regulatory and legal provisions of the states in criminal matters may be approximated, establishing minimum rules regarding the *definition of criminal offences and sanctions*, when essential to *ensure the effective implementation of a Union policy* in a sphere which has been the object of harmonisation measures (Article 83.2)[10].

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[9] The suspension of the ordinary legislative procedure is envisaged when a member of the Council considers that the planned directive affects fundamental aspects of its criminal justice system, referring the matter to the European Council and, if a consensus is not reached, strengthened cooperation can be established if at least nine states are in favour.

[10] In these last two cases a proviso is included, as mentioned above in relation to criminal procedure: when a member of the Council considers that the planned directive affects fundamental aspects of its criminal justice system, the matter is referred to the European Council and, if a consensus is not reached, strengthened cooperation can be established if at least nine states are in favour.

Meanwhile, it defines Eurojust as a body designed to support and strengthen cooperation between the national authorities responsible for both investigation and prosecution of serious crime affecting two or more states or that should be prosecuted using common criteria, referring to its relationship with Europol[11]. The structure, functioning, scope of action and powers of Eurojust will be determined by the European Parliament and the Council by means of the regulations adopted under the ordinary legislative procedure (Article 85 of the TFEU, which in reality replaces Article 31.2 of the current TEU, improving its wording and scope), with the Treaty also allowing the European Parliament and the national parliaments to participate in evaluating the activities of Eurojust.

Unlike the regulations on judicial cooperation in criminal matters, involving the ordinary legislative procedure, the TFEU establishes it only for 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 and common investigative techniques in relation to the detection of serious forms of organised crime (Article 87.2).

Nevertheless, when it comes to adopting measures regarding operational cooperation, the Treaty refers to a special legislative procedure in which the Council, after consulting the European Parliament, must act with unanimity (Article 87.3)[12]. This referral to a special legislative procedure is also made in order for the Council to set the conditions and limits within which the authorities of one state can act in the territory of another (Article 89).

The Treaty also deals with Europol, whose function is to support and strengthen action by the national authorities and their mutual cooperation in preventing and combating serious crime affecting two or more Member States or that should be prosecuted using common bases, such as in relation to terrorism. Like Eurojust, the structure, functioning, scope of action and powers[13] of Europol will be determined by the

[11] The peculiarities of this institution also determine its complex relationship with the European Judicial Network, a matter that was specifically dealt with in Decision 2008/976/JHA, dated 16 December, which clarifies the relations between the two organisations.

[12] As seen above in relation to the approval of rules of criminal procedure and material criminal law, if neither unanimity or consensus are reached on the European Council, at least nine states can establish strengthened cooperation.

[13] The powers may include: a) the collection, storage, processing, analysis and exchange of information, in

European Parliament and the Council by means of regulations adopted in accordance with the ordinary legislative procedure (Article 88).

Finally, we should mention that, within the parameters of this new legal framework, late 2009 saw the approval of the Stockholm Programme, a new roadmap that marks the preferential lines of action in judicial cooperation for the next five years (2010-2014) and that affects the priority granted to the development of an area of freedom, security and justice[14]. This new agenda centres on the interests and needs of citizens, to the degree that it assumes the challenge of ensuring "respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe"[15].

2. Instruments for mutual assistance: bilateral and multilateral conventions

2.1. Cooperation requests

The most commonly used basis in relation to the processing of actions in criminal matters, when the authorities of different states are involved, continues to be the request from one state and fulfilment by the other.

This form of cooperation or collaboration was born of a scrupulous respect for sovereignty and is normally instrumented in the form of bilateral conventions which set out the rules of the political relations between the contracting states at a given moment in time.

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particular that forwarded by the authorities of the Member States or third countries or bodies; and 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.

[14] Its approval at that point was a result in any event of the exhaustion of the validity of the Hague Programme, which cannot be considered as having been executed in full by any means. The end results of the last two years have been duly analysed by the Commission in reports that are available at the following addresses: http://europa.eu/generalreport/en/welcome.htm and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0373:FIN:EN:PDF.

[15] The full text of the Stockholm Programme can be consulted at OJEU C 115/3, of 04.05.2010. Moreover, we must also keep in mind the Plan of Action approved by the Commission in order to develop said Programme [COM (2010) 171 final – not published in the official journal].

This was the way in which the framework for cooperation in criminal matters was established in the 19th and 20th centuries, and it survives today in cases of assistance or cooperation, also in criminal matters, between different states, so that the international policy of each one leads to the signing of the conventions it considers appropriate for its own national interest; they are bilateral conventions whose performance and supervision is a matter for the parties that signed them.

However, the exponential increase of international relations has led to many states being integrated into new economic or political structures, some more formal than others, in the different parts of the globe.

The phenomenon of the new "groupings" of states, for political reasons (such as the Council of Europe, after the Second World War) or initially economic ones (the European Union, or more recently MERCOSUR or the Andean Community, both in South America), historically unprecedented, has also affected the instruments and policies of legal cooperation, but while using the same mechanisms as international cooperation[16].

This is because nowadays it is obvious that it is not just the economy that has become globalised, but also crime, leading to an increasing need to articulate legal relations and judicial cooperation actions in a more fluid and above all more effective and stable manner, because the number of proceedings (including criminal proceedings) with a foreign component has grown enormously in this new context of international relations.

It is for this reason that multilateral conventions on legal cooperation in criminal matters have emerged, both on a regional level, at the outset, and subsequently worldwide, born of the initiative of the Secretariat of the United Nations. They are conventions that refer to the most diverse spheres, from the material act of sending a summons or notification, to the surrender of a person in the territory of another state in order for criminal jurisdiction to be exercised, for prosecuting or enforcing a sentence that has been handed down, or for exchanging information or carrying out joint operations in the fight against terrorism, drug trafficking or international crime.

[16] This phenomenon has led to bilateral conventions on cooperation in criminal matters such as the ones signed between the European Union and the United States of America, in which one of the parties (the EU) represents a collection of states.

