

Frictions on Cross Border Cooperation in Criminal Matters Involving Terrorism Threats – Romanian Standpoint

Marius-Adrian Arva

"Alexandru Ioan Cuza" University of Iași, Romania, arvamariusadrian@yahoo.com

ABSTRACT: In countering terrorist crimes, European organizations with police and judicial jurisdiction have emerged as key players in this field, although often being found on a competitive institutional battleground, especially this being the case of Europol and Eurojust. The methods we used consist in a detailed analysis of applicable European provisions, established doctrine, standpoints, press releases and official statistics, and last but not least the presentation of a well-grounded opinion on the reported disagreements. Through the reform to which Europol is currently undergoing, the Agency is self developing as a central element of the European internal security architecture in conducting investigations and operational actions. We emphasize the tendency to widen the competencies of the European Prosecutor's Office, whose duties are likely to overlap with those of Eurojust, and although Eurojust does not have the vocation of a genuine indictment body, according to the EU Treaty, the European Prosecutor's Office may be established from Eurojust, hence under its oversight. Europol is willing to take on the role of managing EU-wide operational counter-terrorism activities, but as for Eurojust, the measures needed to strengthen the Union's response to terrorist threats can only be implemented by creating a framework narrative in which the European Prosecutor's Office is directly subordinated to Eurojust.

KEYWORDS: Europol, Eurojust, cooperation, jurisdiction

Introduction

Taking into account the two systems of thinking encompassing the European community in the context of the UK's leaving the European Union, namely the imminence of the need for the Union's internal structures to be dismantled in order to avoid a total dissolution of the Union (Kaeding, Pollak & Schmidt 2019, 126), in contrast with the achievement of a stronger and more durable union, as European leaders have made a commitment to a secure and safer Europe (The Rome Declaration 2017), there is a need for reflection on the harmonization and approximation of European norms in the field of cooperation in criminal matters, especially regarding terrorism (Calderoni 2010, 7).

Thus, in a world where borders and barriers between different systems of law fade away (Joutsen 2006, 7), even though terrorist networks do not necessarily envisage such a legal framework when they go through their criminal activities (Klip 2005, 118), it is reasonable to assign each criminal justice system with a set of commonly agreed definitions and instruments for a unitary approach of the phenomenon (Klip & van der Wilt 2002, 78), one of the objectives of such an approach being to prevent the development of terrorist organizations on the territory of states that have not previously encountered such a scenario or whose criminal justice system would not deal with the complexity of the terrorist offenses.

In the structure of the area of freedom, security and justice, as stated by the Treaty on the Functioning of the European Union, an important role was played by the European organizations with functional police and judicial powers, which due to the competitive political context, the uncertainty of legal provisions and the existence of areas of competence with similar features they stand on a competitive institutional ground in which the relations between them oscillate between cooperation and rivalry, especially this being the case of Europol and Eurojust (Bures 2013, 68) each of these agencies having an interest in legitimizing their *status quo* amongst other institutional actors (Antoine 2014, 7).

Europol's Developments

The European Police Office (Europol) is the EU's central law enforcement agency with the role of strengthening cooperation relations between Member States in order to prevent and combat organized

crime and terrorism (Europol Review 2010, 7), while maintaining an ascendant course in development capabilities on responding to new challenges and requirements of national police institutions (Europol review 2016-2017, 7).

Currently, operating under Regulation (EU) 2016/794 on the European Union Agency for Law Enforcement Cooperation (Europol), the European Police Office carries out the following functional activities: *collects, stores, processes, analyzes and performs the exchange of information, including operative information in criminal matters; notify EU countries without delay, via the Europol National Units, of any information or links between criminal offenses concerning them; coordinate, organize and implement operational actions to support and strengthen the actions of the authorities of the EU countries; participate in joint investigation teams; Supports EU countries in the fight against organized crime, promoted or committed through the Internet* (Article 4).

