

# Drug Trafficking: International Cooperation in the Area of Penal Affairs



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**M**y presentation aims to share the experience that I have gained with the European Union's Judicial Cooperation Unit – EuroJust. I am going to talk about the approach to drug trafficking that we take in the European Union, or at least the area that lies within Eurojust's jurisdiction.

I will talk about EuroJust later on, but first I would like to say that EuroJust is a very recent organisation, only inaugurated in 2003. We are still in our initial phase, but since the first day we have been working with real cases, with specific international criminal cases. This is why I have given my presentation the title “Drug Trafficking: International Cooperation in the Area of Penal Affairs”. Because, in fact, this is what we do within the European Union. EuroJust is a European Union body, established in 2002, currently representing twenty-seven member States. When EuroJust was created as a provisional body, in 2001, it was made up of fifteen member states. The European Union was enlarged in 2004 by ten more countries, from Eastern Europe: the Baltic States (Estonia, Latvia and Lithuania), Poland, the Czech Republic, Slovakia, Hungary, Malta and Cyprus. We welcomed two more member states this year, Romania and Bulgaria. This eastwards extension took in the countries that were part of the former Soviet Union's sphere of influence. They

have now joined the founding States. So the European Union is undergoing a process of constant growth. We are still in the process of managing this growth.

The headquarters of EuroJust are in the Netherlands, in The Hague. It may be said that it is a laboratory that acts on a worldwide level. This is the first time that a judicial cooperation unit has been established. We already knew about police cooperation bodies – we have all heard of Interpol and understand what they represent, as well as the importance of the institution on a global level. We created Europol in Europe in the 1990s. This body is different from Interpol because it aims to improve police cooperation within the European Union. In 2001, we established the provisional unit for judicial cooperation, the Pro-EuroJust, which became EuroJust in 2002. Now, following the signing of the new Lisbon Treaty in December 2007, a new EuroJust has been created. This body will have wider powers and a European Attorney General's office may be set up within a few years. For this reason, this is a process that has been developed in an accelerated way, above all from 1999 onwards.

Clearly, the creation of Eurojust needs to be understood within the specific context of the unification of Europe and the high level of cooperation involved in this. We must take into account the fact that there are effectively no borders between the member states of the European Union. You can arrive in Lisbon, in Portuguese territory, and travel as far as Finland or Poland or Greece, passing through France, Germany and all of those countries, and no one will ask to see your passport. There are no border controls. There is total freedom of movement. Europe is not a state. We are not a federation, like

Brazil. We are a union, a union of sovereign states. This obviously involves far more complex issues. Currently, when we talk about judicial cooperation in penal affairs, we are talking about cooperation between twenty-seven States, each one with their own national identity. This also applies in their legal systems. The most obvious example is the system of Common Law in the United Kingdom and the continental system of civil law, which have entirely different origins. There are also a lot of different systems within continental Europe: the traditional French system, *juge d'instruction*, and the German-inspired system, which has recently been through profound changes in the organisation of judicial systems. This is a system where the investigating magistrate is not responsible for the result of the process, for the results of the investigation. The judge is simply a judge who keeps their distance from the proceedings, a judge of freedoms and a judge of rights. Under this system, the Public Prosecutor's Office replaces the judge, who used to hold all the powers of judicial authority. At the moment there are twenty-seven states with thirty different judicial systems. This is not easy and, to make matters worse, twenty-three different languages are spoken. You are very lucky in Brazil, because it is fantastic that the same language is spoken from north to south and from west to east throughout your twenty-seven states. We also have twenty-seven states, but in our case we have to deal with twenty-three different languages. This is why that it is not easy to deal with all these problems in an area without borders. It is obvious that the problems that we have to face all have their own peculiarities due to the nature of the Union. In order to form a common response to the great challenges created by international, organised crime, all the global problems that are presented today

must also be taken into consideration. In this area, the problems are identical, there are no differences.