2.2. The Council of Europe Conventions

In order to facilitate cooperation in a European context, after the Second World War, the Council of Europe started out by passing several instruments of huge significance for the effectiveness of criminal justice. The first two, dating from the 50s, were the European Convention on Extradition of 1957 (ratified today by all the members of the Council of Europe as well as by South Africa, Israel and Korea) and the European Convention on mutual assistance in criminal matters of 1959 (also ratified by all the members of the Council of Europe and by Israel, Chile and Korea), which entered into force in 1960 and 1962, respectively. These two multilateral conventions represented a highly significant advance in international cooperation in criminal matters, not only because they established legal rules to be generally applied on a European level in these areas, but also because they inspired the internal legislation of the signatory countries, adjusting the provisions of the European instruments to the signing of the bilateral conventions.

2.3. The Convention on the Application of the Schengen Agreement (CASA)

Still in the European ambit, initially five states (Germany, Belgium, France, the Netherlands and Luxembourg) signed the Schengen Agreement in 1985, and then the Convention on the Application of the Schengen Agreement (CASA) in 1990, with a view to progressively removing controls on common borders and establishing a regime of the free movement of persons that entered into force in 1995. Italy joined these instruments in 1990, followed by Spain and Portugal in 1991, Greece in 1992, Austria in 1995 and Finland, Sweden and Denmark (the latter with special conditions) in 1996, as well as Iceland and Norway the same year and, finally, Switzerland and Liechtenstein in 2008 and 2009 respectively. Meanwhile, Ireland and the United Kingdom only participate in these instruments to a limited degree.

The Schengen Agreement arose out of the Saarbrücken Agreement, signed by France and the Federal Republic of Germany, on 13 February 1984, the purpose of which was the suppression of border controls between the two countries. This was an attempt to extend the positive experience garnered in the context of the Benelux and introduce this model in the continent generally as a successful counterpoint to the British model with its exhaustive border controls. Indeed, the Benelux countries had removed their

borders in 1960, creating a single territory and transferring control of persons to their external borders by means of a common visa policy, the Benelux tourist visa.

Meanwhile, Schengen also envisaged –among its long-term measures– the suppression of controls on common borders and their transfer to external borders. This meant that the legislative and regulatory provisions regarding the prohibitions and restrictions on which the controls were based would first have to be harmonised, namely by adopting complementary measures to ensure security and prevent illegal immigration of nationals from states that were not members of the European Communities.

Thus, the Agreement stressed that it could be signed without ratification or approval reservations and merely announced, in its 33 articles, a series of specific legally binding measures that should be adopted in the short term (Articles 2 to 16: visual checks of vehicles, spot checks, etc.); and other long-term measures that were reduced to declarations of intent, with the Parties assuming obligations to “seek”, “open discussions” or “take common initiatives” in certain spheres, including judicial cooperation (Articles 17 to 27). These latter provisions were merely a desiderata with no practical effect, which naturally required another text setting out the specific steps necessary. Basically, the initial Agreement lacked the instruments necessary to render its provisions effective and that should have been complied with in full by the first of January 1990 (Article 30); it can therefore be correctly classed as a “framework treaty” or a kind of programme.

Given this situation, it was clearly necessary to approve a complementary instrument that would contain the necessary mechanisms to put the measures for the gradual suppression of border controls into practice. This was how the Convention on the Application of the Schengen Agreement came about, on 19 June 1990, with 142 Articles that are quite difficult to understand and highly complex both in relation to its structure and the areas it regulates, which the remaining states progressively joined.

The gestation of this second instrument began in the late 80s, when Article 13 of the Single European Act –converted into Article 8 of the Treaty of Rome– established that the borders between the Member States of the European Community should disappear by the first of January 1993, heralding the arrival of the free movement of persons, goods, services and capital.

Despite this, while working on making this suppression of borders a reality, it soon became clear that the efforts to achieve the free movement of goods, services and capital were advancing far more rapidly than those aimed at achieving the free movement of persons, as the Member States of the Community were genuinely afraid of the disappearance of the controls that prevented the free movement of persons, convinced that the suppression of borders would increase criminal activity and the flow of illegal immigrants from third-party countries.

Conscious of this situation, the European Council held in Rhodes in December 1988 decided to "urgently appeal to the Council to step up its efforts in all areas where progress has not been so rapid. This applies particularly to […] the free movement of persons". In fulfilment of these warnings, in 1989 and under the Spanish presidency, efforts were redoubled in this regard, with the work being centralised on a group of national coordinators that drafted a report –known as the Palma Document–, which received the blessing of the Madrid European Council in June 1989 and bore fruit in the form of a series of conventions, including Schengen.

This occurred because, in view of the limited development after the adoption by the twelve of the Palma Document, some members of the European Communities, in particular the signatories of the first Schengen Agreement in 1985, plus some others such as Italy, Portugal, Spain or Greece, decided, in view of the difficulties encountered, to try another route, that of a more limited intergovernmental cooperation, achieved within what was known as the "Schengen Group". This led to the development of the second of the above-mentioned instruments, the Convention on the Application of the Schengen Agreement.

The Agreement and the Convention, as well as the rules adopted on the basis of both texts and the connected agreement, constitute what is known as the "Schengen acquis", which since 1999 has formed part of the institutional and legal framework of the European Union by virtue of the protocol annexed to the Treaty of Amsterdam. Title III of the CASA (Articles 39 to 91, entitled "Police and Security") regulates essential aspects of cooperation in criminal matters, which refer to police cooperation (Chapter I) on the investigation of crimes, cross-border surveillance, hot pursuit, the exchange of information or the appointment of liaison officials; as well as cooperation in relation to narcotic drugs (Chapter VI) or firearms and munitions (Chapter VII)[17].

