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The Problem of a European Code of Criminal Procedure

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The idea of a European Criminal Procedure Code

Such a document as a European criminal procedure code does not exist yet. There have not been any works on its project. However, more and more voices in favour of such a codification can be heard[1]. In order to put this idea into practice, a body of experts and protagonists from all the Member States could be called to create a project of legislation. Consequently, the project should be submitted to discussion in the Member States and on the European Union forum. As the group has not yet come into existence and there is no project which could be discussed, the presentation will be of rather theoretical than practical character.

The point of departure for terminology used in the title is a methodological division of the third pillar criminal law into three traditional branches – substantial criminal law, criminal procedure and executive criminal law. Whereas substantial criminal law deals with definitions, rules of responsibility and sanctions of crimes, criminal procedure regulates the rights and obligations of the parties and state organs in the proceedings and mechanisms of cooperation in matters concerning criminal behaviour with transnational elements. Leaving aside the area of substantial and executive criminal law, I would like to deal with European criminal procedure. In case of the UE we can use the term "criminal" procedure" collaterally to "cooperation in criminal matters", where both can be defined as procedures regulating cooperation between the Member States in transnational procedures. Therefore, it constitutes a kind of international procedure, with two significant differences – its *ratione personae* scope applies to bearers of the same EU citizenship, whereas the territorial scope of application is limited to the UE territory. Thus, it operates in the European judicial space. On the other hand, it represents more than just a pattern of cooperation, on the grounds that it strongly influences national law, by forcing harmonization of the area of criminal procedure concerning crimes with transnational elements.

It has become a "commonplace" to say that crime does not stop at national borders. Such situation results in inability of domestic law to protect citizens against crime without cooperation between states. Author of the Council of Europe opinion supporting the idea of creating a model penal code for Europe, Urlich Sieber, assumes that the only way to fight problems caused by an unfinished – and incomplete – integration, is through its intensification. He shows a paradox of the European integration: „*the only possibility to cope effectively with problems caused by incomplete integration is only by further integration*"[2]. Cooperation is not only advantageous for the UE, but also for all the Member States. The Union's objective is to provide its citizens with a high level of safety

[1] P. K r u s z y ń s k i, O niektórych propozycjach rządowego projektu ustawy o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – kodeks wykroczeń (w redakcji z dnia 19 sierpnia 2000.), „Prokuratura i Prawo" No. 2, 2004, p. 11;

[2] U. S i e b e r, Memorandum für ein Europäisches Modellstrafgesetzbuch,, Juristenzeitung (JZ) 1997, p. 375-376; He calls an irony the phenomenon of fighting against problems caused by transfer of competences by the Member States on the part of international organizations, through transferring even wider scope of the competences.

within the area of freedom, security and justice, often referred to as the European judicial area. This objective is to be achieved through closer cooperation between police forces and judicial authorities and by approximation, where necessary, of the rules on criminal matters between the Member States (art. 29 TEU). First of all, a system of mutual assistance should be created, which would allow for fast enforcement of administration of law, notwithstanding the fact, that different stages of proceedings take place in different states. The first time that the idea of "*espace judiciaire européen*" was used was in 1970s by Valéry Giscard d'Estaing, who launched the idea of a European judicial space. Such was the beginning of considering the EU as a unified area for the needs of criminal procedure between the Member States. A new qualitative step was taken during the Tampere European Council, where it was considered that the principle of mutual recognition should be a "cornerstone" of judicial cooperation in criminal matters. Consequently, the Commission elaborated a program of measures to implement the principle of mutual recognition in criminal matters. According to this program, this principle could contribute to legal certainty in the EU, by strengthening cooperation between the Member States and enhancing protection of human rights. The Tampere summit resulted in building foundations to new European criminal procedure in the European judicial area and gave an impulse to develop new instruments of cooperation. The Council Framework Decision on the European arrest warrant was the first substantial measure of implementing the principle. Subsequently, the Draft Treaty establishing a Constitution for Europe adopted the wording of Tampere[3]. Its Chapter IV regulates matters of the area of freedom, security and justice. Section 4 of Chapter IV concerns the "Judicial cooperation in criminal matters" and rules that "*judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and judicial decisions*"[4].

We are experiencing an "avalanche" of new measures of all kind (decisions, framework decisions, proposals for framework decisions, programmes, green papers, statements, conventions, one charter and one Corpus Juris) in the area of European judicial area, which have been introduced, or are being negotiated. Besides, only in recent times has the EU decided to develop its own rules and mechanisms in these fields. The legal instruments governing international cooperation in criminal matters are still, in the first place, the Council of Europe (CoE) instruments. The EU legislation is usually drafted as a complement to CoE conventions. At the moment, the area of cooperation between the Member States constitutes a net of multilevel and diverse instruments, regulating several aspects in a manner often called "fragmentary" – which is a method of passing acts of legislation regulating particular problems. They concern various aspects of criminal procedure such as mutual recognition of decisions in criminal matters[5], arrest warrant[6],

[3] Art. III-270(1), Draft Treaty establishing a Constitution for Europe, as approved by the Intergovernmental Conference on 18 June 2004 (CONV 850/03);

[4] Art. III-171, Draft Treaty, op.cit.;

[5] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10, 15.01.2001; Green paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union. COM/2004/0334 final;

[6] Council framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18.07 2002;

mutual legal assistance[7], procedural safeguards of suspects and defendants[8], executing of orders freezing property[9], joint investigation teams[10], the situation of victims in the proceedings[11] and – most important – legal organs[12] governing the procedure in the EU. All these issues are regulated presently by European Union legislation. They all refer to the area of criminal procedure which is most commonly regulated within one document – a criminal procedure code[13]. Moreover, there are some aspects of the third pillar law which give an impression that an act regulating all the elements of criminal procedure – in a form of a codification, or any other – will come into existence some day in the territory of the European Union. So why add to the plethora of already existing legislation? The suggestion presented below will be to give forth a call for codification. Due to multiplicity of instruments of cooperation between the Member States, it is not expedient to present all of them in detail. Only the chosen aspects of the domain of the third pillar will be presented, which could create an assumption to believe that the whole area of European criminal procedure could go through – although rather in further than closer future – major changes, and be subject to codification which would give an outcome in a form of a criminal procedure code.

In order to present the issue of a criminal procedure code, one needs to concentrate on several points: the method of codification and application, the content and scope of problems to regulate, and – last but not least - the necessity for introducing it.

