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European Union – Police and Customs cooperation : a historical perspective

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EUROPEAN UNION – POLICE AND CUSTOMS COOPERATION. A HISTORICAL PERSPECTIVE

Isabel Maria Freitas Valente

ABSTRACT

The aim of this essay is to present the development and current state of Police and customs cooperation within the EU. Therefore, we present the subject in chronological order since the creation of the European Atomic Energy Community

and the European Economic Community (1957) until the Treaty of Lisbon (2007). And we argue that the Area of Freedom, Security and Justice can only make sense when the three components are present, without detriment to any.

KEYWORDS

European Union; Police Cooperation; Customs Cooperation; Treaties

Since the creation, in 1957, of both the European Atomic Energy Community and the European Economic Community, the security issues that resulted from the free movement of people have often been raised. Nevertheless, it was during the discussion of the Single European Act that these concerns became a major focus of debate, as a greater emphasis was granted to the issue of safety. The articles 13 and 19 of the General Declaration of the Single European Act recognize to each State of the European Economic Community the right to “to take such measures as they consider necessary” to fight cross-border crime. Moreover, the Political Declaration by the governments of the Member States on the free movement of persons states that, “in order to promote the free movement of persons, the Member States shall cooperate, without prejudice to the powers of the Community, in particular as regards the entry, movement and residence of national of third countries. They shall also cooperate in the combating of terrorism, crime, the traffic in drugs and illicit trading in works of art and antiques.”¹

With the European Single Act and its stated goal of, by 1993, having a functioning internal European market, and with the Maastricht Treaty, these issues became even more pressing, because, in order to maintain an area without internal frontiers that guarantees the free movement of persons, capital, services and goods, some of the border controls were bound to be transferred to the external borders controls of the States of the European Union (EU).²

If in the field of judiciary cooperation a vast diversity of international agreements can be found, namely inside the frameworks of the United Nations, the European Council, the EEC, or the Benelux, in the field of international police cooperation, until recently, this kind of agreements were either limited or nonexistent. In practice, this means that the only kind of agreements that actually exist in border and cross-border areas are administrative ones, destined to deal with specific situations.³

² *Idem*.

³ Regarding this topic, Maria João Guia, in her PhD dissertation, *Imigração, Crime Violento e Crimigração* (“Migration, Violent Crime and Crimigration”), Coimbra, 2014, pp. (policopied document), states that: “The cooperation between the countries, on a number of issues, has its roots in the public international law, namely through the copy-pasting of international conventions into Bilateral Agreements (...)

¹ <http://www.eurotreaties.com/seafinalact.pdf> [last accessed 30, January, 2014].

Traditionally, police cooperation consisted solely in the exchange of information between different police forces concerning matters related either to crime, the force's professional training and specialized equipment, or technological innovations. There was a strong reason for this to be just so, because the celebration of any additional agreements between States concerning police matters was always bound to imply a loss of national sovereignty. Nevertheless, the European States have long ago settled that in order to move the European unification process forward, a deeper cooperation in police, judicial, and security matters was essential. Since the second half of the eighties, due to the impulse given to the attainment of an internal market, this specific kind of cooperation has been achieved with a greater intensity, and that has caused an impact that has been felt even by the common European citizen. One of the consequences of this new state of affairs is, for example, the abolition of the controls at the internal frontiers between EU States. The obvious consequence of this new reality is that the national security and judicial systems have become more vulnerable, thus forcing the member States to find compensatory measures capable of solving these new issues.

Against this backdrop, the protection of the welfare of the citizens against local, or European criminality, demands a better mutual assistance between the law enforcing authorities of different Member States, in particular the police and customs personnel. This mutual assistance has as its cornerstone such institutions as Europol and the European Police College (APC), as well as good practices guidelines such as the principle of availability. The customs cooperation bases itself in the Naples II Convention and the Europol Convention. In order to secure the achievement of the goals of police and customs cooperation a number of different instruments were put in place. These include, for example, the Customs 2013 Programme and the mechanism for monitoring cash movements within the European Union.

