# PoLaR — PORTUGUESE LAW REVIEW

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IS INSOLVENCY LAW AUTONOMOUS (AND DOES IT MATTER?) *

Catarina Serra **

1. THE NEED FOR AND THE LIMITS OF LEGAL TAXONOMY

The need to classify and categorize legal matters (legal taxonomy1) is a very natural and logical need for scholars and, to be sure, for all legal professionals2 3. As Aagaard has observed, “[c]lassification is inherent and fundamental to the operation of law. Justice requires consistency. Legal classifications enable consistency by designating categories of similar situations to which a common set of principles applies. The category assigned

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1 The present paper corresponds, with slight amendments, to the paper that was presented at the INSOL Europe Tenth Anniversary Academic Forum Conference, held in Istanbul, Turkey, in 8 and 9 October 2014.

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2 In Dedek’s words: “[l]egal history has witnessed many attempts to impose a measure of order onto the unpruned growth of the Common Law, whether it be through codification, restatement or scholarly treatment. It has particularly been the ambition of jurists, at least since William Blackstone’s time, to provide some guidance to those who, taking recourse to the law, are bound to get lost in its wilderness”. See H. Dedek, “Border Control: Some Comparative Remarks on the Cartography of Obligations”, in R. Bronaugh, J. Neyers and S. Pitel (eds), Exploring Contract Law (2009, Hart, Oxford) pp. 25 ff.

3 As a rule, the need for taxonomy tends to be more intense in common law jurisdictions (with judicial lawmaking), since, for good and for evil, civil law jurisdictions (with statutory lawmaking) are the realm of codification and this, in a certain sense and to a certain extent, equals classification. Not quite with the same understanding, departing, nevertheless from a different standpoint (the coherence of areas), see T. S. Aagaard, “Environmental law as a legal field: an inquiry in legal taxonomy” (2010) 95 Cornell Law Review, at 232.
to a situation thus may determine how the law applies to the situation. The law works through categories, and one of the more important types of categories employed in the law is the legal field. We designate legal fields – environmental law, labour law, criminal law – on the premise that those designations identify something important about how the law operates”\textsuperscript{4}. There are, however, intrinsic limits to legal taxonomy – to every taxonomy – rendering perfect classifications impossible\textsuperscript{5}. One of them has to do with the fact that taxonomy presupposes a homogeneous criterion. Now, homogeneous criteria are very hard to find. The hardships encountered by legal taxonomers as to the adequate criteria are one of the reasons that explain the apparent incoherence of some taxonomy and the skepticism with which some scholars still address taxonomy today.

2. MAPPING PRIVATE LAW

Admitting that there is a category such as private law, we face indeed various difficulties. The first may be expressed in the form of a question. May we lump together civil law and commercial law, civil law and labour law or, even for more striking examples, civil law and insurance law, civil law and banking law, civil law and contract law?

Let us think, for one, of commercial law. Its origins go back to the medieval age, to the Italian cities of Venice, Florence, Genoa, Pisa, where it was born out of special needs – the special needs of merchants. Since then it has had a notorious development, so that, nowadays, we may find it difficult to enumerate all the domains it encompasses. Its special character is undisputed. But may it be considered autonomous in the same sense civil law is usually considered autonomous?

At this point, it is perhaps interesting to conjure Borges’ Chinese encyclopedia (Celestial Empire of Benevolent

\textsuperscript{4} See T. S. Aagaard, op. cit., at 224.

\textsuperscript{5} “We have the high authority of Professor Gray for the proposition that ‘he who could perfectly classify the law would have a perfect knowledge of the law’. But I venture to think that only one who had a perfect knowledge of the law could hope to make a perfect classification and hence that a perfect classification is not to be expected”. See R. Pound, “Classification of law” (1923-1924) 37 Harvard Law Review, at 938.
Knowledge)⁶ and the words used by Foucault to describe his wonderment when he was confronted with it⁷. The encyclopedia contains a classification according to which “animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) \textit{et cetera}, (m) having just broken the water pitcher, (n) that from a long way off look like flies”.

At first glance, the classification is indeed surprising – almost unacceptable. How is there a remotely logical or intelligible criterion when it allows the category of “innumerable” to coexist with the category of “fabulous” or the category of “belonging to the emperor” with the category of “included in the present classification”? According to Michel Foucault, what is striking is “the narrowness of the distance separating one from the other (and juxtaposing them)”. The classification would undoubtedly give rise to “the possibility of dangerous mixtures”⁸.

We should not fall in the temptation, however, to dramatise the situation. As Borges points out, “it is clear that there is no classification of the Universe not being arbitrary and full of conjectures”⁹. And so, even though it is quite evident that there are legal domains that are incomparably more ancient and, therefore, more robust than others (and, regarding seniority and robustness, civil law is hard to beat), even though civil law is undisputedly the source from which the remaining disciplines have emerged and to where they all “return” time and again, even though there are

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⁸ “That passage from Borges kept me laughing a long time, though not without a certain uneasiness that I found hard to shake off. Perhaps because there arose in its wake the suspicion that there is a worse kind of disorder than that of the incongruous, the linking together of things that are inappropriate; I mean the disorder in which fragments of a large number of possible orders glitter separately in the dimension, without law or geometry, of the heteroclite; and that word should be taken in its most literal, etymological sense: in such a state, things are ‘laid’, ‘placed’, ‘arranged’ in sites so very different from one another that it is impossible to find a place of residence for them, to define a common locus beneath them all”. See M. Foucault, op. cit.
⁹ See J. L. Borges, op. cit.
“ambiguities, redundancies and deficiencies”\textsuperscript{10}, mapping the law is still a necessary and useful exercise \textsuperscript{11}.

3. THE PRACTICAL IRRELEVANCE OF THE CONCEPT OF AUTONOMY

Admitting the coexistence of multiple legal fields at multiple and dissimilar levels, we face a second question: are these legal fields autonomous?

The fact that some of them are regulated in a separate piece of legislation, thus enjoying legislative or formal independence, is impressive and, in any case, not to be undervalued\textsuperscript{12}. Law’s existing categories incorporate normative choices and represent an accumulated experience that is worthy of respect. They perform basically two roles: they consolidate people’s expectations and they express law’s ideals for certain types of human interaction\textsuperscript{13}. And because this lends coherence to the area in question, legislative or formal independence does contribute to its becoming a legal field – and to its understanding as such\textsuperscript{14}.

The truth is, however, that no field of law may be completely independent or self-sufficient – no field of law is

\textsuperscript{10} See J. L. Borges, op. cit.

\textsuperscript{11} On the pro and cons of taxonomy, but ultimately sustaining taxonomy continues to be a useful device for the study and development of the (common) law, see K. F. K. Low, “The use and the abuse of taxonomy” (2009) 29 (3) Legal Studies, pp. 355-375.

\textsuperscript{12} If this entailed autonomy, insolvency law would be autonomous in the majority of European countries (and would have been for quite a while now). To elect this as a criterion for autonomy, however, would be misguided. What may have legislative or formal independence, in a certain jurisdiction, at a certain time, may not have it in another jurisdiction or at a different time. Looking at European jurisdictions, we find, at once, several examples of this instability or variability, both in time and space. In Portugal, the accommodation of insolvency rules has alternated between commercial codes, commercial procedure codes and civil procedure codes and has seemingly settled, as in most European jurisdictions, in the insolvency act. Differently, in France, insolvency rules are still accommodated in the commercial code. To sum it all up: not only are there rules laid down in a separate body that do not constitute, \textit{per se}, autonomous legal branches, there are autonomous disciplines in spite of the lack of an independent regulation. It is undisputed that Italian commercial law (\textit{diritto commerciale}) is autonomous despite the fact that its core rules are accommodated in the civil code (\textit{codice civile}).

\textsuperscript{13} See H. Dagan, op. cit. According to him, “[t]hese functions [...] explain the distinctions between private law and other parts of the law, the distinctions between the various fields within private law, and the more minute distinctions between sub-categories within these fields”.

\textsuperscript{14} “[C]entralized and well-coordinated lawmaking processes are more likely to produce law that follows a strong pattern; thus, areas in which law is created by such processes are more likely to exhibit strong, recognizable patterns”. See T. S. Aagaard, op. cit., at 232.
immune to what we might call the intra-systematic dynamics. There is a significant level of continuity and dialogue between disciplines and, as to the framework of private law, between civil law and all the remaining disciplines.\footnote{Every discipline tends to be exposed to “foreign” influences. The exposure varies, of course, according to the robustness of the discipline. In most cases some overlaps are perfectly acceptable, even desirable. See B. A. Ackerman, “The Structure of Subchapter C: An Anthropological Comment” (1977) 87 Yale Law Journal, at 439. In justifying and framing principles for one area of the law, Ackerman explains that lawyers often find that principles governing another area are relevant to their problem. Therefore, it should not be surprising to identify a kind of dependence between legal categories, either in the form of domination / subordination or in the form of reciprocity.}

In the framework of private law, the “domain of reference” is indeed the two-thousand-year-old civil law. Not by accident civil law is considered the general or common private law (droit commun) and, understandably, plays the role of the subsidiary law of the remaining (special) legal fields. This makes it impossible for them to be absolutely independent or self-sufficient – autonomous.

Either way, the autonomy debate may be considered futile or irrelevant for practical purposes. What is indeed the practical use of the classification of a legal field as autonomous? What is its added-value?

What really matters is not whether a set of rules is absolutely independent or self-sufficient (rigorously, no set of rules is), but whether it is coherent and distinct from the others – a legal field in the proper sense of the expression, that is, “a group of situations unified by a pattern or set of patterns that is both common and distinctive to the field”\footnote{This was argued for quite a number of scholars. See, for example, G. U. Tedeschi, Manuale di diritto fallimentare (2001, CEDAM, Padova) at 5, and F. C. Moreno, Proceso Concursal (2005, Aranzadi, Navarra) at 24-25. According to both authors, the discussion was useless for the simple reason that, according to them, it was impossible to fully reduce insolvency law to a single discipline.}. This is what really makes the difference when it comes to apply the law, when it comes to apply or conceive the rule which is the most appropriate to the case.

\footnote{See T. S. Aagaard, op. cit., at 225.}
4. Insolvency Law as a Field of Private Law and the Concept of “Dominant Relations”

It is about time to ask: where does insolvency law stand in all of this?

To cut a long story short, one could say that it has a place in the system of private law, among other private legal fields.

In former times, and for a long while, the so-called bankruptcy law was little more than the rules regulating liquidation or winding-up proceedings. Not surprisingly, it was associated, by some scholars (Italian scholars, mainly) with procedural law\textsuperscript{18}.

This understanding raised objections then – and, \textit{a fortiori}, raises objections now. Furthermore, the scope and the purposes of the discipline have been submitted to changes\textsuperscript{19}. It started out by ensuring orderly liquidation but ended up encompassing proceedings to promote the rescue of economically viable debtors through the means of judicial or non-judicial mechanisms. It tended to apply exclusively to traders and companies but was generally extended to all individuals (natural and legal persons and even entities deprived of legal personality). It used to pursue the resolution of insolvency situations but is more and more directed at providing solutions for the earlier stages (pre-insolvency). The proposal for a Regulation amending the Regulation on insolvency proceedings is a perfect example of this broadening.

This makes it all very difficult to settle in a definition of insolvency law, at least one that may be generally accepted.

\textsuperscript{18} See, for all, A. Brunetti, 	extit{Lezioni sul fallimento} (1936, CEDAM, Padova) at 208.

\textsuperscript{19} The difficulties of a definition are well illustrated by Levinthal: “[i]t is well nigh impossible to define bankruptcy as an institution of jurisprudence in terms that will apply with equal accuracy to the various systems that have been in force among different peoples and in different periods. In some systems, for instance, tradesmen only are subject to the law; in others, all debtors are included. Again, the discharge of the honest insolvent has come to be regarded as the all important feature of some bankruptcy statutes; in others, as satisfactory in the final analysis, the release of the debtor is unknown. It is, therefore, obvious that the definition of bankruptcy usually given by authors treating specifically of one system would not be a correct description of the term as used in all other systems”. See L. E. Levinthal, “The early history of bankruptcy law” (1918) 66(5/6) University of Pennsylvania Law Review and American Law Register, at 224-225.
In any case, it is plain to see that whatever the situation of the debtor (insolvency or pre-insolvency), whatever the instruments used to resolve the situation (assets liquidation or rescue, procedural or non-procedural mechanisms), insolvency law (still) deals basically with responsibility issues. As certain German scholars have underlined, the ultimate and most important target of insolvency law is – has not ceased to be – the satisfaction of creditors\(^{20}\). Thus, insolvency law necessarily integrates the system of private law and maintains “dominant relations” with some of the other private legal fields.

Civil law is, for the obvious reasons, one and perhaps the principal (if we bear in mind the massive recourse of insolvency law to contract and tort law) of the fields to which insolvency law dominantly relates. From civil law it “borrows” principles and rules (freedom of contract, good faith, duty to renegotiate and modification of contracts, just to enumerate a few)\(^{21}\). But there are others, equally important. Let us think, for instance, of certain instruments provided in commercial law or company law (alteration of capital, schemes of arrangement and liability of directors).

5. THE PARTICULARISM (*LE PARTICULARISME*) OF INSOLVENCY LAW

The conclusions reached so far do not undermine the particularism (*le particularisme*)\(^{22}\) of insolvency law nor do they compromise the existence of a legal field or category that goes by that name.

Insolvency law has indeed concerns and needs that are unfamiliar to the rest of the private legal fields and, what is more, that would be unjustifiable in the context of the remaining private legal fields. Some of them are complementary, some of them are conflicting: the realization of creditor’s rights, the respect for the *pari passu* payment to creditors, the collective and universal


\(^{21}\) The phenomenon may be called “cross-boundary borrowings”. See H. Dagan, *op. cit.*

\(^{22}\) The expression is “borrowed” from Durand, though referring to labour law. See P. Durand, *Le particularisme du droit du travail* (1945, Dalloz, Paris) at 254-258.
nature of the proceedings, the rescue of economically viable debtors, the fresh start of individuals\textsuperscript{23}, and it goes on.

It follows that the principles and rules that insolvency law borrows or imports from other legal fields do not remain unchanged. Insolvency law affects them according to its own concerns and needs. And from that moment on they cease to be civil law principles and rules and commercial or company law principles and rules and form part of a distinct domain – they become, in short, principles and rules of insolvency law.

Debt discharge is a good example of this “novation”. It is a cause for the extinguishment of obligations and therefore integrates and follows the general regime (the civil regime). Still, it is a special cause for the extinguishment of obligations, mainly because the extinguishment does not depend on the consent of the creditor. It is fully understandable that it works in insolvency or pre-insolvency situations, serving the purpose of giving a fresh-start or a second chance to the debtor, but would hardly be appropriate outside these special situations.

6. THE PRACTICAL INTEREST OF THE CLASSIFICATION OF INSOLVENCY LAW AS A FIELD OF PRIVATE LAW

That said, it is time for a final (obvious) question: how can this be of any interest from a practical perspective? How can it be of any use for the judge, of the lawyer, of the insolvency practitioner?

However hard to believe, the recognition of the particularism of insolvency law and the identification of the legal fields to which it dominantly connects are not just “academic

\textsuperscript{23} The concern, on the part of insolvency law, with the protection of the debtor as an individual (namely through the consideration of constitutional rights like the right to the free development of one’s personality) is one that may lead to the detachment of insolvency law from civil (contract) law and the further isolation of the former as a field of law. It should be noted that contract law is increasingly accommodating measures, albeit different, to meet concerns and needs of similar nature. Cherednychenko gives one very good example of this – a decision of the German Federal Constitutional Court, where it resorted to constitutional rights primarily for the purpose of the protection of the weaker party (the debtor). The phenomenon is known as constitutionalisation of private law. See O. Cherednychenko, Fundamental Rights, Contract Law and the Protection of the Weaker (A Comparative Analysis of the Constitutionalisation of Contract Law, with Emphasis on Risky Financial Transactions) (2007, Sellier, München), at 207 ff.
ruminations”\textsuperscript{24}. Quite the contrary: the recognition of the particularism of insolvency law and the identification of the legal fields to which it dominantly connects are of the uttermost importance for practical purposes\textsuperscript{25}.

Since the classification in question gives special attention to justification\textsuperscript{26} \textsuperscript{27}, its practical interest lies precisely in the possibility, on the part of the interpreter, to address insolvency law as a coherent, cohesive and unitary, yet not closed (\textit{i.e.}, not autonomous), legal field or domain.

This entails, to be sure, practical benefits for the interpretation specialists and the actual executors of their judgments (judges and lawyers).

In the first place, the interpreter is allowed (and required) to formulate and interpret insolvency law with the consideration of its underlying principles or justifications\textsuperscript{28}.

Secondly, the interpreter is given an ultimate resource outside the strict boundaries of insolvency law. In the worst case scenario, he may be able to find, on the basis of the legal fields to which insolvency law dominantly connects, a way to fill the gaps and overcome the doubts that emerge in insolvency legislation and

\begin{footnotesize}
\begin{itemize}
\item See T. S. Aagaard, op. cit., at 224.
\item “A classification is useful – observes Aagaard – if the organizational framework reflects patterns that reveal something important to us about the materials being classified. If a classification system is helpful, applying the organizational framework differentiates among the elements in a manner that signals salient similarities and differences, bringing some degree of coherence to an otherwise undifferentiated mass”. See T. S. Aagaard, op. cit., at 227.
\item On the type of classification that goes by the name of classification by “justification” or classification into “justificatory categories” see P. Jaffey, “Classification and unjust enrichment”, 2004 (67) Modern Law Review, at 1013-1017.
\item There are, evidently, various forms of classification and, it goes without saying, various forms of classifying the various forms of classification. Jaffey proposes the distinction between classification by justification or classification into justificatory categories and classification by the form of legal relation. See P. Jaffey, op. cit., at 1013-1017. Pound, for instance, forwarded a classification that distinguishes between the natural-law way, the analytical way, the historical way and the nineteenth-century philosophical way. See R. Pound, op. cit., at 942-944.
\item The enunciation of the general principles of legal fields, or legal doctrine (jurisprudence included), is quite a difficult exercise. The difficulties appear to be more severe in regard to insolvency law. It is worth noting, by the way, that there is a profusion of works on principles of corporate insolvency law, principles of international insolvency law, principles of European insolvency law, but almost none on principles of insolvency law \textit{tout court}.
\end{itemize}
\end{footnotesize}
are not likely to be resolved strictly on the basis of insolvency law (insolvency law’s own principles or justifications).

These are valuable supports for legal reasoning, enabling the interpreter to perform a guided “analogical reasoning”, that is, “by drawing on principles underlying other rules that are not actually applicable to the facts”29.

Of course the recognition of insolvency law as a private legal field does not signify absolute certainty. There are uncertainties, for instance, on how to classify rules as important as the ones on shareholders’ loans or the duty to file for insolvency and wrongful trading. The solutions vary both in time and space. Just to give one example: whereas in England wrongful trading is simply accommodated in the Insolvency Act30, in Germany, wrongful trading emerges as a result of the coordinated application of provisions set down not only in the insolvency act31 but also in the civil code32 and in the private limited companies act or the public companies act33 – a situation that is described by Bachner as “a victory of delict over insolvency law”34.

These inconsistencies reflect the ongoing evolution of law and by no means imply that taxonomy is useless. If anything, they show the convenience of engaging on a particular type of taxonomy, one that resists the temptation of “thingifying” legal concepts and participates in the construction of legal knowledge35.