I would like to speak briefly about what we have learnt from our past and present experiences. I am not going to go into detail, I will stick to well known aspects. We all know that today, drug trafficking is the most significant sector of the international crime industry. Drug trafficking and other forms of crime take advantage of opportunities given to them by globalisation, as they are phenomena that have the characteristics of flexibility, mobility and, above all, networked organisation. Networked organisation, in small cells, is perhaps the most recent feature of the organisation of criminal phenomena. Very often, the cells do not know about each other, but they work and cooperate with each other without worrying about the cooperation problems that we have - criminals do not have to follow the rules that we have to follow. They have a business structure, an international structure. They are large criminal multinationals. This crime also involves a lot of powerful people, it is a sophisticated business. They are crimes of the powerful. It is an economically viable and lucrative crime, a crime that always has parallel markets. The issue of money laundering, which is always in the centre of the system, comes from this point. I think that any approach to the drug problem today has to come from the following perspective: trafficking exists because there is money in it, a lot of money. If it did not make money, it would not exist. The issue of money laundering is, therefore, an essential aspect to be tackled in the fight against trafficking.

Of course, all of this is very dark, very sophisticated, and the crime is invisible.

When we talk about economic crime, we are talking about invisible crime. We do not know who the big lords of crime are. They do not know what drugs look or smell like. Their money, as soon as it has been laundered, still has the same colour that it had before. This is a phenomenon that is clearly growing and is increasingly more complex. It is interesting to note that we have now been fighting against drug trafficking for 40 years, and it has never been so sophisticated or developed as it is today. This means that there are a lot of big questions to be answered about the results and about the way that we organise ourselves. Nowadays, countries are increasingly putting more measures in place and dedicating more resources to the fight against this phenomenon, but the results from these measures and resources are steadily getting worse.

This obviously leads to well known damaging effects. The problem is that we are witnessing - if you will excuse the expression - the decline of the State itself, which reveals itself unable to control criminal phenomena that stretch beyond its borders.

The drug problem, as everyone knows, demands a multi-disciplinary and coordinated approach at an international level. When I was in the government with my friend Vitalino Canas, we oversaw the creation of the main national strategies for the fight against drugs. The National Plan for the Fight against Drugs was submitted to intense debate between 1997 and 1999. In fact, we started precisely from the multidisciplinary approach, which nowadays requires the consideration of all of the aspects related to the drug phenomenon. As part of this



multidisciplinary approach, is also, or perhaps above all, a question of justice and, to be more specific, a matter of penal law. So, the main issue is knowing what is being asked of penal law in order to combat this phenomenon from a multidisciplinary context.

Today we have to think and act differently, given the size of the drug problem. It is not just a matter of thinking global and acting local, but we also have to act globally and think locally. We have to consider both perspectives. The big issue is when we are going to face the problem of penal justice and define what effectively constitutes a crime. It is not enough to just say that it is a crime. The real questions are: what kind of crime is it? Why is it a crime? What is crime for? In other words, we must carefully consider the ends and limits of incrimination. I think that this is a very important aspect. I do not want to get into the big arguments revolving around the issues of penal law and the purpose of punishment, because the law experts have dealt with these issues at length. But I get the impression that the more things that we consider as crime, the more we will see a greater sophistication of crime itself as a result. This leads to crime becoming more difficult to fight. I think that one of the biggest problems related to the fight against

drugs is exactly that of over-incrimination. We know about the debates that are taking place on an international level on this subject. But, if you will allow me to draw a parallel, it is one thing to fight against alcohol, as the consumption and sale of alcohol is not a crime. In this case, we are dealing with people who are not criminals, but we can still involve them in re-insertion and recovery projects. It is quite another thing to confront problems that are crimes. I believe that the only option available in this domain carries with it important consequences, as it certainly isn't the same to address the problems of drug consumption within or outside the scope of penal law. Experience shows us that the intervention of penal law in this domain, since it considers the drug user a criminal, makes more complicated the processes of control and fight against drugs in its various dimensions. These include traffic repression as well as the protection and rehabilitation of drug users.