Method of codification

Even if a binding decision as to codification is finally undertaken, several other problems emerge. It would be – among others – choosing a proper legal measure for implementing the final shape of codification. It seems that on the grounds of situating the criminal matters in the third pillar the most suitable would be one of the third pillar measures[14]. The

[7] Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197/3, 12.07.2000;

[8] Green Paper from the Commission on procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union. Brussels, 19.02.2003, COM (2003) 75 final;

[9] Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, OJ L 196/45, 2.8.2003;

[10] Council Framework Decision of 13 June 2002 on joint investigation teams, OJ L 162/1, 20.06.2002;

[11] Council Framework decision of 15 March 2001 on the standing of victims in criminal procedures, OJ L 82/1, 22.03.2001; Green paper on compensation to crime victims. COM(2001) 536 final. 28.09.2001;

[12] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime. OJ L 063 , 06/03/2002; Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network. OJ L 191 , 07/07/1998; Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF), OJ L 136 , 31/05/1999;

[13] These instruments have been created in an independent manner and do not constitute a coherent entity. We can emphasize, after Neil Walker, that undertaking the task of gathering and describing the outcomes of European criminal law encounters great difficulties connected to the lack of legal structure of the documents in force. See: N. W a l k e r, A Constitutional Odyssey, [in:] Walker N. [ed.], Europe's Area of Freedom, Security and Justice, Oxford 2004, p. 3. It results from a variety of legal grounds, on which basis they have been issued, as well as from constant changing of the basis. What is more, the new instruments of regulation the criminal law area always appear.

[14] It is also assumed that necessary changes constituting legal basis for codification. should be introduced into art. 308 Treaty of the European Communities It is especially important as the main adversary of the codification ideas – Great Britain – requires applying the unanimity procedure if those changes were to be

process of facilitating and quickening judicial cooperation can be achieved by the acts of the Council: common positions, decisions, framework decisions and conventions. Also a codification can be viewed as a measure towards achieving this aim. Presently, the Treaty of the EU calls for providing the EU citizens with high level of security. In order to achieve this result measures such a cooperation and approximation of national laws are provided (Art. 29 TEU). However, in the present shape of the third pillar, the EU still lacks powers for comprehensive compilation in the area of codification. Furthermore, no measures are foreseen for this purpose. This opens field for discussion to decide which measure suits best for the purpose of codification and which one is the most probable to be agreed on.

With a wide variety of measures available, we can choose the one most successfully used in the area of criminal procedure. The most effective method should oblige the Member States to implement the proper legal measures allowing for unproblematic cooperation in the frames of integrated European criminal procedure into their national legal order[15]. The national criminal procedures would stay in compliance with the common code of criminal procedure, which should include all the technical rules of cooperation in criminal matters. It is considered that the code would be passed as an act of secondary legislation of the European Union. It could be done by means of presently existing third pillar measures: either as a convention or a framework decision. However, it seems that the mechanism of convention has devaluated recently. It can be seen by hardships with ratification and, consequently, with implementation of recently adopted conventions (such as the mutual assistance convention, or the one regulating simplified extradition procedure)[16]. Much more successful have proved recently to be framework decisions, adopted for the purpose of approximation of laws and regulations of the Member States. With their use major changes have been introduced into the third pillar legislation, among others the European arrest warrant and Eurojust. It is worth to mention in this place, that in the area of criminal law the state sovereignty is still a value strongly defended by the Member States. Framework decisions constitute a measure which it the least interfering in national law. They are not applied directly, but implemented into domestic law through the use of national legislation. Thus, it is the national legislator who passes the act which should be applied in certain area of law. They do not create national law, but they influence it in such a way that it is coherent in all the Member States and can be applied throughout the EU on similar basis.

Other solutions introducing a code point to adopting it as a measure of enhanced cooperation (Art. 40 TEU). It is a measure recommended by the TEU if such cooperation aims at furthering the objectives of the area of freedom, security and justice[17]. Alternatively, some suggest that an act of such a volume and value as a criminal procedure

finally decided.

[15] Such was the case in regards to other fragmentary regulations in the area of criminal procedure, which is the European arrest warrant. One can only regret that these regulations address only limited ratione materiae scope leaving the rest in the present, rather chaotic, form. However, creation of these instruments – though fragmentary – gives hope for taking up further challenges before long.

[16] Conventions enter into force, once they are adopted by at least half of the Member States – but only between these states; Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union OJ C 078, 30.03.1995; Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, OJ C 197, 12.07.2000

[17] It requires consent of the Council on request of the interested states;

code should be best placed in the form of a treaty – in a similar way as the constitutional treaty has been forged recently. It would be both efficient and would guard the national sovereignty feeling from harm. A treaty comes into force after due process of ratification by all 25 Member States. Such an international agreement would help to standardise the crucial areas of law. However, the major inconvenience of this solution is a lengthy and complicated procedure of achieving a consensus between all the interested states, as the Member States would have to ratify it *en bloc*.

The legislative measures will look differently when – and if – the Draft Treaty establishing Constitution is finally ratified. The pillar construction will be abandoned, and proper measures for regulating the previous third-pillar issues will be European laws or framework laws. These acts will aim at facilitating cooperation between judicial authorities of the Member States in relation to proceedings in criminal matters, and shall include the approximation of their laws and regulations (Art. III-270: "*To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, European framework laws may establish minimum rules*"). However, "*such rules shall take into account the differences between the legal traditions and systems of the Member States*"[18]. With their use the cooperation between judicial and equivalent authorities of the Member States in relation to proceedings in criminal matters will be facilitated. European laws and framework laws will become measures proper to lay down the rules and procedures for ensuring recognition throughout the EU of all forms of judgments and judicial decisions. Such legislative measures may concern issues of admissibility of evidence between the Member States. They can be also related to the rights of individuals in criminal procedure and the rights of victims of crimes. There is only one condition, which can influence negatively the legislation process - the laws are supposed to be adopted by the Council, acting unanimously and only after obtaining the consent of the European Parliament. Such a requirement may be difficult to comply with in Europe of 25 Member States. What is more, the Draft Treaty does not propose any new provisions to enable the enactment of a European criminal procedure code. Nonetheless, once it is ratified, framework laws and European laws will become main legislative measures in criminal matters and, consequently, a code of criminal procedure could be adopted in one of those forms. We can notice that the Constitution for Europe prepares a perfect framework for codification – most preferably in a form of European framework law.

There is also a possibility of creating a model criminal procedure code. A model code is – as the name indicates – just a legal model, with no binding legal force. However, it induces certain influence on functioning of the legal order and provokes changes. Attempts to construct a model criminal code have taken place not only in Europe, but also on other continents[19]. A model code was the first measure of harmonisation widely disputed on the

[18] Art. III-270(2), Draft Treaty, op.cit.;

[19] E.g. in Australia, where in 1984 a Model Criminal Code for the Australian Commonwealth was created, or in the United States – in 1962 Model Penal Code (Proposed Official Draft) came into life. Among the activities of the Council of Europe there was an initiative in 1993 by the Parliament of Europe to construct a model criminal code and a model criminal procedure code. A. Cadoppi is a representative of the doctrine in favour of such developments. He assumes that such a document could lead to adopting a common code of criminal procedure for the European Union. Even if it is not the case, the effort is not pointless as common works on relevant provisions would contribute to the movement of harmonisation of law. See: A. C a d o p p i Towards a European criminal code "European Journal of Crime, Criminal Law and Criminal Justice" 1996,

European forum. It was considered to constitute a legal form operating as a source of inspiration for reform authors, who would aim at fulfilling the main objectives in national legal orders. It was supposed to influence the sole creation of law. By its pure existence a gradual unification of law would take place[20].