Multilateral Agreements (as the European Convention on Extradition of 1957, the European Convention on mutual judicial assistance – STE 030 – which was opened for signing on 20 April 1959, or the European Convention on the transfer of sentenced persons – STE 112 – which was opened for signing on 21 March 1983.”

In fact, police and customs cooperation has as its ultimate goal the ensuring of a high level of protection of the citizens. The foundations of this cooperation were laid in 1976, with the creation of the Trevi group. The cooperation was latter consolidated under the framework of the Tampere Programme, (1999) and Hague - Programme on strengthening freedom, security and justice in the European Union (2004).⁴

In this vein, a legal basis⁵ was created with the specific aim of insuring a high level of protection to European citizens, while maintaining an area of freedom and security, through the cooperation between Member States.

A further and better clarification of this matter can be found if we focus on the general evolution of police cooperation.

Thus, it is through Law that this path is being trugged, namely through treaties, in general, and more specifically by the Schengen acquis.⁶ This device puts in place liaison officers in each of the signatory States, in charge of the cooperation in matters of terrorism, drug trafficking, organized crime and illegal immigration networks. The right of hot pursuit, that allows police officers to follow a suspect into the territory of another State, was also instituted, although its application differs according to each State. On the other hand, the creation of mobile units is also foreseen, some of them constituted by police officers from several different nationalities and able to perform security checks throughout the territory.

It should also be pointed out that, initially, Schengen only instituted an exceptional

⁴ With the adoption of the Hague programme, the European Council endows the EU with a new multi-annual five year programme as a follow up to the one adopted at Tampere. Europol is destined to fulfill a central role in the fight against the most serious kinds of organize crime and cross-border terrorism. The European Police College (EPC) must contribute to the strengthening of mutual trust, in order to improve police cooperation. The fight against terrorism is a major challenge. The exchange of information should take into account the principle of availability, since 2008.

For more information check:

<http://eur->

lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:PT:PDF[last accessed 30, January, 2014]

⁵ Police cooperation: articles 29.^o and 30.^o of Lisbon Treaty; Customs cooperation: article 135 of the CE Treaty.

⁶ In 1985 the Schengen Agreement was signed, and in 1990 the Schengen Convention was brought into force.

cooperation between five countries, a cooperation which was only formalized (institutionally and legally) with the Amsterdam Treaty (1997). Furthermore, the Schengen *acquis* has been augmented with International Law treaties adopted from outside the framework of the EU, as is the case of the Prüm Treaty.⁷

In this context, Maria João Guia, basing herself in authors of international reference, claims in her PhD thesis – entitled *Imigração, Crime Violento e Crimigração* (Migration, Violent Crime and Crimigration) – the following worthwhile quotation: “The Prüm Treaty was launched by the initiative of two countries and seems to be willingly repeating the process, with the aim of attaining the goals stated by the EU, but constituting what some authors (Ziller, 2007:22) consider not only a false evidence of advanced cooperation, but something incompatible with EU Law (...). This construction of the much sought-after area of freedom, security and justice, built from the outside towards the inside, and making use of multilateral instruments coming from the outside of the Community’s framework and the intergovernmental cooperation imposed by the Maastricht Treaty, puts a strain into some of the core principles of the Community (Balzacq, 2006), and seems to amount to nothing more than a “lab experiment” without neither democratic legitimacy nor legal guarantees, one to be latter widely applied at the Community level (Morini, 2008), being thus regarded by many authors as an anomaly (Caggiano, 2007).⁸

It should also be noted that the Maastricht Treaty (1992) defines with equal precision all the issues of common interests that should be encouraged as the focus of cooperation: terrorism, drug traffic and international organized crimes. The Treaty also provides a European Police Office

(Europol), simultaneous with the organization of a Union wide information exchange system.