The bottom line is: in spite of all the hardships, we could not do without taxonomy and categorization. As Birks, one of the

29 See P. Jaffey, op. cit., at 1013.
30 See section 214 of the Insolvency Act.
31 See § 15a of the Insolvenzordnung (InsO).
32 See § 832(2) of the Bundesgesetzbuch (BGB).
33 See § 64 of the Gesetz betreffend die Gesellschaft mit beschränkter Haftung (GmbH-Gesetz) and § 92 of the Aktiengesetz (AktG).
35 See H. Dagan, op. cit. Advocating the recast of legal categorization and introducing the notion of “realist taxonomies”, Dagan urges us to “reconstruct taxonomy so as to incorporate [our] insights on the inherent dynamism of law and the important function of contextual normative analysis in the evolution of legal categories”.

most distinguished legal taxonomers, has said: “categories are abolished only in the last stage of Alzheimer’s disease”.

There is no question that there is a category by the name of insolvency law. It corresponds to “[t]he domain [...] concerned with the prevention, regulation and administering of the discontinuity in legal relationships of a person (legal person or natural person) which finds itself in financial problems”, to borrow Wessels’ definition from all the definitions possible.

This is enough to change it all, not merely for the scholar or the professor of insolvency law, but for every insolvency law professional.

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39 “There are numerous ways to define a legal field. A legal field can be defined on the basis of, among other things, a substantive topic (for example, environmental law, labor law, tort law); an aspect of the legal process (for example, statutory interpretation, civil procedure, criminal procedure, remedies); an institutional actor (for example, administrative law, federal courts); or a transsubstantive methodological approach (for example, law and economics, comparative law)” See T. S. Aagaard, op. cit., at 237-238.
THE DISCIPLINARY LIABILITY OF PUBLIC SERVICE EMPLOYEES WITHIN THE PORTUGUESE LEGAL FRAMEWORK: BRIEF COMMENTS

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I. INTRODUCTION

We may define liability as the obligation to account for one's own acts, those of others or the things we have been entrusted with.

Within legal context, the concept of liability is commonly associated with the idea of reimbursing or compensating someone for any previous cause. According to the nature of previous cause, there are different kinds of liability: civil, criminal, disciplinary and the one related to administrative offences.

The civil liability is prescribed by the Portuguese Civil Code and consists in the obligation imposed to someone to repair the damages suffered by third parties. On the one hand, liability may be contractual, e.g., ensued from the non-compliance of contract terms, unilateral legal businesses, or law; when the obligations, technically speaking, are laid down by the law, they mostly concern private rights (article 799 of Portuguese Civil Code). On the other hand, it may be non-contractual, for example, when ensued from the breach of absolute rights or the practice of acts (albeit legal) that might harm others; the obligation to compensate

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outcomes, as a general rule, from the breach of a statutory provision or of an absolute right (article 483 of Portuguese Civil Code).

Regarding criminal liability, this concept is prescribed by the Portuguese Criminal Code and it is not associated with the idea of redress but with sanction: a sanction imposed to someone who breaches, through his/her conduct, essential values of the entire community (as opposed to private rights and interests of an individual), such as the right to life, to physical integrity, to freedom, to sexual orientation, to religious freedom, *inter alia*. The criminal liability will be effective through the practice of acts that breach the essential values of society, legal acts for which breach implies crime, as foreseen and punished by law with severe sanctions (*sanções graves*), considered as *última ratio* sanctions. It also entails a criminal procedure, which is commonly a restriction, partial or complete, of someone’s freedom. As established within the article 1 of the Portuguese Penal Code: “An act may only be criminally punished if it was determined punishable by law before the act was committed”.

The liability regarding administrative offences intends to punish the conducts that breach what we may call “social order” rules, e.g., road traffic, environment, urban planning, and tax offences.

At last, the disciplinary liability is associated with the idea of the breach of conduct duties, general duties of care, technical orientation imposed to an employee, in the scope of his/her work activities and responsibilities. This liability will legitimate the employer to impose a sanction to the employee, within the context of a given procedure.

II. THE DISCIPLINARY LIABILITY OF PUBLIC SERVICE EMPLOYEES

As far as relevant to the current paper, the disciplinary liability of public employees is prescribed by the Portuguese General Law of Labour in Public Functions, approved by Law no. 35/2014, of June the 20th, hereinafter referred to as LLPF.

On the one hand, there is the employee in public functions and, on the other hand, there is the public employer, both
connected by a labour bound in public functions or a public work. The public employee has to fulfil the requirements foreseen in article 25 of the LLPF, without prejudice of the special requirements defined and that may be established, according to the necessary enforcement scope of labour bound in public functions. The public employer is “... the State or a legal person under public law that establish public labour bound pursuant to the current law”.

The disciplinary liability concerning public employees is established in the article 76 of the LLPF, with reference to the duties of the public employee listed in the article 73, and specified in the articles 176 to 239 of this same law. The article 73 establishes that “the employee is subject to the duties enshrined in the current law”, in other statutes, legal acts or collective labour

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1 “1. Besides other special requirements prescribed by law, the public labour bound depends on the fulfillment, on the part of the employee, of the following requirements: a) Portuguese nationality, unless exemption prescribed by the Portuguese Constitution, by an international agreement or by special law; b) to be 18 years old; c) No ban on exerting public functions or no ban on exerting the functions the employee is applying to; d) Essential robustness and psychological profile for the performance of the functions; e) Compliance with the mandatory vaccination laws. 2. The Portuguese nationality shall only be required in the situations established in the paragraph 2 of the article 15 of the Portuguese Constitution” (article 17 of the LLPF).

2 Article 25 of the LLPF.

3 “Employees’ general duties are as follows: a) The duty of pursuing the public interest; b) The duty of exemption; c) The duty of impartiality; d) The duty of information; e) The duty of diligence; f) The duty of obedience; g) The duty of loyalty; h) The duty of courtesy; i) The duty of attendance; j) The duty of punctuality. The duty of pursuing the public interest consists in its defense, the compliance with the Constitution, the laws and legally protected rights and interests of citizens. The duty of exemption consists in not taking direct or indirect advantages, of financial nature or others, for one’s own or for others, of the performed activities. The duty of impartiality consists in exerting the activities with equidistance regarding the interests employees may be confronted with, and without discriminating positively or negatively each and every interest, in compliance with the citizens’ equality. The duty of information consists in providing the citizen with the requested information, in accordance with the law, except the information that is intended by law to be confidential. The duty of diligence consists in knowing and implementing the statutory and regulatory laws and the orders and instructions of the hierarchical superiors as well as exerting public activities in order to achieve the established goals and in accordance with the skills set as appropriate. The duty of obedience consists in accepting and meeting the orders of the legitimate hierarchical superiors in the scope of the service and the labour contract. The duty of loyalty consists in exerting public functions in order to achieve the goals set for the entity or service. The duty of courtesy consists in treating with respect the users of the entity or service, the co-workers and the hierarchical superiors. The duties of attendance and punctuality consist in appearing at workplace regularly and continuously within the established schedule. The employee shall attend training courses aimed at his/her professional development in the scope of his/her activities unless excused for good and sufficient reason.
regulations” and the article 76 sets out that “the public employer disciplinary authority over their employees as long as the public labour bound is in force”.

There are two sorts of disciplinary authority: a) every public employee is responsible to his/her hierarchical superior; and b) every service and body of direct and indirect administration of State is responsible to the member of the Portuguese Government in charge of the its superintendence and supervision (article 176 of the LLPF).

According to the article 183 of the LLPF, disciplinary infraction is “the employee’s conduct, either by action or by omission, albeit merely an act of fault, which breaches general or specific duties inherent to his/her tasks”. The law distinguishes between the competence to initiate disciplinary procedure (article 196) and the competence to impose disciplinary sanctions (article 197).

In the article 180 of the LLPF, the lawmaker defines gradually the types of disciplinary sanctions based on the severity of the transgression and on the liability levels involved. Disciplinary sanctions are as follows:

— **Written warning.** It is a mere reprehension for the irregularity committed and it is imposed to simple labour offences (*infracção leve*);

— **Fine.** It is fixed with reference to a certain sum and cannot exceed the total amount of six daily wages per infraction and the total amount corresponding to 90 days of the annual base wage. This sanction is imposed to negligence or misunderstanding of the work duties;

— **Suspension.** It is the temporary removal of an employee from performing his/her work duties. This measure is due to serious negligence or serious lack of work commitment on part of the employees or to the misconduct that seriously harm the dignity and prestige of their work tasks.

— **Disciplinary resignation or dismissal.** This disciplinary measure consists in the permanent
removal of an employee working on a public contract basis and in the ceasing of his/her labour bound. On the other hand, dismissal is the permanent removal of a selected and appointed employee and involves the ceasing of his/her labour bound, in case of a breach that impairs this same bound.

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*Ceasing of the commission of service (comissão de serviço),* as a main or secondary activity, consists in the compulsory ceasing of a leading position or a similar position. It is mostly due to the inaction of the person in charge or to the breach of enforcement rules regarding service agreements.

The disciplinary measures are imposed to the situations outlined above but there are other criteria that must be taken into account when imposing disciplinary sanctions, namely: nature, mission and attributions of the entity or body; the employee’s position and category; the specific and inherent responsibilities of the employee’s public labour bound; his/her degree of guilt; his/her personality and all the circumstances of the committed infraction either against or in his/her favour.

Except the written warning, the enforcement of any of these sanctions depends on the initiation of a prior disciplinary procedure. It must be confidential and the public service employee, held accused, may be represented or accompanied by his/her lawyer or nominee.

The disciplinary procedure is common (*comum*), as prescribed by articles 205 to 228 of the LLFP, or special (*especial*). In this case, it will take the form of inquiry (*inquérito*) or probe (*sindicância*), as established by article 229 to 231 of the LLPF, or the form of special investigation (*processo especial de averigações*), as prescribed by articles 232 to 234 of the LLPF, and its enforcement refers to cases expressly established by law.

The special investigation is mandatory and immediate when a public employee had two successive negative performance evaluations.
The inquiry aims at determining facts and the probe intends to provide a general enquiry of the functioning of the entity, body or service. It means, therefore, the hierarchical superior has doubts about the disciplinary infraction or malfunctioning of the service. In fact, to be cautious, the superior inquiries or probes previously in order to look for evidence that may confirm if the public employee has committed a disciplinary infraction. If doubts are dispelled and the superior concludes that there is strong proof of disciplinary infraction, he will subsequently initiate a disciplinary procedure.

After the conclusion of inquiry and probe, a disciplinary procedure may thus emerge and, in these situations, by decision of the appointed authority to initiate the procedure, a discovery (fase de instrução) is carried out and the employee is formally indicted within 48 hours.

By default, all the remaining situations fall within the common disciplinary procedure: its enforcement concerns all the cases that do not require a special procedure. The disciplinary procedure includes the notification, the discovery, the indictment, the defence of the accused, the final order (decisão).

Which are the main stages of this procedure? The mandatory and main stages of this procedure are: a) communication/offence report minute and discovery; b) employee’s defence; c) final order 4. The appeal and review of the disciplinary procedure are two other possible stages.

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4 The communication/offence report notice is relevant as it affects the scope of the procedure and gathers all the important facts and evidence collected from the person responsible for the initiation. The next stages include: the order to initiate the procedure and the nomination of person responsible for the discovery (instrutor); the discovery stage for the provision of necessary evidence according to the circumstances of each case (testimony, document evidence or others); the discovery stage ends with a report in order to discontinue the proceeding or prosecute the employee. The accused will be served with the bill of indictment and will be given the possibility to oppose, to present his/her defense and to pursue his/her right to hearing, and the right to require the provision of evidence; after the defense of the accused, the person in charge of the discovery shall reanalyze the proceedings and decides, through a final report, if the appointing authority shall discontinue the disciplinary procedure (if the accused has managed to prove he did not committed the infraction he was charged with) or impose the disciplinary sanction; The final report, with the proposed decision, shall be forwarded to the appointing authority for decision.
The special procedures are more simplified and also have a shorter period of time: report notice, discovery and decision and, in the case of probe (sindicância), the publication of notification and general announcement.

For precautionary measures, within the common disciplinary procedure, and in case of resignation or dismissal, during discovery and on a proposal from the entity or the person responsible for the initiation of disciplinary procedure and by order of the head of the entity or service, the employee may be preventively suspended from exerting his/her functions, without loss of earnings, until final pre-trial order, if his/her presence happens to be inconvenient for the service or for the establishment of truth, as long as this period of time does not exceed 90 days.

Disciplinary procedure and criminal procedure are independent of each other. However, if the disciplinary infraction is also a criminal one, the appointed entity ought to refer it to the Prosecutor’s Office (Ministério Público); the disciplinary procedure shall continue but the compliance of its decision may be suspended until the court judgment is given.

III. THE ADMINISTRATIVE CONCEPT VS. THE CRIMINAL CONCEPT OF DISCIPLINARY PROCEDURE. THE PREVAILING CONCEPT

The discussion between administrative and criminal experts regarding the nature of disciplinary procedure is not new as well as the difficulties in reaching consensus are not new either. In fact, both administrative and criminal schools stand for their ideas, according to the rules and general principles of administrative and criminal laws, consolidated through the years, without any relevant objection from doctrine and jurisprudence.

Those that support the criminal concept consider that disciplinary sanctions are similar to criminal sanctions, thus they shall be imposed to administrative sanctions as well. The differences between criminal law and disciplinary law are merely quantitative.

The severe infractions (infracções mais graves) are reserved to Criminal Law but the minor (leves) ones are punished through disciplinary sanctions. This concept goes even further by
considering that the sanctioning power of Administration has a contentious nature so it should not be reserved to the Administration but exclusively to a criminal judge instead. In fact, within the rule of law, the criminal judge is the one in charge of “judging”, i.e., he is responsible for appreciating a fact and pursuant to law deciding on its potential reprimand.

This theory, as all theories, is not free of criticism.

On the one hand, since subsidiarity (subsidiariedade) and proportionality (fragmentariedade) principles lead the criminal intervention, the criminal infringements shall punish the most severe offences to the fundamental legal values. On the other hand, the quantitative differences are not the sole responsible for the distinction between criminal law and disciplinary law; some conducts shall be punished either criminally or disciplinarily as they are simultaneously considered as crime and disciplinary infraction.

The administrative concept, as opposed to the criminal one, considers that disciplinary sanctions have their own identity which distinguishes them from criminal sanctions: their nature and purposes are different thus they shall be subject to specific principles diverse from the criminal ones.

Consequently, the disciplinary power emerges from a special supremacy relationship between the Administration and some categories of people, thereby justifying the assignment of a specific disciplinary power (administrative and not criminal) to the Administration, which contrasts with the State punitive power. The disciplinary law emphasizes on its ethical nature of disciplinary law and focuses more on correction than on reprimand.

In the scope of this discussion, some defend that prevention does not exist in the disciplinary sanctions which is eventually stress on the supremacy of moral purposes over the purposes of setting an example. The ethical reference intends to define the goals pursued through concept: the proper running of the service and the preservation of corporate honour and dignity. Therefore, as opposed to Criminal Law, disciplinary law does not attach as
great importance to social disorder caused by misconduct as to the employee’s neglect and indignity.

However, besides its ethical dimension, disciplinary law shall also react to any fact that might alter the proper running of the service and shall punish consequently the minor offenses to legal assets; as well as penalties, disciplinary sanctions aim at intimidating, reprimanding, and correcting.

One may defend that the State sanctioning power is a unique whole, hence disciplinary and criminal laws shall be subject to the same principles, which means this situation is based on a “non-question”.

According to the administrative school, disciplinary law may be based on special subjection relationships which are used to the flexibility of the guarantee principles of criminal law within disciplinary law, and on the fact that any organisation shall have an inner structure in order to achieve its goals; in the case of the Administration, these goals are set by the Constitution, thus disciplinary law is expressly inherent to public servants.

Regarding disciplinary procedure, we frequently see that the Portuguese Constitutional Court distinguishes between criminal sanctions and disciplinary sanctions according to the different nature of infractions and that disciplinary power has an instrumental nature concerning the global running of Administration: the principle of hierarchy expressly related to Administration entails that the exertion of disciplinary power belongs to the hierarchical superior, hence the difference between hierarchical and special subjection relationships.

Articles 269 and 271 of the Portuguese Constitution read as follows:

“In the exercise of their functions Public Administration workers and other agents of the state and of other public entities shall exclusively serve the public interest (...)” (article 269, paragraph 1, of the Portuguese Constitution).

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5 Inter alia, see T. Pizarro Beleza / F. A. Castillo Blanco, Estudo Comparado do Procedimento Disciplinar entre Portugal e Espanha (Comparative study on Disciplinary Procedure in Portugal and Spain).
“The staff and agents of the state and of other public entities are civilly and criminally liable and subject to disciplinary proceedings for their actions and omissions in the exercise of their functions, and for any such exercise that leads to a breach of those citizens’ rights or interests that are protected by law, and no phase of any action or proceedings shall be dependent on authorisation by higher authority.” (article 271, paragraph 1, of the Portuguese Constitution).

Therefore, the Constitution lawmaker intended to create a disciplinary procedure for public servants, which is sole, autonomous and independent (from criminal procedure). In fact, the Constitution prescribes the right to hearing and the accused’s right to defence and does not set out, at first sight, any compulsion or need to use criminal law, as an ultimate order, or the legal framework related to administrative offences within the disciplinary procedure as the stages this procedure has to observe seem amply established by the supreme law.

We must stress that the hearing right and the accused’s right to defence are already foreseen in, mutatis mutandis, the Portuguese Code of Administrative Procedure (in its articles 53 to 221 et seq., albeit its different purposes and procedure insertions). This Code also establishes the principles of legality, proportionality, justice, impartiality, involvement and access to justice (see articles 3, 5, 6, 8 and 12) to which the disciplinary procedure is subject to, instead of being apparently subject to the criminal law principles, with a “minus” namely for more severe conducts against values and fundamental principles (such as right to life, to physical integrity, etc.), and the disciplinary procedure that aims at sanctioning, as a last resort, the breach and injury caused to the public interest.

The “public servant” is entrusted with a “mission” that must be pursued with precise and full compliance with duties, previously established and agreed when the public employment contract was concluded, concerning, as we said before, conducts within the exercise (and because of the exercise) of administrative functions.

The criminal concept tend to not accept this sort of constitutional ruptures which operate within the administrative
law, with all the results that it entails, results that differ from those we are used to, if only because of the motives and the logical and deductive reasoning that regulates the procedure, one example being this emancipation trend.

In consequence, the disciplinary procedure will be independent and autonomous in respect to criminal procedure and so the liability assumptions as well as the nature and purpose of the sanctions imposed for disciplinary procedures will differ.

Which one of the above “schools” prevails within the Portuguese legal framework? In our opinion, as we pointed out, within the Portuguese system, the administrative concept prevails, as criminal law and disciplinary law have a diverse nature based on a different idea of infractions. As the disciplinary power is also founded upon this different nature, special subjection and hierarchy relationships, the autonomy of disciplinary law consequently prevails upon criminal law and, as a result, we do not endorse the theory that the sanctioning power of the State is a unique whole, as it subsequently engenders the alienation of the principle of typicality (tipicidade), the acceptance of incriminating analogy, the alienation of the criminal principle of prevalence and the confirmation of separation of powers, between the different functions of the State, *inter alia*.

We do not deny the “similarities” regarding the procedures which, in our opinion, ensue from an option on part of the lawmaker between the structures of criminal procedure and administrative procedure. Indeed, the disciplinary procedure includes a discovery stage, similar to the inquiry stage of criminal procedure; then comes the defence of the accused which has no parallel in the criminal procedure; and, afterward, the drafting of the final report which is similar, at best, to the preliminary investigation decision in criminal procedure.