Scope of the code

The second issue of concern is the *ratione materiae* scope of the codification. There are two ways of determining the substantial scope. First, all the existing instruments could be consolidated in one. Secondly, these instruments can be reconstructed in view of achieving the most effective solutions and change the cooperation mechanisms accordingly. There are several issues, which are usually regulated in all criminal procedure codes. There is always a need to invoke general rules of criminal procedure, to describe judicial and investigative organs responsible for conducting criminal investigation and court proceedings. Codification also explains the rules and stages of proceedings, and makes them binding for the parties of the procedure, connecting with them legal consequences. Below, some aspects of European criminal procedure which function presently will be presented. Gathered collectively they could give an idea about regulating the whole area of criminal procedure between the Member States: criminal procedure safeguards, structure and functioning of cooperation organs and issues of transfer of proceedings, evidence and persons between the Member States.

Safeguards of criminal procedure

One of the central issues of criminal procedure is connected with the problem of procedural rights. It is quite certain that during all stages of criminal procedure, whether it is conducted by national organs or on transnational basis, procedural rights of the parties should be safeguarded. The system of guarantees was considered not to be sufficient as the legislative interests of the Union spread on to new regions, such as criminal law. It is no longer true that the European Union is merely a “community of merchants”. Following creation of the area of freedom, security and justice it became clear that the process is directly bound with embracing procedural safeguards by the European legislation.

In the beginning of the EU existence fundamental rights were mentioned rather chaotically. Art. F TUE, later art. 6 TUE, states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. The Treaty obliges also the EU Member States to respect fundamental rights as guaranteed by the European Convention of Human Rights (ECHR). Through this manoeuvre the jurisprudence of the European Court of Human Rights in Strasbourg (ECtHR) was introduced to the EU legal order[21]. Although it is not expressed in the legislation of the EU,

No. 1, p. 16;

[20] A. W ą s e k, Europejski modelowy kodeks karny [in:] T. N o w a k [ed.], Nowe prawo karne procesowe. Zagadnienia wybrane. Księga ku czci Wiesława Daszkiewicza. Prace Wydziału Prawa i Administracji UAM w Poznaniu, v.III, Poznań 1999, (“[.....] its very existence would encourage the progressive unification of penal law”), p. 147;

[21] Also the influence of the ECJ jurisprudence should not be underestimated. It is the most active organ of the EU in the area of harmonization of national laws of the Member States. Facing the lack of statutory law in the treaties regulating the fundamental rights issues, the ECJ took into consideration also the ECHR jurisprudence. The judgments given by the Court have unifying results. It is considered that its activity constitutes one of the possible ways of harmonization – the method is called “defensive” and relies on

the Union organs have been using the safeguards as introduced in the Convention. These rights refer also to the area of the third pillar. Although the UE is not a party to the Convention, however, all the Member States have signed it and thus it is binding on the territory of the EU anyway. The Treaty provided the Convention with a supra-legislative value in regards to the national law[22]. Presently the catalogue of procedural rights has been broadened by the Charter of Fundamental Rights of the Union, a document created during the Intergovernmental Conference in Nice. The Charter, now incorporated in the project of the Draft Treaty, although lacks binding force, has influenced the concept of fundamental rights safeguards in the EU and broadened the European Convention order. It is considered that procedural guarantees in the UE have a double source: the European Convention of Human Rights and the Charter of Fundamental Rights. From this perspective a complicated construction of two legal instruments of the same scope is created[23]. Such situation of two legal instruments influencing human rights application leads to a dualistic construction of procedural safeguards of the parties[24]. Furthermore, Art. 52(3) of the Charter (Art. II-112(3) of the Draft Treaty), states "*Insofar as this Charter contains rights which correspond to rights guaranteed by the Convention […], the meaning and scope of those rights shall be the same as those laid down by the said Convention*". Therefore, the Charter concluded a reception of the Strasbourg procedural safeguards *acquis* finishing the dichotomy. Thus, we can combine the two systems – as it has been done factually by the Art. 52 of the Charter and existing jurisprudence of the ECJ – and describe particular rights and guarantees of the criminal procedure in a unified catalogue.

In the whole catalogue of procedural safeguards the right to a fair trial has a central meaning. Art. 6(1) of the Convention states that: "*everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*". Its scope extends to other rights which constitute further explanations what is understood under this notion. In the broad understanding the fair trial rule is considered to play a central role, and apply to all the aspects of criminal procedure, such as the organisation of the court, and rights of the parties. This concept has been interpreted by the

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eliminating from the national orders all the provisions contrary to the Community law. The Court has created a wide jurisprudence in this area. Consistency is the basic value in the Community law. The ECJ has been playing a central role in the process of introducing coherence.

[22] In many states the national legislators met the requirements of the Treaty, by the way of incorporating the Convention into their legal orders, as binding law. In other states the existing law has been adapted to the Convention standards. In the Great Britain the provisions have been incorporated under the form of Human Rights Act 1998, which obliges all the state organs to act in compliance with the Convention. What is more, The Code for Crown Prosecutor, emphasizes the importance of obeying the rules having source in the Convention. See: C. M i c h a l c z y k, Struktura i funkcjonowanie Prokuratury Wielkiej Brytanii, "Prokuratura i Prawo" 2003, No. 11, p. 103; also at www.cps.gov.uk; Also in the jurisprudence of the Polish Supreme Court (SN) we can find statement of the necessity of direct application of the Convention. As we can read in one of the judgments: "from the moment of entering the structures of the Council of Europe, Poland is obliged to apply the jurisprudence of the ECHR in the process of interpretation of the Polish law." (SN from 11.01.1995 (III ARN 75/95), OSNAP 1995/9/106). See: K. K u b u j, Kamienie milowe „Prawo i Życie", May 2000, p. 25; Furthermore, by making the respect for human rights the necessary condition for applying to the membership of the European Union, the Treaty gave them a fundamental role.

[23] Joining the European Convention by the EU has been temporarily postponed due to the creation of the Charter of Fundamental Rights. However, even the Charter itself does mention such a possibility.