[17] See MORENO CATENA and CASTILLEJO, *La persecución de los delitos en el Convenio de Schengen*,

But in addition, the CASA contains specific provisions on judicial assistance in criminal matters (Chapter II) with the acknowledged aim (Article 48.1) of supplementing the European Convention on Mutual Assistance in criminal matters of 20 April 1959, as well as, as far as the relations between the Contracting states that are members of the Benelux Economic Union are concerned, Chapter II of the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, amended by the Protocol of 11 May 1974 and facilitating the application of said agreements.

With this same vocation of supplementing the European Convention on Extradition of 13 September 1957 and the relations between the Contracting states that are members of the Benelux Economic Union, Chapter I of the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters of 27 June 1962, amended by the Protocol of 11 May 1974 as well as facilitating the application of said agreements, specific provisions are established in Chapter IV (Articles 59 to 66).

In addition to this, a matter of great importance for cooperation in criminal matters is regulated: the *ne bis in idem* principle (Chapter III, Articles 54 to 58), i.e., the prohibition stating that a person who has been finally judged by one state may not be prosecuted by another state for the same offence, provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party (Article 54). The enshrinement of this principle represents an essential element of cooperation in criminal matters, as the fact that a subject can be sentenced twice for the same offences (albeit in two different states) challenges the essential criteria of proportionality and justice.

Finally, in order to supplement another convention, the Council of Europe Convention of 21 March 1983 on the transfer of sentenced persons, the CASA establishes specific rules in Chapter V for the transmission of the enforcement of criminal sentences.

2.4. The 2000 Convention on Mutual Assistance in criminal matters between the Member States of the EU

European policy in relation to legal cooperation in criminal matters has gradually been putting instruments in place in order to supplement the earlier Council of Europe

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Conventions and overcome the obstacles in the way of the implementation of a European space of justice, including criminal justice.

One of the relevant points in this field, via the route of Article 34 of the TEU, has been the approval of the Convention on mutual assistance in criminal matters between the Member States of the EU on 29 May 2000, which entered into force in August 2005, having been ratified by a sufficient number of states. This Convention intends to promote and update mutual assistance between judicial, police and customs authorities, supplementing and facilitating the application of the 1959 Council of Europe Convention, its 1978 protocol, as well as the 1990 CASA and the 1962 Benelux Treaty.

As well as regulating how certain procedures should be carried out, such as declarations via video conference and intervening communications, the Convention refers to direct communication between the authorities of one State with the addressees of a judicial notification who are in the territory of another and direct transmission and enforcement by the corresponding authorities, without passing through a central authority, as a general rule.

It also establishes the possibility to create joint investigation teams with two or more states, including covert investigations, carried out by undercover agents, so that the Convention replaces Framework Decision 2002/465, on joint investigation teams.

But perhaps the most relevant innovation that this instrument contains is the application of the rules of the requesting country (*forum regit actum*) regarding judicial assistance in criminal matters and not those of the state providing assistance (*locus regit actum*), so that the procedural guarantees indicated by the requesting state, including the terms it establishes, are respected[18].

This provision clearly belongs to a different line of mutual recognition, as the authorities that carry out acts of assistance will have to waive their own rules in favour of those that apply in the state where they are to have effect; thus, instead of always using what has been obtained pursuant to the rules of the requested state in all countries, even if these rules contravene or are not in line with those of the requesting state, which is the

[18] However, the Protocol to the 2000 Convention on mutual assistance in criminal matters (OJ C326, 21 November 2001), which establishes measures regarding requests for information on bank transactions in order to combat organised crime, returns to the *locus regit actum* principle, referring to the legislation of the requested state in order to carry out the act of mutual assistance.

basis of the principle of mutual recognition, the guarantees established by the state where the action is to have effect will be observed, meaning that all objections regarding the effectiveness of judicial cooperation fade away.

3. Integration policies

The objective of achieving an area of freedom, security and justice in Europe entails ensuring the effectiveness all over Europe of the judicial decisions handed down in any of its states, with such decisions being considered final just as if they were internal decisions. In this scenario, the national judge of a state would be judge of the whole EU, and his/her decisions would have to be accepted and obeyed as if they had been handed down by a judge in the state where it is sought to uphold them.

The road ahead is a long and often arduous one, and it can be approached with two different forms of intervention: on the one hand, via harmonisation, that is, with the validity in all states of criminal and procedural rules and institutions that are sufficiently similar to generate reciprocal trust, beyond the inevitable errors or defects in the specific functioning of the system. On the other hand, via mutual recognition, i.e., accepting an act or a decision of another state as one's own, merely due to the fact that it comes from the EU, and ensuring it is enforced.

It is clear that the objective of the European space of justice requires, above all, that each of the states trust the principles that govern the procedural systems of the other states, and the correct functioning of their institutions, particularly in the case of the criminal system, where the individual freedoms that we have worked so hard to establish in the majority of European states are at stake.

Probably the first reaction from any of the levels of the judicial system of a country when it considers that there is a deficit in the protection of rights in another state, or in the structure or the guarantees of the Bench, would be to quarantine any actions originating in said state, even in those cases in which they themselves have requested help.

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3.1. Instruments for harmonisation

It is clear that important advances in European political integration may take place, which will no doubt grant greater democratic legitimacy to the community institutions, breaking with the current organisation where the intervention of popular sovereignty is largely unrecognisable, despite the enhanced role progressively being assumed by the European Parliament[19].

But until that new era of political integration arrives, because of what we have just pointed out, progress in European integration in relation to criminal justice, in the context of the area of freedom, security and justice, should basically start with harmonisation based on mutual trust; that is, while ensuring full respect of the sovereignty of each of the states, there must be an independent Judiciary with rules regarding criminal law and criminal procedure that are comparable.