However, these similarities come along with substantial dissimilarities. For instance, in the disciplinary procedure, the intervention of the same investigator, during the investigation and the defendant hearing stages ending with the final report does not breach the article 40, b), of the Portuguese Code of Criminal Procedure, and this interpretation does not breach either the articles 32, paragraphs 5 and 10, and 239, paragraph 3, of the
Portuguese Constitution, nor the article 6, paragraph 1, of the European Convention on Human Rights.

Though, in order to define who intervene and who is responsible for the different stages of criminal procedure, the article 40, b), of the Portuguese Code of Criminal Procedure prescribes that “No judge shall intervene in trial, appeal, or request for revision concerning a procedure in which he has already: (...) b) Chairing a pre-trial meeting [debate instrutório]”. The reasons of this legal provision are related to the guarantee of an impartial trial, through the removal imposed ex lege to the judge who chaired the pre-trial meeting. This meeting, through oral and adversarial hearing, intends to ascertain if during inquiry and preliminary investigation stage there were solid evidence and elements to prosecute the defendant. So what is true for the article 298 of the Portuguese Code of Criminal Procedure is also true for the articles 204 and 205 of the Law no. 35/2014, of 20 June, but it is not for the article 209 of this same law as it states a regime different from the one foreseen in articles 40, b), and 54, paragraph 1, of the Portuguese Code of Criminal Procedure.

This is due to the fact that the preliminary stages of the disciplinary procedure (discovery, defence of the accused, and final report) do not exactly correspond to the preliminary stages of the criminal procedure (inquiry, examination and trial, as foreseen in articles 206 to 219 of Law no. 35/2014, of 20 June, and articles 262 to 310 of the Portuguese Code of Criminal Procedure, respectively), as well as the functions of the person in charge of discovery (instrutor) within the disciplinary procedure do not exactly correspond either to the functions of the judge, or the Prosecutor’s Office, in the criminal procedure.

In fact, the disciplinary procedure is an administrative one, albeit its special and sanctioning nature, and thus it is subject to the hearing and defence of the accused guarantees prescribed by the Constitution (articles 269 to 271), similar to the right enshrined in the criminal procedure (article 32, paragraph 10, of the Portuguese Code of Criminal Procedure), and it has its own protocol, firstly because it is not brought before a court and also because it has its own concepts and principles.
There is therefore a general consensus that disciplinary liability aims at taking action against infractions of duties imposed by the integration in a group and differs from the other concepts, such as civil liability and criminal liability (the civil liability is the obligation to repair the damaged suffered by someone; and the criminal liability involves the infraction of community interests. The purpose here is the national defence). It is true that these three concepts of liability may exist separately from each other but they may also coexist. The same fact may not be proved within the criminal procedure in order to be punished and taken to a criminal trial but, within the disciplinary procedure, it may have sufficient evidence to ascertain that the agent is dangerous or inconvenient at work.

Still on this distinction between criminal procedure and disciplinary procedure and in favour of the autonomy and independence of the last one, we share the opinion of Marcello Caetano when we stated that: “Within criminal procedure the level of proof shall be based on the evidence ensued from the adversarial system of preliminary investigation stage to deliver judgment. Within the disciplinary procedure, the hierarchical superior only has to be certain that there was in fact an infraction or that the agent, according to his/her conduct, needs to be corrected or shall not continue exerting public activities”.

There is no question that the disciplinary procedure is independent from the criminal procedure and it does not assume the relevance of a “minus” regarding criminal law but an “aliud” nature instead: the disciplinary procedure is independent from the criminal procedure that may be have been initiated for the same reasons and besides it refers to principles and purposes inherent to a quality “public service”. The infractions that may have been committed have exogenous and endogenous reflexes within the public entity where they happened, they shall be resolved internally and the external consequences shall be repaired.

Still on the distinction of these two procedures, within the criminal procedure, the Prosecutor’s Office is the sole empowered to initiate a procedure (article 262 of the Portuguese Code of

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6 See I. Galvão Telles, Direito das Obrigações (Coimbra: Coimbra Editora 1997).
Criminal Procedure); however, as far as disciplinary procedure is concerned, the law states that “any hierarchical superior” (article 196 of the Annex to the Law no. 35/2014, of 20 June) may initiate a disciplinary procedure. The phrase “any hierarchical superior” seems to restrain or unable the delegation of powers as any chief is responsible for the initiation of procedure whether he/she works in the same service of the accused employee or not, as opposed to the previous situation since, at that time, the “ultimate superior” was in charge of the initiation of disciplinary procedures (according to the articles 35, paragraphs 1 and 2, and 36, paragraph 1, of the Portuguese Code of Administrative Procedure).

In these terms, and in our opinion, a hierarchical superior shall not delegate this power to an employee with the same position, category and career of the accused. The power to initiate a disciplinary procedure shall always belong to the hierarchical superior and the possibility of hierarchical appeal shall be safeguarded, as prescribed by the articles 166 et. seq. of the Portuguese Code of Administrative Procedure, since this really is about administrative procedure.

When exercising its disciplinary powers, the fixing of the level of proof and penalties, the Administration enjoys some freedom, within the area we refer to as “administrative justice”, and acts apart from the legal probe (sindicância judicial) except if the criteria used for the level of proof or the achievements undermine the principles of the administrative activity or happen to be gross and expressly unacceptable within the scope of the delimitation and coexistence between what is discretionary and/or bound.

These diversity and autonomy of the disciplinary procedure also justifies, for instance, the fact that distancing (impedimento) or refusal (recusa) concepts of criminal procedure shall not be implemented “tout court” in the disciplinary procedure.

IV. Specificities Regarding Evidence and Impugnation of Acts

Regarding admissible evidence, as provided for by the article 341 of the Portuguese Civil Code, “Evidence shall express
the reality of facts”. In the subsequent articles, this Code states testimonial, documental or presumptive evidence.

Article 115, paragraph 1, of the Portuguese Code of Administrative Procedure establishes that “The person in charge for the procedure shall enquire every fact that may be appropriate and necessary for a fair and legal decision-making, within a reasonable time limit and, for this purpose, he may use all evidence accepted by law” (emphasis added). Therefore, the law prescribes the duty of general investigation and, in the articles 116 et. seq., the guarantees of defence of the concerned person (here, the accused), regarding the provision of evidence and the use of evidence accepted by law.

Simultaneously, article 212 of Law no. 35/2014 (LLPF) establishes that “The person in charge of the discovery issues the grievance or complaint and performs discovery. He is also in charge of the hearing of the accused, his witnesses and those he considers necessary; he appreciates the searches and diligences in order to reveal the truth and he also adds to the file the disciplinary record of the employee”.

So, in the disciplinary procedure, every proof, including during the defence of the accused, is provided before the appointed person in charge of the discovery who is also responsible for the indictment and the final report (articles 213 and 219 of the LLPF) which shall contain the facts being effectively proved, their qualification and the penalty imposed. This report is somehow similar to the pre-trial order in criminal procedure (article 302 of the Portuguese Code of Criminal Procedure). In addition, the inquiry stage (for the verification of facts) may be the discovery stage of disciplinary procedure (article 212 of LLPF), but, due to the concise verification of facts and according the principles of legality and access to justice, it shall not restrain or unable a new inquest of facts and the provision of evidence necessary to a due examination of facts and to a fair composition of disputes, as provided for by the principles of criminal law, the Constitution of the Portuguese Republic, and the Law no. 35/2014 (LLPF).

In disciplinary procedure, albeit the defence of the accused is subject to adversarial principle it does not correspond to the
trial hearing in criminal procedure. As the disciplinary procedure is an administrative procedure and not a criminal one, there is no trial hearing for the provision of evidence and discussion (as it happens in court), that is the reason why the prohibition to intervene in a trial determined by the article 46, b), of the Portuguese Code of Criminal Procedure, when applied to disciplinary procedures, shall be interpreted as referring exclusively to the decision stage, foreseen in article 220 of the latest Disciplinary Regulation (Estatuto Disciplinar), and not to the preliminary stages of the defence of the accused nor the final report which both complete the discovery.

The accusatorial structure of the procedure means essentially the recognition of the accused as a party in the procedure who has the right to effective freedom of action for exercising his defence.

If a conduct is both a disciplinary and criminal infractions and if the author is also civilly held liable, regarding the above accusatorial structure, in terms of evidence, the question arises of whether we may use the evidence collected in the administrative procedure in the criminal and/or civil procedures, when the same fact happens to be a crime and entails a civil liability. In other words, it is of the utmost importance to clarify if the evidence within the administrative procedure is valuable in other procedures. In a way, it is a mean of examining the right to evidence in its full, as foreseen in the Portuguese Constitution, considering that the administrative procedure actors are closer to the facts and evidence and have more powers of spatio-temporal immediacy than within criminal procedure although “the produced evidence will entirely be repeated”.

The right to evidence is a corollary of the guarantees of litigation and fair and just proceedings enshrined in law. According to this right, the parties are provided with possibility of using to their advantage any means of evidence deemed appropriate to assert their pretension either to demonstrate the facts which legal burden of proving and allegation rests on them or to rebut unfavourable facts they want to contradict.

The evidence is subject to the appreciation of the person in charge of the discovery who may accept or reject it according to its
integrity, need or adequacy. The rejection is due to impertinent or
dilatory evidence or to evidence that do not relate to the scope of
the discovery and do not imply the same specific knowledge, even
though it relates to facts, with the purpose of “having an effective
proceedings without excessive, circumstantial and secondary
things, facts, and situations in order to comply with the principles
of procedural time and cost saving” (see ruling of the Court of
Appeal of Lisbon – Tribunal da Relação de Lisboa – of
27.02.2007). The acts of acceptance or rejection are subject to the
right of hierarchical appeal regarding their legality or
administrative action.

Likewise, the impugnation of acts issued within disciplinary
procedure shall use all means of evidence previously produced
(article 224 of the Law no. 35/2014, of 20 June – LLFP) and those
required afterwards (“supervenience” principle – superveniência)
as provide for by article 226 of the LLFP “requiring new means of
evidence or adding convenient documents provided that they
could not be required and used in due time”.

Thus, the impugnation of acts issued within disciplinary
procedure uses the evidence previously produced but the
production of new means of evidence that occurs subsequently is
subject to a formal request.

Finally, regarding evidence, we may refer the ambiguity
related to subjectivity and constraint that often affects testimonial
in the disciplinary procedure. In fact, in criminal procedure the
personal relationships between family and friends are not taken
into account for the interpretation of the witness statements;
however, in the disciplinary procedure, we may refer the
friendship and the hierarchy relations that may exist between the
accused and the witnesses or even between the hierarchical
superior and the witnesses. In fact, even though unconsciously
and without premeditation, one may be tempted to influence the
person in charge of the discovery and to emphasis aspects deemed
irrelevant for the disciplinary liability of the accused.
As Jorge de Figueiredo Dias points out, we shall take into account the witnesses and the Person’s opinions regarding the facts as well as the implications arising from the fact human relationships do not follow the rules of exact sciences.

V. CONCLUSIONS

At this juncture, we may conclude that:

a) The disciplinary liability related to the legal concept of liability but according to its causes and purposes, it is independent from civil and criminal liability as well as and the one related to administrative offences.

b) The disciplinary liability of public service employees has an internal sphere (the employee and the organization he works in) and an external one (the projection of the inner relation to the exterior) and aims at providing quality public service and at complying with the public interest.

c) The disciplinary procedure is independent and autonomous even though it includes some principles and criteria of other areas of law, namely of Criminal Law.

d) There are different concepts regarding the nature of disciplinary liability and procedure and the main ones are the administrative and the criminal concepts.

e) According to the autonomy of disciplinary liability and disciplinary procedure, we believe that the prevailing concept within the Portuguese legal framework is the administrative one.

f) Despite our opinion about the administrative concept of disciplinary procedure of public service employees, some principles of the criminal procedure are called upon, like the principle of typicality (tipicidade) and the principle in dubio pro reu, in order to appreciate evidence and determine penalties. Some criminal criteria are also considered, such as guilt, education and understanding of the accused person.

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7 J. Figueiredo Dias, Temas Básicos da Doutrina Penal (Coimbra: Coimbra Editora 2001) 163 e 164
g) The disciplinary procedure may be common (comum) or special (especial) regarding the causes and circumstances of each case.

h) In the disciplinary procedure the accused with provided with all the guarantees of defence.

i) The power regarding disciplinary complaint no longer lies upon the ultimate hierarchical superior but upon any hierarchical superior.

j) The decision to adopt a common or special procedure requires a perfunctory appreciation of facts and their reasonability.

k) In these terms, the lawmaker should have foreseen a preliminary stage in order to elucidate the hierarchical superior about the disciplinary procedure to initiate or to reject as unfounded or to issue the offence notice.

l) The disciplinary sanctions are based on the severity of infractions.

m) Except for warning, the remaining sanctions shall be preceded by disciplinary procedure.

n) The decisions rendered in the scope of disciplinary procedures are guaranteed administrative and dispute impugnation (legal impugnation of administrative acts).
REGULATION EU 1215/2012, EXEQUATUR’S SUPPRESSION AND THE OPTIMIZATION OF EXECUTIVE PROCEEDINGS BASED ON OTHER MEMBER-STATES’ DECISIONS: EXECUTED PERSON’S SERVICE AND REFUSAL OF JUDGEMENT’S RECOGNITION AND ENFORCEMENT IN PORTUGAL

Joana Covelo de Abreu *

When exequatur’s suppression is one of the main goals in EU, it is necessary to analyse how that is going to be observed in Member-States, especially taking into consideration Member-States’ information. In this context, it is especially understandable Portuguese enforcement reality can generate some particular problems since it was not under any revision and there are structural changes that derive from Regulation 1215/2012 that deserved a closer look to national solutions. In this sense, Member-States’ procedural autonomy must be tested under equivalence and effectiveness in order to set which national solutions are able to fully assure Regulation’s efficacy.

This gains particular importance when refusal of recognition and / or enforcement is one of defence rights recognized to the person against whom another Member-State’s decision was issued. Once again, it is important to understand if national Portuguese solutions are adequate to assure Regulation’s reality.
1. **Exequatur’s Suppression**

Exequatur’s suppression implies that an origin decision is enforced, in other Member-State, in the same conditions it would be enforced in the origin Member-State (as stated in article 36.º, n.º 1 of the Regulation 1215/2012). “Alternatively, resorting to a similar concept, the decision must be accepted as it would be if it had been issued by the courts of the addressed Member State”\(^1\) (whereas 26 of the Regulation 1215/2012). Therefore, Regulation 1215/2012 consecrates, in a more obvious way, a “principle of assimilation of a judgment issued in the origin Member-State as a decision given by the Member-State addressed”\(^2\).

Exequatur’s suppression was the main goal of the European Commission since that had in mind to show to citizens that “Europe is active and concretely improves their life and working conditions”\(^3\). Therefore, Commission wanted to strengthen reciprocal trust among Member-States and to reduce expenses associated to cross-border litigations\(^4\). In fact, the expression “reciprocal trust” can be found in whereas 26 of the Regulation 1215/2012, in its French version. Therefore, they did not resort to the usual legal expression “mutual trust” that appears, for instance, in the Portuguese version\(^5\). There are many authors that question if that came from an interpretation error – and, being so, if the error was in the Portuguese\(^6\) or in the French version. For us, it is quite indifferent this dissidence since, despite the literal

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\(^{5}\) In the Portuguese version, the expression found is “confiança mútua”.

\(^{6}\) Also in the English version we can read the expression “mutual trust”, which literal translation is more close to the Portuguese expression “confiança mútua” than to the expression “confiança reciproca”, that we can derive from the French version.
interpretation of EU legislator’s wording, it is commonly accepted by the authors that the general principle is of the reciprocal trust. Anyway, it seems to us that it is important that the nomenclature adopted by the doctrine has already passed to, at least, one of the Regulation’s official versions.

Regulation 1215/2012 adoption came from Commission’s hard work which had its climax with a Regulation’s proposal (presented by that European institution). In this proposal, Commission mentioned four essential gaps. Among them, we can highlight one with major importance for the topic under discussion: “recognition and enforcement procedure of a decision in other Member-State («exequatur») constitutes an obstacle to judicial decisions’ free circulation, causing useless expenses and delays to interested parties and discourages companies and citizens to profit from internal market.”

Member-States agreed that judicial decisions’ free circulation should be enforced. But, in order to exequatur’s suppression be a reality, it was necessary that fundamental rights recognised to citizens were assured, namely, the respect for defence rights and the existence of a fair and equal trial, as they are densified in article 47.º of the Charter of Fundamental Rights of the European Union (CFREU).

Still, there were some disagreements on what concerns the means to make those rights to action and to defence truly effective.

Bearing this in mind, Commission started to show that the defendant had three moments where he had the chance to defend himself, in exceptional circumstances, avoiding that a decision could be recognised and enforced in other Member-State: 1) the defendant can contest that judicial decision in the origin Member-State when he was not duly informed about those proceedings in

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7 See European Commission’s Proposal for a Regulation of the European Parliament and of the Council, on jurisdiction..., p. 3.
9 See European Commission’s Proposal for a Regulation of the European Parliament and of the Council, on jurisdiction..., p. 6. In fact, this document states that “opinions were different about those guarantees range and the place where they must be available (if in the enforcement Member-State or in the origin Member-State)".
that Member-State; 2) the defendant can use an extraordinary way in the enforcement Member-State that will allow him to revisit any procedural error eventually noted in the origin court’s proceedings that was possible to have violated his right to a fair trial; 3) he can demand enforcement proceedings’ suspension (in the enforcement Member-State) based on a decision, when that is irreconcilable with other enforcement Member-State’s decision, or, meeting some conditions, with another delivered in other country.\textsuperscript{10}

But, in fact, those moments are materialized in just two moments (and not three, as stated by the Commission in her proposal) where the defendant can exercise his defence rights: 1) an appeal in the origin Member-State; 2) an appeal in the enforcement Member-State. In both cases, the defendant can evoke the refusal of that enforcement based on the existence of another decision since “irreconcilable exception is maintained without any alteration”\textsuperscript{11} in the Commission’s proposal.

We can also verify the integral maintenance of refusal causes of judgement’s recognition and enforcement, as now stated in articles 45.º and 46.º of the Regulation. In this particular matter, Commission’s proposal presented an absolute novelty: the public policy clause, mentioned in ancient article 34.º, n.º 1 of the Regulation 44/2001 (article 45.º, n.º 1, a) of the Regulation 1215/2012), would disappear as refusal cause to recognise and / or to enforce a judgment presented in other Member-State. To justify this option, Commission stated it would promote savings in terms of time and expenses of the exequatur’s proceedings while defendants’ necessary protection would still be guaranteed\textsuperscript{12}. And we can devise what motivated this refusal clause’s removal: having in mind those references made to the Court of Justice and Portuguese jurisprudence, we can see that parties in the litigation evoke public policy clause as an “alternative” refusal clause and, sometimes, as a “subsidiary” one, without having in mind


\textsuperscript{11} See Catherine Kessedjian, Commentaire de la refonte du règlement n.º 44/2001..., p. 129.

\textsuperscript{12} See European Commission’s Proposal for a Regulation of the European Parliament and of the Council, on jurisdiction..., p. 7.
jurisprudential developments presented by the Court of Justice. In fact, as clear in case law Apostolides\textsuperscript{13}, the Court of Justice shown that evoking public policy clause can only happen when recognition / enforcement of a decision “affects, in an unacceptable way, a fundamental principle of the addressed Member State. It must substantiate a manifest violation of an essential juridical rule or fundamental right of the addressed Member State’s public order”\textsuperscript{14}. In this sense, parties normally do not evoke and prove that unacceptable violation and they are, most of times, unable to illustrate which is the juridical rule / fundamental right that is essential to the enforcement Member-State’s legal order.

