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THE EU-UKRAINE COOPERATION IN CRIMINAL MATTERS: “JUSTICE” DIMENSION

This article analyses grounds for the legal regulation of the EU-Ukraine cooperation in criminal matters within the framework of the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, through the prism of collaboration in the area of justice. The article defines the main practical problems of judicial system in providing mutual legal assistance. This includes the peculiarities of the European Convention on Mutual Assistance in Criminal Matters of 1959 and the European Convention on Extradition of 1957 application. Analyzing the issue of mutual legal assistance, the author places the emphasis on a problem of the lawful interception of telecommunications. The article also deals with the reasons for the delay in the ratification of international instruments on extradition, the Rome Statute of the International Criminal Court and legal framework and prospects of Ukraine's cooperation with Eurojust.

Keywords: judicial cooperation, cooperation in criminal matters, the Association Agreement, legal assistance, extradition, International Criminal Court, Eurojust.

Introduction. Cooperation between Ukraine and the European Union in criminal matters is essential for ensuring the effective and prompt hearing of cases concerning various crimes, ranging from the most serious ones, such as terrorism and human trafficking, to the crimes, which do not represent a grave public danger, but are linked to the need of conducting judicial procedures on the territory of another state. Life safety has always been and still remains the key issue in the international arena. As the Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (hereinafter referred to as the Association Agreement) enters into force, the relations between Ukraine and the EU have reached a new level. In view of this, a more intensive cooperation with the EU in criminal matters is an important aspect of confidence in punishability of different crimes and also is a guarantee of the practical implementation of the rule of law principle in Ukraine, which is necessary for the sustainable development of our relations with the EU in general.

The studies of the EU cooperation in criminal matters with third countries were carried out by such foreign scientists as Steve Peers, Valsamis Mitsilegas, Pieter Jan Kuijper, Jan Wouters, J. Monar, as well as by the Ukrainian ones: V.I. Muravyov, Z.M. Makaruha, K.V. Smirnova, N.V. Bench, O. Dovzhuk, R. Kolyshko. Most of these foreign and Ukrainian scholars considered the issue of EU-Ukraine cooperation in criminal matters either as one of the components of the area of freedom, security and justice (hereinafter – AFSJ) or envisaged only some of AFSJ aspects (such as the problem of the Rome Statute of the International Criminal Court ratification (hereinafter – RS ICC), general issues of legal assistance, cooperation on specific types of crimes).

However, the issue of judicial cooperation between Ukraine and the EU as a range of measures within the component of AFSJ – "Justice", that is cooperation in criminal matters in the narrow sense, remains unexplored. This research for the first time discloses some practical problems regarding the application by Ukrainian judges of international conventions on legal cooperation with the EU, the reasons of an incomplete regulation on legal interception of telecommunications, the issue of correlation of legal and political reasons for ratifying the RS ICC in the light of recent practices and trends. This study also reviews a comparative analysis of judicial cooperation in criminal matters within the EU and its collaboration with third countries concerning this issue. This is necessary in order to identify possible vectors for developing our cooperation with the EU in criminal matters in future.

The **purpose** of this article is to set up a new and more profound vision of the essence, range of problems and prospects of the EU-Ukraine cooperation in criminal matters from the perspective of the AFSJ component – "Justice".

Basic material. With the Association Agreement entering into force on September 1, 2017, the main directions of the EU-Ukraine cooperation in criminal matters are determined by its provisions, in particular by Articles 8 and 24.

Thus, these norms stipulate that the parties shall seek to enhance arrangements on mutual legal assistance and extradition. This would include, where appropriate, accession to, and implementation of, the relevant international instruments of the United Nations and the Council of Europe, as well as the Rome Statute of the International Criminal Court of 1998 as referred to in Article 8 of this Agreement, and closer cooperation with Eurojust¹.