As to the Amsterdam Treaty (1997), it defines with precision the objectives of the Member States and the sectors that need police, customs and law enforcement cooperation in order to secure a high degree of security. It also reinforces the role of Europol. Furthermore, the Amsterdam Treaty includes, among the objectives of the European Union, the “maintenance and the development of the Union as a space of freedom, security and justice, inside which the free movement of persons, in conjunction with the directly related accompanying measures with respect to external border controls, asylum and immigration”.⁹

The Nice Treaty (2001), in its turn, offers no kind of alteration.

It should be noted, in this regard, that in the draft treaty establishing a Constitution for Europe (2004) police cooperation was mainstreamed in the Union policies and Europol integrated within the institutional framework.

As already mentioned above the police cooperation between representatives of the Member States had its genesis in 1976, with the Group of TREVI.¹⁰

However, police cooperation had progressed since 1985, at first for a limited number of Member States, in connection with the establishment of the ‘Schengen area’ of freedom of movement of persons. With the entry into force of the Treaty of Amsterdam, the Schengen *acquis* relating to police cooperation was incorporated into EU law, but under the ‘third pillar’, i.e. intergovernmental cooperation. The same method was used for police cooperation measures (in particular exchanges of genetic data) adopted by a small group of Member States under the Prüm Treaty, then fully introduced at Union level by Council Decision 2008/615/JHA of 23 June 2008.

⁷ The Prüm Treaty was signed on 27 May 2005, at Prüm (Germany), by seven Member States (Belgium, Germany, France, Luxembourg, Netherlands, Austria and Spain) and began to be enforced in Austria and Spain on the first of November 2006, and in Germany on 23, November, 2006. Other eight Member States (Finland, Italy, Portugal, Slovenia, Sweden, Romania, Bulgaria and Greece) have solemnly stated their intention of signing it in the future. Check: http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/660/660824/660824pt.pdf [last accessed 30, January, 2014].

⁸ Maria João Guia, *op. Cit.*, p.275

⁹ Check: Nuno Piçarra, *A União Europeia como Espaço de Liberdade, Segurança e Justiça: Uma Caracterização Geral* (“The European Union as a Space of Freedom, Security and Justice: a general characterization), Lisboa, UNL, 2009, p. 1. Available at:

http://www.fd.unl.pt/docentes_docs/ma/np_MA_14109.pdf. [last accessed on 30, January, 2014].

¹⁰ A. Grzelak, *The European Union on the way towards the Area of Freedom, Security and Justice*, Centrum Europejskie Natolin, Warszawa 2009, p. 15.

The Treaty of Maastricht then set out matters of common interest which gave legitimate grounds for police cooperation (terrorism, drugs and other forms of international crime) and established the principle of creating a European police office – Europol¹¹, which initially took concrete shape through the establishment of a Europol Drugs Unit.

Finally, the Lisbon Treaty was aimed at, to a large extent, addressing the pressing need of a simplifying revision that also leaned towards a deepening of the construction of a European space of Freedom, Safety and Justice.

In this light, we can say that “with the entry into force of the Treaty of Lisbon and the abolition of the ‘pillars’ the European Union now has more resources to promote police cooperation, while the Treaty has increased parliamentary scrutiny over the development of such cooperation. The main instrument for cooperation is the European Police Office (Europol). It is complemented by customs cooperation. However, in the ‘European internal security architecture’ which is being established, police and customs cooperation is in dissociable from respect for fundamental right and progress made on judicial cooperation in criminal matters. On the other hand, at a time when concerns over terrorism are growing, the external dimension cannot be ignored, in particular the specific issues connected with protection of personal data.”¹² Therefore, the Articles 33, 87, 88 and 89 TFEU constitute the legal basis of this Police Cooperation.

In fact, with the Treaty of Lisbon the current institutional framework was considerably simplified: most police cooperation measures are now adopted using the ordinary legislative procedure, i.e. in codecision with the European Parliament and by qualified majority in the Council of the European Union, and are subject to review by the Court of Justice.