The communitisation of cooperation in criminal matters brought about by the Treaty of Lisbon ultimately means that harmonisation can even be imposed by rules issued by the bodies of the EU with legislative capacity, which would go on to form part of the legal systems of the states. However, the resistance shown by several states to this loss of sovereignty (which can be interpreted as a renunciation of the chance to design their own system of criminal justice, considering any attempt by the EU to legislate on criminal matters a threat), introduces serious doubts regarding the actual advances in this field. But the thing is, moreover, harmonisation cannot mean total legal equality of legal systems that have been formed over centuries with very different elements.

Therefore, on the one hand, the legislative power of the states cannot be done away with when each one has established its own criminal justice system, according to its tradition and legal system, i.e. the organisation of criminal justice, and the determination of criminal behaviour and the corresponding punishment, as well as the development of proceedings; in essence, the criminal policy programme that each state intends to enforce.

Nevertheless, it is also important to keep in mind that harmonisation (unlike the main trend in community policy, concerned essentially with increasing the instruments in

[19] It is worth highlighting that the Treaty of Lisbon gives it a role that is almost equivalent to that of the Council in the process for passing new rules.

order to improve criminal prosecution), will have to aspire to establishing the same standards of guarantees for all, and which will have to be those closest to the system that provides greatest protection of rights, because it is clear that the citizens of a state cannot be asked to forego the guarantees provided by their own legal system.

Harmonisation will essentially have to seek to achieve, on the one hand, the validity of the same system of procedural guarantees, with the same degree of protection, in the entire European area, and on the other, it will have to ensure that the classification of criminal behaviour and punishments imposed is applied to a more or less uniform degree all over the EU and, finally, that the institutional guarantees of the public servants of the criminal justice system are strictly respected including, and most importantly, the independence of judges.

This all means that harmonisation in this field should be the result of the convergence of two factors: on the one hand, the wishes of the states –and, above all, of their citizens, who are too often overlooked in the process of European construction– which will be the fruit of trust in the rest of the legal systems.

On the other hand, the impulse of the community institutions themselves who, either by means of Framework Decisions, or via more intense cooperation, have ensured in recent years that the states approve uniform regulations that, as mentioned above, can lead to the levelling of the standards of guarantees towards those of the legal system that best guarantees respect of the rights of those involved in legal proceedings. Nevertheless, while the difficulties encountered by the Commission in approving a common, specific rule on minimum procedural guarantees did not bode well for the immediate future of harmonisation in this area[20] and it seems that the exploration of new itineraries designed in the Treaty of Lisbon may provide more optimistic results, as shown by the recent approval by the Council of a Directive on the right to translation and interpretation in criminal proceedings[21] and the existence of two proposals for directives currently in the pipeline, one referring to the right to information[22] and the

[20] A detailed analysis of the above-mentioned Proposal for a Framework Decision and its processing can be seen in LOREDO COLUNGA, "La armonización de la legislación procesal penal en la Unión Europea: los derechos del imputado", in *Teoría & Derecho: Revista de Pensamiento Jurídico,* no. 3/2008.

[21] Text approved by the Council of Luxembourg of 7 and 8 October 2010 and that had already been agreed at a political level durign the Spanish presidency of the EU.

[22] Proposal for a Directive of the European Parliament and of the Council on the right to information in criminal proceedings. COM (2010) 392 final.

other to the right to legal advice and communication upon arrest[23].

In this regard, the Commission itself, in a Communication to the Council and the European Parliament in 2005 on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between the Member States[24], pointed out that mutual trust includes legislative actions that ensure a high degree of protection of the rights of individuals in the EU, and put forward the idea of harmonising certain legislative provisions in criminal matters, and specifically the law of criminal procedure on a community level so that judicial decisions are the result of demanding rules in terms of guaranteeing the rights of individuals, such as the presumption of innocence, the regulation of decisions *in absentia*, minimum rules for obtaining evidence, etc.

It seems that in said 2005 communication the Commission stated its wish to identify the potential obstacles before adopting new instruments, which may be a reflection of the decision to opt for harmonisation of legislations over the automatic application of mutual recognition.

Statements reflecting a trend towards the harmonisation of criminal provisions can be found in numerous Framework Decisions and Proposals for Framework Decisions.

As stated in the Commission Communication of 21 February 2006 to the Council and the European Parliament on punishments involving disqualifications imposed by criminal verdicts[25], community legislation adopted in relation to disqualifications is aimed at the approximation of national legislations.

This has been established in some important EU provisions, such as Framework Decision 2004/68/JHA, on combating the sexual exploitation of children and child pornography, which sets minimum rules regarding the elements comprising such offences, and recognises that it is necessary to set sufficiently severe penalties for the authors of these offences so that the sexual exploitation of children and child pornography can be included within the scope of application of the instruments already

[23] Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest. COM (2011) 326 final.

[24] COM (2005) 195 final - not published in the official journal.

[25] COM (2006) 73 final - not published in the official journal.

approved for combating organised crime[26]. Moreover, among other things, the Framework Decision requires that each Member State adopt the measures necessary to ensure that the offences involved are sanctioned with criminal penalties set out in the Decision itself[27].

The same can be said of Council Framework Decision 2004/757/JHA, of 25 October 2004, laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking, which requires that the sanctions envisaged by the Member States be effective, proportionate and dissuasive and include custodial sentences. In order to determine the level of the sanctions, factual elements must be considered, such as the quantities and type of drug trafficked, or whether the offence was committed within the framework of a criminal organisation. The Framework Decision also establishes that the state must ensure that drug trafficking crimes are punished with effective, proportionate and dissuasive sentences and sets a minimum sentence for the different types (Article 4)[28].

Moreover, along these lines of the harmonisation of criminal legislation, the Commission Green Paper, of 26 April 2006, on the presumption of innocence[29], expressly maintains that said Commission initiative forms part of the process of harmonisation of criminal law, as the principle of mutual recognition can only work effectively if there is trust in the other judicial systems, mutual trust deriving from a shared reference to the fundamental rights, as highlighted in the Commission Green Paper of 19 February 2003 on procedural safeguards for the accused[30]. The Commission acknowledges that large differences exist on sentences between Member States, while the decisions taken prior to the enforcement of a sentence are not always

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[26] Refers to Council Joint Action 98/699/JHA, of 3 December 1998, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime and Council Joint Action 98/733/JHA, of 21 December 1998, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union.