However, it looks to us that this Commission’s option was larger than reality would advise – as became clear be the publication of the Regulation 1215/2012. In fact, as taught by Catherine Kessedjian, setting aside public policy clause would go further than EU primary law, in what internal market relates to\textsuperscript{15}, as we are able to derive from reading Court of Justice’s case law Liga Portuguesa de Futebol and Bwin Internacional\textsuperscript{16}.

This proposal was bold but, for some authors, it was “premature”\textsuperscript{17}: Regulation 44/2001 has given EU mechanisms that really worked and there was not a great controversy around its construction. In this way, there are people who understand that the Commission, especially in what concerns public policy clause removal, wanted to accomplish a political agenda more than wanted to promote a real functional operability of that Regulation – “in practice, the Regulation works well and the need of recast derives more of political choices made by the Commission, not all of them justified, such as [...] in the total suppression of the public policy control in decisions’ enforcement”\textsuperscript{18}.

\textsuperscript{13} See Case Law CJ Apostolides, 28th April 2009, process C-420/07.
\textsuperscript{14} See Joana Rita Covelo de Abreu, «Effective judicial protection in judicial cooperation in civil matters and the Court of Justice of the European Union case law...»
\textsuperscript{15} See Catherine Kessedjian, Commentaire de la refonte du règlement n.\textsuperscript{°} 44/2001..., p. 129.
\textsuperscript{16} See Case CJ Liga Portuguesa de Futebol Profissional and Bwin Internacional, 8th September 2009, process C-42/07.
\textsuperscript{17} See Catherine Kessedjian, «Commentaire de la refonte du règlement n.\textsuperscript{°} 44/2001...»., p. 130.
\textsuperscript{18} See Catherine Kessedjian, «Commentaire de la refonte du règlement n.\textsuperscript{°} 44/2001»..., p. 130 (translated freely).
2. **Exequatur’s Suppression in the Light of the Regulation 1215/2012 and Portuguese Enforcement Procedure**

Under article 42.º, n.ºs 1 and 3, in order to enforce another Member State’s decision, the applicant has to provide: a) a copy of the judgement which satisfies the conditions necessary to establish its authenticity; b) the certificate certifying that the judgement is enforceable and containing an extract of the judgement (among other information); and c) when seen as necessary by the competent enforcement authority, a translation or a transliteration of the certificate contents.

However, under article 42.º, n.º 4, the competent enforcement authority can demand, to the applicant, the decision’s translation only if it is unable to proceed without such translation.

Article 43.º, n.º 1 states that “[w]here enforcement is sought of a judgment given in another Member State, the certificate [...] shall be served on the person against whom the enforcement is sought prior to the first enforcement measure. The certificate shall be accompanied by the judgment, if not already served on that person”.

Therefore, bearing in mind article 43.º, n.º 1, there are two different syllogisms we can derive:

— Serving the person against whom enforcement is requested, in an enforcement procedure based on a judgement issued in another Member-State, will have to proceed the first enforcement procedure measure (“prior to the first enforcement measure”); or

— Before serving the person in the enforcement procedure itself, Member States will have to predict a previous measure so the competent authority can dialogue with the required person, giving him notice of that certificate.

As we know, the two main purposes of the Regulation 1215/2012 aim cross-border litigations be less time-consuming.
and simpler\textsuperscript{19}. These aims perhaps make us believe that, under a teleological argument, the second solution might give in or, at least, does not seem appropriate for those purposes.

Concerning first option, we have to remember the principle of procedural autonomy of Member States, whose presence we can derive from analysing article 75.\textsuperscript{0} of the Regulation. This principle is enshrined in article 19.\textsuperscript{0}, n.\textsuperscript{0} 1, 2\textsuperscript{nd} paragraph of the Treaty of the European Union (TEU), where we can read that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law”. With this EU primary law disposition, European legislator wanted to determine that it is up to Member States to set procedural ways to protect rights given by EU legal order. However, this ability, given to Member States, is not unlimited and their procedural autonomy is tested under two principles: of equivalence (national procedural solutions cannot promote a less favourable treatment to litigations where EU law is applicable than that given to purely internal ones, of similar nature) and of effectiveness (internal rules cannot make impossible or excessively difficult, in practice, the exercise of rights given by EU legal order).

Heading our attention to Portuguese civil procedure, we see that Law n.\textsuperscript{0} 41/2013, of the 26\textsuperscript{th} June, approved the new Civil Procedural Code (CPC). Concerning enforcement procedure, this can follow two proceedings’ ways: as ordinary or as summary. This new CPC of 2013 is seen as a “counter-reform”\textsuperscript{20} when compared to the one operated in 2008, which was the culmination of a series of reforms initiated in 2003.

About those two ways of enforcement procedure, previous article 465.\textsuperscript{0} of the CPC determined that enforcement procedure would follow an unique form. Despite that, we knew that rule was misleading since procedure had several formalities (for that, we have to remind ancient articles 812.\textsuperscript{0}-C, 812.\textsuperscript{0}-D, 812.\textsuperscript{0}-E and 812.\textsuperscript{0}-F\textsuperscript{21}). Nowadays, article 550.\textsuperscript{0}, n.\textsuperscript{0} 1 of the CPC determines

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\textsuperscript{19} See whereas 1, 3 and 26 of the Regulation 1215/2012.


\textsuperscript{21} And before those, articles 812.\textsuperscript{0}-A, 812.\textsuperscript{0}-B and 812.\textsuperscript{0}-C.
that “common process to certain amount’s payment is ordinary or summary”.

In this sense, enforcement procedure to certain amount’s payment that follows the ordinary way will be subjected to previous judicial knowledge and order to proceed (article 726.º, n.º 1 of the CPC) and serving the person against whom enforcement procedure is moved will happen before the attachment of assets (article 726.º, n.ºs 6 e 8 of the CPC). However, the applicant can ask to the court if the attachment of assets can happen before the citation. For that, the applicant must evoke the facts that justify his fear of losing his credit’s guarantee and he has to present, immediately, the means of proof (article 727.º of the CPC).

In the summary way, we face with a rule that previous judicial knowledge and order to proceed will not take place and that the attachment of assets will happen before serving the person enforcement procedure was started against (article 855.º, n.º 3 of the CPC). This way is more simplified and it was thought in order to be applicable to proceedings based on enforcement orders that guarantee greater juridical security. For this matter, article 550.º, n.º 2, a) and b) of the CPC determines summary way in enforcement procedures based on arbitral or judicial judgement, when they cannot be enforced in the same procedure, and on enforcing order for payment.

We can derive that there are two different regimes for enforcement procedures based on judgements:

— Enforcement procedure will keep running in the same proceedings of the declarative procedure that ran before it (where, by the rule, service will happen before attachment of assets): under 626.º, n.º 1 of the CPC “enforcement procedure based on final convicting decision will initiate under request, unless that final decision was delivered under a special procedure of eviction”. When there is total or partial conviction in the declarative procedure, enforcement procedure will run as some kind of “incident” in the declarative one.
Enforcement procedure will run in a summary way: bearing in mind article 626.º, n.º 2 of the CPC, we can read that “enforcement procedure based on final convicting decision [...] will follow the proceedings under summary way where service will happen after attachment of assets”.

Both regimes must be seen in the light of article 90.º of the CPC, concerning enforcement procedures based on foreign judgement. Under the referred article, jurisdiction for enforcement procedure will be set in the same terms to enforce higher courts’ judgements. This means that the courts where the person against the enforcement procedure is presented is domiciled will be the ones with jurisdiction.

Therefore, enforcement procedure based on judgements of other Member State should follow the summary way proceedings, where attachment of assets happens before service, under CPC.

However, Portuguese legislation (especially CPC) should be in accordance with the Regulation 1215/2012, more specifically, with article 43.º, n.º 1, where it seems European legislator wanted that service would happen before any other enforcement procedure measure.

Operating equivalence and effectiveness’ tests – to determine the scope and limits of the principle of procedural autonomy of Member-States – to national rules that determine enforcement procedure to observe the summary way proceedings (where attachment of assents will happen before service), we can reach the conclusion that those national dispositions create a less favourable treatment to those actions where EU law is applicable and that those can create an impossibility or an excessive difficulty, in practice, to enforce rights provided by EU legal order. As we know, article 43.º of the Regulation was thought to promote defence rights and those, by promoting the attachment of assets before the service, would be compromised. In fact, the same article 43.º, n.º 1 of the Regulation fully determines that the debtor has to be served before any other measure in the enforcement procedure is adopted. In this context, Portuguese internal law must be interpreted in a way it can be adequate to the terms of the Regulation or, if that interpretation cannot be made, Portuguese
judge must set those internal rules (incompatible with EU law) aside and order to the debtor to be served before any other procedural moment happen in the enforcement procedure, despite CPC commands other way.

However, so national judge can be sure which is the best path to follow, it is important to refer to the Court of Justice, explaining Portuguese procedural context, under article 267.º of the Treaty on the Functioning of the European Union (TFEU).

3. INFORMATION UNDER ARTICLES 75 AND 76 AND EVOKING REFUSAL OF RECOGNITION AND ENFORCEMENT

Bearing in mind section concerning refusal of recognition and enforcement, we face articles 45 and 46, where those causes of refusal are mentioned.

Article 45 states that recognition can be refused, under request by any interested party, when it is evoked the public policy clause (article 45, n.º 1, a) of the Regulation), reasons concerning the default of appearance (article 45, n.º 1, b), the irreconcilability of that decision with another delivered in the enforcement Member-State or in a third country (article 45, n.º 1, c) and d) when that decision fails to follow jurisdiction in matters relating to consumers, insurance and individual contracts of employment and, still, fails to fulfil rules of exclusive jurisdiction (article 45, n.º 1, e).

Under article 46.º, those refusal causes are applicable to enforcement’s refusal.

Recognition’s notion is not mentioned in the Regulation terms; therefore, we can use the precedent set by the Court of Justice in the case law Hoffmann vs. Krieg22, where this Court established the theory of the decision’s effects extension. This theory states that a judgement will produce the same effects it would produce in the origin Member-State, where it was delivered. With exequatur’s suppression brought by Regulation 1215/2012, this theory implies a wider range since a decision which is enforceable in the origin Member-State, will be recognised as so, in the same conditions, in the enforcement

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Member-State. On the other hand, taking into consideration case law E. Coursier vs. Fortis Bank e Martine Bellami\(^{23}\), the Court of Justice, pronouncing itself about the enforcement declaration (under former Regulation 44/2001) understood it would not amplify the judgement’s content, it would not modified it nor put it in a position of superior rank over those that had been delivered by enforcement Member State’s courts. This case law ended up to influence decisively the terms enforcement can now be operated, under article 41.º of the Regulation 1215/2012 – “the procedure for the enforcement of judgments given in another Member State shall be governed by the law of the Member State addressed. A judgment given in a Member State which is enforceable in the Member State addressed shall be enforced there under the same conditions as a judgment given in the Member State addressed”. Therefore, the principle of the equal treatment in which that case law was base is patent in the enforcement regime set by the Regulation 1215/2012.

Article 41.º must be analysed bearing in mind article 75.º, both of the Regulation. Article 75.º, a) enshrines that “[b]y 10 January 2014, the Member States shall communicate to the Commission: a) the courts to which the application for refusal of enforcement is to be submitted”.

With exequatur’s suppression there was an alteration in the dynamics of the procedure where parties can evoke refusal causes of recognition / enforcement of a judgement delivered in other Member-State. If before 10 January 2015, it was the applicant that went to the enforcement Member State’s court to get the recognition / declaration of enforcement of that decision and the debtor, in an appeal, could evoke those refusal causes, today it is the debtor (or presumed debtor) that has to start an action / a procedural incident to evoke one or several of those refusal causes.

However, information related with article 76 was only published on 9th January 2015 (so, one day before the Regulation’s entry into force\(^{24}\)) and information concerning article 75 are only

\(^{23}\) See Case law CJ E. Coursier vs. Fortis Bank e Martine Bellami, 29th April 1999, process C-267/97, whereas 21.

available in the European E-justice Portal and where released around May 2015. However, in this information, nothing was said by Portugal that could end all those doubts we mentioned before.

In this uncertainty context, how must the debtor react in order to evoke those refusal causes of recognition / enforcement, in the new Regulation’s light, in the Portuguese legal system?

Which are the hypotheses?

— Since no changes were made in Portuguese CPC concerning the groundings to enforcement opposition or to attachment of assets’ opposition, the national judge, operating as an European functional court, can allow the debtor to evoke those refusal causes in those procedural moments, despite CPC does not state anything about that possibility;

— Creating a proper procedure (or a proper incident, under the enforcement procedure) that allow the debtor to evoke those refusal causes.

4. **How to Make Portuguese Procedural Solutions Compatible with EU Law – Drawing Some Conclusions**

Having in mind the Regulation under analysis and its embraced teleology – of procedural promptness and simplification and of reducing expenses in cross-border litigations – we can understand there is a lot to be done in Portuguese legal order to avoid setting some difficulties to the truth effectiveness of that European act.

In a rapid test under equivalence and effectiveness, we were able to conclude that procedural autonomy of Member States was not being observed, by Portugal, in a compatible way to the promotion of EU integration and of EU citizenship.

In fact, besides judicial operators have national dispositions that compromise the application *prima facie* of the Regulation terms – especially those concerning the refusal causes of recognition / enforcement – we sense those problems will be even
greater in practice. There is nothing in the information presented by Portugal that allows parties and judges to conclude how refusal causes are going to be evoked: 1) if in the enforcement procedure, when enforcement opposition is admissible (with service happening before the attachment of assets, despite the summary way the proceedings should follow); 2) if an autonomous declarative procedure that will happen before enforcement procedure can commence (or dictating its suspension); or 3) if an attached declarative procedure to the enforcement procedure, that states the suspension of the latter.

The first scenario would promote Regulation’s teleology of procedural promptness and simplification, but it would demand decisions delivered in other Member States be treated as unequal to those delivered in Portugal, since the latter give to the applicant the ability to get the attachment of assets before the service to the debtor. Besides, if it would be possible to subsume to enforcement opposition grounds set under article 729.º, d) and f) of the CPC, refusal causes of default in appearance (article 45.º, n.º 1, b) of the Regulation) and irreconcilable decisions (article 45.º, n.º 1, c) and d) of the Regulation), it would not be possible to subsume, for instance, the refusal based on the public order clause (article 45.º, n.º 1, a) of the Regulation).

The second and third scenarios seem to be more prompt to serve the purpose we can derive, from a literal interpretation, of article 47.º, n.º 2 where European legislator speaks about a “procedure for refusal of enforcement” that cannot be mistaken with an enforcement opposition. This interpretation gains strength when we look at article 75.º, where we can read the expression “the courts to which the application for refusal of enforcement is to be submitted”. In the Portuguese version, in article 45.º, n.º 2 we can find a mention to a request (“pedido”, in Portuguese) which gives even more strength to the idea that perhaps European legislator wanted to predict a declarative procedure in order to the interested party could evoke those refusal causes.

As shown before, this entails a methodological difficulty that can only be surpassed if Portuguese judges use preliminary ruling process (under article 267 of the TFUE) – since it is a
mechanism serving the effective judicial protection principle. If they do not resort to this ability, they will be in a place where they can compromise, in absolute, defence and action rights given to both parties.

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The scope of this study is to provide an impartial analysis of the Portuguese current financial situation, putting particular focus on the domain of sub-national bodies, specifically municipalities. Methodologically, the work will give special attention to the measures contained in the Memorandum of Understanding (MoU) celebrated between Portuguese authorities and the Troika, but will try to go further: as far as possible, a critical attitude will be adopted and the dangers that such measures can involve will be considered, particularly concerning the basic structures of the Portuguese legal order, such as the Democratic principle and the Social State principle.

1. Method and Sequence

Before addressing the subject of European constraints and local public finances directly, it is somewhat crucial to expose a methodological approach to these matters.

In the first place, it must be said that the purpose is to bring here a legal / institutional presentation with focus on the legal aspects of public finance, instead of an economic, sociological, axiological or political approach. In simpler terms: we will have, not statistics, facts, values or political intentions in mind, but only legal norms (principles and rules) and within these, predominantly the Constitutional and legal norms of the Portuguese system.
In second place, it is our intention to follow an analytical approach, trying to stipulate and to use a clear language. This is a very important aspect because, as it is well known, it is easy to find some ambiguity concerning the words and expressions related to these subjects, such as “Fiscal law”, “Tax law”, “Financial law”, “Public finance law”, “Fiscal policy”, “Fiscal federalism”, “Fiscal system”, and some others. So, it is important to settle by now precise meanings in order to avoid uncertainty and in order to reach clear conclusions. Having that in mind, it is intended:

i) To use the expression “Financial” as having the same meaning of “Fiscal”, it being the set of matters established by political decision-makers concerning public finances. Consequently, the expressions “Financial Law” will be considered as a synonym of “Public finance law”, or, in other words, the set of norms related to the financial activity of Public entities. Within this financial law it is possible to identify a “Local financial law” as the set of norms related to the financial activity of sub-national entities, particularly the Municipalities.

ii) To use the expression “normative system” as a synonym of “legal system” or “jurisdiction”, i.e., the set of norms existing in a certain country and in a certain moment. Accordingly, “norm” and “law” will also be used as having the same meaning.

In third place despite the current attitude of State censure and criticism we do not — at least until this moment — join in with the post-modern rhetoric that announces and proclaims the end of the State and advocates the supremacy of supranational organizations or the unlimited power of spontaneous social and economic structures such as the markets. On the one hand, because we believe that some institutions cannot walk by themselves and some actions cannot be taken if the States does not want it. For example, with respect to “supranational organizations” such as the EU, the IMF and others, we still
consider that States are “die Herren der Vertrage” ¹, as the recent political and legal developments have shown. On the other hand, because we do not accept the fact that an invisible hand or some corresponding spontaneous mechanism has the possibility of driving social structures through a good path and toward a good end as true. On the contrary, what happens is that when something goes wrong, the markets call for State intervention.

Of course, this scientific attitude takes for granted a theoretical and philosophical approach that considers Reason and State as the pillars of modern social existence. Unfortunately, we cannot expand our considerations about this matter here.

From a structural point of view, the analysis will be divided in two different parts, each of them related to different aspects:

— First, a brief elucidation of the most relevant characteristics of the Portuguese legal system, mainly taking into account its constitutional, legal and administrative structures (descriptive dimension);

— Second, a neutral and objective explanation of the problematical current situation of Portuguese Public finances, putting special emphasis on local Finances aspects (realistic dimension).

Naturally, before ending, we will try to align some conclusive remarks.

Having said this, let us face the first topic – the descriptive dimension.

2. DESCRIPTIVE DIMENSION: THE PORTUGUESE LEGAL SYSTEM

Concerning the Institutional framework, it must be underlined that the Portuguese legal system is a typical continental one, undoubtedly prescribing the supremacy of the “written law” and the principle of hierarchy. Consequently, it can

be characterized as a *gradual* or a multi-level arrangement, having the Constitutional norms on top.

Another important aspect that must be noted is that general binding effect is not recognized to the courts’ decisions. In reality, judicial sentences only have *inter-partes* effects, not projecting their consequences to third parties, with the exception of Constitutional Court’s decisions within the context of the abstract process of constitutional review (*erga omnes* effects).

Regarding the State’s structure, Portugal is a unitary State, and not a federal one. Using the words mentioned in a previous work, “It means that it is only conceived as one single sovereign unit in which a unique level of decision-power ("central government") is supreme.” Of course this principle of unity does not prevent the existence of subnational bodies, such as the autonomous island system (Azores and Madeira) and the Local Authorities (Administrative Regions, Municipalities and parishes). In any case, these sub-national entities are kept away from the possibility of ruling on some basic subjects, such as territorial division (including the creation, abolition and modification of local authorities), the creation of taxes or the rules concerning local finances.