According to the new regulations, in addition to the practical and operational role of the Agency in providing information exchange in criminal matters and in facilitating ongoing cooperation with Member States (Djupdal 2018, 46), Europol is currently developing as a core element of the European internal security architecture (Lungu 2018, 28) in order to support and reinforce the actions of the competent authorities of the Member States, carried out either collectively with the competent authorities, in joint investigation teams or in cooperation with Eurojust (Article 4 Section (1) Letter c) of Regulation (EU) 2016/794).

Through this reform to the agency, a multidisciplinary treatment is being applied, in order to effectively prevent the terrorist phenomenon, which integrates criminal and security policies, with the aim of incorporating investigations and prosecutions, thus creating a quantifiable result on informational exchange and police actions (Europol 2015, 57).

A primary tool for Europol to carry out its functional responsibilities in the field of transnational cooperation is the possibility of participating in the activities of joint investigation teams, teams in which the Agency staff has the capacity to manage the information obtained in order to effectively deal with the investigation, Europol being able to certify the need to set up such a team (Article 5 of Regulation (EU) 2016/794).

In this respect, within the meaning of the European provisions, joint investigation team (*hereinafter referred to as "JIT"*) means a team made up of members from at least two Member States, with a precise and limited purpose, for carrying out criminal investigations in one or more Member States constituting the team, when it is necessary to carry out difficult investigations involving the mobilization of important means or when several Member States conduct criminal investigations, in which the circumstances of the case necessitate coordinated and concerted action (Article 1 Section (1) Council Framework Decision 2002/465/JAI), bearing in mind that the priority of setting up such teams subsists in the fight against terrorist offenses (Point 7 of Council Framework Decision 2002/465/JAI Preamble).

In the light of these considerations, the Romanian national legislature has agreed to regulate the procedure for setting up joint investigation teams in cases involving offenses that Europol is committed to.

Thus, with regard to the investigation of terrorist offenses, the judicial authorities, namely the Directorate for the Investigation of Organized Crime and Terrorism (DIICOT), through its Chief Prosecutor (Article 183 Section (1) of Law no. 302/2004), propose to other participating States that Europol should be included personally in the JIT (Article 4 Section (1) of Law no. 56/2018), and will send to the Agency a participation request, via Europol National Unit (Article 7 of Regulation (EU) 2016/794), after obtaining the agreement of the other participating States authorities (Article 4 Section (2) of Law no. 56/2018).

Other means of transnational cooperation represents Europol's ability to request national competent authorities for the initiation, the leading or the coordination of a criminal investigation which fall within the remit of the European Agency, requesting that national judicial authorities have the possibility of declining (Article 6 Section (1) and (3) of Regulation (EU) 2016/794), the issues raised being faithfully transposed into Romanian law (Article 5 of Law no. 56/2018).

Observing the multidisciplinary context in which JITs can be set up, the speed of investigation, the increased information flow and the de-bureaucratization of the procedure involving the transmission of international solicitation addresses (Block 2011, 96), under its coordinating role, Europol provides quick access to relevant information available in other countries than those in which the JIT operates, facilitates the exchange of information between stakeholders through a specialized secure network (SIENA) (Europol, 19), providing logistical, analytical and forensic support (The Network Of National Experts On JIT 2017, 23), all of which are being enhanced by Europol liaison officers (Article 8 of Regulation (EU) 2016/794 and Article 8 of Law no. 56/2018).

In line with the Agency's operational outlook, we underline its receptiveness to the development of analytical capabilities in order to support the identification, coordination and implementation of multidisciplinary teams working with Member States and developing a quick response to terrorist attacks (Europol 2018, 4), an example in this sense being the development of an operational model called the *Counter-Terrorism Joint Liaison Team (CT-JLT)* (European Parliament 2016), with an active role in conducting cross-border investigations into terrorism (Council of the EU 2018, 3).

But the emergence of links between international crime and terrorism has called for the indispensability of centralizing the information flow within the Union, thus appears for the first time at European level a center that provides the Member States with a set of synchronized tools (Wainwright 2016, 17), consisting in the development of the *European Counter Terrorism Centre (ECTC)* emerging from Europol, which works in line with the Agency's regulatory basis, with the aim of maximizing the operational intelligence exchange for conducting counter-terrorism activities (Europol 2019, 63).