In this context, what is being asked from penal law and justice? Depending on the guidelines of criminal policy, there's the critical issue of incrimination, i.e. deciding which facts constitute a crime, which is the *sine qua non* condition to create systems of international cooperation. The improvement of international cooperation among the various penal systems must begin with this issue. Therefore we must consider the main traits of criminal acts linked to organized international crime, which definitely have broken down the three traditional rules of engagement: the time scale, the spatial element and the "action" element. The criminal actions of today do not have much in common with those that we learnt about in classes 30 years ago. I remember that when I started working as a delegate in the

Attorney General's office in 1979, I always started my pre-judgement accusations by saying, "On this day, at that time, in that place, Mr. So and So did this, that and the other." Nowadays, when we reach this point, we do not know what day, at what place and when the events happened. The three unities of classical study have been completely shattered. All this is related to the reality that a huge number of people, different times, places and actions are all involved, along with a hard to follow sequence of events and the effect of distance, all of which are very important considerations that must be considered as a whole. Due to the disassociation between execution, material and responsibility, it is very difficult to know where the people who are really responsible for the crime are located. Evidence shows us that most of the time the people who carry out the tasks are the ones who have the least amount of responsibility for the planning of the actual crime. From my perspective, this is one of the big problems that criminal justice has to face. We go out to make arrests, we go to arrest traffickers. The problem is knowing if we are arresting the persons really responsible for those activities, which are usually planned by third parties.

Deterritorialization of criminal activities is another problem. Where do these crimes take place, if we are faced with a criminal organisation that acts internationally, often using technological means (the so called cybercrime)? I am going to use the example of the European Union, where we have this problem. If we make plans on an international scale, the problem becomes knowing how the organisation should be investigated, and which country has the jurisdiction for judging the crime. If, for example, we are dealing with an

organisation that acts in Colombia as country of origin, with elements in Brazil as a transition country and with elements in Europe as a destination country, we see that the organisation is the same and the people involved are the same and there are also different people involved in each country. This is a great challenge that we must deal with.

Herein lines the new paradigm of criminal politics. I do not want to conceptualise too much, but I would like to talk about a few points. The right to pursue and the right to punish are functions of sovereignty, or State functions. There are no international courts of law, no international police, no international offices of Public Prosecutors or international courts. The bodies that have to deal with this are all national. When countries act alone, they are totally destitute of effect when it comes to any phenomena that transcend its borders. There is another great risk involved with this: the confrontation between national justice and globalised crime. This confrontation works as a large filter that causes exemption from punishment. National penal systems concentrate on local realities, on national realities, as this is the way that they were constructed historically. My fear comes from my perception that we are still, in terms of organisation, inspired by models from the 19th century for fighting domestic crime - crime that exists within borders and was meant to be fought in those terms.

Therefore, we are faced with an internationalisation of criminal policy, where the word "cooperation" is key. Today, cooperation means a very different thing to what it was a few years ago. I can give you examples from my own experience: in the 80s, I was dealing with some cases that had

international connections. To deal with them, we used to send letters that were transmitted internally through a chain of command that reached the central services of the Ministry of Justice, where they redirected through diplomatic means to the “relevant institutions” of other States which we could never identify a priori. So, sometimes, years would go by before I received any replies. It is obvious that we cannot continue in this way nowadays. Therefore, the new concept of coordination has to be explored to its fullest, alongside that of cooperation. The concept of coordination exists internally, at the State level; it involves coordination between the police forces, the State attorney’s office and the judiciary, but nowadays it is also an international challenge. Just look at the Palermo Convention, a convention from the year 2000 about organised crime. There, it was agreed that countries must coordinate their actions. This is the root of the problem: how should countries coordinate with each other? At the moment, it is impossible to imagine global coordination. This coordination has to be organised on a regional level by taking into consideration the specifics of each region (in this regard, Brazil must be considered a region, just like the European Union - it is of an equivalent, almost identical size). Coordination on a regional level, achieved through the creation of regional structures of coordination, also has to be harmonized with other regions, as no other type of intervention and no other type of responses are possible. The development of these new means of cooperation at the European Union level, as it stands today, represent an embryo of a global answer that stems from the level of regional integration already achieved. As I said at the beginning, this is a laboratory, a new experience that it’s being developed.

The objective is to set in motion cooperation mechanisms to detect crime, investigate it, bring it to justice and obtain the conviction of those who are principally responsible. Actions that focus strictly on local aspects and are disregard the international aspects of a case risk leading to a corrupt result that modern criminal law should not allow to happen, as it leads to an incrimination of poverty; in other words, a process where the criminals are always the poor or people on the margins, who most of the time don’t have any other choice than to work for the criminal leaders. Today, trafficking is a crime that is increasingly concentrated in the centres of power, namely economic power.