[24] A. N o g a l, Karta Praw Podstawowych Unii Europejskiej, „Civitas – Studia z filozofii polityki" No. 6 2002, p. 100-117;

ECtHR jurisprudence for numerous occasions [25]. A detailed analyse of the concept was presented by Jean Pradel. As he assumed, the fair trial principle applies to "*every criminal case*" and "*[t]he fair trial principle is connected to the whole criminal procedure, not only to its 'core' which constitutes the basic rule of judiciary, but also to everything what is connected to its structure"* [26]. Particular elements of the fair trial rule can be found in the Charter, in Chapter VI, entitled "The judicial rights". The Charter rules in art. 47 that everybody has a right to an effective and remedy and to a fair trial. The hearing should be *"fair, public, within a reasonable time by an independent and impartial tribunal previously established by law"*. The Charter contains presumption of innocence and right to defence, where follows that everyone should have the possibility of being advised, defended and represented (art. 48, formulated on the basis of art. 6(2) of the Convention). Of course, the Member States are free to introduce higher standards than codified in the Charter, but certainly they cannot infringe the existing safeguards. Also the principles of legality and proportionality of criminal offences and sanctions should be complied with. The Charter introduces also a new understanding of *ne bis in idem* principle. Its application is extended to the whole territory of the Union. Consequently, *lis pendens* and *res iudicata* in criminal matters could become notions binding among all the Member States. Following the concept of mutual recognition of judicial decisions in criminal matters, the Charter provides that decision and judgments rendered in one of the Member States should be recognized in the whole territory of the EU. Thus, a common and unified legal area has been created for the purpose of the criminal procedure in the European judicial area, where all the judicial decisions, notwithstanding the issuing state, have equal binding force.

Moreover, one of the instruments implementing fundamental rights in the area of freedom, security and justice the Commission is a Green paper on procedural safeguards for suspects and defendants in criminal proceedings in the European Union adopted in February 2003[27]. It is aimed at enhancing confidence in judicial system of the Member States, in particular faith in procedural safeguards and fairness of proceedings. In result of carrying out a review of procedural safeguards in the Member States the Commission identified several areas of rights, which should be obeyed by judicial authorities in the EU. These are: access to legal representation (both before trial and during trial) access to interpretation and translation, notifying suspects and defendants of their rights (in a form of so called "Letter of Rights"), ensuring that vulnerable suspects and defendants in particular are properly protected and that consular assistance to foreign detainees is provided. The Green Paper states, that it was not its aim to replace the existing system of human rights as set in the European Convention. It aims rather at ensuring even higher level of safeguards and at taking care of correct application of the existing rights, rather than at confirming them.

Nevertheless, it is not the aim of this presentation to describe the particular procedural rights in the European Union. It aims at presenting a coherent and rational system of procedural rights, which might play role of a *habeas corpus* in a code of criminal procedure of the European Union. Thanks to creating the human rights protection instrument – the European Convention of Human Rights – and the planned protection

[25] According to the European Court of Human Rights fair trial rule is the central issue of the proceeding. The Court has stated many times that the right to legal assistance and equality of arms constitute elements of a wider concept which is a fair trial. Judgment Borgers v. Belgium, 30.10.1991, Series A-214-B, No. 12005/86;

[26] J. P r a d e l, Rzetelny proces w europejskim prawie karnym, „Prokuratura i Prawo" 1996 No. 9, p. 7;

[27] COM (2003) 75 final, 19.2.2003;

instruments – as The Charter and Green Paper – we can come to a conclusion that they constitute a part of *acquis communaitaire*. Taking into consideration the profound internalisation of those instruments into legal national orders there should be no impediment for them to constitute a part of a future criminal procedure code.

Principle of mutual recognition of decisions in criminal matters

Traditional judicial cooperation in criminal matters is based on a variety of international legal instruments. These are mainly characterized by the **'request' principle,** where one sovereign state makes a request to another sovereign state, which then decides whether to comply with it. This system is both **slow and complex**. Presently, in the European Union there has been a need for taking up measures leading to improving the system of cooperation between the Member States – through the use of mutual recognition of decisions at all states of criminal procedure. We can divide the decisions undergoing recognition in two kinds : judgments finishing the proceedings (sentences) and other decisions (described as *pre-trial orders*) where also decisions given in the pre-trial procedures belong. The principle of mutual recognition made the headlines of the Tampere summit, described as the “cornerstone” of cooperation in criminal matters. The next step was expressed in the Programme of measures planned in order to implement the principle of mutual recognition of decisions in criminal matters, which stated the need to execute also the decisions given also before the final sentence, so called *pre-sententielles*[28]. They can be related to various aspects of criminal procedure: from decisions ruling preservation of evidence, freezing assets and gathering evidence, through measures of confiscation, to decisions restricting personal freedom. In order to implement the mutual recognition principle on all stages of procedure and in compliance with the Tampere conclusions, the Member States set in motion energetic implementation of the principle of common judicial area, which will be presented beneath.

Investigation and cooperation organs

In the common area of freedom, security and justice, several organs have been created in order to improve and facilitate judicial cooperation between the Member States. Incorporating new organs into the existing legal order of the European Union, as well as gradual growing of their competences led to overvaluation of the theory of the unique power of the state to investigate and prosecute. More and more often critics face the question if there are actually no common European organs of administration of justice. The recent changes taking place in the European judicial area has made a strict “no” answer questionable.

The organs responsible for cooperation in the criminal matters are presently: Europol – in charge with police cooperation, Olaf – office for fighting financial criminality, busy with a narrow spectrum of cases connected to criminality to the detriment of the Communities[29], also Eurojust and European Judicial Network, being in charge of arranging cooperation in criminal matters. These organs act in the frames of the Community as well as in the third pillar of the EU. The scheme of the organs would be incomplete without mentioning the

[28] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10, 15.01.2001; Measure No. 5;

[29] Commission Decision of 28 April establishing the European Anti-Fraud Office (OLAF), OJ L 13 6, 31.05.1999;

project of Corpus Juris, a document regulating the whole criminal procedure on the Community level (although solely in regards to a narrow *ratione materiae* of cases – crimes committed to the detriment of the financial interests of the Communities). It can be noticed that these organs are responsible for some aspects of the common European criminal procedure[30].

The tasks of Eurojust and the European Judicial Network (EJN) are similar. Their activities intertwine and complement each other. They both work not from a central point (The Hague) but from the 25 capitals of the Member States. They both also share the secretariat. Their activities are based on the same priorities and they act in the same area of freedom, security and justice. The European Judicial Network has a task of facilitating and coordinating legal assistance between the Member States[31]. Its activities are connected with sharing legal and practical information between the judicial authorities if the Member States and facilitating contacts between them. The EJN decision constitutes an obligation to treat the Member States legal assistance request as a priority, or at least equally to domestic requests. In order to set the conditions of exercising such a request, consultation between the judicial organs is possible. Eurojust is an instrument of coordinating tasks of investigation of transnational crimes, aiming at the interests of the Union as a whole[32]. Eurojust has no powers of direct action on the territory of the Member States. It can act directly only in cases when a national member has, by his national law, been empowered to act in his national territory. In consequence, the operational powers of Eurojust members to act personally on their national territories depend on the powers they have been given by their respective states. The real players remain national investigative and judicial authorities. Eurojust is, as such, not a player but only a coordinator and facilitator. Generally speaking, the Eurojust members do not have Union-wide powers and Eurojust is not a single judicial unit, like the European prosecutor is supposed to be. In the Draft Treaty establishing a Constitution for Europe Eurojust is defined as an organisation supporting coordination and cooperation of national investigation organs. The Treaty mentions that the detailed scope of activities is to be regulated in a European law issued on