Thus, in terms of information distribution, despite the fact it was suggested in the past that the idea of exchanging information between national authorities and Europol being voluntary, the level of involvement of the Member States varies according to the national factor involved in policing and informational exchange, which alters the efforts of Europol to combat terrorism (Bures 2011, 93-94), over time things have evolved, nowadays the efficacy of the development of SIENA alike software's, alongside with the establishment of teams and networks of experts, such as the one mentioned above - (CT-JLT) (Europol 2017, 29) being extremely valued in the fight against terrorism.

At the same time, in order to combat online terrorist propaganda at ECTC was developed the Internet Referral Unit (IRU), a unit composed of specialists from various areas of expertise, ranging from experts in religious terrorism, translators, software developers, police officers with experience in countering terrorism, accountable for supporting competent authorities with operational analyzes, reporting online content of extremist nature, detecting and removing online propaganda content (Europol, www.europol.europa.eu).

Thereby, the IRU supports online content inquiries, at the request of Member States, providing operational support through forensic and technical analyzes, as well as field trials, focusing lately on facilitating transnational access to electronic evidence (Europol 2017, 7).

Notwithstanding the reported skepticism in the field that indicates the uncertainty with which competent national bodies address the distribution of confidential or classified information to Europol by limiting access to intelligence obtained in connection with terrorist acts (Wilkinson 2006, 175) or the perception of the informational exchange through Europol as a burden, and not as added value (Bures 2016, 64), in October 2017, the ECTC, in close cooperation with Eurojust and the European Judicial Network, set up the SIRIUS Project (Eurojust, www.eurojust.europa.eu), which originally consisted of an online platform for law enforcement agencies that facilitates the sharing of knowledge, good practice and expertise investigating online crime, with particular attention being paid to counter-terrorism (Europol 2017), is currently seeking to allow access by the judicial authorities (Council of the European Union 2018, 1).

By balancing the uncertainties mentioned above with the program's effectiveness, the European legislator is confident within the capabilities developed by SIRIUS, by including it into the list of potential platforms that can provide secure means of transmitting and facilitating procedures in the draft regulation on European Production and Preservation Orders for electronic evidence in criminal matters (European Commission 2018, 21).

Applying methods that have been proven effective in other areas of crime prevention, methods such as joint liaison teams, confrontation of operative information, the expansion of databases and the concentration of resources on social networking and financial flow analysis, ECTC succeeded within a short period of time to be developed as an important pillar on counterterrorism, thus newly created databases being an important source for present and future terrorist-related investigations (van Gemert 2018, 39).

Therefore, in relation to the multidimensional development trends and to the priorities established according to the programmatic documents, Europol through the European Counter-Terrorism Center is willing to take on the role of managing the operational anti-terrorist activities in the European Union as a whole, as evidence standing the ongoing projects for the centralization of prevention management, information exchange and the coordination of police investigations in countering terrorist activities.

Progressive restraints of Eurojust

According to the former District Chief Prosecutor of the Court of Paris, François Molins, *The quality of judicial cooperation in the fight against terrorism is a big challenge. We cannot work in silos in our countries anymore. We need an overall approach. To strengthen and bolster judicial cooperation, we need to go through Eurojust, the only European agency able to do that* (Eurojust 2018, 18).

Starting from this statement, and taking into account the substantial changes to the functioning of Eurojust, which will apply from 12 December 2019 (Article 82 Section (2) of Regulation (EU) 2018/1727), it is required to study the provisions of the new Regulation on The European Union Agency for Criminal Justice Cooperation (Eurojust), without omitting the results obtained by the Agency thus far.

Thus, we show that Eurojust is the body with a legal personality of the European Union (Article 1 Section (3) of Regulation (EU) 2018/1727) whose mission is *to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol* (Article 85 Section (1) of TFEU).

