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THE WARRANTY OF THE RIGHT TO DEFENSE UNDER AN OPERATING EUROPEAN DEPARTMENT OF PUBLIC PROSECUTION

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Abstract: Both in the European Union and in European doctrine was widely discussed the ratione materiae of the future European Public Prosecutor. In terms of the Lisbon Treaty its jurisdincion is limited to crimes that threaten the Union's financial interests, but at the same time the Council of Europe may extend this competence by unanimous decision and other serious offenses. European Public Prosecutor is now one of the main objectives of the European Union and is one of the priorities of the common space of freedom, security and justice for the next five years. Still looking for ways and methods useful for the implementation of these goals, but two conditions must be met: it must be a useful institution, well embedded in the EU institutions and must be based on our national legal traditions that have proven their relevance. Finally, it gives a substantial importance to defense lawyers and rights in various stages of the procedure, both in the contentious matter of freedom and during the performance of an adversarial procedure.
Keywords: European prosecutor, defense liberties, criminal law, protection of interests, jurisdictional competence

1. Introduction

Community Europe has undergone since its origins, structural and textual, a cruel lag time ignoring fundamental rights. It can be observed that neither the European Community Treaty nor the EU Treaty (Treaty of European Union) contained any written catalog of fundamental rights but equal pay for men and women was set right from the beginning, in Article 119 of the European Community Treaty (ECT). While after approaches of the treaties, of the Single Act in 1986, in Nice in 2000, there was a consistent growth in competencies and action fields of Europe and the guarantee of fundamental rights was rescheduled always, always stayed behind. The bottlenecks in the front, with small steps, small jumps, Europe has been sentenced to a permanent recovery attempt in order to make it coincide with the ambition of its projects suitable protective of the rights of citizens interested in their application. Europe was never a Europe without rights, even in ancient times of Praetorian power. Recently we have recalled lawyers conclusions sentence 'Advocaten voor de Wereld "given by a Court of Justice that from now on we can recognize and call "of the European Union" and figuratively states: "The seed was

placed in a vacant land, and only with time basic individual rights could sprout and grow to Court." [1]

It remains for us to see that the rights and freedoms have been a shy or late entry into the European Union, even if they were present in Community case. Besides the European community had to wait until 1999, when the Amsterdam Treaty entered into force, a treaty which stated it as general principle of the European Union that must be respected.

By reading the textual history of Europe more congestion and more delays can be explained. Continuing gap between the policies undertaken and the level of protection which must be guaranteed to every citizen in a democratic society, was a hindrance or, in any case, a brake on the development of a genuine European policy, especially with regard to the implementation of a genuine judicial area. What some thought or even announced - late European Community protection of fundamental rights - seems to have been reabsorbed in recent years. What seemed impossible at the beginning is now possible when fundamental rights are a value and objective of Europe, even before the construction of a single market.

After December 1, 2009, we are at a crossroads, once the Lisbon Treaty and the Stockholm Program rooted fundamental rights.

- No one can blame that EU has not said catalog of fundamental rights although they would need at least one jurisdiction setting - since Article 6 of the EU Treaty states that the Chart "proclaimed" at Nice, then "adopted on 12 December 2007, has the same legal value as the Treaties (Art. 6.1. TEU);
- The Union shall accede to the European Convention on human rights and breaches of fundamental rights as guaranteed by the ECHR and as part of Union law as general principles (art.6.2.TEU), bond required by the Commission after the memorandum of 4 April 1979 [2] that the Stockholm program now qualifies him as "primordial" and demand "urgent" [3];
- Along with the disappearance of the three pillars, all competences regarding fundamental rights in the European Union shall apply to the area of freedom, security and justice, well-known catalyst of verticality.

This latter point is not trivial, since, since the 1980s, the Single European Act, it is clear that all attempts to approximate the penal regulations of the Member States, based on cooperation and legal assistance arising from intergovernmental cooperation without guarantee genuine European criminal policy scale remained always announced and always postponed.

On the other hand, the Lisbon Treaty provides a legal basis for the existence of a European public prosecution, but it could be also due to multiple or severe repression.

In this respect, the additional approaches considering both instruments incomplete or ineffective investigation and prosecution of criminal cooperation and

insufficient protective rules. This fact has prevented the establishment of a pursuit authorities and central public action was exercised only to protect the financial interests of the Union.