As can be read in the *Fact sheets on the European Union – 2014*, published by the European Parliament, “nevertheless, going beyond the

specific features of the area of freedom, security and justice (exceptions applying to the United Kingdom, Ireland and Denmark, privileged role for national parliaments; see Protocols No 1, 2, 21 and 22 annexed to the TFEU), police cooperation, together with judicial cooperation in criminal matters, retains some original features:

- the Commission shares its power of initiative with the Member States, provided they represent a quarter of the members of the Council (Article 76 TFEU);
- as regards measures for operational cooperation, the European Parliament is merely consulted; furthermore, in the absence of unanimity in the Council (which is required a priori), the possible establishment of enhanced cooperation between the Member States which wish for such cooperation (at least nine) is subject to a suspensory examination by the European Council in order to reach a consensus (‘emergency brake’ mechanism under Article 87(3) TFEU);
- acts adopted prior to the entry into force of the TFEU cannot be the subject of treaty infringement proceedings or a reference for a preliminary ruling for five years (Protocol No 36 annexed to the TFEU).¹³

Ultimately, the objective of police cooperation is to help make the Union an area of freedom, security and justice which respects fundamental rights, involving all the competent authorities of the Member States, including police, customs and other specialized law enforcement services in relation to the prevention, detection and investigation of criminal offences. In practice, this cooperation mainly concerns serious forms of crime (organized crime, drug trafficking, trafficking in human beings) and terrorist activities.¹⁴

The EU supports effective cooperation among the national law enforcement and judicial authorities of its Member States through agencies like Europol (plays a key role in preventing and

¹¹ The Europol Convention was signed on 26 July 1995. The office did not officially begin its work until 1 July 1999, on the basis of the enhanced powers granted by the Treaty of Amsterdam signed on 2 October 1997. Cf. http://ius.unibas.ch/uploads/publics/9618/20100913144350_4c8e1c86bcc33.pdf [Acesso em 30 de Janeiro de 2014].

¹² Check: http://www.europarl.europa.eu/ftu/pdf/en/FTU_5.12.7.pdf. [last accessed on 30, January 2014].

¹³ *Fact sheets on the European Union – 2014*, Brussels, European Parliament, 2014, p.2.

¹⁴ See Sabine Gless, “Police and Judicial Cooperation between the European Union Member States Results and Prospects”, in *The Future of Police and Judicial Cooperation in European Union*, Fijnaut & Ouwerkerk (eds), Netherlands, Koninklijke NV, 2010, pp. 25-48.

combating terrorism and other forms of serious international crime.) and Eurojust, that was created in 2002 to improve cooperation among national judicial authorities in the EU, particularly in the areas of mutual legal assistance and extradition. Eurojust helps EU Member State judicial authorities effectively investigate and prosecute cross-border crime, including terrorism. An agreement between Eurojust and US authorities enhances transatlantic cooperation, and US liaison officers are stationed at Eurojust headquarters in The Hague.¹⁵

Europol's core activities—information exchange and operational analysis—offer centralized support for law enforcement operations, a hub for criminal information, and a center for law enforcement expertise. It supports the EU's law enforcement community by gathering, analyzing, and disseminating information and coordinating operations. Europol experts and analysts participate in Joint Investigation Teams, which help solve criminal cases in EU countries.

It is important to mention that, in December 2006, the Council expressed its agreement towards the replacement of the Europol Convention for a Council Decision. A Commission introduced, in late December 2006, a proposal to transform Europol in a Union Agency financed by the Community budget.

On the other hand, the European Police College (CEPOL) was established by a Council Decision dating from December 22 2000, and subsequently modified by a decision from September 20 2005.

The goal of this agency is to optimize the cooperation between several national police training institutes, which comprise the agency, and contribute to the training of senior police officers from the Member States police services. CEPOL supports and develops an European approach to deal with the main problems that the Member States face. To meet these goals, the agency organizes training sessions, collaborates in the formulation of harmonized training programs and disseminates best practices and research results.