The new Eurojust Regulation reforms the Agency's operational principles and structure to improve operative efficiency (European Council, www.consilium.europa.eu), bringing novelties to the Agency's operational activity, as follows: it has a proactive role, acting on its own initiative in coordinating inquiries, tracing tasks and carrying out case analyzes (Article 3 (2) of the Regulation); assists investigations that may have repercussions at European level, even if they involve only one Member State (Article 3 (6) of the Regulation); strengthens operational functions by reducing the administrative workload of national members (Article 8 of the Regulation); establishes a close cooperation system with the European Prosecutor's Office (Article 50 of the Regulation) and reinforces cooperation with Europol (Article 49 of the Regulation).

In particular, Eurojust is an efficient team of judges, prosecutors and other legal experts working in the same location, but continues to function as members of their national agencies. For this, it is an advantage that they have quick access to information and expertise, each member of Eurojust knowing the applicable legal system in their state of origin, thus having the opportunity to consult the other members on issues encountered (Bures 2006, 64).

Understanding that Eurojust's mandate ceases when investigations or prosecutions are carried out by the European Public Prosecutor's Office (Article 3 Section (1) of Regulation (EU) 2018/1727), whose competencies are currently limited to crimes that affect the financial interests of the Union (Article 4 of Regulation (EU) 2017/1939), but observing the intention of European leaders to also engage it in the investigation of cross-border terrorism (European Commission 2017), beyond current powers that have been established (Macron 2017), we underline the view that states that Eurojust does not have the vocation to become a true European indictment body and cannot directly carry out prosecutions nor criminal investigations (Brière 2018, 4).

However, we do entirely agree with that judgment, in the sense that the actual legislative context does not set out explicit powers regarding the possibility of criminal investigations directly by Eurojust, meaning that the European legislator, willingly did not comply with the provisions of article 85 Section (1) Subsection 2 Letter a) of the Treaty on the Functioning of the European Union, according to which Eurojust's powers may include, **but are not limited to**, *the initiation of criminal investigations (...)* and the possibility of mandating Eurojust with the execution of criminal proceedings in certain cases.

Thereby, taking into account the recommendations of the Committee on Legal Affairs (European Parliament, europarl.europa.eu) to develop a coherent legislative system for the European Public Prosecutor's Office and Eurojust, that reflects the functional differences between the two European agencies, as well as the conclusions of the European Commission's impact assessment (European Commission 2013) that states the high efficiency of the European Public Prosecutor's Office organization was followed by the establishment of a legal framework for an independent and efficient European Prosecutor (European Parliament 2016).

Regarding the total independence of the European Public Prosecutor's Office, we express our concern that according to the EU Treaty, such a European Criminal Investigation Agency can be set up *from Eurojust* (Article 86 Section (1) Subsection I of TFEU), **hence under its authority**, and not based on mutual cooperation or on the development of operational, administrative and management links between them (as putted by Article 100 Section (1) of Regulation (EU) 2017/1939).

Even taking into account the negative findings on criminal investigations and prosecutions of cross-border terrorism (European Commission, ec.europa.eu) that require the imminence of strengthening the Union's response to terrorist threats by amending the EU Treaty in order to also extend the mandate of the European Public Prosecutor's Office for terrorist offenses affecting two or more Member States (European Commission, ec.europa.eu), we can only conclude that, according to the Treaty on the Functioning of the EU, the European Prosecutor's Office must directly subordinate to Eurojust.

In this respect, without ignoring the role of the European Prosecutor in carrying out investigations and prosecutions, thus exercising the prerogatives of a genuine judicial power, in contrast to Eurojust, whose role is to support the work of national authorities and to carry out coordination and cooperation between the national bodies responsible for investigating and prosecuting criminal offenses (Deboyser 2015, 82), we stress out the concurrent view expressed by the Chamber of Deputies of the Romanian Parliament through the reasoned opinion in the interparliamentary political dialogue, according to which (...) *the optimal use of pre-existing European coordination mechanisms in criminal matters, has not been fully implemented (...)*, opting on strengthening Eurojust and making full use of the powers given to it (Romanian Chamber of Deputies 2013).

Similarly, in the opinion expressed in the context of the Proposal for a Regulation on Eurojust, the Romanian Parliament's Chamber of Deputies supports the attribution to Eurojust of some key competences, namely the possibility of initiating criminal prosecution or conducting criminal investigations (Romanian Chamber of Deputies 2013, 2).