2. The prospect for the European Public Prosecutor to be the pledger for respecting the right to defense

From the point of view of the rights of defense, in addition to traditional government guarantees, the establishment of a European Public Prosecutor could not be assessed only in terms of solidarity and clarity of institutional guarantees that you will set up for the rights of defense, security will remain however, closely related to the progress or failure of the criminal judicial cooperation instruments in the area of freedom, security and justice, as outlined in the Lisbon Treaty.

Regarding the institutional safeguards that will be put in the new institution, the European Union still has many unanswered questions regarding the status of European prosecutor and the legal framework of the right to defense: Who will be the European Public Prosecutor? Where do I start defense rights?

After the establishment of the European Public Prosecutor announced, but choked in the bud the Constitutional Treaty, the Lisbon Treaty has sealed his act of birth, circumstance led the distinguished lawyer Bertrand Favreau, President of the institution of human rights and European lawyers in his speech at the International Conference of Public Prosecutor attached to the Court of Cassation of France (Paris 2010) make the following assessment: "But it is a newborn whose features still do not know, nor nature, nor future development. European prosecutor perpetual becoming, is yet unknown opponent profile and therefore unsafe for defense".

About the status of the prosecutor, the Strasbourg jurisprudence clearly expressed the view, in the sense that "the prosecutor represents the prosecution, it is the other party to criminal proceedings" and specifies the Nikula v. Finland judgment: "The defendant and prosecutor have distinct interests and opponents and opposing the same time." Similarly, the same point of view was stressed by the EU Court of Justice in the Case Fahri c to France [4], so even then the status of the European Prosecutor, his powers, how to appeal against decisions can only interpellate from the beginning, the rights of the future defender party that will prosecute.

Since then, his status, his powers, how to appeal against its decisions can only be challenged by the beginning of the future rights defender party that will follow.

2.1. Genesis and operation of the European Public Prosecutor

To talk about the genesis of the project European prosecutor must refer to the year 1989, the year in which it was drawn by the European Court of Justice (ECJ) the novel decision called "Greek corn" [5], which establishes the obligation for

Member States to assimilate Protection of Community financial interests with those of their own financial interests (principle of assimilation). Besides, in this decision results the formula which will become a genuine European standard sanctions "which are effective, proportionate and dissuasive".

After a short period, the Directorate General of Financial Control of the Commission organized together with the European Parliament, an International Congress which will be the origin of the creation of an entire network of associations of Research on European criminal law. This was for the Commission and Parliament the opportunity to implement the expert groups which had in common the protection of the financial interests of Europe by either administrative, criminal penalties, or by sanctions of the two categories.

Several statutes were conceived, successively: that of the European prosecutor after Corpus Juris in 1996 - 1997, completed version of Florence in 2000, resumed in a communication to the Commission [6], before it disappeared as a result of the Intergovernmental Conference of Nice, and then returned in 2001 in the Green Paper [7]. Finally it came to designing a European parquet peer "from Eurojust" for future possibly in Article III - 275 former constitutional treaty and finally resumed, the Treaty of Lisbon, Article 86 TFEU, which gives a broader, including the great crime which has a transnational size [8].

Although various documents presented have provided different aspects, so far, only Corpus Juris is inconclusive without neglecting size correlative procedural rights.

As an attempt of European criminal law, *Corpus Juris project* came to the conclusion that unification of the parts of criminal law was necessary and proposed course within the limited scope of protection of financial interests, a detailed inventory and often innovative procedural guarantees. Combining the principle of territoriality and the principle of judicial guarantees, the Corpus Juris incorporated all the European powers and the international rights of the defense, with direct reference to the richness of the international doctrine of human rights, the ECHR jurisprudence and what was still ECJ. In addition, he mentioned a set of rights that should be reserved for the suspect, the accused and the rights of defense, in general [9].

Corpus Juris tried to make a summary, not as a common point, but as an autonomous rule and updated with each model. He attaches a great importance to defense lawyers and rights with reference to the various stages of procedure in litigation freedom, but also along the whole course of the contradictory proceedings [10]. However, in the eyes of critics, was perceived as an exclusively repressive text, assimilated to a simple creation process of the European Prosecutor [11].