The doctrine understands these norms on cooperation between Ukraine and the EU in criminal matters in both broad and narrow senses. Investigating the issue of cooperation in criminal matters in terms of all components of the space, "Freedom, Security and Justice," N.V. Bench believes that, according to the Association Agreement text, cooperation in criminal matters should be understood both as judicial cooperation and as cooperation between law enforcement agencies of Ukraine and the EU². Instead, O. Sushko believes that the provisions of Article 24 of the Association Agreement cover mutual assistance to a greater extent between judicial authorities³.

In our opinion, while exploring the cooperation between Ukraine and the EU in the field of justice, the understanding of cooperation in criminal matters on the basis of Article 24 of the Association Agreement is narrow, as this norm clearly defines the judicial nature of such cooperation, as well as its priority directions without regard to the issues of criminality, which may derive from the Association Agreement blocs on the mobility of citizens or fight against various types of crimes.

In addition to the Association Agreement, the issue of cooperation in criminal matters within the "justice" component is governed by the EU-Ukraine Action Plan on Justice, Freedom and Security of 18 June 2007 (hereinafter referred to as the 2007 Action Plan). Most of the tasks outlined therein within the framework of judicial cooperation in criminal matters remain relevant and, to some extent, are similar to the provisions of Article 24 of the Association Agreement.

In our research, we suppose it necessary to focus on the areas defined in Article 24(3) of the Association Agreement.

On the subject of international instruments in the field of judicial cooperation in criminal matters, Ukraine on January 16, 1998 ratified the European Convention on Mutual Assistance in Criminal Matters of 1959 (hereinafter referred to as the 1959 Convention), along with the Additional Protocol of 1978, and on June 1, 2011 – Second Additional Protocol was ratified, which came into force for Ukraine on January 1, 2012.

Thus, according to the 1959 Convention (as amended), the parties undertake to afford each other the widest measure of mutual assistance, including but not limited the service of writs and records of judicial verdicts concerning appearance of witnesses, experts and prosecuted persons, hearing by telephone or video conference, spontaneous information, restitution, temporary transfer of detained persons, controlled delivery, covert investigations, joint investigation teams⁴.

As far as the 1959 Convention applying practice by the Ukrainian judiciary is concerned, the main issues of such cooperation in criminal matters are that the Ukrainian side, while executing requests for mutual assistance, uses exclusively the mechanism for sending and receiving requests through the Ministries of Justice of the parties to the 1959 Convention, while the mechanism for direct transfers between courts, provided by the same Convention, does not apply. This is due to these very circumstances.

The Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine), as presently in effect, does not provide any procedural mechanism for direct judicial cooperation, despite the fact that Article 543 of it provides the possibility of determining the procedure for sending, reviewing and executing requests not only according to this Code, but also according to the effective international treaties of Ukraine.

¹ *Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part of 29.05.2014* (the European Union and its Member States and Ukraine). *Official Journal of the European Union L 161*, 13, 2137.

² Бенч, Н.В. (2016). *Міжнародно-правове співробітництво України та Європейського Союзу в кримінальних справах у сфері свободи, безпеки та юстиції*: дис. канд. юр. наук: 12.00.11. Київ, 48-49.

³ Сушко, О. (2012). *Угода про асоціацію Україна-ЄС: дороговказ реформ*. Київ: Konrad Adenauer Stiftung Policy Paper, 19.

⁴ *European Convention on Mutual Assistance in Criminal Matters of 20.04.1959* (Council of Europe). *European Treaty Series*, No. 30, 3.

Due to the impossibility of direct judicial cooperation under the 1959 Convention, proceedings are delayed in time. Thus, in the case on temporary access to the documents which were placed in Norway, having satisfied the prosecutor's request Ukrainian court decided to calculate the period of validity of the order for temporal access to things and documents since the moment of its receipt by the competent authority of the Kingdom of Norway. Such decision was motivated by the fact that a long period of time necessary for the translation and forwarding of the ruling eliminates the possibility of its further execution in the statutory terms¹.