Further on, finding divergent views on the original text of the Regulation establishing the European Public Prosecutor's Office, according to which the establishment of such an agency is premature and would lead to the erosion of Eurojust and not to its development (Czech Senate 2013), given that strengthening and intensifying pre-existing mechanisms at the level of judicial authorities and agencies to combat cross-border crime are more effective instruments (Dutch House of Representatives 2013), we emphasize that the imminent extension of the European Public Prosecutor's Office mandate in the field of terrorist offenses cannot result in the development of Eurojust's role as an *essential link* in the coordination of terrorism prosecution, as the promoters of this trend have concluded (European Commission 2018, 14).

Moreover, the argument that Eurojust's disengagement for the benefit of the European Public Prosecutor's Office in the field of terrorism would facilitate Eurojust's cross-border investigations in other areas of cross-border crime (European Commission 2018, 14) can only be hilarious, leading to

the conclusion that any other transfer of competence to the European Public Prosecutor's Office strengthens and does not erode the European Union Agency for Criminal Justice Cooperation.

Thus, taking into account the ruling of Article 86 Section (4) of TFEU, which establishes the possibility of extending the powers of the European Public Prosecutor's Office to other serious forms of crime with a transnational impact, as well as the positive support of the political and academic environment manifested to supplement the attributions of European Public Prosecutor's Office with the investigation of cross-border terrorist offenses (Giuffrida 2017, 149), our intention is not to criticize the opportunity of expanding the sphere of competence but to underline the existing administrative options, namely to establish such a European judicial body, hierarchically subordinated to Eurojust, especially given that the establishment of a European Public Prosecutor's Office operating in parallel with Eurojust, concurrently maintaining relations of cooperation between the two European agencies would only result in the introduction of an element of complexity in the institutional framework of the Union (Nato 2016, 332).

It is true that one of the reasons for the establishment of Eurojust was to set up a core for a future European Prosecutor (European Parliament 2001, 33), but we have to say that in the time elapsed since the early stages of Eurojust, the European legislator so far has been concerned to increase the mandate of the agency, with the European Prosecutor's project evolving in a parallel approach and not by suppressing the functional attributions of the European Union Agency for Criminal Justice Cooperation.

As for the general legal framework for combating terrorism, we show that Eurojust's role is particularly appreciated in terms of achieving cooperation through joint investigation teams as well as coordination meetings facilitated by Eurojust (Point 7 of Directive (EU) 2017/541 Preamble), not least by endorsing the Agency's position as cooperation and coordination of investigations in the event of a conflict of inter-state jurisdiction (Article 19 Section (3) of Directive (EU) 2017/541).

Likewise, the role of Eurojust as an operational and strategic actor in combating terrorism, facilitating multilateral judicial cooperation, coordinating and exchanging intelligence in cross-border investigations of terrorism It is also highlighted (Council of the EU 2018). In this respect, Eurojust is proving its efficiency in accelerating the execution of European arrest warrants, European investigation orders, as well as information and evidence exchange in ongoing investigations.

There were 108 European arrest warrants issued in 2014 for terrorist offenses and 79 such mandates issued in 2015 (e-justice.europa.eu) and even if we do not have a statistic of the European investigation orders implemented for terrorist offenses, we underscore that there has been a considerable increase in the use of this instrument, from 86 such orders issued in 2017 to 830 issued in the year 2018 (Eurojust 2017; 2018, www.eurojust.europa.eu).

Without overlapping with Europol's specific tasks in setting up JITs, we show that Eurojust plays a key role in setting up the team, providing operational and technical assistance to JITs (Article 4 Section (1) Letter f) of Regulation (EU) 2018/1727), such as assistance with the discovery and admissibility of evidence, involvement of national members or co-ordination between partners (Council of the EU 2017, 21), which is why the coordination of the Secretariat of the Network for joint investigation teams, made up of Eurojust staff, is ensured by Eurojust (Article 48 Section (2) of Regulation (EU) 2018/1727). Furthermore, the European provisions state that national members seconded by each Member State have the competence to participate in, and to set up joint investigation teams (Article 8 Section (1) Letter d) of Regulation (EU) 2018/1727).