[27] This is also set out in Framework Decision 2003/568/JHA, on combating corruption in the private sector, regarding the legislation affecting the processes for awarding public contracts and aimed at combating corruption and organised crime and to other directives applicable to the financial sector.

[28] Along the same lines, other more recently approved norms should be mentioned, such as Framework Decision 2008/913/JHA, on combating certain forms and expressions of racism and xenophobia by means of criminal law; Framework Decision 2008/919/JHA, which amends the harmonised definition of terrorism; or Framework Decision 2008/841/JHA, which defines the crimes regarding participation in criminal organisations.

[29] COM (2006) 174 final – not published in the official journal.

[30] COM (2003) 75 final.

applied on the basis of common rules aimed at guaranteeing the same degree of protection of fundamental rights in the EU as a whole.

More recently, the Council Decision of 12 February 2007 establishes a specific programme "Criminal Justice" for the 2007-2013 period[31], as part of the general "Fundamental Rights and Justice" programme. It highlights that the programme's four general objectives comprise: i) promoting judicial cooperation in criminal matters; ii) approximating the legal systems of the Member States to one another and to the judicial system of the EU; iii) improving contacts and the exchange of information and of good practices between the judicial and administrative authorities and justice professionals, and promoting the training of legal professionals, and iv) increasing trust between judicial authorities.

3.2. The principle of mutual recognition

The principle of mutual recognition has its origins in the problems that arise in the single market and the free movement of goods, as a result of a CJEC judgment, dated 20 February 1979, in the *Cassis de Dijon* case, in which the court decided that where there is no harmonised legislation, products from another state must be admitted if they comply with the regulations of the country of origin, thus overcoming what were known as the technical limits to trade.

This discovery by the CJEC was subsequently transferred to criminal matters, in order to promote the free movement of court decisions in the context of the EU[32], as a faster and more effective means of broadening the field of play in this area of cooperation in criminal matters, because in this way the never-ending negotiations for harmonisation based on a Framework Decision or conventions under the "third pillar" were bypassed.

And indeed the invocation of the principle of mutual recognition has appeared repeatedly and become a permanent feature of virtually all the regulatory instruments or acts of the Council or the Commission in relation to cooperation in criminal matters;

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[31] Decision 2007/126/JHA (OJ L 58, 24.02.07).

[32] The applicability of the principle of mutual recognition to the free movement of goods, over which the consumer will decide whether or not to buy them, is very different to the case of the free movement of judicial resolutions, as BACHMAIER explains in, "El exhorto europeo de obtención de pruebas en el proceso penal", in *El Derecho Procesal Penal en la Unión Europea*, *op. cit*., page 176.

it is used with enormous enthusiasm as if it were a kind of mantra or magic spell[33].

By means of this system of mutual recognition, a decision issued by a court of any EU Member State not only has authority and effect in its own territory, where said body exercises its jurisdictional power, but it also has direct effect in the state where it is to be complied with, where the authorities will simply recognise and enforce it.

As pointed out earlier, the application of the principle of mutual recognition can only work if it is underpinned by mutual trust between the legal systems, as it would be unthinkable for a state to assign the sovereignty of its jurisdictional decisions in favour of resolutions that are enforced in its territory, issued by foreign judges, on the basis of a different legal system that is alien or whose system of safeguards is under suspicion. Thus, only with a shared basis of the independence of judges and of respect for fundamental rights, i.e., the same foundations for a system of justice, is it possible to accept the principle that one state places its entire *imperium* at the disposal of a foreign resolution, to ensure compliance with it as if it were a domestic resolution, merely because it was issued.

In this regard it is clear that mutual recognition can only be the result and the fruit of groundwork done in the field of regulatory harmonisation, leading to mutual trust between states in their respective systems of justice; otherwise we would be putting the cart before the horse[34], or trying to run before we have learned to walk[35]. Therefore, it can be said that both routes, harmonisation and mutual recognition, should be complementary, because in order to achieve the direct validity and effectiveness of a foreign resolutions, even with the obvious and natural discrepancies between the different legal systems, the constitutional order of the state where enforcement is to take place must be respected[36].

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[33] A large sector of German commentators vehemently oppose this principle; see, SCHÜNEMANN, *op. cit.*, *passim*. For a more comprehensive view, see TIEDEMANN, "El nuevo procedimiento penal europeo", in *El Derecho penal de la Unión Europea. Situación actual y perspectivas de futuro* (Arroyo and Nieto, eds.), Cuenca, 2007, page 143 *et seq*.

[34] In the words of GÓMEZ-JARA, "Orden de detención europea y constitución europea: reflexiones sobre su fundamento en el principio de reconocimiento mutuo", in *Revista La Ley*, dated 26 July 2004.

[35] According to HASSEMER, *Strafrecht in einem europäischen Verfassungsvertrag*, in *ZStW*, 116-2, II, page 317.

[36] See ORMAZÁBAL, "La formación del espacio judicial europeo en materia penal y el principio de mutuo reconocimiento. Especial referencia a la extradición y al mutuo reconocimiento de pruebas", in *El Derecho Procesal Penal en la Unión Europea*, *op. cit.*, page 70. See also the astute observations of MIRANDA, "El

As PEITEADO rightly maintains[37], the origins of mutual recognition contain the three elements that define it: first of all, the distinction between recognition and harmonisation; secondly, regulatory equivalence, according to objectives, protected interests and safeguards provided; thirdly, its link with the single space of justice.