[30] Additionally, the operational EU units can be included to the system of organs acting in the area of freedom, security and justice – joint investigative teams. The European Council held in Tampere on 15 and 16 October 1999 called for joint investigation teams to be set up as a first step to combat trafficking in drugs and human beings as well as terrorism. In result the Council Framework Decision of 13 June 2002 on joint investigation teams was created. It introduces the possibility to set up a joint investigation team for a specific purpose and a limited period to carry out criminal investigations in one or more of the Member States. The team is created by mutual agreement of the competent authorities of two or more Member States. A joint investigation team may, in particular, be set up where investigations into criminal offences require difficult and demanding investigations having links with more than one Member States or where the circumstances of the case necessitate coordinated, concerted action. The team shall carry out its operations in accordance with the law of the Member State in which it operates. The composition of the team shall be set out in the agreement. The leader of the team shall be a representative of the competent authority participating in criminal investigations from the Member State in which the team operates. The leader of the team shall act within the limits of his competence under national law. Council Framework Decision of 13 June 2002 on joint investigation teams OJ C 357, 13.12.2000;

[31] The tasks of the European Judicial Network are formulated in the Joint Action of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network. OJ L 191 , 07/07/1998;

[32] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime. O J L 063 , 06/03/2002;

the basis of the constitutional provisions. It is also supposed to support and strengthen judicial cooperation in collaboration with the European Judicial Network [33].

One step further than in the case of all the existing organs go the proposals presented during the Nice conference, which introduce a notion of a European Public Prosecutor: the Corpus Juris project[34] and the Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Public Prosecutor [35]. They create a new concept of centralized Union-wide investigative authority, empowered to investigate and bring cases regarding financial crimes committed to detriment of the Community to Member States courts. The proposed structure of criminal protection of financial interests of the Community would differ basically from the presently existing measures. The prosecutor would be hierarchically higher positioned than domestic investigative organs. In result – they would be obliged to cooperate with him. They could not refuse to exercise a request passed by the prosecutor, which is the major difference comparing to presently existing measures of cooperation. Therefore, his decisions and requests as well as decisions rendered on his request (connected with applying coercive measures, which should be passed by national judges competent according to the domestic law) would be directly applicable. In such a vertical system of cooperation the traditional structures of cooperation would be in certain scope replaced by direct actions of a European Public Prosecutor[36]. For the purpose of investigations led by the prosecutor, European Union would constitute an integrated judicial area.

On the European forum creation of a European Public Prosecutor is a widely discussed problem. There is no such an organ nowadays. Whether it will ever come into existence is still an open question. Subsequently, the text of the Draft Treaty of Constitution itself also kept the question open, contemplating the possibility of the establishment of the office starting from Eurojust, but only if such a proposal is made by the Council of Ministers after obtaining the consent of the European Parliament. Accordingly, the European Prosecutor shall be responsible for investigating, prosecuting and bringing to justice perpetrators of offences against the Communities' financial interests. It would exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences. The detailed structure of the office is left to be decided in the secondary EU legislation – by a European law.

Presenting two documents: Corpus Juris and – created on its basis – a Green Paper on a European Public Prosecutor gave an impulse to a wide political debate on harmonisation of

[33] Art. III-174, Draft Treaty, op.cit.;

[34] M. D e l m a s – M a r t y, [red.], Corpus Juris, introducing provisions for the purpose of the financial interests of the European Union, Economica, Paris 1997; also M. D e l m a s – M a r t y, J. A. E. V e r v a e l e, The implementation of the Corpus Juris in the Member States, Penal Provisions for the Protection of European Finances, Groningen, Intersentia 2000-2001;

[35] Green Paper on criminal-law protection of the financial interests of the community and the establishment of a European prosecutor, 11.12.2001, COM (2001) 715 final;

[36] European Public Prosecutor would be a vertical structure, whereas all the existing organs are based on horizontal pattern of cooperation;

criminal law in the European Union[37]. Opinions on their implications are divided[38]. The Corpus Juris is seen double ways: as an instrument of combating serious crimes against financial interests of the Community and as the first Community-wide criminal code. Many critics assume, that by its creation the first model of a European criminal procedure was created. As a model criminal and criminal procedure code it constitutes an encouragement to further expand the cooperation in criminal law area on European level[39]. Corpus Juris is portrayed as a radical answer to an absurd situation created after abolishing the state borders within the European Union – when the borders became wide open for criminals and closed for the investigation organs. Some describe it as an introduction to expanding the common regulation area to other except for financial areas of European criminal law. As Andrzej Waltoś indicates, it might become *„a contracted sui generis criminal code and procedural, binding in regard to criminal matters against the interests of the European Union*".[40] Nevertheless, the authors themselves stressed that it was not their objective to create a "model" criminal code or criminal procedure code for the use on the whole Community. The Commission expressly states that: „*there can be no question of codifying the criminal law in Europe, as that would be out of proportion to the objective*". Regulations of Corpus Juris do not aspire to a position of a supra-European code. So far, it is only a proposal for a criminal substantial and procedural provisions binding in all the

[37] The proposal was presented to a variety of institutions and subjects. The Commission made it available in the Internet, sent it to more than 12.000 entities and individuals – groups and private persons, EU institutions, judicial institutions in the Member States, lawyers and law associations, groups of specialists, non-governmental organisations and universities; the process resulted in receiving hundreds of reports. On the grounds of systematisation of these information a report presenting the opinions and conclusions on the European Public Prosecutor was created. M. D e l m a s – M a r t y, J. A. E. V e r v a e l e, The implementation of the Corpus Juris in the Member States, Penal Provisions for the Protection of European Finances, Groningen, Intersentia 2000-2001;

[38] An exceptionally antagonist attitude the proposal found in the Great Britain, where right wing groups understood it as an attack on the system of common law, aiming at eliminating its principles and applying the continental „Napoleonic system" rules instead. See: M. D e l m a s – M a r t y, J. R. S p e n c e r, [ed.] European Criminal Procedures, CSICL, Cambridge University Press 2004, p. 63). However, the Chamber of Lords took a more favorable position. It described the proposal as „a serious attempt to tackle a real problem where national laws alone seem to be failing the citizen". (House of Lords, Select Committee on the European Communities, Session 1998-9, 9th Report, Prosecuting fraud on the Communities' finances – the Corpus Juris, HL, Paper 62, Stationery Office, also in site: www.parliament.uk). In spite of much hopes, Corpus Juris remains still nothing more as „a (very) green paper"(M. D e l m a s – M a r t y J. R. S p e n c e r, [ed.] European Criminal Procedures, CSICL, Cambridge University Press 2004, p. 64). Some adversaries of the unification of criminal law on the Union level go as far to describe the proposal "juristisches science fiction" (A. S z w a r c, Corpus Juris z perspektywy polskiego prawa karnego [in :] Zasady procesu karnego wobec wyzwań współczesności. Księga ku czci profesora Stanisława Waltosia, Warszawa 2000, p. 95).