It is also important to refer that unitary State does not necessarily mean centralization, at least from a legal point of view. In fact, it is prescribed that the State shall be organized in such a way as to respect the principles of subsidiarity and the democratic decentralization of the Public Administration. Subsidiarity means that the State should only exercise the powers that sub-
national bodies are unable to carry out in the same way or more efficiently, while decentralization corresponds to the empowerment of sub-national levels, particularly the local communities, assigning them real instruments for the provision of public goods and the delivery of Public Interest.

One relevant idea that must be emphasized without delay is that in Portugal a big number of Local decisions concerning public finance is more grounded on "emotive", than on rational and strict logical reasons.

Surely it is not the best initial picture, but it is certainly pragmatic and realistic. For example: a large proportion of choices concerning public spending has its basis on the elections cycles, which seems to suggest that financial decision-makers have more fear of losing elections than of making bad use of public funds; Similarly, some public investments as roads, municipal buildings or other public equipments are carried out as a consequence of pressure made by powerful economic groups and private motivations, which also provides some evidence in the sense that for financial actors the fear of losing their supporters is more relevant than the proper use of public money. Finally, a non irrelevant number of staff admissions is still founded on family and amity relations — despite the “legal” procedures formally adopted —, which may suggest that those admissions are not absolutely impartial.

Here, we touch on a very important aspect: it is absolutely crucial and urgent to introduce the ideas of Public interest and discipline in the Portuguese collective conscience, not only by citizens and taxpayers in general (avoiding tax evasion and tax fraud) but also by political and financial decision-makers.

3. REALISTIC DIMENSION: THE CONSTRAINTS IMPOSED BY THE TROIKA. PARTICULARLY, THE MEMORANDUM OF UNDERSTANDING (MOU)

Portugal is presently facing a severe economic and financial crisis, as a result of decades of bad using of public money, and is often seen by the “markets” as an unreliable debtor. Consequently, as a way of avoid that undesirable status and regain some international credibility, the Portuguese State is at the moment
trying to accomplish a large number of rules imposed by a Troika composed by representatives of the European commission, the International Monetary Fund and the European Central Bank in order to introduce Public Finance discipline, and essentially to accomplish the demands of the Stability and Growth Pact (SGP) of the EU.

In this context, in May 2011, a Memorandum of Understanding between the Portuguese authorities and the Troika (MoU) was written, laying down conditions in order to ensure financial assistance from the European Financial Stabilisation Mechanism (EFSM) to Portugal ¹¹.

Before scrutinizing some aspects of its respective content, it is not possible to ignore that the establishment of this Memorandum entails some dilemmas and even some dangers with respect to the traditional basic standards of modern State. Indeed, it cannot be forgotten that the measures here included are imposed by a non-elective group of actors (Troika), potentially violating the democratic principle and the people´soverignty principle (both prescribed by the Portuguese Constitution). However, here is not the right place to develop this subject.

So, addressing directly the substance, it is possible to identify, inside the MoU, general and specific conditions in order to make the financial assistance possible. The more relevant general conditions prescribed therein are:

(i) The financial aid is conceded only if some concrete measures in some concrete fields or areas are carried out;

(ii) The disbursements of financial assistance will be subject to quarterly reviews of conditionality;

(iii) The internal authorities (e.g., the Government) commit themselves consult with the Troika on the adoption of policies that are not consistent with the Memorandum;

¹¹ See http://ec.europa.eu/economy_finance/eu_borrower/mou/2011-05-18-mou-portugal_en.pdf. This is the first version of this Memorandum. After May 2011 it has been periodically reviewed.
(iv) They will also provide the Troika with all information requested; and

(v) If targets are missed, or expected to be missed, additional action shall be taken.

As we can easily conclude, some of these items involve the renunciation of a substantial proportion of sovereignty, particularly when the consultation before the adoption of policies is demanded. But, perhaps, this is the only and necessary way to achieve the set objectives (convergence and discipline).

Besides that, a very clear material delimitation is established and precise intervention fields are circumscribed. Those fields can be exposed in a simple manner as follows:

(i) Public finance in general;

(ii) Public administration, including not only the Central, but also the Regional and Local Bodies;

(iii) Health care and educations systems;

(iv) Judicial system;

(v) Financial sector regulation and supervision;

(vi) Transport, Telecommunications, Energy and Postal services;

(vii) Labor market.

Despite the undeniable relevance of all these fields, it is certain that for our purposes the two first assume an increased weight, reason why we will focus on them exclusively 12.

3.1. The Financial Constraints

Beginning by the Public finance aspects in general, there are three main economic policy goals that deserve particular attention:

— First, to reduce gradually the State deficit to an acceptable value, and this shall be carried out “by means of high-

quality permanent measures”. It must be underlined that this goal must be achieved taking into account the demands of the Social State (constitutionally prescribed), particularly without compromising the basic existence conditions of vulnerable groups. Simultaneously, the State debt-to-GDP ratio must be set on a downward path.

— Second, to contain the public expenditure growth, in order to reach a balanced budgetary position. For example, the prohibition of creation of new State Owned Enterprises is settled (as well as the reduction of their operating costs) and increased attention is required at the moment of engaging in any new Public Private Partnerships agreement. Simultaneously, concerning the Public Health Care System, a reduction of their overall operating costs is also demanded.

— Third, a “recalibration of the tax system” (*lato sensu*), which includes:

(i) The introduction of a standstill rule to all tax expenditure, blocking the creation of new benefits and the enlargement of existing ones;

(ii) The reduction of benefits, deductions and special regimes with reference to personal income tax, corporate tax, VAT and property tax;

(iii) The creation of a single tax office and the promotion of service sharing between different administrative bodies;

(iv) The increase of the resources devoted to auditing in the tax administration; and

(v) The establishment of special chambers within the Tax Courts specialized to handle large cases.

At the same time, two other goals, but these of a legal or normative nature, must be pursued:

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13 For example, in the field of VAT the reduction of exemptions and the transfer of categories of goods and services from the reduced and intermediate tax rates to higher ones is demanded.
(i) Primarily, the rationalization of all budgetary processes through a new legal framework — including the revision of the local and regional finance laws in order to include all relevant public entities in the perimeter of local and regional government — and the assurance of the respective full implementation. Related to this last aspect, it is curious to observe that the Troika constantly emphasizes the necessity of financial discipline and self-control (“the government will rigorously implement the Budget Law”), assuming the fact that this had not been done before.

(ii) Secondly, the strength of the accountability, report and monitoring systems, avoiding “de-budgetization” (seen as the removal of public monies from the general budget), the main focus being set on the improvement of the reporting perimeter. This is a crucial and vital aspect, since the reports sometimes do not include all public entities, but only the State and “some” other public bodies. Therefore, the reporting perimeter must be progressively expanded, and take into account not only the State itself (Central Administration), but also all State Owned Enterprises, the Regional and Local administrations (including connected enterprises) and all Public-private Partnerships.

3.2. The Administrative Reorganization

It is commonly assumed that Portugal has a weighty organizational system, with a very complicated structure, and countless bureaucratic procedures. Because of this, one nuclear aspect deserving special attention from the Troika and identified

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as a potential “tumor” of the Portuguese financial situation is the structure and design of the Administrative bodies.

Concerning this specific aspect — and besides the transversal goal of promoting mobility of staff between different levels —, two different fields can be identified and distinguished in order to make deep reforms: the Central administration and the Local Administration.

Let us see each one separately and briefly.

a) CENTRAL ADMINISTRATION

Beginning with the first one, an ambitious set of goals is prescribed, which may introduce some social instability and even turbulence, if implemented. Despite this fact, it is clear that they are, in our opinion, absolutely necessary and essential. They are:

(i) The improvement of the efficiency of the direct public administration (which is frequently described as wasteful and unproductive), be it by means of eliminating redundancies and simplifying procedures, or through the reorganization of services. Here the elimination of services “that do not represent a meaningful use of public monies” is particularly stipulated (in any case, trying to maintain the quality of the public goods provision).

(ii) The reduction of all public bodies dimension (and correlative costs), using legal limitations of staff admissions and extinguishing management positions and administrative units. In this context, a special emphasis is put on the indirect administration, mainly on the creation and functioning of public “enterprises”, “foundations” and “associations”.

As is easily realized, if these measures, or others with similar impact, are carried out — which, until the present moment (2016), and despite some particular actions, has not been convincingly and credibly made —, unemployment and labour
precariousness will surely increase, as well as the corresponding “social insecurity”.

It is important to say that the question of the inclusion of the Social Security in the merger was brought to the table, though not conclusively.

b) LOCAL ADMINISTRATION

With respect to the Local Administration — particularly important in the context of this work — the demands are not less severe.

First, is categorically demanded the reorganization and the “significant reduction” of the number of municipalities and parishes. Once this measure is carried out — which only took place concerning parishes —, Portugal will watch a historical and unprecedented reform, similar to the one that occurred in the 19th century.

In second place, a deeply-rooted problem must be faced — centralism, or, in other words, the provision of public goods and services by the Central Administration at local level. Indeed, it must be well thought out if it is worth it for the State itself to provide for the production of goods that can be better provided by local bodies, and at a lower cost. Here, as it is easily seen, the closeness to the citizens is decisive and the principle of subsidiarity should be correctly understood. Consequently, the Central bodies should only intervene if the Municipalities cannot provide the same good at the same or better financial conditions (for example: the implementation of a school buses network can surely be better conceived if carried out by municipalities, taking into account the real local needs present in the case; or, similarly, the attribution of social houses will surely be better done by local bodies and if it takes into consideration the family social and personal situation of each person concerned).

Of course, all of these considerations take for granted the existence of a real and operative administrative and financial autonomy in local spheres (in all its dimensions: budgetary, patrimonial, tax and credit autonomy). Otherwise, we fall in an empty and blank declaration, without any practical sense.
In third place, is required the introduction of limits concerning the creation of foundations, associations and similar bodies, which have largely contributed to the “de-budgetization” occurrences referred to above.

Finally, the hardest measure (from the point of view of Municipal bodies): the reduction of transfers from the State budget. Regarding this matter, it is important to say that the Portuguese Local Finance Law — pursuing the constitutional imperatives of Equalization and State unity — has established a set of financial adjustments (transfers), which are amounts of money that, in addition to the ordinary revenue from each Authority, may balance and equalize them, having in mind the purpose of reducing disparities. Such transfers are based on several criteria such as the potential or real tax revenue, the specific topographic situation of the Municipality, its area, its demographic basis, etc. and — it is important to underline — they always have a legal source (they must always be prescribed in the State budget). Discretionary transfers (or subsidies) are forbidden. In this context, and insofar as almost all Municipalities are dangerously dependent on these transfers, it is effortlessly concluded that their financial autonomy will be severely limited.

In this context, and with the aim of inspiring and stimulating political debate, the Green Book on Local Administrative Reform (Livro Verde da Reformat de Administração Local) was published, containing the respective guiding principles and basic criteria. Subsequently, on the basis of the possible consensus attained, all legal frameworks must be modified and adapted.

The reform envisaged in this green book has four main lines of action: (i) locally-owned enterprises, (ii) territorial organization, (iii) municipal and intermunicipal administration and finances and, finally, (iv) local democracy. These four lines must have a common core or center, having in mind the financial sustainability, the concrete and pragmatic definition of the

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perimeter of local governments and the change of the management paradigm.

In the first field mentioned, in addition to the revision of the corresponding legal framework, a truthful “diagnostic” about the number (the real number...) of “municipal enterprises” is demanded, promoting its significant reduction and trying to adequate their existence to their real mission.

Concerning specifically the axis of territorial organization, the realistic analysis and revision of the current administrative map is prescribed, trying to promote the reduction of the number of civil parishes, particularly by their fusion. This measure intends to give the eventual newly-created bodies significantly more weight, influence and political power in the first place, and, in second place, economic impact, making scale gains possible. Of course, the improvement of the internal performance of the administrative bodies is expected, increasing their efficiency 16.

With respect to municipal and intermunicipal administration and finances — the third line —, the main goal is the complete conversion of the administrative structures inside each different level (Municipalities, Associations of municipalities and other relevant organizations), trying to reinforce the efficiency of services and to avoid the replication of functions at the same time.

Lastly, regarding local democracy, the focus must be directed to the problems concerning the arrangement and constitution of executive bodies (v.g., Câmara municipal), as well as to the questions related to local elections, as the new legal framework (once again...) and number of local representatives.

3.3. THE SOCIAL CONSEQUENCES

We have mentioned above the demands of the Social State principle and the necessity of taking into account the basic existence conditions of vulnerable groups. But, what is a fact is that the MoU prescribes a set of goals that directly or indirectly

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16 However, a significant number of contestation movements appeared, in most of the cases motivated by (real or fictitious) historical, geographical and cultural reasons, and putting into question the credibility of the criteria contained in the green book.
can put in crisis the most elemental demands of such principle and can push the social structures toward a large contestation movement and an atmosphere of great instability.

It is known that this theme is somewhat beyond the purposes of this article, but the analysis would be incomplete and partial if a reference to the social consequences of all these measures was not made, even if briefly.

Just with the intention of showing the austerity and hardness of some actions, and in a simply descriptive manner, we can identify some hard nuclei:

(i) With respect to the health system, the goal of “controlled costs” is fixed, reviewing and increasing moderating fees (*taxas moderadoras*), for example through a substantial revision of existing exemption categories or the cut of tax allowances for healthcare. Simultaneously, Portugal must act in order to “reduce unnecessary visits to specialists and emergencies” and reduce costs for patient transportation.

(ii) Another key point refers to the education system. Here, the most visible exigencies are the general reduction of costs, by rationalizing the school network, creating school clusters and reducing transfers to private schools.

(iii) Also, the labour market is subject to problematic measures — from the point of view of present conditions —, including the reform of unemployment insurance (reducing maximum duration of respective benefits), the “liberalization” of individual dismissals, the establishment of flexible working time arrangements and the promotion of wage adjustments in line with productivity.

Besides that, some other specific measures can be taken, all of them with a significant social impact, like the reduction and “freezing” of pensions, the introduction of higher electricity excise
taxes or the reduction of subsidies to private producers of goods and services.

Very well, it is realistic to believe that Portuguese authorities will try to minimize the impact of these negative effects, at least because of the electoral fear (panic of losing elections). Although this may be true, under these circumstances it is reasonable to ask if the essential requirements of the Social State are being observed. Naturally, from a legal perspective, there are high possibilities of some fundamental rights being affected in an unconstitutional way, such as the case, specifically, of the rights to health, education and work.

Despite the absence of a concrete answer to these questions — it will all depend on the way of putting such measures into practice—, one thing is sure: the judicial actors — particularly the Constitutional Court, but not forgetting the common Courts (Portugal has a diffuse system of constitutionality control) — must be aware and must declare all measures that affect the fundamental rights in a disproportional mode null. In any case, the touchstone is this: all restrictive measures must be absolutely necessary, adequate and quantitatively proportional to the end of the State’s sustainability, all of those which surpass these criteria being illegitimate.

4. CONCLUSIONS

Well, after having made this analysis, what can be said by way of conclusion about the current situation of the Portuguese Local Financial System and its attitude concerning the challenges of these severe targets?

Based on what we have said before, we think the most relevant idea to retain is this (notwithstanding the repetition): the Portuguese attitude, collective conscience or mentality must change — everyone must be aware of the importance of Public Interest and must internalize the idea that without sacrifices it is not possible to have a good and peaceful social existence. Besides that, the present Portuguese “financial actors” must take into account the demands, the collective necessities and above all the

\[17 \text{ See articles 203 and 280 of the CRP.}\]
responsibilities for future generations, not laying on them a disproportional burden and a legacy of heavy duties. This means that each financial decision must always be framed by the principles of necessity and proportionality and, particularly that those actors must moderate both the expenditure impulse and the credit impulse. Simultaneously, the strengthening of the control mechanisms and its effectiveness must be seen almost as a national design.

If all these impositions are observed, not only the internal financial situation will progressively get better (avoiding renunciations and sacrifices for the citizens / taxpayers), but also the fulfillment of the EU demands, especially, those related to the SGP, will possibly be achievable.

To conclude: the key words are discipline and responsibility. These are the axiological foundations of a new social structure, having in mind that public powers cannot provide the satisfaction of all needs and are not able to help anytime, because the State itself is deeply in crisis.

Returning to an idea expressed at the beginning of this work, it is important to note that in our perspective, this crisis does not mean the end of the State as an Institution with sovereignty, independence and autonomy in all its different levels (political, administrative, financial, etc.).

It is true that the State of these days cannot be seen as the European Welfare State of the 20th Century, ensuring an optimal degree of satisfaction of different social needs (health, education, housing, social security, etc.). It is also true that a regression in the quantity and quality of public goods and the abandon of some traditional areas or fields of intervention is almost inevitable. However, the State always returns, is continuously reinvented and cannot be simply removed from the definition of the social models.

If this idea of subsistence can also be applied to other Entities as the European Union — whose end has also been widely announced —, is a question that must be faced in another context and within another work.
The definition of the competence ratione materiae of the European Public Prosecutor’s Office and the substantive legality principle — The Way Forward

Margarida Santos *

The scope of this study is to provide an analysis on the option expressed in the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office under discussion, concerning on the material scope of competence of the European Public Prosecutor’s Office.

In particular this study wants to verify if the proposal’s definition is in accordance with the substantive legality principle. In this sense, special consideration is afforded to the reflection over the matter of the best form in which to define the scope of the competence ratione materiae of the European Public Prosecutor’s Office contemplated in article 86 TFEU, in the light of the principle of the lex certa and lex praevia.

I. Introduction

The text of the Article 86 TFEU is written in an ambiguous way regarding the legal basis on the material scope of competences of the European Public Prosecutor’s Office

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A reading of the various versions of the Article 86 TFEU reveals doubts about the true meaning of this legal provision, while the Portuguese version is the one that seems to better define the idea that the regulation will determine the competence *ratione materiae* of the EPPO. As expressed by John A. E. Vervaele, “[i]ts predecessors were much clearer and did include an explicit reference to substantive criminal law as forming part of the EPPO regulatory package”.

On July 2013, the European Commission presented a Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office (EPPO Proposal). This proposal, which represents a decisive step in the creation of the EPPO, allowed to speculate some of the possible contours of that which may be the end result.

Concerning the competence *ratione materiae* of the EPPO, the EPPO Proposal opts for a reference to the draft Directive - Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law.

This context raises the question of if the directive option is in accordance with the principle of Article 86 (1) TFEU and, above
all, if it would comply with the substantive legality principle (the principle of the *lex certa* and *lex praevia*).

II. **The Starting Point: Article 86 TFEU**

The text of Article 86 TFEU in its ambiguity and depending on the interpretation carried out seems to allow the development of “different” EU criminal models. According to André Klip, “[u]nfortunately, Article 86 is that a hybrid system will be created”\(^4\). It seems to have been this (hybrid) understanding of the criminal model that has been expressed on the EPPO Proposal.

In Article 86 (1) TFEU, it is provided the possibility of the Council to establish the EPPO. In paragraph 2 of this Article, it is “determined” the material scope of competences of the EPPO: “offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1”. The nucleus of the EPPO's competences remains restricted to the offences against the Union's financial interests. In addition, as permitted in the text of the Constitutional Treaty, in accordance with Article 86 (4) TFEU, “The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State”.