The first of the provisions that applied the principle of mutual recognition in criminal matters was Council Framework Decision 2002/584/JHA of 13 June 2002, on the European Arrest Warrant and Surrender Procedures between Member States. This was followed by Council Framework Decision 2003/577/JHA, of 22 July 2003, on the execution in the European Union of orders freezing property or evidence.

On the basis of these two provisions approved under Article 34.2 of the TEU, acts of analysis, proposal and decision have been taking place for which the principle of mutual recognition is the mandatory starting point.

Thus, Council Framework Decision 2005/214/JHA, of 24 February 2005, on the application of the principle of mutual recognition to financial penalties, which covers both criminal and administrative penalties, and which establishes a mechanism for the transmission of decisions, setting out the certificate that must be attached to the decision in the annex.

Council Framework Decision 2006/783/JHA, of 6 October 2006, on the application of the principle of mutual recognition to confiscation orders, with rules governing the transmission, recognition and enforcement of the same, is clearly part of the same initiative.

From the point of view of stepping up protection of fundamental rights in the European space of criminal justice, the Proposal for a Council Framework Decision, of 29 August 2006, on the European supervision order in pre-trial procedures between Member States of the European Union[38] was approved, with a view to having non-custodial

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papel del Tribunal de Justicia en el espacio de libertad, seguridad y justicia", in *El Derecho penal de la Unión Europea. Situación actual y perspectivas de futuro*, *op. cit*., pages 192-193; in the same work see NIETO, "Modelos de organización del sistema europeo de Derecho penal", page 169 *et seq*.

[37] "El reconocimiento mutuo y la eficacia directa de resoluciones penales definitivas sobre procesos penales en tramitación en la Unión Europea", in *El Derecho Procesal Penal en la Unión Europea*, *op. cit*., pages 183-184.

[38] COM (2006) 468 final – not published in the Official Journal.

interim supervision measures ordered in criminal proceedings enforced in the state of residence of the sentenced person, who will have to be available to appear at court in the state where the order was issued.

Finally, it can be affirmed that the implementation of the principle of mutual recognition of criminal decisions has received important backing in recent years, as can be seen by the approval of the following provisions: Council Framework Decision 2008/841/JHA, of 24 October 2008 on the fight against organised crime; Council Framework Decision 2008/909/JHA, of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union; Council Framework Decision 2008/947/JHA, of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions; Council Framework Decision 2008/978/JHA, of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters; Council Framework Decision 2009/299/JHA, of 26 February 2009, on fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial; and Council Framework Decision 2009/829/JHA, of 23 October, on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention; and Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.

4. Communitisation policies: the European space of justice. The role of the Court of Justice.

As can be seen, the number of fields in which the EU has been extending cooperation in criminal matters has been gradually growing.

There are some actions of international legal cooperation that have but a small effect on the exercise and the affirmation of the power of a state, such as summons or notifications carried out in its territory, because they do not imply compromising its sovereignty, or imperatively entail duties that must be performed within the territory of the state, either on the part of the state itself or on that of the person receiving the

summons or notification. For this reason, for several decades now this field of international legal cooperation has been opened up without too much difficulty, event with direct communication between foreign authorities and the individuals in the territory of the state that provides, facilitates or bears the request or actions of the authorities of the state where the proceedings are underway.

The second dimension in the exercise of the sovereignty of states arises in what is termed the European space of justice or area of freedom, security and justice, and has to do with dealing with the requests for obtaining evidence or interim or executive measures; i.e., directly placing a state's own coactive means and, as such, its *imperium,* at the disposal of the authorities of another state without a prior internal homologation or decision giving force to or validating the foreign decision.

The third of the great waivers of the power of the state in relation to international legal cooperation has to do with the abandonment of the protection of the persons in its territory, acceding to surrender them to the authorities of the requesting state, in cases of extradition. The protection of persons and assets is perhaps the most palpable manifestation of the power and sovereignty exercised by the owners of both worldly and spiritual power, and this was reflected in the old possibility of "sanctuary", with the Church protecting the person who took refuge on holy ground, with the power to decide whether or not to hand the person over to whoever sought him/her. This type of cooperation, which requires *imperium* activity by the authorities of the state where the person sought is located (arrest and surrender), was developed, with the scope and the limits we will see below, by Framework Decision 2002/584, of 13 June 2002, on the European arrest warrant and surrender procedures, which represented a substantial change in the way the surrender of a person to a foreign state was conceived and implied a decisive advance in the application of the principle of mutual recognition, doing away with the traditional system of extradition and, with some exceptions, bypassing the three basic principles that had held sway in this area: the principle of dual criminality, that of specificity and the prohibition of the extradition of nationals[39].

But legal cooperation has traditionally been based on the criterion of the cost for the state providing assistance, measured not in economic terms but in the sense of the waiver of sovereignty, and therefore the first point of resistance, above any other, was

[39] See MORENO CATENA, *La orden europea de detención en España*, in *Revista del Poder Judicial*, no. 78, page 11 *et seq*.; CASTILLEJO, *Procedimiento español de emisión y ejecución de una orden europea de detención y entrega*, Pamplona, 2005.

in relation to legislative power, when the state is obliged to accept as its own or enforce decisions that are applying rules of a foreign legal system, leaving aside national provisions.

For that reason, this has always been the strongest point of resistance, a reflection of the affirmation of the principles and values that formed the legal system itself, as opposed to the safeguards that may exist in the legal system from which the judicial decision it is intended be applied or enforced in its territory has emanated.

It is clear that the diligent work of the European institutions, the Commission in particular, through the different Green Papers, the Communications and the Proposals, which I have already mentioned, as well as the different judgments of the Court of Justice, have set about breaking down this resistance, although much of the reticence that can be seen today will no doubt persist.