These factors have to be taken into account when the issue of cooperation is analysed. Now, what elements do we have to consider in order to identify responses to these new challenges?

First, it is obviously necessary to remove bureaucratic barriers, simplify the proceedings and bring the various systems closer so as to allow greater cooperation between States.

Second, we have to explore and develop the potential that exists for the expansion of penal law. The international treaties signed so far have allowed penal law today to act in areas that it did not act in before; this also a result of the incorporation of those same treaties into the national legislations.

Third is the issue of criminalisation. Countries have to guarantee that actions mentioned in international law are considered as crimes, and this is only guaranteed by incorporating them into national law. At the same time, countries

must establish the jurisdiction over activities that take place within its territory.

Fourth is the issue of coordination, an essential aspect that forces us to change practices. If coordination works in the areas of investigation and prosecution of transnational crimes, it means, in theory, that multiple investigations and cases will be taking place in parallel at any time and as such we must make sure that these processes are being executed in an efficient and coordinated way. Once this coordination is in place, we have to think about who is going to judge who, and if it is possible to concentrate the processes in a single country or not. The principle *ne bis in idem* is today considered to be a fundamental aspect for preventing conflicts of jurisdiction. Another important point is making sure that the products of crime are confiscated – this is where the point related to money laundering comes in.

Increasing the efficiency of the actions taken in the fight against organized crime also implies resorting to more intrusive methods of investigation, the so called new investigation techniques: surveillance, wire tapping, controlled deliveries, undercover operations. This means a greater intrusion into individual rights, and I am talking about a greater intrusion into rights on an international scale. In doing so, we would also have to grant a higher degree of protection of those rights within the process, so that can provide a fair balance between freedom and security. At the same time, we advance with practical to simplify cooperation, such as direct and spontaneous exchanges of information between the relevant national authorities and we intensify the use of joint investigation teams, made up of agents from various

States, intervening in the territory of all the countries involved in a specific country and under the authority of the members of the current host country. Requests for assistance and extradition must also be simplified.

How to protect fundamental rights is a particularly sensitive issue for the advancement of international cooperation. Fundamental rights and their protection cannot be seen as a barrier to cooperation. On the contrary, fundamental rights are an essential aspect for safeguarding security and for guaranteeing that crime is effectively pursued. At the European Union level, for example, problems have arisen in the cooperation with countries that still apply the death penalty. There are also problems related to the legality of evidence obtained from countries who do not guarantee the same level of human rights as the European Union. These formalities are especially relevant when trying to carry out intelligence operations, searches, arrests and interrogations of people, all highly intrusive operations. The solution is found by requesting that the operations be conducted in accordance to the laws of the soliciting State, such as is already being done and permitted in the European Union. Of course, there are the minimum rights that are set out in the 1966 United Nations International Covenant on Civil and Political Rights: the right to liberty, the right to security and the right to a fair trial. We always have to consider the idea that it is necessary to respect the differences between systems, to act with these differences as a basis and to cooperate despite these differences.

In this context, coordination takes on a new role that I have already referred to. National authorities must coordinate amongst themselves, directly, if possible. Another



problem is raised if they are not able to coordinate themselves: who is going to stimulate this coordination? In many cases, problems arise as soon as there's a need to find someone's counterpart in another country. The issue of coordination is, without a doubt, the reason behind the creation of EuroJust. A very simple idea that is fraught with obstacles, but one that experience shows us works in practice. To what end? To start investigations and penal actions in many States, in a coherent and efficient way that prevents the emergence of conflicts of jurisdiction and to give them continuity, based on the idea that reinforcing cooperation between judicial authorities and the police is always necessary.

By taking a look at the most recent events in the European Union, we can see that cooperation is being developed along four lines of action: the improvement of classical, traditional cooperation; the prevention and management of conflicts of jurisdiction; the bringing together and improvement of national criminal legislation to facilitate cooperation (we have already gone beyond this in the European Union, we are now dealing with the area of mutual recognition of judicial decisions); and the facilitation of extradition. The following are the judicial baselines for this: we have treaties at the European Union

level, especially the one that deals with the construction of a space of freedom, security and justice. At the United Nations level, we have the Palermo Convention that currently provides a great impetus for international cooperation against serious and organized crime.