Another problem with the 1959 Convention application by Ukrainian courts is lack of training for judges. Thus, quite often, courts cite the invalid version of Article 15 of the 1959 Convention, which defines communication channels in the process of providing mutual legal assistance. This clause expired on January 1, 2012 (for example, the Chernihiv district court decision of the Chernihiv region of October 18, 2017, case No. 732/512/17).

Within the EU, the general issues of mutual legal assistance are regulated by the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (hereinafter referred to as the 2000 EU Convention).

The only form of mutual assistance foreseen by the 2000 EU Convention, which is not included in the 1959 Convention, is interception of telecommunications.

Legal regulation of the interception of telecommunications in Ukraine is very imperfect and far from minimum standards of the EU. Today, the issues of lawful interception of telecommunications are subjects to the Law of Ukraine "On Operational Investigative Activity", provisions of Chapter 21 of the CPC of Ukraine and Article 39 of the Law of Ukraine "On Telecommunications".

A special act on this issue has never been adopted, although such attempts were being made during 2004-2005, when the work on the draft Law on Telecommunications Interception was carried out (No. 4042-1, No. 4042-2 – the main one). In 2005 this bill was sent for the revision, in particular, for the reasons of an uncertainty of the control system for the legality of interceptions.

As for the EU countries, they have a separate system of supervision to prevent violations of human rights and freedoms because of telecommunications interception procedures. Thus, in Germany there is a Parliamentary Control Panel that supervises and controls the activities of the Federal Republic intelligence service². Additionally, the G-10 Commission is also a part of the parliamentary control system. All individuals who suppose that their rights violations were caused by intelligence services activities may complain to the G-10 Commission.

In Ukraine there is no similar form of parliamentary control which indicates the need to revise the draft Law on Telecommunications Interception concerning this issue. Thus, it is possible to introduce such control by creating a separate unit within the Secretariat of the Ukrainian Parliament Commissioner for Human Rights.

In addition, adopting EU practice, in Ukraine it would be appropriate to introduce public control in the form of annual reports of the Prosecutor General of Ukraine and the Minister of Internal Affairs of Ukraine on the number of permits for interception of information, types of crimes which have become the grounds for such permits and number of refusals to grant corresponding motions.

As may be seen from the above in Ukraine there is no special law on minimum standards for the functioning of judiciary, law enforcement agencies and other bodies as a single system in course of the legitimate interception of telecommunications. Such problem means the isolation of Ukrainian legal system from the possibility of effective application of best European practices, technologies and instruments for legitimate interception of telecommunications, as well as from banner data protection measures and, consequently, the defense of violated individuals' rights. The current situation shows that there is a significant restraining leverage in the constructive development of the EU-Ukraine collaboration in this direction, as one of important components of our cooperation in criminal matters.

The next direction of judicial cooperation in criminal matters, as defined in Article 24 of the Association Agreement, is the strengthening of cooperation on extradition.

¹ Ухвала в справі № 520/15060/17 2018 (Київський районний суд міста Одеси).

<<http://www.reyestr.court.gov.ua/Review/71557482>> (2018, July 25).

² Intelligence review in Germany 2012. *The European Network of National Intelligence Reviewers*.

<<http://www.ennir.be/germany/intelligence-review-germany>> (2018, August 28).

Based on the analysis of CPC of Ukraine, Ukrainian scientist Y.M. Chornous interprets extradition as a form of international cooperation in criminal proceedings.

We agree with R.M. Valeev, as well as with V.K. Zvirbul, V.P. Shupilov, M.P. Svistulenko and S.S. Nesterenko, who interpret extradition as a form (act) of international legal assistance. Thus, firstly, this process can be characterized by all features of cooperation on legal assistance; and secondly issues concerning extradition have always been a part of bilateral Ukrainian treaties on legal assistance (for example, with Lithuania, Estonia and Latvia).