The Green Paper, the discussion paper, drafted immediately after the removal project at the European Commission on the future prosecutor summit in Nice,

where Eurojust was the preferred solution. This solution based on a new legal cooperation body, whose logic is different, obviously remains unclear, or, in any case, only optional. Regarding the arguments of the Green Paper, it proposes the establishment of a European Prosecutor, independent, whose action would be linked to the European prosecutors but under the control of national delegates' jurisdictions in the form of centralized direction of investigations and prosecutions, limited to protecting financial interests of the Union.

The Lisbon Treaty provided a legal basis to create a "European court starting from Eurojust" and has set tasks: "to combat crimes that harm the financial interests of the Union" with the possibility to be extended simultaneously or subsequently on the "fight serious crime with cross-border dimensions "as future power" Investigation, prosecution and prosecution of the perpetrators and accomplices of crimes falling within the jurisdiction *ratione materia* stated above.

In addition, the Treaty of secondary task was entrusted to establish operating rules about regulations and directives and the European Public Prosecutor and would perform public action on these crimes, "before competent courts of the Member States".

Regarding the status of an independent prosecutor therE have been controversies starting with the question of whether or not it will be related to the principle of legality or suitability, as there is no explanation and nothing prohibits it. From this point of view, the right to defense, distinction is not without importance, without any subtlety, as the lawyer is entitled to know by whom it is called, which is the subject of the case, the law applies to all in the sense of being a loyal adversary. It is possible that the central echelon to be called an independent European Public Prosecutor, while national prosecutors, delegates may be dependent, at least in relation to their system, a case that reflects government priorities.

Depending on who will be their real interlocutor, lawyers will encounter difficulties with the rules of the nature of law that is subject to this floor, especially since criminal proceedings may be exercised before the 27th national judicial systems. When it comes to opportunity, it will be put the issue of joint and confrontation with prosecution powers of national prosecutors.

Even if it is the first implementation of the European judicial area, that of prosecutor, the Stockholm Program provides no precision, no calendar, but a methodology. Taking the logic of the Constitutional Treaty "from Eurojust" program begins by postponing the maturity. It states that the Member States and Eurojust should be put first "in order, with care, the decision 2009/426 of 16 December 2008, which, according to the Lisbon Treaty gives the opportunity to follow in the development of Eurojust in the years to follow, especially in terms of triggering investigations and resolving conflicts of jurisdiction" [12].

Closely examining the provision, it can be seen that all Member States are required to "based on an assessment of the implementation of this instrument, new possibilities could be taken into account especially the allocation of new powers of national members of Eurojust community, strengthening the powers of the College of Eurojust or the creation of a European Public Prosecutor".
The term right to defense could at least become problematic if it increases the strength of tracking of body originally established only for coordination and cooperation between judicial authorities of the Member States in a disappeared pillar [13] in which the defense would have no effective role.
It is uncertain the meaning that needs to be considered from now on institutions and actions arising from the European Union, whereas the functions of a Eurojust custody of a European Department of Public Prosecution, are generalized liability and judicial repression of individual liberty, constitutional courts criteria in countries which have declared their "attachment to the principles of liberty, democracy, respect for human rights and fundamental freedoms of the rule of law." [14] It is worth mentioning that in the case of cross-border crimes there are involved suspects of different nationalities that at every stage of a criminal investigation raise the question of equality of arms. It should be noted here that the European Norm shows unequivocally that the process must be contradictory and in any case ensure "equality of arms" between the parties, but especially between the prosecutor and convict [15].
A question of the rights of defense means also to ask ourselves about the judge who will be responsible for applying them or punish non-compliance, so the issue of judicial security.

2.2. The contours of the European Department of Public Prosecution

A European Prosecution Department has an important place in our European institutions, but must satisfy two conditions:
- Should be a useful institution, well inserted in the right and the EU institutions;
- Must be based on our national legal traditions that have proven their relevance over the centuries. [16]

2.2.1. The European Public Prosecutor should be a useful institution

Designing an institution assumes, of course, imagination, but mostly requires a clear vision of the objectives and its insertion in a determined context.

2.2.1.1. The European Public Prosecutor responds to clear purpose:

The Lisbon Treaty sets the objective of the European Public Prosecutor to investigate, pursue and prosecute the perpetrators and accomplices of crimes threatening the financial interests of the Union.

