Think Global – Act European

Notre Europe
Thinking a united Europe
Penser l'unité européenne

Real Instituto Elcano

EGMONT

GKI

tgae
Think Global – Act European

The Contribution of 14 European Think Tanks to the Spanish, Belgian and Hungarian Trio Presidency of the European Union

Directed by:
Elvire Fabry and **Gaëtane Ricard-Nihoul,** Notre Europe

tgae
Think Global – Act European

bruegel

CEPS

CENTRE FOR EUROPEAN REFORM
NEW IDEAS FOR A NEW EUROPE

DANISH INSTITUTE FOR INTERNATIONAL STUDIES

demos EUROPA

ΕΛΙΑΜΕΠ
ELIAMEP

EUROPEAN COUNCIL ON FOREIGN RELATIONS
ecfr.eu

EUROPEUM
INSTITUTE FOR EUROPEAN POLICY

Sieps
Swedish Institute for European Policy Studies

SWP

INTERNAL SECURITY AND JUDICIAL COOPERATION

EU Police and Judicial Cooperation in Criminal Law: Balancing Efficiency and Human Rights Protection

Ivo Šlosarčík Director of Research, Europeum

Global context and specific challenges

Judicial cooperation in criminal law is one of the most rapidly developing areas of the EU law. At the same time, EU regulation of criminal law belongs to the most sensitive areas from the perspective of national sovereignty and regulatory autonomy. The EU rules also frequently trigger conflict(s) with both the EU and the national human rights standards / rules. Therefore, new EU initiatives in the area of criminal law are frequently (mis)interpreted in the media and / or challenged before national judicial authorities. For example, the pilot instrument of the judicial cooperation in the criminal law, the European arrest warrant mechanism, was challenged before the constitutional courts in Germany, Poland, Czech Republic, Greece, Cyprus as well as before the European Court of Justice.

From the institutional perspective, the EU activity concentrates on the establishment of standards of judicial cooperation while the implementation is left to the member states. The application of the rules on judicial cooperation in individual cases is also left to the national judiciary. The European Court of Justice is involved only indirectly, via answers to preliminary questions formulated by the national courts. The decentralisation of the implementation of judicial cooperation thus requires a high level of trust among the EU states in the quality of their respective legal and judicial systems.

The lion's share of expenses linked with the judicial cooperation is covered directly by member states; the impact of the EU rules of judicial cooperation in criminal law on the EU budget is relatively modest.

Regarding the dynamics of the judicial cooperation in criminal law, the year of 2009 is important for two reasons: the finalisation of the ratification of the Lisbon Treaty and the formulation of the Stockholm Programme for 2009-2014. The impact of the Lisbon

Treaty on the future of the EU judicial cooperation in criminal law is threefold: firstly, the Lisbon Treaty replaces unanimity in the Council of the EU by qualified majority voting and it includes the European Parliament into the EU legislative process. Secondly, the Lisbon Treaty strengthens the control mechanisms over the implementation of the EU rules by member states, in particular by extending the Commission's power to use enforcement actions against member states for violation of (non-compliance with) the EU rules in the domain of criminal law. Thirdly, the Lisbon Treaty incorporates, albeit in rather vague terms, the EU Charter of Fundamental Rights into the EU legal / constitutional system – and the EU Charter also explicitly guarantees several rules important / relevant for criminal law, such as the ban on inhuman and degrading treatment or punishment, the right to fair trial, the principle of presumption of innocence, the principle of legality and the principle of *ne bis in idem*.

The Stockholm Programme is the follow-up of the previous five-year plans for the EU activity in the domain of internal security, which were adopted in Tampere (1999-2004) and The Hague (2004-2009). Regardless of the fact that the Stockholm Programme will be a 'soft-law' norm, it will establish a very influential political commitment and a benchmark for the future EU activities in criminal law. The conclusion of the five-year period of The Hague Programme in 2009 also provides for an evaluation of the results of the EU activities so far and for a more long-term and strategic analysis of future EU action.

Current status

The EU regulation in the domain of internal security is primarily focused on four categories of activities:

- Establishment of agencies and other structures at the EU level which support and coordinate activities of national agencies and institutions. The role of the EU bodies is, however, only supplementary and does not intend to replace the national structures.
- Establishment of standards of visa, asylum and immigration procedures at EU level, while the implementation and application of these standards is left to national authorities.
- Limited substantial harmonisation of criminal law (i.e. common EU rules on the definition of the criminal activity and the respective sanctions) for selected crimes with strong interstate elements. Again, EU activity is relatively limited and does not aspire to create a general EU criminal code.
- Establishment of a regime which guarantees mutual recognition of judicial decisions issued / produced by an individual member state's judiciary in all other EU states. The mechanism of mutual recognition thus respects the autonomy of the member states' systems of criminal law and establishes *de facto* 'free movement of judicial decisions' within the EU.