The main basis of Ukraine's international cooperation on extradition are laid down in the European Convention on Extradition of December 13, 1957 (as amended by the Additional Protocol, the Second, Third and Fourth Additional Protocols). Ukraine joined this Convention in September 1995, and in January 1998 it was ratified together with the Additional and Second Additional Protocols. The parties to the European Convention of 1957 are 50 countries, including all EU member states.

This Convention establishes the conditions for the extradition of all persons against whom the competent authorities of the requesting party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

The Third and Fourth Additional Protocols were signed in November 2010 and September 2012, ratified by Ukraine by the Law of June 7, 2017, No. 2090-VIII. However, the law on ratification has not entered into force yet, since, as it envisages, the onset of this fact is made dependent on the entry into force of the Law of Ukraine "On Amendments to the Criminal Procedural Code of Ukraine in connection with the ratification of the Third Additional Protocol and Fourth Additional Protocol to the European Convention on Extradition" of June 7, 2017, No. 2090-19.

The Third Additional Protocol is aimed at unifying the rules of applying the simplified extradition procedure by the states. The Fourth Protocol amends and complements the provisions of the Convention in order to adjust it to the modern needs of States' cooperation¹ (regarding the lapse of time, requests and supporting documents requirements, re-extradition to a third state, channels and means of communication). In order for these protocols to be ratified, as it has already been mentioned, amendments to the CPC of Ukraine, defined in the above-mentioned Law, should be made.

Analyzing the EU-Ukraine cooperation in criminal matters, it is necessary to determine the basic principles and methods of the same cooperation between the EU member states themselves.

First of all, it should be mentioned that the EU has defined the principle of mutual recognition of judgments and judicial decisions to be the milestone of the AFSJ ensuring.

Surrender procedures are carried out on the basis of a European arrest warrant (hereinafter – the EAW). The EAW establishment has led to the abolishing of extradition between Member States of the EU². A range of other issues are also regulated uniformly on the grounds of mutual recognition principle. This is, for example, the application of the European Security Order, the European Investigation Order, Freezing Property or Evidence Orders.

Drawing on the example of legal regulation of extradition and the use of the above-mentioned warrants during investigations, we can determine one common feature inherent in absolutely all spheres of judicial cooperation in criminal matters in the EU. We mean the principle of mutual recognition. It is the milestone of the EU judicial cooperation and it can develop fully only if there appears a high level of mutual trust between Member States³. That is, the principle of mutual recognition forms the basis of judicial cooperation within the EU not only due to its legal confirmation, but also due to the sufficiently high level of actual trust between the EU countries concerning legality and validity of all judgments.

The EU-Ukraine relations in this area are not based on the principle of mutual recognition, that is, our cooperation with the EU regarding mutual legal assistance in criminal matters can be called

¹ Пояснювальна записка Міністра юстиції України до проекту Закону України «Про ратифікацію Третього додаткового протоколу та Четвертого додаткового протоколу до Європейської конвенції про видачу правопорушників» від 28 лютого 2017 року. *Офіційний веб-сайт Верховної Ради України*. <http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=61253> (2018, August 28).

² 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision 2012 (The Council of the European Union). *Official Journal L 190*, 1. (2018, July 18).

³ Milt, K. (2018). Judicial cooperation in criminal matters. *European Parliament. Fact Sheets on the European Union*. <<http://www.europarl.europa.eu/factsheets/en/sheet/155/judicial-cooperation-in-criminal-matters>> (2018, August 28).

"traditional". Comparing basic guidelines of cooperation on the grounds of the mutual recognition principle with those resulting from the so-called "traditional" cooperation, it is necessary to highlight the following points.

First of all, in case of "traditional" cooperation, the latter is established between states, which means that it is the result of so-called political practices, whereas, in cooperation on the grounds of the mutual recognition principle collaboration is based primarily on the judicial authorities' reciprocity. It is obvious that in view of such understanding the Article 24 of the Association Agreement for the first time specifies the nature of cooperation with Ukraine in criminal matters, namely, judicial nature.