Union Budget totals considerable amounts, just like fraud, they are estimated at more than one billion euro per year.
Interstate borders are not a barrier to crime, but are really an asset and an obstacle to the investigations taking place in the states.
A European Prosecution Department would strengthen the fight by removing legal barriers due to differences in legal systems and coordination of the State public actions.

2.2.1.2. The European Prosecution Department should be inserted in a complex institutional landscape

A European Department of Public Prosecution should coordinate with the national public ministries.
Justice is a "royal" service given that the right balance between the necessary cooperation between the State and indispensable respect for national sovereignty must be found.
The Lisbon Treaty strengthens cooperation integrating issues of justice and Home Affairs along with the 'first pillar' of the Union.
This development is required. It doesn't, however, result in the creation of an integrated criminal area, since each State retains its autonomy of public action.

A European Prosecution Department should align existing cooperation
There is effective criminal cooperation:
- european arrest warrant, avoids lengthy and complex extradition procedures between EU countries.
- mutual recognition of judicial decisions, strengthens our institutions' judicial authority throughout the European Union.
- the business complexity requires a coordinated and complete agreement between the State, forming joint investigation teams.

EUROJUST is now an established player in the field of judicial cooperation; it is the privileged instrument of coordination and support actions led by prosecutors and jurisdictions of the Member States.
Making a European Prosecution Department is possible by coordinating all of this cooperation, thanks to development of EUROJUST.
A European Department of Public Prosecution can not ignore the national legal traditions. The Anglo-Saxon accuser pattern until recently operated without a Department of Public Prosecution and the French model is based on a fully integrated department of public prosecution in judicial authority and has no power to send to provisional arrest.

Each member country has its own experience and vision of the criminal proceedings.

2.2.2. The European Prosecution Department must rely on national legal traditions

This is why the future of the European Department of Public Prosecution is in the dialogue and exchanges between our national traditions as much to learn from previous systems. For example France is engaged in a thorough reform of criminal procedure, asking the following questions:

- How to ensure better respect of the rights and freedoms during procedure? The existence of a judge is not a panacea. I saw this both in France and in other countries. Germany, Italy, Austria and recently Switzerland have suppressed.
- How to ensure the effectiveness and impartiality of investigations? Germany chose a criminal investigation and prosecution entrusted to officials of the Prosecution Department and the establishment of an investigating judge to control the coercive measures. Austria and Switzerland have chosen the transfer of the investigation from the investigating judge to the prosecution department.

Reforming the criminal proceedings in France will approach the systems in place in other EU countries, the magistrates of the prosecution department direct 96% of the judicial police investigations, the next step being to direct them in full.

Surveys of the prosecution department will be improved to better protect victims' rights and guarantees of defense and create a judge of investigations and freedoms will ensure fairness and impartiality of the investigation.

2.3. Judicial guarantee and defense rights.

The Lisbon Treaty states that the European Public Prosecutor must exercise public action on crime "in the courts of the Member States". We will try to illustrate in what sense will be carried out the guarantee that asks arsenal vertical hierarchy (power of investigation, prosecution trigger power, power to require coercive measures, sending power to the jurisdiction of the court) before the courts' appropriate "of the 27 Member States.

Judicial guarantee as a fundamental principle of European law is better guaranteed in the European control as in any other is needless to mention that litigants in the 27 Member States addressing European jurisdictions to require the highest level of security. Access to justice is one of the constituents of a community of law. This principle of European law without blemish, and always endlessly reiterated sanction, the guarantee is now more than ever strengthened by Article 47 of the Charter of Fundamental Rights of the European Union in which noted, moreover, before the consecration of the nature of coercion, that it "will go further than the ECHR, since not only guarantees everyone the right to the hearing of his case fairly

public, and within a reasonable time by an independent and impartial tribunal, previously established by law, but and the right to be heard by the EU institutions before any individual measure which would affect adversely is taken against him and the right to access the file of his interest. [17]

Regarding the verification made by the judge, the exercise of public action must take place "before competent courts of the Member States". This problem seems to be set for trial jurisdiction, the security issue remains intact at the stage of investigation, ie the early stage which may be required or ordered measures called "coercive" in the territory of 27 countries. The principle of judicial security implies that a European court must undergo rigorous judicial mechanisms. Who will review the legality of the arrest and detention? The same question arises in respect of disputes concerning measures of investigation.