The Court of Justice has carried out vital work in this field, in the form of a handful of judgments which contain creative case law, introducing a radical change in the way the role is understood of provisions issued by the regulatory instruments of the third pillar, be they Framework Decisions or Conventions, as well as the criminal aspects of community matters and relations between the third pillar and the community pillar[40].

a) The first of the judgments worth highlighting is the one handed down on 16 June 2005, in the *Maria Pupino* case (C-105/03), which dealt with a problem of a regulatory nature and the scope of Framework Decisions, i.e., an instrument included in the system of sources of the third pillar, and, as such, not communitised[41]. In Italian criminal law, where Ms Pupino was on trial, the applicability of Council Framework Decision 2001/220/JHA, dated 15 March 2001, on the standing of victims in criminal proceedings, was raised, despite the fact that it had not be transposed to Italian law, because almost a year had elapsed since the term set out in the Framework Decision itself had expired. The judgment deals with the problem of a Framework Decision acknowledging certain rights, such as, in this case, that of protecting vulnerable victims from the consequences of declaring in a public hearing.

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[40] See IRURZUN, "¿El espacio judicial europeo en una encrucijada?", in *El Derecho penal de la Unión Europea. Situación actual y perspectivas de futuro*, *op. cit.*, page 50 *et seq*.

[41] On this judgment and its consequences, see SARMIENTO, "Un paso más en la constitucionalización del tercer pilar de la Unión Europea. La sentencia Maria Pupino y el efecto directo de las decisiones marco", in *Revista electrónica de estudios internacionales* (2005), *passim*, in www.reei.org.

The CJEC considered in this sentence that the obligatory nature of Directives and Framework Decisions is identical from a legal point of view, so that not only are they binding, but the authorities of the states and, in particular, the jurisdictional bodies, are obliged to obtain a *conforming interpretation* with national law[42]. Therefore, the CJEC has opened up the effectiveness of the third pillar Framework Decisions to an extraordinary degree, putting them almost on the same level as Directives, a first-pillar regulatory act, practically granting them direct effect, with a conforming interpretation, provided that this does not require a *contra legem* interpretation of national law.

b) The second group of judgments are those issued in interpretation and application of Article 54 of the CASA[43], on the validity of the *ne bis in idem* principle[44], which also affects *lis pendens*, as it must prevent not only dual sentences but also dual prosecution, i.e., dual investigation and trial, either successively or simultaneously[45], which involves the problem of choosing the state where the acts should be tried[46].

Two primary judgments, of great importance, refer to the notion of a final judgment (the *bis*): those of 11 February 2003, joined cases *Gözütok* and *Brugge* (C-187 and 385/01) and the judgment of 10 March 2005, the *Miraglia* case (C-469/03).

Here the CJEC, going beyond what would initially be interpreted as a final judgment, considered that there were no grounds for further proceedings and trial in the case of

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[42]See MUÑOZ DE MORALES, "La aplicación del principio de interpretación conforme a las decisiones-marco ¿hacia el efecto directo?: especial referencia al caso *Pupino*", in *El Derecho penal de la Unión Europea. Situación actual y perspectivas de futuro*, *op. cit.*, page 291 *et seq*.

[43] The precept states that "A person who has been finally judged by a Contracting Party may not be prosecuted by another Contracting Party for the same offences provided that, where he is sentenced, the sentence has been served or is currently being served or can no longer be carried out under the sentencing laws of the Contracting Party".

[44] See in this regard SARMIENTO, "El principio *ne bis in idem* en la jurisprudencia del Tribunal de Justicia de la Comunidad Europea", in *El principio de* ne bis in idem *en el Derecho penal europeo e internacional* (Arroyo and Nieto, coord.), Cuenca, 2007, pages 37 *et seq*.

[45] For this reason the Commission addressed the problem in the *Green Paper on Conflicts of Jurisdiction and the Principle of* ne bis in idem *in Criminal Proceedings* (December 2005). On this point, see GONZÁLEZ CANO, "Consideraciones generales sobre el Libro Verde de la Comisión Europea relativo a los conflictos de jurisdicción y el principio non bis in idem en los procedimientos penales", in *Unión Europea Aranzadi,* no. 11/2006.

[46]See COLOMER HERNÁNDEZ, "Conflictos de jurisdicción, *non bis in idem* y litispendencia internacional en la Unión Europea", in *El Derecho penal de la Unión Europea. Situación actual y perspectivas de futuro*, (Arroyo and Nieto, eds.), Cuenca, 2007, page 65 *et seq*.

the settlement (*transactie*) of the accused person (Gözütok) with the Public Prosecutor's Office, without judicial intervention (Brugge), and therefore any decision which cancels the criminal action is considered a final judgement, allowing the movement of persons around Europe without fear of being tried again. Decisions shelving criminal proceedings, when no decision is reached on the guilt of the accused person (Miraglia) are not however considered final judgments, for the purposes of the application of the *ne bis in idem* principle, when the prosecutor has decided not to prosecute as criminal actions have already been brought in another state, because this decision does not entail any assessment of the merits of the case.

Subsequently, in a judgment of 9 March 2006, the *Van Esbroeck* case (C-436/04), the CJEC, together with the entry into force and temporal applicability of the Convention, dealt with the problem of defining conviction for "the same acts" (the *idem*). The Court resolved that the rule had to be interpreted in the sense of identical natural or historic acts; the Court referred to the "material acts", i.e., a collection of acts that are inextricably interconnected, regardless of their legal classification or of the legal interest protected, because, due to the lack of harmonisation of national criminal legislation, the classification of a crime can vary from one state to the next.

The Court also considered that the final judgments referred to in the CASA included judgments absolving the accused person, even when issued due to a lack of evidence or because of the statute of limitations; see the judgment of 28 September 2006, the *Gasparini and others* case (C-467/04).

The CJEC also deals with the problem of the acts and the identity of the same, when any of their elements are modified. In the judgment of 28 September 2006, the *Van Straaten* case (C-150/05) the Court ruled that complete identity is not required, so that when the acts in the second trial are included in those of the former, the prohibition of *bis in idem* would come into play[47]. This same doctrine was reiterated in the judgment of 18 July 2007, the *Kretzinger* case (C-288/05)[48].