[39] The attempts to employ a „model" criminal code have been taken by the Council of Europe. However, in spite of drawing attention of criminal law experts, they did not impose a major influence on the process of harmonisation of national law systems of the Member States. For opinions on a model criminal code see: Th. W e i g e n d Strafrecht durch internationale Vereinbarungen – Verlust nationaler Strafrechtskultur? ZStW 1993 No. 4; also in: A. W ą s e k, Europejski modelowy kodeks karny [in:] Nowe prawo karne procesowe. Zagadnienia wybrane. Księga ku czci Wiesława Daszkiewicza. T. N o w a k [ed.], Prace Wydziału Prawa i Administracji UAM w Poznaniu, v. III, Poznań 1999; A. W a l t o ś, Wizja procesu karnego XXI wieku, „Prokuratura i Prawo" 2002, No. 1; also: S. W a l t o ś, A. W ą s e k, Harmonizacja prawa karnego w Europie z polskiej perspektywy v. 1, „Palestra" No. 11-12, 1996; also: S. W a l t o ś, A. W ą s e k, Harmonizacja prawa karnego w Europie z polskiej perspektywy 2, „Palestra" No. 1-2, 1997;

[40] A. W a l t o ś, Wizja procesu karnego XXI wieku, „Prokuratura i Prawo" 2002, No. 1, p. 20;

Member States[41]. However, it is worth indicating that notwithstanding lack of binding power Corpus Iuris functions in the international environment[42].
It is not the place to describe the structure and rules governing the functioning of a European Public Prosecutor. I would just like to draw attention to the fact that although the proposals have not yet come into force and they are to be applied only regarding limited number of crimes, the regulations presented in Corpus Juris and the Green Paper are inspiring for the discussion about harmonization of criminal procedure and constructing further elements of the European judicial space. For the purpose of investigation conducted by the European Prosecutor, the model of the EU territoriality was chosen, where the EU is an area of freedom, security and justice. Implementing the provisions of Corpus Juris – whatever method is finally chosen – would contribute to internationalization of administration of justice and its further evolution.

Criminal investigation - European evidence warrant

The conference in Tampere took into consideration also the issue of transfer of evidence between the Member States[43]. At the Tampere summit conclusions of the principle of mutual recognition of judicial decision in criminal matters was applied also to decisions in the investigation stage of criminal procedure (pre-trial orders), including the orders related to gathering of evidence. The concept of recognition of evidence orders was supposed to lead to creation of a "free movement of evidence" area, based on the pattern applied to other domains of criminal law. On the basis of the conclusions, as well as in compliance with the Programme of measures to implement the principle of mutual recognition of decisions in criminal matters[44] two Framework Decisions have been issued in order to cope with this problem: the Framework Decision on the execution in the European Union of orders freezing property or evidence of 2003 [45] and Proposal of a Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters[46]. Both will allow a judicial authority of one Member State to send a relevant order directly to the judicial authority of another Member State where it will be recognised and executed without further formality, unless one of the grounds for non-recognition is invoked. Both stay in compliance with the principle of mutual recognition as accepted in Tampere.
However, the Decision on execution of freezing orders deals only with explicitly limited provisional measures to "*prevent the destruction, transformation, moving, transfer or disposal of [……] evidence*". Thus, it regulates only one stage of gathering of the evidence

[41] According to the opinion of: A. W ą s e k Europejski modelowy kodeks karny [in:] T. Nowak [ed.], Nowe prawo karne procesowe. Zagadnienia wybrane. Księga ku czci Wiesława Daszkiewicza. Prace Wydziału Prawa i Administracji UAM w Poznaniu, v. III, Poznań 1999, p.166;
[42] E. Z i e l i ń s k a, Corpus Iuris zawierający przepisy karne mające na celu ochronę interesów finansowych Unii Europejskiej. Wydanie dwujęzyczne angielsko-polskie, tłum. A Walczak-Żochowska. Warszawa 1999, p. 8;
[43] Tampere European Council – Presidency Conclusions, 16.10.1999, p. 36;
[44] Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12/10, 15.01.2001;
[45] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union orders freezing property of evidence OJ L 196, 02/08/2003. The Member States are supposed to implement the appropriate measures before 2 August 2005.
[46] Proposal for a Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters. [COM (2003) 688 final], 14.11.2003;

in criminal matters – securing of already existing evidence. The decision further states that coercive measures rendered necessary by the freezing orders should be taken in accordance with the applicable procedural rules of the executing state. Thanks to its application, throughout the European Union, Member States are able to freeze and confiscate property related to the commission of an offence. The competent judicial authority recognizes a freezing order, transmitted in accordance with the Decision, without any further formality being required and takes all the required measures for its execution.

As another step towards fulfilling the objective of maintaining and developing the area of freedom, security and justice, the Council presented a proposal for a Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters. The warrant will result in quicker, more effective judicial cooperation in criminal matters, and will partly replace the existing mutual assistance regime. The warrant should be used to acquire objects, documents and data for use in criminal proceedings. This includes objects, documents or data, also acquired in result of search of premises and forensic evidence, also from the third parties, if not taken from a person's body. However, the scope of the evidence warrant is limited. The scope of activities to be taken on the basis of the framework decision is restricted to existing and directly available evidence. It is not possible to use it in order to initiate the taking of evidence which is non-existing (in form of interviews, statements or other types of hearings involving suspects, witnesses or any other party). Also initiating interception of communications, covert surveillance or monitoring of bank accounts by the power of the warrant is not possible (not already available). Nor it can be used as an impulse to obtain the evidence not directly available – from the body of persons, such as DNA samples (neither existing nor available). Nonetheless, the results of such actions taken by the state previously to issuing the warrant can be used. Historical data on financial transactions, historical records of statements, interviews and hearings and other historic records from police or judicial files can be obtained through the use of the warrant. Therefore, these actions cannot be started on grounds of the warrant, but – if evidence already exists – it can be issued to the requesting state.

According to the Commission opinion, implementation of the Framework Decision will allow for faster and more effective cooperation and will replace the existing mutual assistance instruments, in compliance with the Tampere conclusions[47]. As it has no binding force – and, what is more, the representatives of the Member States show a certain scepticism regarding its functioning – the final term of implementation is not known[48]. The European evidence warrant will provide a simple, fast and effective mechanism for obtaining evidence and transferring it to the issuing state. Together with the freezing order they form foundations for a future European Union evidence procedure, building part of the criminal procedure code. According to such a procedure the European Union could constitute a unified judicial area for the purpose of criminal proceedings, by creating "free

[47] Communication from the Commission to the Council and the European Parliament Biannual Update of the Scoreboard to Review Progress on the Creation of an Area of "Freedom, Security and Justice" in the European Union (First Half Of 2003), Brussels, 22.5.2003 Com(2003) 291 final;

[48] The authors of the Framework Decision planned to make it come into force 1 January 2005. From that day the European Evidence Warrant was supposed to replace all the existing Council of Europe conventions regulating the mutual assistance matters (Convention from 1959) and transfer and confiscation proceeds of crime (Convention from 1990), as well as the EU convention on mutual assistance (Convention from 2000) and convention implementing the Schengen Agreement (Convention from 1990).

movement of evidence". It is proposed that a single document regulating the whole evidence system during the pre-trial procedure should be created. The works on a common body of evidence are often regarded as the first stage of creation of legislation regulating a common criminal procedure[49]. Thanks to introduction of the first element of that procedure – the European Evidence Warrant – the principle of mutual recognition of judicial decisions in criminal matters would be introduced, creating in practice a „free movement of evidence" in the European judicial area.