In another train of thoughts, we phrase that in recent years an increasing number of Joint Investigation Teams have been implemented at Eurojust to investigate terrorist offenses, and that a considerable number of JITs have been set up for offenses related to illicit activities of terrorist groups (Council of the EU 2016, 2), including migrant trafficking, which is why, like European officials who advocate encouraging national authorities to create an automatism in setting up joint investigation teams in complex transnational cases such as terrorist attacks (Eurojust 2013, 2), we are certain that a future evaluation of Eurojust will considerably increase the added value of joint investigation teams with regard to the investigation of terrorist offenses on European soil.

Casework and joint activities in the priority crime areas, 2015-2018

		TERRORISM	MIGRANT SMUGGLING
Cases (sum of new cases and ongoing cases from previous years)	2018	191	157
	2017	178	153
	2016	124	133
	2015	74	94
Joint investigation teams (sum of newly established JITs and ongoing JITs from previous years)	2018	11	12
	2017	12	14
	2016	6	11
	2015	5	10

Figure 1. Case work and joint activities at Eurojust for terrorism and migrant smuggling offenses between 2015 and 2018 (screen capture from *Eurojust Annual Report of 2018*, page 42)

Cohabitation of Europol and Eurojust

As for the relations between Eurojust and Europol, it is to be noticed that, at least formally, the idea of a continuous cooperation in the field of the two agencies, as well as in various analytical projects and thematic objectives (this includes ECTC) (Eurojust 2018, 34), more precisely by recruiting a national expert (prosecutor) in the fight against terrorism, seconded to the ECTC, to facilitate the exchange of information between Eurojust and the ECT (Eurojust 2017, 31), this was not always the degree of interinstitutional cordiality.

Thus, the motivation behind the establishment of Eurojust consists in that the expansion of judicial cooperation in criminal matters, together with Europol's police powers, is a key factor in establishing an appropriate legal framework for the European Union (European Parliament 2001, 33), in other words, in order to counterbalance activities on judicial cooperation in relation to already existing police cooperation instruments (Mangenot 2006, 52).

Other researchers also argued that the establishment of Eurojust had the objective of proving the increased efficiency of European judicial cooperation in spite of police cooperation (Mangenot 2006, 50), but it was shown that in fact Europol proves to be the organization with a higher degree of autonomy vis-à-vis the Member States in terms of human resources (Bigo 2007, 17).

At the same time, interinstitutional relations of cooperation and information exchange have been shown to have been altered firstly by the obstacles encountered by strict data and information security protocols at Europol (Bures 2006, 88) and ultimately due to rivalries between the two European agencies (Bures 2006, 88).

However, we believe that the hatchet has been buried, with a strong cooperation relationship between the two European agencies, taking into account the active involvement of Europol in Eurojust's ongoing counter-terrorism investigations, as well as the delegation of a Eurojust prosecutor to Europol's headquarters (Council of the EU 2019, 7), thus taking the ultimate interest in ensuring an area of freedom and security for European citizens.

Moreover, the European legislator reserved in the new regulatory framework of Eurojust a whole article consisting of six paragraphs in which the concrete methods of achieving the information exchange between the two agencies are punctually regulated, while reaffirming the need to maintain a close cooperation with Europol (Article 49 of Regulation (EU) 2018/1727).

Conclusions

We emphasize the importance of each of the two major European agencies considered in the fight against terrorism in terms of policing or intelligence, on the one hand, and the judiciary, on the other, without omitting the role of effective cooperation on a horizontal and vertical basis, with a view to resolving the casework that Europol and Eurojust are invested with under the mandate given by the European legislator.

We also note that the measures needed to strengthen the Union's response to terrorist threats by amending the TFEU to extend the authority of the European Public Prosecutor's Office also for terrorist crimes, can only be accomplished by creating a regulatory framework in which the EPPO is directly subordinated to Eurojust.

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