In a word, the Treaty provides two areas of material scope of competence of the EPPO: first, relating to the “offences against the Union’s financial interests” (paragraphs 1 and 2 of article 86 TFEU); the second related to “serious crime having a cross-border dimension” (paragraph 4 of article 86 TFEU). The final text of article 86 TFEU comprised, in a way, the two areas of crime, synthesizing the two existing understandings of “added value” of EPPO. These two understandings are reflected, in a certain way, on the reasoned opinion submitted, within the framework of

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\(^4\) ANDRÉ KLIP, *European Criminal Law: An Integrative Approach*, Antwerp, Oxford, Intersentia, 2nd ed., 2012, p. 459. As stated the author (p. 469), “European criminal law deals with a multi-layered patchwork of legislation and case law, in which national courts, the Court, European and national legislatures, as well as other authorities and bodies play a role. It is a hybrid system with common notions and values, as well as individual particularities.”
Protocol No 2 on the application of the principles of subsidiarity and proportionality, by the national Parliaments and interviewees of national and supranational practitioners, as well as in literature. As synthetized by Katalin Ligeti, the final version of article 86 TFEU “accommodated both visions and established a two-step approach by restricting the primary scope of competence to the protection of the financial interests of the EU, but allowing for its potential extension in line with the objectives of an AFSJ – to serious cross-border crime”. It should be noted, however, that Member States have decided, under the systematic location of the article 86 TFUE, against its inclusion in the chapter relating to the EU budget, notably in article 325 TFUE. It is paradigmatic that the EPPO should be considered, at least in the abstract, as a “European body” to act within the area of freedom, security and justice, and which should naturally contribute to reach these objectives. From a political point of view, as declares Katalin Ligeti, the article 86 TFUE “embodies essentially a broader vision of the EPPO”.

III. THE COMPETENCE RATIONE MATERIAE OF THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE WITHIN THE PROPOSAL FOR A COUNCIL REGULATION ON THE ESTABLISHMENT OF THE EUROPEAN PUBLIC PROSECUTOR’S OFFICE

With regard to the content of the material scope in the article 12 of the EPPO Proposal, the Commission definitely opts for a referral under national law, which criminalizes acts or

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7 KATALIN LIGETI, “Approximation of substantive criminal and the establishment of the European Public Prosecutor’s Office”, in FRANCESCA GALLI, ANNE WEYEMBERG (Ed.), Approximation of substantive criminal law in the EU – The way forward, Belgium, Editions de l’ Université de Bruxelles, 2013, p. 75 and 76.

8 See Katalin Ligeti, “Approximation of substantive criminal and the establishment of the European Public Prosecutor’s Office”, cit., p. 76.

9 Idem, ibidem.
omissions affecting the Union’s financial interest and determines the applicable penalties by implementing the draft Directive Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law\textsuperscript{10}, which is still under negotiation \textsuperscript{11}.

In accordance with Articles 12 and 13 of the EPPO Proposal, and relating to the material scope of competence of the EPPO, in the light of the terminology used in the draft Directive\textsuperscript{12}, it is included in this context: (i) \textit{fraud affecting the Union’s financial interests} (article 3 draft Directive); (ii) but also are included \textit{fraud related offences affecting the Union’s financial interests}, such as money laundering, corruption and misappropriation (Article 4 draft Directive)\textsuperscript{13}.

Furthermore, according to article 13 of the EPPO Proposal, it is also contemplated an “ancillary competence” of the EPPO, since two conditions are fulfilled: (i) “the offences referred to in Article 12 are inextricably linked with criminal offences other than those referred to in Article 12” and (ii) “their joint investigation and prosecution are in the interest of a good administration of justice the European Public Prosecutor’s Office”. In this case, “the European Public Prosecutor’s Office shall also be competent for those other criminal offences, under the conditions that the


offences referred to in Article 12 are preponderant and the other criminal offences are based on identical facts”.

To sum up, with regard to the material scope of action of the EPPO, the Commission (i) “definitely opts for a referral under national law”, which determines the legal types of crime through the relevant implementation of the EU\(^{14}\) and (ii) “extends the competence to offences that technically are not considered as PIF-offences, but that, because of their constituent facts, are identical and inextricably linked with those of the PIF-offences (so-called ancillary competence for mixed cases)”\(^{15}\).

The EPPO Proposal is in negotiation and several changes have occurred\(^{16}\). The negotiations on this sensitive issue from a technical and political point of view are still far from reaching its end. However, there is a clear effort to discussion towards the adaptation of the EPPO to the “structural design” of the Member States. Concerning to our specific subject, this has not yet been deeply analyzed\(^{17}\).

In this context, with regard to our subject, it is noted that an Opinion of the European Economic and Social Committee\(^{18}\) was issued, sent on December 11, 2013, and an Opinion of the Committee of the Regions was also issued, on 30-31 January 2014\(^{19}\).

The European Economic and Social Committee highlights that “the consistency of the EU criminal law system would be better ensured if the regulation defined with accuracy and precision not only the terminology used but especially the offences

\(^{14}\) Cf. JOHN A. E. VERVAELE, “The material scope of competence of the European Public Prosecutor’s Office: Lex uncerta and unpraevia?”, cit., p. 92.

\(^{15}\) Cf. idem, ibidem.


\(^{17}\) An analysis of the inter-institutional procedures can be seen at http://eur-lex.europa.eu/legal-content/PT/HIS/?uri=CELEX:52013PC0534&query=149720008654#1214059.


in question that affect the EU’s financial interests and which are to be subject to prosecution in the Member States”. This Committee also analyses that “it is necessary to legally define these offences expressly and explicitly, and that this could be done by including a paragraph clearly specifying the offences to be investigated by the European Public Prosecutor’s Office”\textsuperscript{20}.

The last “state of play” of the negotiations was issued on December 2015\textsuperscript{21}. Regarding the content of the material scope of the EPPO, at the last “state of play” of negotiations issued in June 2015\textsuperscript{22}, in a footnote, are referred some issues that could indicate a future reflection With regard to article 2 (“Definitions”), as set out in the negotiations that took place in February 2015\textsuperscript{23}, it still continues the references to the need to deepen analyze the question of uniformity in definitions (e.g., “the Union’s financial interests”) with the EU legislation. Also, under the provisions of Section 4 on the competence of the EPPO relevant issues are raised to our particular theme. With regard to article 17 concerning criminal offences within the competence of the EPPO, it is assumed, in a footnote, that “[t]he competence of the EPPO as determined by this Article raises complex legal issues that will need to be considered further”. It is described that “[t]he competence of the EPPO as determined by this Article raises complex legal issues that will need to be considered further”\textsuperscript{24}.

Hence, given the development that has been achieved, particularly about the protection of the “Union’s financial interests” and the option accomplished in the proposal regulation

\textsuperscript{20} Cf. idem, conclusions and recommendations n. \textsuperscript{9} 4.1.3.
\textsuperscript{21} See http://eur-lex.europa.eu/legal-content/PT/HIS/?uri=CELEX:52013PC0534&qid=1439730028645#2015-12-03_DIS_byCONSIL.
\textsuperscript{22} The document can be consulted at
http://www.parlament.gv.at/PAKT/EU/XXV/EU/06/89/EU_68921/imfname_10557249.pdf: Latvian Presidency has prepared a text for the first 16 articles, which appears at Annex 1. Annex 2 contains the full text of articles 17 to 23, including footnotes.
\textsuperscript{24} See http://www.parlament.gv.at/PAKT/EU/XXV/EU/06/89/EU_68921/imfname_10557249.pdf.
launched in July 2013, at least at first it seems that the EPPO will be designed as a “European Financial Prosecutor’s Office”25.

The option taken by the European Commission to cover only, at least at first, the protection of “Union’s financial interests” materializes the need for reaching a political consensus, given the existing arguments from different sides (political, academic, judicial praxis, ...). These different perspectives reflect, to some extent, the will (not always expressed) in maintaining the “criminal sovereignty” of Member States.

In addition, the European Commission itself has been “justifying” the restricted material scope of competence26 with the need to face the economic and financial context and the need to control public budget and, in particular, EU budget27.

In this scenario, concerning the protection of “Union’s financial interests”, it is important to understand what it means, in article 86 (2), “The European Public Prosecutor’s Office shall be responsible for investigating (...) offences against the Union’s financial interests, as determined by the regulation provided for in paragraph 1” (emphasis added) 28.

25 LOTHAR KUHL, “The Future of the European Union’s Financial Interests – Financial Criminal Law Investigations under the Lead of a European Prosecutor’s Office”, cit., p. 187. As synthetized by the author (p. 187), “[a] European Financial Prosecutor’s Office has continuously remained on the institutional agenda for a new Treaty since starting in 2003 with the work of the Convention, followed by the 2004 Constitutional Treaty and later confirmed by the Lisbon Reform Treaty of 2007. Notwithstanding this, the horizontal political strategy concept papers for a single European judicial area have remained silent on this institution. The Tampere conclusions of 1999 and The Hague agenda of 2004 indeed ignored the topic, which national departments of justice by their vast majority may consider a highly avant-garde challenge. But it is fair to say, that a European Public Prosecutor’s Office for a more effective fight against fraud and corruption is in accordance with the citizens’ and tax payers’ expectations who consider the current responses insufficient to achieve a satisfactory degree of law enforcement and sanctions”.

26 At this point, it is expressive the image suggested by Katalin Ligeti about the broader vision of the material scope of competence of the EPPO concerning the resistance and controversy among Member States. As analyzed by the author “(...) projecting the image of an omnipotent supranational parquet which could further fuel resistance and controversy among Member States”) – cf. KATALIN LIGETI, “Approximation of substantive criminal and the establishment of the European Public Prosecutor’s Office”, cit., p. 76.

27 Cf. KATALIN LIGETI, “Approximation of substantive criminal and the establishment of the European Public Prosecutor’s Office”, cit., p. 76.

28 About this question, see, inter alia, KATALIN LIGETI, “Approximation of substantive criminal and the establishment of the European Public Prosecutor’s Office”, cit., p. 80 and the following; ROSARIA SICURELLA, “Setting up a European Criminal policy for the Protection of EU Financial interests: guidelines for a coherent definition of the Material Scope of the
IV. **The Definition of the Competence Ratione Materiae of the European Public Prosecutor’s Office: Reflections from Article 86 TFEU (and from Articles 83 and 325 TFEU)**

Articles 82 - 86 TFEU compose a complex system of legal bases, allowing for the approximation of the criminal law. The Treaty frame provides the substantive criminal harmonization by directives at the article 83; the procedure criminal harmonization at the article 82, and the development of the EU “bodies”, concerning the criminal law enforcement at articles 84, 85, 86.

Under the Treaty of Lisbon, in the abstract, and synthesizing all doctrinal understandings, there are three possible solutions which allow the normative approximation regarding the implementation of the European Public Prosecutor’s Office: (i) article 83 TFEU (ii) article 86 (1, 2 and 4) TFEU and (iii) the article 325 (4) TFEU.

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We follow here Katalin Lígeti’s syntheses - Katalin Lígeti, “Approximation of substantive criminal and the establishment of the European Public Prosecutor’s Office”, cit., p. 74.

See Anabela Miranda Rodrigues, “Anotação ao artigo 86.º TFEU”, cit., p. 452. See also, John A. E. Vervaele, “The material scope of competence of the European Public Prosecutor’s Office: Lex uncerta and unpraevia?”, cit., p. 90 and the following, and John A. E. Vervaele, “Harmonised policies and the harmonization of substantive criminal law”, in Galli, Francesca / Wettemberg, Anne (Ed.), *Approximation of substantive criminal law in*
With regard specifically to article 325 TFEU, according to some scholars, there was a significant change (omission) in article text 325 TFEU (ex article 280 TEC), which concerns the fight against “fraud and any other illegal activities affecting the financial interests of the Union”. This omission seems to open the door to the existence of a transnational legal type of crime, but only limited to “fraud and any other illegal activities affecting the financial interests of the Union”. In this sense, the article text 325 TFEU contemplates the possibility of being taken the first step towards the creation of a genuine European criminal law, with European source\textsuperscript{31}.

Despite the fact that article 325 TFEU constitutes a possible basis for the definition of offenses affecting the EU’s financial interests, it is important to equally consider if the article 86 TFEU itself does not give the answer about the way forward with regard to the definition of the material scope of competence of the EPPO\textsuperscript{32}.

The majority of the literature considers that article 86 TFEU is not the proper legal basis for the approximation of substantive criminal law but concerns only the institutional and procedural framework, not providing any substantive

\textsuperscript{31} Analyzing this possibility, see, for example, HELMUT SATZGER, “La europeización del derecho penal. La influencia del derecho de la unión Europea en el ordenamiento jurídico-penal nacional de los estados miembros”, text given by the author during “Segunda Escuela de Verano en Ciencias Criminales y Dogmática Penal alemana”, at Göttingen, on September 2013, p. 27, and INÊS FERREIRA LEITE, “Direito Penal Europeu: do Corpus Juris aos métodos de integração europeia”, cit., p. 355 e 356. Accordingly, for example, to Martin Heger, after the creation of the EPPO only seems possible the adoption of European legal type of crimes for the protection of EU financial interests on the basis of article 325 TFEU. The author believes that, otherwise, is not satisfied the need for this measure to ensure the protection of the financial interests on effective and equivalent way throughout the EU – see MARTIN HEGER, “Perspektiven des Europäischen Strafrechts nach dem Vertrag von Lissabon”, ZIS, 8, 2009, disponível em http://www.zis-online.com/dat/artikel/2009_8_347.pdf , p. 416.

\textsuperscript{32} This interpretation implies that we understands the difference between the article 325 (4) (ordinary legislative procedure), and article 86 (2) (special legislative procedure), in so far as both of them could, in the abstract, provide a legal basis for the approximation of substantive criminal law concerning the protection of financial interests. For an analysis of these differences and their implications in view of the establishment of the EPPO, see ROSARIA SICURELLA, “Setting up a European Criminal policy for the Protection of EU Financial interests: guidelines for a coherent definition of the Material Scope of the European Public Prosecutor’s Office”, cit., p. 893 and the following.
According to this viewpoint, “provisions in Article 86 TFEU only establish such a direct competence concerning criminal procedural law, covering issues explicitly referred to in Article 86(3) TFEU...” 34. In this sense, the expression in paragraph 1 of article 86 of the TFEU “as determined by the regulation provided for in paragraph 1” should be considered as equivalent to “as indicated in the regulation” 35.

The idea behind this interpretation, and following the synthesis of Katalin Ligeti36, is based on fact that the Member States have established the legal framework for the approximation of substantive law in article 83 TFEU. Article 83 TFEU only allows for the adoption of directives for certain areas of crime, and does not establish the adoption of directives on the general part of criminal law and is subject to the emergency brake procedure. In this context, those that defend this idea believe that accepting article 86 TFEU as a legal basis for the approximation of substantive law could contradict the logic of the Treaty. In addition, as highlighted by Rosaria Sicurella, the interpretation of article 86 (2) as being the legal bases for that criminal approximation could also bring another sensitive problem. In fact, the adoption of the regulation establishing the EPPO requires a special legislative procedure, which requires unanimity in the Council after (“mere”) consent of the European Parliament. Hence, this fact could represent that “the very first manifestation of a European criminal law would unequivocally be affected by an evident and problematic democratic deficit”37.

33 See, for example, Safferling, Internationales Strafrech, cit., p. 409. Também, v.g., Pedro Caíro, Fundamento, conteúdo e limites da jurisdição penal do Estado – o caso português, cit., p. 563, nota 1357.
34 See, again, the synthesis of Rosaria Sicurella, “Setting up a European Criminal policy for the Protection of EU Financial interests: guidelines for a coherent definition of the Material Scope of the European Public Prosecutor’s Office”, cit., p. 895.
35 For a critical examination of certain language versions of article 86 (2) TFEU (Portuguese versions, German, Italian, Spanish, French and Romanian), see Pedro Caíro, Fundamento, conteúdo e limites da jurisdição penal do Estado – o caso português, cit., p. 563, note 1357.
36 See the synthesis of Katalin Ligeti, “Approximation of substantive criminal and the establishment of the European Public Prosecutor’s Office”, cit., p. 80 e 81. See, also, John A. E. Verwaal, “The material scope of competence of the European Public Prosecutor’s Office: Lex uncerca and unpraevia?”, cit., p. 90 and the following.
Another doctrine understands, however, that article 86 TFEU does not concern only the procedural aspects and can similarly “handle” matters of substantive criminal law. According to this literature, serving us the expressive synthesis of Rosaria Sicurella, “the wording of Article 86 TFEU legitimates the building up of a real ´system´ of provisions for the protection of financial interests of the Union (essentially similar to the one defined by the Corpus juris), since it refers to regulations that would not only establish an EPPO, but that would also ‘determine’ offences to be applied by the EPPO, together with the definition of the statute of the EPPO and some fundamental common rules on procedure applicable...”.

To that extent the expression “as determined by the regulation” should be read “as defined by the regulation”. According to this understanding, “(...) Article 86

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TFUE would represent the legal basis for a limited number of European criminal offences directly applicable to individuals (without passing by the implementation procedures of directives by the domestic legislator), covering all behaviours falling into the category of ‘crimes affecting financial interests of the Union’".\textsuperscript{40}

In this sense, for example, Katalin Ligeti understands that the legal basis for defining the material competence of the EPPO consists of article 86 (2) TFUE postulating that the offences against the Union’s financial interests should be defined also under the regulation referred to in article 86 (1) TFEU \textsuperscript{41}. As the author reports, “[i]t may be deduced from this wording ["as determined by the regulation provided for in paragraph 1"] that Article 86 TFEU allows the EU legislator to adopt, by regulation, common criminal law provisions for the protection of the EU financial interests directly applicable to EU citizens”. In this sense, it would ensure the EU, as stated by Katalin Ligeti, a “genuine competence” to adopt common definitions for offences and for the general part of the criminal law\textsuperscript{42}.

According to Katalin Ligeti’s position, with which we largely agree, to consider whether article 86 TFEU is a proper legal basis for the approximation of substantive criminal law, we should take into account a number of arguments that go beyond the systematic interpretation of the Treaty. And, we add, that go beyond the literal and systematic interpretation of article 82 (2) TFEU, not forgetting to carry out a careful analysis of the various versions of the article, which allow us to state that the regulation which implements the EPPO, based on article 86 TFEU, “can and should” define the material competence of the EPPO\textsuperscript{43}.

First of all, (i) for the sake of “operational functioning” of the EPPO, it is necessary that this transnational body knows exactly for which type of criminal behavior it may exercise its powers within the area of freedom, security and justice.

\textsuperscript{40} Cf. idem, ibidem. See, for example, CHRISTOPH SAFFERLING, \textit{Internationales Strafrecht}, cit., p. 409.

\textsuperscript{41} KATALIN LIGETI, “Approximation of substantive criminal and the establishment of the European Public Prosecutor’s Office”, cit., p. 81.

\textsuperscript{42} Idem, ibidem.

\textsuperscript{43} Idem, p. 83.
But if the material scope of the EPPO’s would be defined by reference to the directive and its national implementing legislation, this would mean that the EPPO would be provided with different definitions of legal types of crime within its competence, according to the number of Member States participating in this European body. Indeed, as analyzed by Katalin Ligeti, the fact that the material scope of competence of the EPPO may diverge among the Member States may “cause substantial problems in investigation and prosecution of transnational cases”\textsuperscript{44}.

Secondly, (\textit{ii}) it is important to realize that the expression “crimes affecting the financial interests of the union” is “an autonomous notion of EU law that as to be interpreted independently and uniformly throughout the EU”\textsuperscript{45}.

Besides, (\textit{iv}) according to the different standard of procedural safeguards and judicial review among the Member States, “EU citizens and economic operators have a fundamental right following from the right to a fair trial to know which prosecuting authority (national or European) is in charge of the case”, which requires that “the applicable law be foreseeable”\textsuperscript{46}.