Cooperation between countries is important, especially in the area of processing letters of request and extraditions. I would like to give you an example of how the cooperation process works in normal terms for sending requests, especially in cases where there is no treaty. Judicial authority A from country A tries to obtain some evidence from country B. They send a letter of request. Country A will follow the stages of their internal bureaucracy until the case gets to the Ministry of Justice - there can be two, three or four stages before the case gets to the central authority. The Ministry of Justice will then contact the Ministry of Foreign Affairs or Foreign Relations, who will contact the embassy of the country in question. The embassy will then send the case to the country B's Ministry of Foreign Affairs, who will send it on to a central authority or the Ministry of Justice in this country. Then the opposite process takes place, until the case gets to Judicial Authority B, which is the body responsible for this specific function. If the letter of request does not get lost along the way, months and sometimes years will go by before it makes it to its destination. After all this, what could happen next is that after receiving the letter, Judicial Authority B does not understand what is being requested. This is because Judicial Authority A made the request according to the legal system in their country, complete with its concepts and procedures. Judicial Authority B will then request clarifications

so everything moves in the opposite direction and the process is delayed for another half year. We speak different languages, we operate under different judicial systems and we have different procedures. There is a very large communication and dialogue problem here. As you all know, this is the way that things still largely work on an international level, even though recent measures are beginning to allow direct contacts between central authorities. This “closed borders” environment is still the one that we have to work in.

The experience of the European Union has made possible the elimination of one of the stages: the diplomatic route. This allows us to make a “central authority – central authority” contact. Now we still have a top-to-bottom internal process to deal with, and this takes time. Judicial Authority A does not know who Judicial Authority B is, because there is no direct contact and doesn’t know how to frame a request that Judicial Authority B is able to deal with following his or her rules and therefore needs assistance. At the moment in the European Union, we are taking the second step of involving the judiciary in the cooperation process. We are going to make advances with this. Certain measures are already being developed.

The European Union, for example, instigated a system of liaison magistrates in 1996. The Ministry of Justice appoints magistrates to liaise with the other ministry of justice (central authority to central authority). The European Judiciary Network, which creates points of contact for cooperation and meets twice per year, examined the national systems in 1998. At the moment, the European Judiciary

Network is made up of 400 points of contact. Then EuroJust was created in 2002 as a central structure that gives us permanent representation. Europol was created at the same time for police cooperation, mainly related to the exchange and processing of information.

A particularly relevant and complex issue in the domain of cooperation is the one related to conflicts of jurisdiction and territorial and extra-territorial rights. There are significant problems here, one is related to instrumental crimes and interconnected crimes, the second one to money laundering. The most complicated thing about money laundering crimes is knowing about what relation it bears to the underlying crime. We do not know how to punish money laundering crime without knowing about the underlying crime. And we have to question where the money laundering takes place: the institution with the authority to investigate the crime is the one with jurisdiction over the place where the crime has taken place, but this is usually different to the place where the subsequent crime happens. The problem becomes even bigger when banking operations are carried out over electronic means, for example via the Internet. Who has jurisdiction over it?

Other questions also arise: How can the competent jurisdictions take action? Who is going to do this? How will foreign authorities respond to this? Judicial authorities stick to a basic “not me” principle during the course of their activities. I have my territorial jurisdiction, it is laid out here in my court, in my district, in my borough. What lies outside the boundaries of my territory has nothing to do with me. We have to turn this around. Then there’s the matter of what law to apply: The

law of the country that makes the request? The law of the country that receives the request? In Europe, we already have the possibility of applying the law from the country that makes the request when action is taken, and to apply the law from the country that receives the request during the trial. In other words, we do not only apply our country's law, but we also apply the law from the country that took part in the search with us. There are, therefore some problem created by this, but these differences cannot be an obstacle to cooperation. If they were an obstacle, they would turn out to be of benefit to criminals.