Secondly, we agree with Zoran Burić that these two forms of cooperation are characterized by flexibility and stringency of regulation. Thus, "traditional" one is characterized by the absence of clear deadlines for committing various actions, as well as by a wide range of grounds for refusal to commit them, while the other one is characterized by directly opposite conditions.

Another important direction of cooperation between Ukraine and the EU in criminal matters, as stated in Articles 8, 24 of the Association Agreement, is the ratification and implementation of the RS ICC.

The first and most important argument of the Ukraine's impossibility to ratify the RS immediately after its signing was the Opinion of the Constitutional Court of Ukraine on the conformity of the RS with the Constitution of Ukraine (Opinion of July 11, 2001 No. 3-a / 2001). The court came to the conclusion that Paragraph ten of the Preamble and Article 1 of the RS, by which the International Criminal Court "... shall be complementary to national criminal jurisdictions." contravene the Constitution of Ukraine because the possibility of such supplementation to the judicial system of Ukraine is not foreseen by provisions of Section VIII "Justice", and, therefore, Ukraine's accession to the RS in accordance with Article 9(2) of the Constitution of Ukraine can be possible only after corresponding amendments to the Constitution are made¹.

In order to eliminate the mentioned obstacle to the RS ratification, the Law of Ukraine "On Amendments to the Constitution of Ukraine (on Justice)" of June 2, 2016, No. 1401-VIII was adopted. Now Article 124 of the Constitution of Ukraine is restated with paragraph six stipulating that "Ukraine can recognize the jurisdiction of the International Criminal Court under the terms of the Rome Statute of the International Criminal Court". However, under the Final and Transitional Provisions of Law No. 1401-VIII this norm on recognizing RS jurisdiction shall come into force in three years from the day following the day of this Law publication, that is, from June 30, 2019.

Consequently, practical implementation of these provisions is postponed by the legislator without providing any reasons. The three-year period laid down in the transitional provisions is called in the EU "unusual in international practice"².

Analyzing publications and statements of various scholars, officials of Ukraine and the EU, as well as the Council of Europe, it is possible to distinguish several reasons which explain Ukraine's delaying the RS ratification.

For one thing it is necessary to harmonize Ukrainian substantive and procedural law according to the RS. The EU has repeatedly pointed out this issue. Thus, we should make amendments to the Criminal Code of Ukraine in regarding setting out the notions of crimes, as well as their exhaustive list, in line with the RS terms.

In July 2016, a draft law "On Amendments to the Criminal Code of Ukraine to ensure its harmonization with the provisions of the Rome Statute of the International Criminal Court", created by experts at the initiative of the Center for Civil Liberties³, was presented at the Ukrainian parliament. This draft introduces a range of amendments to the Criminal Code of Ukraine, which include: the notion

¹ *Висновок у справі № 1-35/2001 за конституційним поданням Президента України про надання висновку щодо відповідності Конституції України Римського Статуту Міжнародного кримінального суду (справа про Римський Статут 2001)* (Конституційний суд України). <<http://zakon2.rada.gov.ua/laws/show/v003v710-01>> (2018, August 28).

² В ЕС расстроены: Порошенко хочет членство в Международном уголовном суде только через три года 2015. *Центр інформації про права человека*. <https://humanrights.org.ua/ru/material/v_jes_zasmucheni_poroshenko_khoche_chlenstvo_v_mizhnarodnomu_kriminalnomu_sudi_azh_cherez_tri_roki> (2018, August 28).

³ У парламенті відбувся "круглий стіл" на тему: «Імплементція норм міжнародного гуманітарного права та Римського статуту міжнародного кримінального суду до національного законодавства України» (відео) 2016. *Офіційний веб-сайт Верховної Ради України*. <<http://rada.gov.ua/print/133094.html>> (2018, August 28).

of crimes "Enslavement", "Crimes against humanity", various types of war crimes. Also the notion of genocide has been clarified and Article 437 of the Criminal Code of Ukraine regarding the crime of aggression has been completely changed. Moreover, it should be marked that the notion and components of the crime of aggression in this bill are fully in line with the Kampala Amendments adopted on June 11, 2010.