Procedure of surrender - European Arrest Warrant

Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between the Member States is the first act introducing a unified European area on a certain stage of criminal procedure. It was created in compliance with the Tampere conclusions aiming at implementing the mutual recognition principle. There is a necessity to replace the presently dominating model of cooperation in the area of freedom, security and justice by the principle of free movement of decisions in criminal matters, relating both to ultimate and pre-trial decisions. As the first measure it implements into the European Union law the standard of *ipso facto* recognition of all the decisions in criminal matters. If one of the Member States issues an arrest warrant, which fulfills the conditions required in the framework decision, it has to be executed as lawful and binding in all the other Member States. The European arrest warrant represents the top achievement in Europe's gradual departure from the classical principles of international law governing the international cooperation. The development is based on the mutual confidence of the Member States in their legal systems, and their willingness to respect fundamental human rights. European arrest warrant is the first concrete manifestation of mutual confidence principle which is a cornerstone for judicial cooperation[50]. It is a decision of a judicial organ, rendered in one of the Member States in order to arrest and surrender a requested person, for the purpose of criminal proceedings. European Member States' judiciary will no longer have to go through the formal extradition procedure. Presently, the procedure is "judicialised" – the procedure of surrender is transferred from one judicial organ (such as courts or prosecutors) to another without a need to apply the diplomatic path of communication. Thus, it forms a horizontal path of surrender, which is quicker (the maximum duration of the whole procedure is 70 days comparing to years needed for completing extradition procedures) and more efficient (grounds for refusal are strictly limited).

The judiciary of each state is able to issue a European arrest warrant when a person is being prosecuted for an offence punishable by a custodial sentence of over a year or sentenced to a custodial or detention order exceeding four months. The spirit of the whole institution is an obligation to recognise *ipso facto* a request of judicial organs of the issuing state in the executing state. Each Member State should execute any warrant, without controlling its contents and quality *a priori*. There is a list of circumstances excluding the obligation to surrender: amnesty, *res iudicata* case and humanitarian reasons. Other circumstances are only facultative reasons to refuse the execution (as dual criminality). For

[49] W. H e t z e r, National Criminal Prosecution and Tendering of Evidence, "European Journal of Crime, Criminal Law and Criminal Justice" No 2, 2004, p. 183;

[50] Council Framework decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190/1, 18.07 2002

a list of 32 serious offences – punishable by deprivation of liberty of at least 3 years – the surrender of the person does not require the double criminality of the act condition. So far, the dual criminality condition required the act to be punishable by the both states – where the request has been issued and where the surrender was supposed to be carries out[51]. The easiest case of surrender takes place when a person consents for it. Then he is surrendered within 10 days to the issuing state. If the person does not consent to his surrender – a possibility of which the person should be informed – he is entitled to have a hearing by the organ executing warrant. Once a positive decision on the execution of the warrant has been taken (which should be taken within the period of 60 days) the requested person has to be surrendered within the time limit of ten days.

The European arrest warrant definitely constitutes a new qualitative step towards a European judicial criminal area. It opens borders of the Member States to the process of the administration of justice. The "free movement of prosecutions" as a corollary to the free movement of persons, therefore, has become the foundation of cooperation in criminal matters. As it is said, the high level of mutual trust and cooperation between the Member States has made it possible to simplify and improve the surrender procedure. In doing so, they developed into a single European judicial area.

We can encounter opinions, which state that in order to make the warrant fully operational, there is a need to take another step forward – with the aim to construct a coherent set of law regulating the whole criminal law area. Such a regulation would contain the present instruments of cooperation – the procedural safeguards, mutual assistance, transfer of proceedings, transfer of the sentenced, extradition and the arrest warrant. Until present times nobody assumed that the European integration would ever be so successful as to reach the stage of becoming a common area for the purposes of criminal law and criminal procedure[52]. The present opinion as to the possibility of implementing a European criminal procedure code does not belong to the unconceivable ideas. The European arrest warrant is supposed to become one of the impulses leading to this objective. However, it does require much time, work and – last but not least – the will to take that step[53].

The perspectives of a European criminal procedure code

As to the usefulness of the proposition to codify the cooperation procedures in criminal matters between the Member States, it is not widely supported. Although we can encounter opinions foreseeing such a possibility in the doctrine, they are far form predicting it as an obvious fact. Creating a common investigation and prosecution area constitutes the first step towards better coordination of the legal systems of the Member States in the area of criminal procedure. By introducing the mutual recognition principle on the whole territory

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[51] Serious doubts are still caused by the double criminality principle. There is no consent in the EU on its wide application. Creation of such instruments as the European Arrest Warrant brings its abolition even closer.

[52] In the context of the first works on a model criminal code undertaken by the Council of Europe, it was shown that there is a need to elaborate a model piece of legislation in the domain of criminal procedure, regarding the arrest warrants, which could apply to the whole territory of Europe. [in:] T. N o w a k [ed.], Nowe prawo karne procesowe. Zagadnienia wybrane. Księga ku czci Wiesława Daszkiewicza. Prace Wydziału Prawa i Administracji UAM w Poznaniu, v.III, Poznań 1999, p. 149;

[53] P. H o f m a ń s k i, International Cooperation in criminal matters – Some observation, [quoted after:] A. G ó r s k i, A. S a k o w i c z, Europejski nakaz aresztowania. Między skutecznością ścigania a gwarancyjną funkcją praw człowieka, „Przegląd Policyjny" 2002, No. 3-4, p. 60;

of the UE, as well as gradual abolition of most of the obstacles in surrendering criminals[54]. Some say it is still too early for planning measures of unification of each stage of criminal procedure in the UE in this point of integration[55]. Nevertheless, some steps towards this aim could be undertaken. It is impossible to ignore the growing "Europeanization" of criminal law and equally growing demands of reshaping it in such a way as to make it more transparent and functional[56].