From the four approaches mentioned, it is the principle of mutual recognition which is the core of the judicial cooperation in criminal law in the EU. The priority of the mutual-recognition approach over the harmonisation of the substantive criminal law is stressed in the Lisbon Treaty which states that "the Union shall endeavour to ensure a high level of security […] through the mutual recognition of judgements in criminal matters and, if necessary, through the approximation of criminal laws"(Art. 67 TFEU).

However, the principle of mutual recognition is not directly applicable in the member states and needs to be elaborated in more detailed instruments of EU law (framework decisions, directive). In practice, the EU used a 'step-by-step' approach and adopted specific framework decisions establishing rules (and setting their conditions and limits) on mutual recognition regarding specific types of decisions issued in the course of the criminal process – such as arrest warrants, evidence warrants, judicial decisions on financial penalties and / or confiscations of property or judicial decisions imposing custodial sanctions. Some kinds of judicial decision are not regulated yet, e.g. those suspending a driving license as a sanction for a criminal offence.

A relatively large gap in the current EU regulation of judicial cooperation in criminal law is the absence of detailed procedural safeguards for individuals prosecuted; in particular, taking into account the more vulnerable position of a person prosecuted outside his / her country. Another missing element of effective judicial cooperation is the absence of common EU rules on criminal jurisdiction.

The debate on the Stockholm Programme for 2009-2014 reflects these missing elements of the EU regulatory framework. The Swedish Presidency stated that the Stockholm Programme should "strike a balance between better law enforcement and measures for legal rights and enhanced protection of private life". As examples of the potential EU actions strengthening the human rights protection in the context of the EU judicial cooperation in criminal law, the Swedish Presidency mentioned the expected EU's accession to the European Convention for Human Rights, a more intensive role for the EU Agency of Fundamental Rights in the EU legislative process and the adoption of common EU rules for defendants during the criminal investigation and process. The Stockholm Programme has been adopted at the European Council Summit in December 2009.

Since the Lisbon Treaty, which simplified the adoption of the EU legislation by the Council of the EU in the domain of judicial cooperation in criminal law, and which entered in force on 1st December 2009, intensive related legislative activity can be expected in the years 2010-2011. By the same time, the increase of powers of the European Parliament in the EU legislative process might enhance the public debate on the practical implications of the EU norms and on the absence of mutual knowledge / understanding of the specifics of systems of criminal law in individual member states.

Proposals

The current Trio Presidency should consider these actions to both further enhance the creation of the EU as an area of judicial cooperation in criminal law and to ensure a high level of human rights standards in the criminal proceedings:

- Adopt a catalogue of minimal EU standards of rights for the defendant in the criminal procedure. In particular, the EU rules should reflect the more difficult position of the defendant in a country different from the state of his / her citizenship regarding his / her weaker knowledge of the local legal system, access to legal advice, weaker knowledge of the local language, the absence of a social network and (last but not least) the financial burden caused by his / her presence in a foreign state during trial.
- Make clearer rules on the jurisdiction in criminal cases. In particular, the EU rules should clarify the proximity of the offender's behaviour with the territory, citizens and / or interest of a member state which would establish a criminal jurisdiction of the state concerned over the person/offender. This would prevent situations where a member state might punish / regulate by its criminal-law activities concentrated in other EU states and thus effectively 'export' its criminal-law standards and preferences into other EU states.
- Elaborate, by means of soft law or binding legislation, the impact of the EU Charter of Fundamental Rights on criminal law in the EU.
- Organise an information campaign on the impacts of EU judicial cooperation in criminal law. EU information could eliminate many myths about the practical impact of EU rules on citizens. These myths might misinterpret the EU role as an extensive intrusion into state sovereignty, or they might (also incorrectly) cause expectations that the EU will radically improve national systems of criminal law or that the EU courts will serve as an appellate body against the national criminal courts' judgements (e.g. by making an incorrect analogy between the role of the European Court of Human Rights in Strasbourg and the role of the European Court of Justice (ECJ) in Luxembourg).
- Promote communication and the exchange of experience with EU rules between national judiciaries (e.g. via Eurojust) and between national courts and the ECJ (by the preliminary question procedure).