Of course, the first part is for the defender as he was the one intervening in the freedom dispute. [18] This role must be examined in comparison with the advantages of Strasbourg and especially the right to liberty and security under Article 5 of the Convention. [19] On this point, premonitory Corpus Juris envisaged the most interesting and most innovative proposal [20].

It appears that those who have drawn it had foreseen that, strictly applying the principle of legal security, throughout the preparatory phase, an independent and impartial judge called "judge of freedoms", designated by each Member State, tasked respect judicial guarantees (Article 25 bis -1). This judge has exclusive jurisdiction to order outside the order of arrest, any measure or any measure conservative research on conduct which is the subject of prosecution. With regard to the Green Paper, it opted for a "national judge of freedoms" without any further details.

Regarding control of conflicts of competence at all levels, it is unlikely that it will be left flooring, choose "nationality" jurisdiction or control of the judge responsible for ordering or coercive acts which he calls, or to choose the Member State "it suspects to judge" as required by "the Green Paper" [21].

In terms of cross-border crime, if it is possible to choose the legal system that provides a minimum guarantee for the defendant, a European criminal procedure would be built on the lower standard, with a negative image for the European justice. Increasing Eurojust powers under the decision nr. 2009 / 426 of 16 December 2008 to resolve conflicts of jurisdiction seems to make guarantees about similar problems.

This leads inevitably in terms of procedural safeguards to think that any deepening of European criminal policy involves judicial guarantees which apply to all stages of the procedure, and therefore the creation of a European Pre-Trial Chamber attached to the Court of Justice itself called upon to exercise criminal control and Corpus Juris 2000 version called Florence came to this conclusion [22].

The project of a European Public Prosecutor could not discern then in the light of all the powers of the Community the right to liberty and security, the rights of defense and due process theory often more protective than actual national laws which apply the full procedure proposed. It necessarily falls within a framework of rules arising from international instruments, particularly European: ECHR transposed into national law of the Member States and the Charter of Fundamental Rights.

The action of a European court will obviously be subjected to review, to come successively the two European courses. In fact, if in 2005, with the Bosphors Air Lines sentence, the European Court has put the principle that the protection of fundamental rights provided by Community law is considered as "equivalent" to that provided Convention [23] mechanism, here it is only a presumption and it is not indisputable.

Regarding the rights of the defense, the Court of Strasbourg will have the final say in what is a dialogue rather than a competition of European jurisdictions, to all the rules dictated by the Union, committed to the principles of the Convention by Article 6 TEU (Treaty on European Union) and then to adhesion.

The necessary matters to create a European Public Prosecutor, are both necessary in a criminal law preliminary procedural likeness and substantial rules for all cross-border damage to the interests of the Union.

In truth, actually it seemed impossible to create a repressive institution without the Union to be able to provide procedural rights and judicial protection of individuals. Therefore the implementation of a European Public Prosecutor must be assessed globally, in terms of the level of security offered by the European judicial area.

Conclusions

Moving from horizontality to verticality which is required by the establishment of a European Public Prosecutor is undoubtedly difficult. But it is also an opportunity to take distance, to rethink the area of criminal justice that the Union wants to equip itself with. It is also a way to find a balance between the various tools at disposal regarding the law of each Member State (harmonization, unification, mutual recognition) and to give a well-established role for each character (either national or European).

I would like to note here something that Henri Labayle said: "Time for disputes has passed. Tensions must be adapted to the stake which is the realization of a true area of freedom, security and justice and the need to impose legitimacy to citizens" [24].

Professor John Varvaele proposed a very convincing way to get to accept the challenge. The proposed method, on the general rules is to reflect:

- on one hand, based on contextual parameters (such as the constitutional principles of the Treaty, the choices already made by Article 86 sword and shield functions of penalties).
- on the other hand, starting from parameters substantially (which require an independent European Public Prosecutor, especially in relation to the executive, impartial and responsible) [25].

Concerning the question posed in the case law, not all questions have found an answer, but their identification and the concrete way of posing them are all insurances that we are moving forward. Thus, there is a progressive commitment towards establishing a European public prosecutor well integrated into the EU law, which also relies on our national traditions, the way of a European criminal justice grounded in practical reality.

Finally, when it comes to more concrete functioning of a future European public ministry, two key axes will be given: on the one hand, the issue of proof in criminal justice is obviously essential and inevitable, on the other hand, the equally important issue of the rights to defense.

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