We cannot consider it as an imperative. Firstly, there is no express legal ground for the Member States to adopt codifying measures in the area of criminal procedure and cooperation. Secondly, the need for political will of closer integration is decisive, which seems to be lacking in this very moment[57]. Among the arguments against creating a common code the most significant are based on grounds of culture and society. It is particularly significant in case of major differences between the *common law* and the statutory law states. Frequently it is pointed to the fact that the diversity cannot be removed by the way of adopting the UE legislation. The diversities result from different models of criminal law and procedure. The principle of inquisitorial and accusatorial procedure, principle of legality and opportunity are not easy to concur. It is also not possible to decide which of the two systems should take prevalence[58]. Thus, taking all the above into account, we can assume that a code of criminal procedure for Europe is just a possibility which can be used in order to achieve the aim of better and more efficient cooperation in criminal matters between the Member States in view of creating "area of freedom, security and justice". Definitely, the idea behind creating new law should be creating a better law. Thus, the code should not only constitute a measure of harmonization of national criminal procedures, but additionally it would aim at making the cooperation procedures work more efficiently and successfully. In this special moment of time the European Union stands at the crossroads in its history, quoting the words of Christine van den Wyngaert[59]. Under the new Constitution Treaty the Communities are to be merged into a new structure, closer to federation than an international organization. The code of criminal procedure for Europe could constitute a significant part of the new profile of the European Union. Certainly, it should not be just another legal act adding to the abundant legislation passed by the EU organs which would make the procedures even more complex. Creating such a codification

[54] As the character of the European criminal law area has been illustrated by a British journalist: „Here, then, is the embryo of a common judicial area: an operational police force able to cross borders and ask for investigations to be initiated; a prosecutorial body; open borders throughout most of the EU; mutual recognition of offences; and harmonisation of some legal standards". See: Ph. J o h n s t o n, Crime and Punishment: Britain powerless to arrest arrival of Eurocop, "Daily Telegraph", 16 June 2000;

[55] M. B a ł a b a n o w, The EU Penal Code? „Przegląd Prawniczy UW", 2003, No.3;

[56] It is also noticed that no longer only highly specialized in international procedure experts are responsible for conducting mutual assistance cases. As it is more often applicable presently, it follows, that the applicable rules should become less complex and more transparent. [see:] W. S c h o m b u r g, Are we on the Road to a European Law-Enforcement area? International Cooperation in Criminal Matters. What Place for Justice? "European Journal of Crime, Criminal Law and Criminal Justice" No. 8/1, Kluwer Law International 2000;

[57] In the process of integration the major decisive factor is always the political will of the Member States, as states: M. M a t a c z y ń s k i, Kto jest ostatecznym arbitrem konstytucyjności w Europie? [in:] Wymiar sprawiedliwości w Unii Europejskiej. [ed.] C. M i k, Toruń 2001, p. 128

[58] Three elements of the whole codification movement have been accordingly stressed: coherency between the systems of law of particular states and territories, the general rules and profits of codification and general agreement as to the major legal principles applied in all the law systems.

[59] Ch. V a n d e n W y n g a e r t, Eurojust and European Public Prosecutor in the Corpus Juris Model: Water and Fire? [in:] Walker N. [ed.], Europe's Area of Freedom, Security and Justice, Oxford 2004, p. 201;

would correspond with the willingness to strengthen and clarify the procedures of cooperation.

It is not determined if the act gathering the whole body of European criminal procedure is to be called a “European criminal procedure code”. Many other names are equally justified: “a criminal procedure code for Europe” (similar to the Constitution for Europe), “a code of cooperation in criminal matters”, or skipping the “code” word (as it may bring unhappy coincidences), we can stay by a “framework decision” or “framework law”, regulating the area of cooperation in criminal matters. The major concern should be the *ratione materiae* scope of the act. It should contain the whole body of legislation in the area of cooperation in criminal matters. Nonetheless, it is worth to point out that the works on a comparable codification are presently being conducted by the Council of Europe. In place of the many presently existing fragmentary conventions, the Council decided to gather their content in the scope of one unified convention about international cooperation, in the aim of harmonising the existing solutions[60]. This convention is to be comprised of an introductory part describing the general conditions and circumstances of refusing assistance and the detailed part regulating four forms of cooperation: extradition, mutual assistance, transfer of proceedings and transfer of persons. As Imre Wiener states: *„such a common convention about the international cooperation in criminal matters would strengthens the efforts of the Council of Europe in the aim of creating a common and unified European system of cooperation in criminal mattes”*[61]. Consequently, the Council of Europe one more time creates the foundation for European Union legislation.

A common code is supposed to become a part of the unified European legal order, most probably becoming a form of a federation. The supporters of codification often assume that the future Europe will become a federation state. Criminal procedure in the future federation would be based on a common criminal code and criminal procedure code. Some even postulate introducing a common administration of justice and judicial system, with the Supreme Court of Europe as the highest authority[62]. Such ideas seem to be too far reaching, especially facing the lack of support towards further integration in the form of federation, which can be observed among the Member States[63]. Conceivably, the progressing integration is due to achieve such a stage, where it will be the only possibility to adopt common criminal law in the whole EU. At the time being – following the opinion of Andrzej Wąsek – we can include it to the “*legal futurology*” type of philosophy[64]. The

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[60] Comprehensive (European) Convention on Inter-State Cooperation in the Penal Field, Preliminary Draft-Information Document of the Secretariat General prepared by the Directorate of the Legal Affairs, MJU-15(86), so called. Project from Syracuse. [see.] I. W i e n e r, Międzynarodowa pomoc prawna w sprawach karnych a prawa człowieka. [in:] Standardy praw człowieka a polskie prawo karne, J. S k u p i ń s k i, J. J a k u b o w k s a – H a r a, [ed.], Warszawa 1995, p. 303;

[61] I. W i e n e r, Międzynarodowa pomoc prawna ....op.cit., p.303;

[62] A. C a d o p p i, Towards a European criminal code? European Journal of Crime, Criminal Law and Criminal Justice 1996, No. 1, p. 2;

[63] It is even more important, as the systems of administration of justice differ from each other significantly. [see:] B. S t e f a ń s k a, Prokuratura w Hiszpanii; organizacja i kompetencje, „Prokuratura i Prawo” 2002, No. 12, p. 83-103; C. M i c h a l c z y k, Struktura i funkcjonowanie Prokuratury Wielkiej Brytanii, „Prokuratura i Prawo” 2003, No. 11, p. 95-113;

[64] A. W ą s e k Europejski modelowy kodeks karny [in:] Nowe prawo karne procesowe. Zagadnienia wybrane. Księga ku czci Wiesława Daszkiewicza. T. N o w a k [ed.], Prace Wydziału Prawa i Administracji UAM w Poznaniu, v.III, Poznań 1999, p. 163; also P. K r u s z y ń s k i, O niektórych propozycjach rządowego projektu ustawy o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz

question of the future shape of Europe is the essential question in regards the area of European criminal law. The debate on the future shape and place of criminal law in Europe constitutes a part to a broader discussion of the future shape of Europe itself.

ustawy – kodeks wykroczeń (w redakcji z dnia 19 sierpnia 2000), Prokuratura i Prawo” No. 2, 2004, p. 11;