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[47] In this case Mr Straaten had been tried for trafficking 5000 grams of heroin in Italy and, later, was involved in criminal proceedings for trafficking 5500 grams of heroin in the Netherlands, even though the Italian drugs formed part of those brought into the Netherlands. The CJEC stated that "the quantities of the drug that are at issue" "or the persons alleged to have been party to the acts" are not required to be identical.

[48] The acts consisted of receiving contraband foreign tobacco in one state and importing and possessing the same tobacco in another state, taking into account that Mr Kretzinger's intention from the outset was to transport the tobacco, after taking possession of it for the first time, to a final destination after crossing

Nevertheless, in the judgment of 18 July 2007, the *Kraaijenbrink* case (C-367/05), the Court quite rightly decided that there is no *idem*, where the acts consisted, on the one hand, of possessing in one state amounts of money gained from drug trafficking and, on the other, in getting rid of amounts of money gained from drug trafficking in currency exchange offices in another state. This decision resolved that they should not be considered "the same acts", for the purposes of Article 54 of the CASA, simply because the acts are related to each other by the same criminal intent.

c) The third of these questions refers to the power of the community bodies of the third pillar to pass criminal rules that seek to protect legal assets covered by the first pillar. In the CJEC Judgment of 13 September 2005, the *Commission versus Council* case (C-176/03), it was decided to cancel Council Framework Decision 2003/80/JHA, of 27 January 2003[49], on the protection of the environment through criminal law, rejecting the appeal for nullity filed by the Commission, whose Proposal for a Directive under Article 175 of the Treaty had been rejected by the Council, which argued that it had no power to harmonise criminal law, and it approved the Framework Decision that the CJEC cancelled.

The Court considered that the Commission has regulatory competence to approximate the legislations of the Member States in criminal matters when it is essential to guarantee common EU policy in a sphere that has been the object of harmonisation methods and concluded that the community legislator can "when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences" adopt the measures "which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective".

several states.

[49] See NIETO, "Posibilidades y límites de la armonización del Derecho penal nacional tras Comisión *v.* Consejo", in *El Derecho penal de la Unión Europea. Situación actual y perspectivas de futuro*, *op. cit.*, pages 325 *et seq*.

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5. Final Reflections.

As has been seen, the situation we have described cannot be defined as something closed and watertight; it is rather in a constant state of ebullition and the process of change is continuous[50].

We have then started out on a difficult road, heading towards the common area of freedom, security and justice, taking into account, on the other hand, that, far from representing an end in itself, judicial cooperation is an essential condition for achieving Justice, as when dealing with cross-border cases, or with a foreign element, the judicial protection of citizens can only be effectively guaranteed by means of the actions or intervention of the authorities in all the states involved.

Meanwhile, specifically in criminal matters, the common area of freedom, security and justice presents ever more peremptory requirements; the increase in freedoms, including the freedom of movement and the objective of European citizenship, must run parallel to the preservation of public safety, so that crossing a border does not represent an advantage for the culprit of a crime. If this were the case, not only would individual freedoms be endangered, but so would justice itself, because criminal prosecution cannot be limited to the borders of a country and this perspective must be replaced by a more global view, just as the forms of crime present in our societies are global.

As the conclusion of Tampere stated, “Criminals must find no ways of exploiting differences in the judicial systems of Member States. Judgements and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved”, and, at the same time “The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union”.

The European Union is responding to these challenges with the creation of its own entities, with their own legal personality, such as Eurojust, or independent bodies within

[50] An accurate reflection on the future prospects can be found in MARISCAL, *Más allá de Lisboa: Horizontes europeos*, Madrid, 2010.

the Commission, such as OLAF, but in any event providing a gradual response to the ever closer relations between states, with the explicit horizon and objective of achieving the area of freedom, security and justice.

In any event, the advances being achieved are mainly with regard to fighting crime, often losing sight of the importance of safeguarding the parties' procedural guarantees and, ultimately, the democratic legitimacy of the sources of regulatory production[51]. The Court of Justice of the European Union contributes to this by placing the idea of the force of European integration at all costs above other considerations, and opting for "creative" interpretations in police and judicial cooperation in criminal matters (such as in the case of Article 54 of the CASA, in relation to the *ne bis in idem* principle) clearly aimed at furthering, to the greatest extent possible, the validity of the principle of mutual recognition, even in view of its dubious regulatory backing.

In conclusion, it is worth referring to the threat of an "a la carte Europe"[52], as the result of the concessions that the ratification of the Treaty of Lisbon entailed for some Member States[53]. This increases the risk of multi-speed integration, something that is difficult to manage and that ultimately hinders the effective creation of the European area of freedom, security and justice.

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[51] See SCHÜNEMANN, "Peligros para el Estado de Derecho a través de la europeización de la Administración de Justicia penal?", in *El Derecho Procesal Penal en la Unión Europea* (coord. Armenta, Gascón and Cedeño), Madrid, 2006, page 24.

[52] A general expression that can be found, for example, in GARCÍA MORENO, "La cooperación judicial penal en el espacio de libertad, seguridad y justicia después del Tratado de Lisboa", in *Aranzadi Unión Europea*, no. 10/2009.

[53] First of all, it is important to remember the special position of the United Kingdom and Poland in relation to the charter of Fundamental Rights. There is also the possibility of the "emergency brakes" envisaged in Articles 82.2 and 83.1 and 2 of the TFEU being applied, which make it possible to block directives on certain aspects of criminal procedure –substantive or procedural–-, forcing the subject matter towards enhanced cooperation. And, finally, the unique status of Denmark, Ireland and the United Kingdom in relation to the area of freedom, security and justice (envisaged in Protocols 21 and 22), that implies their exclusion from the legislative procedures –as well as the regulations in this regard not being binding on them–, notwithstanding the fact that they can opt to participate or assume said provisions at a later date.

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