According to John A. E. Vervaele, despite the ambiguity of the text of article 86 TFEU, “(...) we can not conclude that the legislator has deliberately excluded substantive harmonization from the phrasing under Article 86”\textsuperscript{47}. It is necessary to have a set of offenses and sanctions, which are prescribed by a regulation, which correspond to “the autonomous definition of PIF in EU law”, and “[t]his regulation could be part of one of the regulations based on Article 86 TFEU”\textsuperscript{48}. Only with this viewpoint, it is possible to reach a set of offenses and sanctions which will respect the substantive legality principle and to that extent with the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union, serving as a

\textsuperscript{44} Cf. \textit{idem}, p. 82.
\textsuperscript{45} \textit{Idem}, \textit{ibidem}.
\textsuperscript{46} Cf. \textit{idem}, \textit{ibidem}.
\textsuperscript{47} See JOHN A. E. VERVELE, “The material scope of competence of the European Public Prosecutor’s Office: \textit{Lex certa et unpraevia}?”, cit., p. 90.
\textsuperscript{48} See \textit{idem}, p. 98.
“common level playing field for the criminal law enforcement by the EPPO”\textsuperscript{49}.

Indeed, it seems that it is exactly on the principle of legality that stays one of the major problems on the current proposal.

We cannot give up the rationale of the substantive legality principle, which is the basis of the Member States’ criminal law (or, if it is not directly, then it goes through the idea of “rule of law”), and must also be the basis of the EU criminal law if we want to conceive this “new EU model” of criminal intervention, which includes the exercise of the criminal action. In short, the principle of legality has to be seen as a material limit of the EPPO intervention. It is actually in the teleology and the fundamentals of the principle of legality that remain the problem of defining the material competence of the EPPO and it is also on the light brought by the principle of legality that subsists the way forward.

To that extent, to fulfill the teleology of the principle of legality, it seems to us that the appropriate way to define the material scope of the EPPO is the regulation, that it is abstractly possible on the basis of article 86 TFEU or on article 325 TFEU.

It would therefore be a paradox, as stated by Katalin Ligeti, to create European investigative and prosecution powers to a supranational level, but leave it to the national laws of the member States to define when such powers can be used\textsuperscript{50}.

In view of the wider objectives associated with the implementation of the European Public Prosecutor, and the (possible) extended field of action, it may make more sense that the legal basis is the article 86 TFEU. In this sense, the regulation contemplated in article 86 (2) shall also accommodate material definition of the EPPO.

V. CONCLUSIONS

An EU criminal intervention model limited to the “Union’s financial interests” seems to us the appropriate and feasible

\textsuperscript{49} See. \textit{idem, ibidem}. In a similar sense, see LORENZO PICOTTI, “Le basi giuridiche per l'introduzione di norme penali comuni relative ai reati oggetto della competenza della Procura Europea”, cit.

\textsuperscript{50} Cf. KATALIN LIGETI, “Approximation of substantive criminal and the establishment of the European Public Prosecutor’s Office”, cit., p. 82.
possibility in the present moment. Indeed, for the protection of the substantive legality principle, the implementation of the EPPO will have to be associated with the precise definition of the material competence through the method of unification, which by regulation are defined in a uniform and equivalent way the legal types of crime, in “EU space”. To that extent, the “Union’s financial interests” are interests/legal values with a “typically European cropping that need such unification”\textsuperscript{51}. Hence, in this legal area it seems appropriate and necessary the existence of the maximum degree of approximation (the unification) through the adoption of a regulation. Without this method, we believe that we cannot move to a new criminal intervention model that encompasses the use of investigative and prosecutorial powers by judicial authorities, such as prosecutors at EU level, in so far as it would be completely jeopardize the teleology and content of the substantive legality principle. In this sense, the EPPO Proposal’s option (“restricted material scope of the EPPO - Article 86 (1) TFEU) seems to be consistent with the “possible step”.

Despite the importance and complexity of the subject, it is important to note that the material scope of competence of the EPPO has not played a central role in this debate.

The EPPO Proposal is under negotiation, and subject to several changes. Negotiations on this sensitive issue from a technical and political point of view are still far from reaching its end.

Regardless of the developments that may follow, this proposal “renewed” the idea of the implementation of the EPPO witch is for many unimaginary in the current economic and financial scenario.

The future of the implementation of the EPPO and the contours of its features depend, above all, on the political integration model that Member States aspire to develop, given the nucleus of sovereignty that Member States want to preserve.

\textsuperscript{51} MÁRIO FERREIRA MONTE, “Da autonomia constitucional do direito penal nacional à necessidade de um direito penal europeu”, in MONTE, MÁRIO FERREIRA, O Direito Penal Europeu de “Roma” a “Lisboa” – Subsídios Para a Sua Legitimação, Lisboa, Quid Juris, 2009, p. 82 [“recorte tipicamente europeu que carecem de tal unificação”].
It is therefore important at this stage of “transition”, of construction of a new EU criminal model, of a different model of criminal intervention, to reflect where we want to go.

We believe that it is important to take a step forward, which does not include only staying in the insufficient field of cooperation and approximation only through harmonization, with regard the “Union´s financial interests”.

Indeed, the warning given by the principle of legality must be present in the definition of the EU criminal model that we want to build and thus, inevitably, in the definition of the material scope of the EPPO. It is essential to define and justify the boundaries as far as national/EU criminal law can go without jeopardizing their features, based on the rule of law principles.

In this sense, in order to maintain the essential nucleus of the substantive legality principle, it is necessary to change the direction and rethink the substantive model under construction. Only then will we have a new model of criminal intervention in the EU which implements the basic idea that the substantive legality principle truly appears itself as a material limit to the intervention of criminal law.
LE PLAN ET L’INSPIRATION DES PROJETS DE REFORME DU DROIT DES OBLIGATIONS EN FRANCE ET EN ESPAGNE *

Nuno Manuel Pinto Oliveira **

“De bonnes lois civiles sont le plus grand bien que les hommes puissent donner et recevoir ; elles sont la source des mœurs, la palladium de la propriété, et la garantie de toute paix publique et particulière : elles le maintiennent ; elles modèrent la puissance, et contribuent à la faire respecter, comme si elle était la justice même.”

(Jean-Étienne-Marie Portalis, Discours préliminaire du premier projet de Code civil)

I.

Il y a quelques années, l’idée même d’une codification, ou d’une recodification, était devenue quelque peu anachronique. Le code étant “une sorte de quintessence de l’ordre” 1, l’idée de la “codification” se rapprocherait de la modernité et l’idée de la “décodification” de la post-modernité. “[I]l ne faut pas confondre désordre et désastre”, disait l’un des plus importants civilistes

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1 Cet rapport-ci a été présenté à Saint-Jacques de Compostelle le 16 février 2011, au 1er Colloque franco-espagnol de droit des obligations, organisé par M. le Professeur Javier Lete.


2 Professeur de droit civil, Université de Minho.

représentation de texte natural: 

Français d’aujourd’hui: — “le désordre est la condition première de l’ordre” 2. La “critique de la raison juridique”, c’était la critique de la “raison systémique”, c’est-à-dire: c’était la critique de la “raison codificatrice” 3. L’ “âge de la codification” étant dépassé, on parlait d’un “âge de la décodification” 4.

La codification serait “le paroxysme du droit”; l’ “âge de la codification” serait le temps du mythe et l’ “âge de la décodification”, le temps de la réalité. “La codification ne serait pas considérée comme ‘le paroxysme du droit’ [...] et la décodification ou la disparition de la codification comme le signe d’un déclin, d’une décadence du droit, si l’idée de codification n’avait pas été fondée sur les idées normatives de perfection juridique” 5, à la fois formelle et matérielle. — Ce “déclin du droit”, cette “décadence du droit”, seraient toutefois irréversibles:

“la codification fondée sur les paradigmes de l’étatisme et de la perfection formelle et matérielle, élaborés dès le XVIIIe siècle et qui ne répondent plus aux réalités et aux nécessités du XXIe siècle, est très certainement sans avenir.” 6

Les temps sont pourtant changés: à l’Union européenne, on discute la codification, aux États-membres de l’Union européenne on discute la recodification des droits nationaux. Ces deux mouvements-ci, celui de la codification du droit européen et celui de la recodification des droits nationaux, devraient être coordonnés. La modernisation” (recodificatrice) des droits nationaux devrait signifier son européanisation. L’interaction entre les droits nationaux devrait signifier le dialogue de la législation, de la doctrine, de la jurisprudence: Êtant tenus de répondre à des problèmes communs — car les problèmes du droit

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2 François Terré, loc. cit., p. 357-364.
privé sont en effet communs à tous — les États-membres devraient dialoguer, en tentant de trouver les meilleurs solutions 7. 

La diversité et le pluralisme de systèmes juridiques seraient donc des avantages. Comptez tenu de cette diversité — compte tenu de ce pluralisme —, l’Union européenne aurait une capacité unique : celle de faire usage des systèmes juridiques nationaux comme s’ils étaient des “laboratoires vivants”, engagés dans un processus d’apprentissage et d’enseignement réciproques 8. Les avant-projets de réforme du code civil français et du code civil espagnol sont des contributions fondamentales à ce dialogue des droits nationaux. — Ils sont des contributions fondamentales à ce processus d’apprentissage et d’enseignement.

L’inspiration comparatiste étant commune à tous les avant-projets de réforme, aucun d’eux ne pouvant être considéré isolément, elle est peut-être moins évidente aux avant-projets de réforme du Code civil français et peut-être plus prononcée à l’avant-projet de réforme du Code civil espagnol, celui-ci étant le fruit, le fruit mûr, d’une analyse comparative très large, très approfondie.

On y trouve quelques solutions empruntées aux systèmes de Common law, tels que l’Angleterre ou les États-Unis (par exemple, le concept de “violation fondamentale du contrat”, de *fundamental breach of contract*, de l’article 1199) ; on y trouve quelques autres solutions empruntées aux systèmes de Civil law, tels que la France, ou l’Italie, ou le Portugal (par exemple, le concept d’“intérêt légitime du créancier” de l’article 1088) ; on y trouve surtout des solutions empruntées à la loi de réforme du Code civil allemand, à la Schuldrechtsmodernisierungsgesetz 9.

9 C’est aussi l’opinion de M. le Professeur Cabanillas Sánchez, telle qu’il l’a présentée au cours de la première journée du 1er. *Colloque Franco-Espagnol sur le droit des obligations*: “la Comisión General de Codificación se ha inspirado fundamentalmente en la Convención de Viena sobre la compraventa internacional de mercaderías, en los Principios de Derecho europeo de los contratos de la Comisión Lando, en los Principios sobre los contratos comerciales internacionales elaborados por el Unidroit, en el Derecho elaborado por la Unión Europea, donde se enmarcan los Principios Acquis y el Borrador del Marco Común de Referencia, y en el Derecho comparado, donde destaca la reforma operada en el BGB alemán por la Ley de modernización del Derecho de obligaciones”.

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83 LE PLAN ET L’INSPIRATION DES PROJETS
Les contributions des avant-projets de réforme du Code français et du Code espagnol ne sauraient donc être comprises qu’au cadre plus large d’un dialogue européen — d’un dialogue où la voix de la loi allemande ne saurait être ignorée.

La possibilité d’un dialogue juridique entre la France et l’Allemagne est quelquefois remise en doute. “Les échanges entre les deux systèmes de droit sont aujourd’hui quasi inexistants” 10; “il n’existe pas entre la France et l’Allemagne de dialogue juridique privilégié” 11. Les relations juridiques entre la France et l’Allemagne seraient fort “ambivalentes” — “entre attirance et rejet, admiration et rivalité”, a-t-on écrit très récemment —; la distance entre la France et l’Allemagne, insurmontable; le rapprochement imposé par le droit communautaire, insuffisant — “le droit communautaire ne pouvant être que de compromis, le rapprochement qu’il permet entre le droit allemand et le droit français connaît des limites d’autant plus importantes qu’elles portent essentiellement sur le mode de pensée des juristes de part et d’autre du Rhin” 12.

Le diagnostic est pourtant quelque peu exagéré: — d’une part, le droit comparé est devenu de plus en plus important; — d’autre part, le dialogue entre les juristes français et les juristes allemands est possible; il a été possible dans le passé; il est possible dans le présent; — finalement, le dialogue entre les juristes français et les juristes allemands est nécessaire. Il est bien possible que la plus grande partie du problème de l’harmonisation du droit (privé) européen ne soit que celle du rapprochement entre le droit (civil) français et le droit (civil) allemand 13.

II.

11 Gwendoline Lardeux, loc. cit., p. 3.
12 Gwendoline Lardeux, loc. cit., p. 3.
Etrange liaison, celle des Codes allemand et français. Les deux Codes civils se sont proposés des buts tout à fait différents — si différents qu’on peut les qualifier d’antagoniques. Le Code civil français se proposait d’être un code politique — politiquement engagé. Il devrait être la forme juridique du libéralisme 14, ses amis l’appelant de constitution civile de la France, ses ennemis le considérant une législation bourgeoise. Il y a en a eu même qui, au bout d’une “analyse structurelle”, c’est-à-dire : — d’une analyse marxiste, le définisse comme “la règle du jeu dans la paix bourgeoise” 15. Le Code Civil allemand, par contre, se proposait d’être un code scientifique, politiquement neutral.


Leur inquiétude était peut-être justifiée. La loi allemande du 2001 / 2002 s’appelant “Loi de modernisation du droit des obligations” (pas moins !) — Gesetz zur Modernisierung des Schuldrechts —, le Code civil allemand se donnait l’air d’être rajeuni, le Code civil français restant vieux de deux siècles.


La crise de la codification civile s’imposant à la réflexion de (presque) tous les civilistes français, (l’urgence de) la recodification s’imposait à l’action de quelques-uns. Il fallait ranimer le code civil; il fallait recodifier le droit civil 20.

Au cours de la première journée du 1er. Colloque franco-espagnol de droit des obligations M. le Professeur Mazeaud a très passionnément parlé du “fabuleux destin” de cette recodification 21.

En présentant le premier avant-projet de réforme du droit des obligations, celui du 2005, M. le Professeur Catala exprimait en tout cas une double conviction — à son avis (et à ses mots), une “double certitude”: “que le Code de 1804 constituaît toujours un modèle idéal de législation civile ; qu’il était possible de le rénover sans dégrader sa structure ni sa forme”.

Compte tenu de la valeur archétypique du Code, en tant que “modèle idéal de législation civile”, les principes directeurs de la codification, énoncés au “discours préliminaire”, devraient constituer les principes directeurs de la recodification. Les lois

\begin{footnotes}
\footnote{Philippe Rémy, loc. cit., p. 99-119.}
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Les lois, en tant qu’actes de raison — de souveraineté —, feraient l’objet d’un Code civil; les règlements, en tant qu’actes d’autorité, ne le feraient point ; le Code civil devrait donc “[rester] le siège de maximes générales qui édictent un droit commun actualisé, recouvrant et ménageant à la fois le particularisme des lois spéciales nouvelles”. Ce qui n’est pas dépourvu de conséquences : — Le droit de la consommation, contenant nombre de “détails d’exécution” et de “précautions provisoires ou accidentelles”, devrait rester hors du Code civil.

“Le droit civil est un droit d’équilibre, pareillement soucieux des intérêts en présence, sans a priori favorable à l’une ou l’autre partie”, ce sont les mots de M. le Professeur Catala. “ C’est à d’autres codes ou lois [— notamment, au code de la consommation, au code du commerce, au code du travail —] qu’incombe le soin de régler la balance contractuelle vers plus d’efficacité ou de sécurité, en fonction des situations juridiques en cause et de l’utilité sociale recherchée.”

Il y a là une différence fondamentale entre le code allemand et le code français. La structure du code allemand, en tant que “code de concepts”, ne pose pas d’obstacle à l’intégration du droit de la consommation ; la structure du code français, en tant que “code de principes”, y pose pourtant un obstacle important. L’avant-projet de loi de réforme du Code civil espagnol s’inspire, pragmatiquement, de la solution de la loi allemande (articles 1261 à 1268). Il propose l’intégration du “noyau dur” — du “noyau
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III.

Le plan du Code civil français repose sur le concept de contrat ; le plan du Code civil allemand repose sur le concept d’obligation — plus précisément, sur le concept de rapport obligatoire (Schuldverhältnis). Le contrat n’y est que l’un des faits constitutifs, n’y est que l’une des sources, des rapports obligatoires 23.

Le plan du Code civil espagnol est un peu plus complexe. Le Livre II.e s’appelle Des obligations et des contrats, les dispositions appartenant naturellement au droit des obligations devant faire l’objet du Titre I.e, les dispositions appartenant au droit des contrats devant faire l’objet du Titre II.e.

L’apparence de simplicité du système n’est pourtant qu’une apparence décevante : le Titre I.e — Des obligations — contient des dispositions qui, probablement, devraient trouver son siège au Titre II.e ( l’article 1091, sur la force obligatoire du contrat, ou les articles 1152 à 1155, sur les clauses pénales).

L’avant-projet de réforme du Code civil espagnol conserve le système du Code civil — ce qui explique que quelques dispositions, notamment celles portant sur le changement des

22 V. la contribution aux travaux de M. le Professeur Cabanillas Sánchez, “Observaciones comparativas sobre los proyectos de reforma del derecho de los contratos en Francia y en España” — “En la Propuesta de la Comisión General de Codificación se tiene muy en cuenta la protección del consumidor, incorporando al Código civil el núcleo sustancial de la protección de los consumidores en el ámbito contractual, mientras que no ocurre lo mismo en el Proyecto de la Cancillería, que en este aspecto sigue a la Propuesta del grupo Terré y al Anteproyecto Catala. En la Presentación del Anteproyecto Catala se afirma que el Código civil se tiene que dirigir de manera indiferenciada a todo ciudadano, al margen de su actividad de comerciante o de consumidor. La protección del consumidor no es uno de sus objetivos. El Derecho civil es un Derecho de equilibrio, sin ser a priori favorable a una u otra parte. Incumbe a otros Códigos o Leyes el cuidado de regular el balance contractual, en función de las situaciones jurídicas en cuestión y la utilidad social buscada.”


Le plan n’est pourtant que l’aspect le plus “extérieur”, n’est que la forme d’un code civil ; son inspiration, c’est son aspect le plus “intérieur”, c’est sa substance ; le plan n’est que le “corps” d’un code ; son inspiration c’est son “esprit”. L’inspiration libérale des codes du XIXe siècle ayant fait l’objet de la critique, les avant-projets de réforme des Code civils de la France et de l’Espagne se sont efforcés d’atteindre l’équilibre entre la liberté et la justice.

Il y a, certes, des nuances. Il y a des nuances apparentes, plus superficielles, portant sur les mots — on peut parler de “bonne foi”, ou de “justice contractuelle”, tel que M. le Professeur Miquel l’a remarqué — ; il y a des nuances plus profondes, portant sur la philosophie de chacun des projets — on peut réformer le code selon des approches plus libérales, ou des approches plus “sociales”, sinon “socialistes”, tel que M. le Professeur Mazeaud l’a souligné 24. —. Ces différences-ci ne touchent pourtant pas l’essentiel : ce qui importe, c’est la substance ; ce qui importe, c’est le souci d’équilibre entre la liberté et la justice.

Celui-ci étant partout, je me limiterai à quelques exemples.

a) En premier lieu, les avant-projets de réforme de deux codes proposent d’approfondir la liberté contractuelle. Le concept de liberté des codes civils d’un Etat libéral pouvait être celui d’une liberté “formelle”, donc d’une “fausse” liberté ; le concept de liberté contractuelle des codes civils d’un Etat social ne saurait être que celui d’une liberté “matérielle”, donc d’une “vraie” liberté.