The problems become more complicated when we consider the penal process itself. There are problems related to admissibility and prohibitions of evidence. There are statute problems related to the accused or the person taken into custody, problems with defence rights and validity of evidence, as well as effectiveness of evidence that is gathered outside the country. There are also problems with witness protection on an international scale, with arrest and compensation, with the confiscation of the products of crime and interception of telecommunications. All of the above has to be considered within the sphere of international cooperation. When it comes to extradition, we have to consider problems related to the extradition of nationals of a country; the rule is that a country does not extradite its own nationals. How can this rule make sense nowadays given the context of international freedom of movement? We have resolved this problem in Europe, the issue of nationals is no longer an obstacle. We got rid of extradition and replaced it with the European Arrest Warrant. The European Arrest Warrant is an order that is issued by a judge in one country, and is

effective in any other member country just as if it were a national decision. As expected, the execution of the warrant is subject to controls. But the order stands, so gone are the days of extradition requests. Nowadays, the normal amount of time that it takes to hand a person over varies between 10 to 40 days. Of course, I do not mean to say that everything is easy. There are immense difficulties, both at the technical and practical levels. That's why mechanisms were instituted to facilitate cooperation. EuroJust is the most recent and advanced one of them all, because it is the first time that an organization was created with the participation of multiple States to deal with criminal matters.

As I told you at the start, EuroJust, the European Union's Judicial Cooperation Unit, is a Union body that is made up of representatives from all the national systems. We were inaugurated in 2002. These representatives could be attorneys, judges or police officers with equivalent capacities. National representatives are attorneys, judges or police officers with similar duties, who can be assisted by one or more person appointed by the States.

National members work permanently in The Hague. When more complicated cases are being dealt with and our actions are not sufficient, we organise coordination meetings where the specific case is discussed. So we frequently hold meetings involving ten, fifteen or more countries for large multinational cases. During these meetings, judges, attorneys and police officers sit around a table and discuss specific cases, define strategies together, verify the evidence that they have to exchange and check the letters of request that have to be sent - and where they have to

be sent to. This allows preparation work to be done. This set of proceedings is carried out with an efficiency that we could not have imagined before the existence of this organisation.

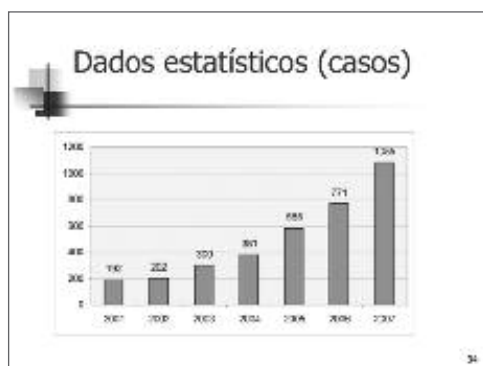
We only have the ability to make requests - we do not give orders to anyone. We make requests within a pro-active context so that procedures can be initiated and concentrated and the joint investigation teams can be coordinated and requests for information made. We ensure that information gets passed between authorities and we normally support this coordination through meetings for that purpose. We facilitate requests for assistance, the management of letters of request and European detention decisions, and the work that we do is also based on Europol's analyses.

The objectives of EuroJust are basically to stimulate and promote coordination, to improve judicial cooperation and to support national authorities. In the area of relations with authorities from other countries, we also deal with countries that are not members of the European Union (this is another area that is being expanded). Within its jurisdiction we have all types of serious or organised crime that affect two or more Member-States in the Community – we focus on organised crime, drugs and money laundering. In other words, all the main types of cross-border crime. Our jurisdiction is identical to that of Europol.

We work with members from each country or as part of a team. We hold meetings twice per week. Our partners are the Member States, our police officers, our attorneys and our judges. In the European Union, we basically have Europol and the OLAF (European Anti-Fraud Office). We have

cooperation agreements with third countries. Currently, two of these agreements have been signed. The first agreement was with Norway and the second was with the United States of America. Both the United States and Norway have full time attorneys and liaison magistrates in our facilities in The Hague. We have also signed an agreement with Croatia, which is awaiting approval by the Council of the European Union. At the moment we are in negotiations with Switzerland (Switzerland is one of our main partners), we are negotiating with Russia (the negotiations are not easy), and we are also negotiating an agreement - Memorandum of Understanding - with IberRed, which is one of the points of contact that includes Central and South America. One day, I would like to add Brazil to this list, as it is a first class partner in the international context. Personally, I would like to be able to add Brazil to the list due to the special relationship that we have. We already have points of contact in thirty-two countries.

I would like to present some statistical data to illustrate the cases that we deal with at EuroJust.



Slide 34

(Slide 34) As soon as EuroJust was established, we immediately began to work on specific cases. In the last three years, the