Secondly, taking into account the analyzed legal problems, most scholars and statesmen consider that the main constraining leverage of the RS ratification is a range of political reasons (senior officials' fears about their amenability for incompetent decisions; fear of the possible liability of Ukrainian military due to the fact of carrying out the anti-terrorist operation in the territory of the so-called "LNR" and "DNR"). The indicated political reasons are baseless, as it was repeatedly pointed out by international community, in particular, by the ICC Prosecutor Fatou Bensouda in the Report on Preliminary Examination Activities 2016 of the situation in Ukraine.

Besides the other areas of cooperation in criminal matters, Article 24 of the Association Agreement foresees closer cooperation of Ukraine with Eurojust.

Agreement on cooperation between Eurojust and Ukraine was signed on June 27, 2016 and entered into force for Ukraine on September 2, 2017.

The General Prosecutor's Office of Ukraine is the competent authority of Ukraine under the Agreement with Eurojust. According to the President of Ukraine Decree of May 17, 2018, No. 128/2018, a Liaison Prosecutor to Eurojust is a prosecutor of the General Prosecutor's Office of Ukraine.

The fact of the Agreement with Eurojust entry into force created the legal basis for Ukraine to use all capabilities of Eurojust in combating serious transnational crimes. Thus, taking into account this Agreement, on July 7, 2017 "Agreement between Ukraine and the Kingdom of the Netherlands on international legal cooperation regarding crimes related to the crash of the MH17 flight of Malaysian Airlines on July 17, 2014" was concluded. It was ratified on July 12, 2018 but has not entered into force yet. Under this Agreement, the parties have agreed to provide each other with the widest possible cooperation measures in relation to the issue of prosecution and conviction in the Netherlands of persons involved in the shooting down of an aircraft as well as execution of a sentence¹.

Conclusion. The legal basis of judicial cooperation between Ukraine and the EU in criminal matters consists of the Association Agreement and the 2007 Action Plan. The nature of our cooperation with the EU in this area is "traditional", which means that it is based on multilateral international agreements on mutual legal assistance. Instead, within the EU itself such cooperation is based on the principle of mutual recognition of judgments and judicial decisions and, consequently, on the application of uniform instruments, such as the European arrest warrant.

To improve judicial cooperation with the EU in criminal matters, Ukraine should take all measures to implement the Association Agreement, in particular:

–ratify the Third and Fourth Additional Protocols to the European Convention on Extradition of December 13, 1957, which requires the adoption of the Law of Ukraine "On Amendments to the Criminal Procedural Code of Ukraine in connection with the ratification of the Third Additional Protocol and the Fourth Additional Protocol to the European Convention on Extradition" of June 7, 2017, No. 2090-19;

–adopt the Law of Ukraine "On Interception of Telecommunications", refining it following the practice of the EU, in terms of establishing parliamentary and public control over the legality of actions that will be regulated by this Law;

–finish all internal procedures for Rome Statute of the International Criminal Court ratification, whereas, agreeing with S.P. Kuchevska, this is a logical continuation of Ukraine's criminal policy in the international arena;

–continue cooperation with Eurojust on the basis of existing agreements, as well as determine the person of the Liaison Prosecutor to Eurojust as soon as possible;

–institute a separate subject-matter of training judges and court employees (based on the National School of Judges of Ukraine) concerning problematic aspects of providing and receiving international legal assistance in criminal matters.

¹ Угода між Україною та Королівством Нідерландів про міжнародне правове співробітництво щодо злочинів, пов'язаних зі збиттям літака рейсу MH17 Малайзійських авіаліній 17 липня 2014 року 2017 (Президенти України та Королівства Нідерландів). Офіційний веб-сайт Верховної Ради України. <http://zakon5.rada.gov.ua/laws/show/528_002-17> (2018, August 28).

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