CEPOL takes the form of a network comprised by national police training institutes for senior officers. It has a permanent secretariat

(headquarters: Bramshill, United Kingdom). CEPOL enjoys legal personality. Its budget became a responsibility of the European Union in 2006, and will consequently be included in the budget of the EU.

It is particularly relevant to remember the relevance of other cooperation instruments, namely:

- A working group of Member States Heads of Police was created in October 2000. The group meets at least once during each rotating presidency of the Council.
- The European Crime Prevention Network meets since 2001 to exchange experiences and good practices between national contact persons, responsible for Crime Prevention in each Member State.
- The European Forum for the Prevention of Organized Crime brings together, since 2001, different public and private parties who are interested in debating these questions.
- The Schengen Information System, in force since 1995, contributes to the registration and consultation a certain volume of data. It allows for the control of external borders, as well as inside the Schengen space.
- Joint research teams, created by a Council Framework Decision from June 13 2002, can be used for the development of criminal investigations in one or several Member States. These teams may include Europol representatives.

Criminality has become a common issue whose consequences and ramifications increasingly transcend the borders of each State, to the extent that, generally speaking, crime agents are no longer confined to national border, frequently establishing connections inside and outside of the Union, both amongst individuals and criminal networks, with the purpose of perpetrating isolated or multiple offenses.

It is therefore clear that, independently of national legal cultures or the moral condemnation that a specific crime may provoke on a national level, a joint action should always exist where the fight against crime is concerned, given that this has become a common and shared responsibility, a joint action that must try to avoid that these organized groups of criminals take advantage of legal gaps and differences between the legislations

¹⁵ <http://www.euintheus.org/what-we-do/policy-areas/freedom-security-and-justice/europol-and-eurojust/> [Acesso em 30 de Janeiro de 2014].

of Member States and explore anomalies in different systems. Inside this Area of Freedom, Security and Justice, people, goods, services and money can freely circulate (which implies that the criminal can also freely circulate), and Justice is the only thing that is confined to borders.

The inexistence of a common judiciary space has led to the emergence of several Community initiatives that try to draw legislations closer together, to reinforce the cooperation between the police forces and the judiciary spheres and to create common investigation teams, etc.

It is, however, fundamental to remember that a balance between the need for a speedy and effective cooperation amongst police and judiciary authorities and the interests of citizens must always exist, to the extent that the latter cannot be subjected to further or excessive constraints or see their rights and freedoms or their possibilities of protection restricted.

With this in mind, it is important to highlight that according to art. 2 in the Treaty of the European Union, the purpose of the Union is to “offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

It is also convenient to mention, with a view to a greater clarification, that the integrated approach that guides the actions of the Union comprises both the prevention and the repression. The latter relies mainly in the effective cooperation between the services of the Member States, particularly the Police Services, the exchange of information and the mutual aid in terms of captures and confiscations. The fight against organized criminality is global, and involves a countless number of Union fields of action and policies.

Indeed, the Union takes a well deserved pride in its permanent protection of the rights of the Human Being, in the World and within the Community space. The Charter of Fundamental Rights reinforces this commitment by the Union.

Moreover, the Area of Freedom, Security and Justice can only make sense when the three components are present, without detriment to any. If, on the one hand, it is necessary to give an answer to the expectations of citizens where the

fight against criminality is concerned, on the other hand, special care should be taken to prevent excesses and extremes, that is, the so called “security above all”. The answers that are found cannot, and should not, jeopardize the full respect, guarantee and promotion of the Fundamental Human Rights and the Law, which have always been the cornerstone of the European construction, and they cannot become the victims of this combat.

Lasting security and stability can only exist where the Law and Human Rights are respected. History itself has shown that situation of conflict and instability emerge primarily from the deterioration of the respect towards Human Rights.

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