C’est l’idée de “matérialisation” de la liberté contractuelle qui inspire, par exemple, les solutions de l’article 1113-1 de l’avant-projet Catala, de l’article 33 du projet Terré et de l’article 50 du projet de la Chancellerie, ainsi que de l’article 1298, alinéa 2, de l’avant-projet espagnol, sanctionnant la réticence dolosive comme

24 M. le Professeur Mazeaud a proposé de distinguer trois écoles de pensée : l’école “classique, conservatrice, nationaliste” ; l’école libérale, “qui prône une liberté contractuelle sans entrave, si ce n’est le contrôle des vices du consentement” ; l’école sociale, “sinon solidariste” — v. “Le plan et les sources d’inspiration”.
cause d’annulation du contrat. C’est toujours l’idée de “matérialisation” de la liberté contractuelle qui inspire, par exemple, les solutions de l’article 1114-3 de l’avant-projet Catala et de l’article 63 du projet de la Chancellerie, ainsi que de l’article 1301 de l’avant-projet espagnol, sanctionnant la violence économique comme cause d’annulation du contrat.

Cette solution-ci étant déjà largement acceptée en France, elle restait pourtant controversée en Espagne.

L’ordonnance N.° 2016-131, du 10 février 2016, vient de consacrer ces deux causes d’invalidité du contrat.

L’annulation du contrat du fait d’une dissimulation intentionnelle, c’est à dire, d’une réticence, fait l’objet de l’article 1137 :

Le dol est le fait pour un contractant d’obtenir le consentement de l’autre par des manœuvres ou des mensonges.

Constitue également un dol la dissimulation intentionnelle par l’un des contractants d’une information dont il sait le caractère déterminant pour l’autre partie.

L’annulation du contrat du fait de la violence fait l’objet des articles 1140 à 1143, le premier définissant la violence tout court et le dernier, la violence économique.

L’article 1140 affirme qu’“il y a violence lorsqu’une partie s’engage sous la pression d’une contrainte qui lui inspire la crainte d’exposer sa personne, sa fortune ou celles de ses proches à un mal considérable” et l’article 1143 ajoute qu’“il y a également violence lorsqu’une partie, abusant de l’état de dépendance dans lequel se trouve son cocontractant, obtient de

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25 Les projets français, plus audacieux sur ce point-ci, proposent de fixer aux articles 1110 à 1110-1 un principe général sur les obligations pré-contractuelles d’information et de renseignement: “Celui des contractants qui connaît ou aurait dû connaître une information dont il sait l’importance déterminante pour l’autre a l’obligation de le renseigner. Cette obligation de renseignement n’existe cependant qu’en faveur de celui qui a été dans l’impossibilité de se renseigner par lui-même ou qui a légitimement pu faire confiance à son cocontractant, en raison, notamment, de la nature du contrat, ou de la qualité des parties. […] Seront considérées comme pertinentes les informations qui présentent un lien direct et nécessaire avec l’objet ou la cause du contrat.” L’avant projet de réforme du Code civil espagnol, plus pragmatique, ne propose pourtant aucun principe général (article 1300).
lui un engagement qu'il n'aurait pas souscrit en l'absence d'une telle contrainte et en tire un avantage manifestement excessif”

b) En second lieu, les avant-projets de réforme des deux codes proposent de “moraliser” le régime de l'exécution et de l'inexécution du contrat.

Ils proposent de le “moraliser”, d'une part, en admettant l'exécution forcée en nature des obligations de donner, des obligations de faire (facere) et des obligations ne pas faire (non facere).


Ils proposent de le “moraliser”, d’autre part, en rendant plus facile la résolution du contrat pour inexécution.


27 L’article 1217 compte l’exécution forcée en nature parmi les conséquences de l’inexécution du contrat et les articles 1221 et 1222 reconnaissent au créancier le droit de poursuivre l’exécution en nature, tout en fixant les deux limites de ce droit-ci, le premier se rapportant aux cas où l’exécution est impossible, le second aux cas où l’exécution est trop onéreuse, à cause d’une “disproportion manièse entre son coût pour le débiteur et son intérêt pour le créancier”.

28 V. la contribution aux travaux de M. le Professeur Cabanillas Sánchez, “Observaciones comparativas sobre los proyectos de reforma del derecho de los contratos en Francia y en España” : “El acreedor tiene derecho a exigir el cumplimiento de la obligación, sea dineraria o no. El derecho de acreedor al cumplimiento comprende la reparación o rectificación de los defectos de la prestación ejecutada o su sustitución por otra conforme a lo pactado cuando la naturaleza de la obligación no lo impida”.

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C'était la solution de l’article 1158 de l’avant-projet Catala, des articles 108 à 110 du projet Terré et des articles 165 à 168 du projet de la Chancellerie ²⁹.

C’est la solution des articles 1224 et 1226 de l’ordonnance N.º 2016-131:

Article 1224 : La résolution résulte soit de l’application d’une clause résolutoire soit, en cas d’inexécution suffisamment grave, d’une notification du créancier au débiteur ou d’une décision de justice.

Article 1226 : Le créancier peut, à ses risques et périls, résoudre le contrat par voie de notification. Sauf urgence, il doit préalablement mettre en demeure le débiteur défaillant de satisfaire à son engagement dans un délai raisonnable.

La mise en demeure mentionne expressément qu’à défaut pour le débiteur de satisfaire à son obligation, le créancier sera en droit de résoudre le contrat.

Lorsque l’inexécution persiste, le créancier notifie au débiteur la résolution du contrat et les raisons qui la motivent.

Le débiteur peut à tout moment saisir le juge pour contester la résolution. Le créancier doit alors prouver la gravité de l’inexécution ³⁰.

L’avant-projet espagnol propose de remplacer le système de résolution judiciaire de l’actuel article 1124 du Code civil, dont la portée a été considérablement modérée par la doctrine et par la jurisprudence, par le système de résolution “hors-judiciaire”, de résolution unilatérale, d’un nouvel article 1199.

Les conditions de la résolution unilatérale, “hors-judiciaire”, sont pourtant différentes.

L’article 1158 de l’avant-projet Catala ne la soumettait qu’à la condition d’un “délai raisonnable” ³¹ ; l’article 168 du projet de


³¹ Le rapport de Mme. le Professeur Rochfeld tranche la question, en soutenant que “Dans le cas où [le créancier] opterait pour cette dernière [ c’est-à-dire, pour la résolution
la Chancellerie n’admettait la résolution unilatérale qu’au cas d’une inexécution qui “prive le créancier de son intérêt au contrat” ; l’article 108 du projet Terré n’admettait la résolution unilatérale qu’aux cas de “grave inexécution”.

L’article 109 la caractérisait, en faisant appel à trois critères : celui de l’”essence du contrat”, celui de l’intérêt du créancier, celui de la gravité du comportement (faultif) du débiteur.

_Celui de l’”essence du contrat”:_ “L’inexécution est grave lorsqu’elle porte sur une obligation dont la stricte observation est de l’essence du contrat” ; _celui de l’intérêt du créancier_ : L’inexécution est grave “lorsqu’elle prive substantiellement le créancier de ce qu’il pouvait légitimement attendre du contrat, à moins que le débiteur n’ait pas pu prévoir que l’inexécution aurait un tel résultat” ; _celui de la gravité de du comportement (faultif) du débiteur_ : “L’inexécution intentionnelle est toujours considérée comme grave lorsqu’elle fait présumer que le débiteur n’exécutera pas dans le futur.” 32

Les articles 1224 et 1226 du code civil, à la suite de leur rénovation par l’ordonnance N.º 2016-131, ne retiennent qu’un critère, défini au moyen d’un concept fort indéterminé — celui d’une inexécution 

_L’absence d’une indication quelconque sur la signification de ce concept-ci dans le texte de la loi sera-t-elle une invitation à une (re)lecture des travaux préparatoires ? Les indications du projet Terré, par exemple, pourraient-elles contribuer à l’interprétation des articles 1224 et 1226 du code civil ? 33

_L’avant-projet espagnol propose de coordonner deux principes : celui de l’inexécution essentielle du contrat — le créancier dispose du droit de résoudre le contrat lorsqu’il y a une_

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32 Pour la comparaison des projets français, v. la contribution de Mme. le Professeur Pignarre aux travaux du 1er. Colloque franco-espagnol de droit des obligations.
33 V., par exemple, Nicolas Dissaux / Christophe Jamin, Projet de réforme du droit des contrats, du régime général et de la preuve des obligations [rendu public le 25 de février 2015], 136.
inexécution essentielle (article 1199) —; celui du délai raisonnable accordé au débiteur pour exécuter le contrat — en dehors des cas d’inexécution essentielle, seule l’inexécution répétée justifie la résolution du contrat. Le créancier n’aura le droit de le résoudre qu’après avoir accordé au débiteur deux opportunités d’exécuter ses obligations, en lui fixant un délai supplémentaire, lequel doit être raisonnable (article 1200). Le critère de l’”inexécution essentielle du contrat” a ses origines à la doctrine de la “fundamental breach of contract” des droits anglais et nord-américain; le critère du délai supplémentaire, lui, il a ses origines au droit allemand 34.

bb) En Europe — en Angleterre, en Allemagne, en France —, on s’interroge aujourd’hui: faut-il consacrer un principe de restitution des avantages patrimoniaux résultant d’un fait illicite — notamment, de l’inexécution du contrat?

L’avant-projet Catala admet la condamnation de l’auteur du fait illicite à des dommages-intérêts punitifs: “L’auteur d’une faute manifestement délibérée, et notamment d’une faute lucrative, peut être condamné, outre les dommages-intérêts compensatoires, à des dommages-intérêts punitifs dont le juge a la faculté de faire bénéficier pour une part le Trésor public”, tels sont les mots de l’article 1371 de l’avant-projet.

L’article 1371 devrait s’appliquer aux deux responsabilités, c’est-à-dire à la responsabilité aquilienne ou délictuelle et à la responsabilité contractuelle. Le critère de la “faute manifestement délibérée, et notamment d’une faute lucrative” rapproche singulièrement les dommages-intérêts “punitifs” de l’article 1371 des dommages-intérêts “restitutifs” des droits anglais et nord-américain (disgorgement et restitutionary damages).

Le projet de la Chancellerie en disait moins ; en effet, il ne disait (presque) rien sur cette question-ci ; le projet Terré en disait plus ; en effet, il disait (presque) tout :

34 L’inspiration “comparative” de l’avant-projet espagnol a été mise en relief aux contributions de Antonio Cabanillas Sánchez — “Observaciones comparadas de los Proyectos de reforma del derecho de los contratos en Francia y en España” — et de Lis Paula San Miguel Pradera — “La modernización de la resolución por incumplimiento en el derecho español. La propuesta de modernización del Código Civil español”.

en cas de dol, le créancier de l'obligation inexécutée peut préférer demander au juge que le débiteur soit condamné à lui verser tout ou partie du profit retiré de l'inexécution. 35

L'article 1386-25 de la “Proposition de loi portant réforme de la responsabilité civile”, déposée par M. Béteille au Sénat le 9 juillet 2010, admettait assez prudemment la restitution des profits illicites, à des termes évoquant à la fois les suggestions de l’avant-projet Catala et du projet Terré :

Dans les cas où la loi en dispose expressément (sic !), lorsque le dommage résulte d’une faute délictuelle ou d’une inexécution contractuelle commise volontairement et a permis à son auteur un enrichissement que la seule réparation du dommage n’est pas à même de supprimer, le juge peut condamner, par décision motivée, l’auteur du dommage, outre à des dommages et intérêts en application de l’article 1386-22, à des dommages et intérêts punitifs dont le montant ne peut dépasser le double du montant des dommages et intérêts compensatoires.

L’ordonnance N.º 2016-131 a pourtant éliminé toute référence à la restitution des profits illicites 36.

L’avant-projet espagnol reste en silence sur ce point-ci, la solution négative ayant cependant les faveurs de la majorité de la doctrine et de la jurisprudence.

cc) En troisième lieu, l’équilibre entre les intérêts du créancier et du débiteur exige que les risques d’un changement anormal, imprévisible et insurmontable des circonstances soient partagés par les deux sujets du rapport obligatoire.

Le droit français a longtemps refusé la révision judiciaire du contrat par imprévision. Les arrêts les plus anciens n’admettaient que le juge sanctionne le créancier en le condamnant à verser des dommages-intérêts au débiteur, le fondement de la condamnation étant la violation d’un devoir de renégociation du contrat ; les arrêts les plus récents — par

35 V. la contribution de M. le Professeur Brun aux travaux du 1er Colloque franco-espagnol de droit des obligations — “Les dommages et intérêts”.


exemple, l’arrêt de la section commerciale de la Cour de cassation du 29 juin 2010 — admettent toutefois que le juge sanctionne le créancier en déclarant la caducité du contrat aux cas ou le changement des circonstances “[prive] de toute contrepartie réelle l’engagement souscrit par le débiteur”. Le contrat atteint par le changement des circonstances dont l’équilibre contractuel dépend serait donc un contrat dépourvu de cause.

Les articles 1135-1 à 1135-3 de l’avant-projet Catala consacraient les solutions acceptées par la doctrine et par la jurisprudence majoritaires :

Art. 1135-1: Dans les contrats à exécution successive ou échelonnée, les parties peuvent s’engager à négocier une modification de leur convention pour le cas où il adviendrait que, par l’effet des circonstances, l’équilibre initial des prestations réciproques fût perturbé au point que le contrat perde tout intérêt pour l’une d’entre elles.

Art. 1135-2: A défaut d’une telle clause, la partie qui perd son intérêt dans le contrat peut demander au président du tribunal de grande instance d’ordonner une nouvelle négociation.

La partie préjudiquée par le changement, celle “qui perd son intérêt dans le contrat”, aurait la faculté de demander au juge la condamnation de l’autre partie à la renégociation du contrat ; au cas d’échec de la renégociation, “exempt de mauvaise foi”, elle aurait la faculté de résilier le contrat sans frais ni dommage.

L’article 136 du projet de la Chancellerie précisait trois choses : d’une part, il précisait que le changement des circonstances devait être, à la fois, “imprévisible” et “insurmontable” ; d’autre part, il précisait que la partie préjudiquée avait le droit à la renégociation ; finalement, qu’elle “d[evait] continuer à exécuter ses obligations durant la renégociation”.

Si un changement de circonstances, imprévisible et insurmontable, rend l’exécution excessivement onéreuse pour une partie qui n’avait pas accepté d’en assumer le risque, celle-ci peut demander une renégociation à son co-contractant mais doit continuer à exécuter ses obligations durant la renégociation. En cas de refus ou d’échec de la renégociation, le juge peut, si les parties en sont d’accord, procéder à l’adaptation du contrat, ou à défaut y mettre fin à la date et aux conditions qu’il fixe.
L’article 92 du projet Terré affirmait d’une façon peut-être plus claire l’existence d’un “devoir de renégociation” et les sanctions de son échec :

[...] les parties doivent renégocier le contrat en vue de l’adapter ou d’y mettre fin lorsque l’exécution devient excessivement onéreuse pour l’une d’elles par suite d’un changement imprévisible des circonstances et qu’elle n’a pas accepté d’en assumer le risque lors de la conclusion du contrat.

En l’absence d’accord des parties dans un délai raisonnable, le juge peut adapter le contrat en considération des attentes légitimes des parties ou y mettre fin à la date et aux conditions qu’il fixe.

L’avant-projet Catala ne prévoyait pas l’“adaptation” ou la “modification” du contenu du contrat ; le projet de la Chancellerie ne l’admettait qu’aux cas où “les parties en sont d’accord” ; le projet Terré l’admettait en des termes plus larges, le juge n’étant tenu que de considérer les “attentes légitimes des parties” 37.

L’ordonnance N° 2016-131 s’éloigne des solutions plus modernes, plus européennes, celles du projet Terré pour se rapprocher des solutions plus conservatrices, celles de l’avant-projet Catala et du projet de la Chancellerie.

L’article 1195 du code civil, rénové par cette ordonnance-ci, détermine :

Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l’exécution excessivement onéreuse pour une partie qui n’avait pas accepté d’en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.

En cas de refus ou d’échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu’elles déterminent, ou demander d’un commun accord au juge de procéder à son adaptation. A défaut d’accord dans un délai raisonnable, le juge peut, à la demande d’une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu’il fixe 38.

37 Pour la comparaison des projets français, v. la contribution aux travaux de M. le Professeur Gout — “L’altération du fondement contractuel : erreur et imprévision”.
On remarquera d’abord que l’existence d’une authentique obligation de (re)négotiation du contrat est plutôt douteuse.

Le projet Terré disait que les parties devaient renégocier le contrat. Le code civil, tel qu’il a été modifié par l’ordonnance du 2016, ne le dit point. Il ne reconnait qu’à la partie prejudiquée la faculté de demander à son cocontractant de renégocier 39.

Le rapport du Ministère de Justice dit que “[l’]imprévision a [...] vocation à jouer un rôle préventif, le risque d’anéantissement ou de révision du contrat par le juge devant inciter les parties à négocier.” Il ne s’agit point de obliger les parties à négocier; il s’agit de les inciter: c’est tout.

On remarquera ensuite que la révision du contrat et la résiliation du contrat peuvent être demandées par quelqu’une des deux parties.

Il s’agit d’un progrès par rapport à l’avant-projet Catala et au projet de la Chancellerie. Il ne s’agit pourtant pas d’un progrès par rapport au projet Terré. La primauté pratique de la résiliation sur la révision du contrat incite la partie prejudiquée à renverser le préjudice provoqué par le changement, d’une telle façon que la partie originairement prejudiquée ne perdra rien et que la partie originairement non prejudiquée risquera de perdre tout 40.

L’article 1213 de l’avant-projet de réforme du Code civil espagnol tente de concilier les deux systèmes, le système allemand et le système français: d’une part, à l’image des avant-projets de loi de réforme du Code civil français, il consacre la primauté de la renégociation sur l’adaptation judiciaire du contrat; d’autre part, à l’image de la loi de réforme du Code civil allemand, il consacre la primauté de modification sur la résiliation du contrat 41.


41 Pour la présentation de l’avant-projet espagnol, v. la contribution aux travaux de M. le Professeur Morales Moreno — “Error y alteración sobrevenida de las circunstancias” ; v. aussi Pablo Salvador Codero, “Alteración de las circunstancias en el art. 1213 de la Propuesta de Modernización del Código Civil en materia de Obligaciones y Contratos”, in : InDret, n.º
Les convergences entre la réforme du code civil français et le projet de réforme du code civil espagnol sont plus importantes que les divergences. C’est sans doute par cette raison-ci que M. le Professeur Cabanillas Sánchez estime que les projets de réforme du code civil français et que le projet de la Comisión General de Codificación sont d’accord avec les Principes de droit européen des contrats ; avec les principes relatifs aux contrats du commerce international (“Principes UNIDROIT”) ; avec l’avant-projet d’un “cadre commun de référence” du droit privé européen 42.

Etant moins importantes que les convergences, les divergences subsistent, pourtant. Le droit européen des contrats fait encore l’objet du débat, du dialogue — de la discussion.

Les projets français ont déjà réussi dans sa vocation législative. La loi de modernisation du droit des contrats vient d’être publiée au Journal Officiel de la République Française du 11 février 2016. Le projet espagnol n’en a pas encore réussi, les difficultés à la fois juridiques (constitutionnelles) et politiques de l’Espagne l’ayant empêché de devenir loi.

Le succès ou l’insuccès d’un projet de code civil ne devrait jamais être surestimé. Il y aura toujours des avant-projets et des projets de code qui deviennent des lois ; il y a des projets qui n’en deviennent pas. Quoiqu’il arrive, ils resteront toujours des

42 V. la contribution aux travaux de M. le Professeur Cabanillas Sánchez, “Observaciones comparativas sobre los proyectos de reforma del derecho de los contratos en Francia y en España” ; “El Proyecto de la Cancillería y la Propuesta de la Comisión General de Codificación concuerdan con los Principios Lando, los Principios Unidroit y el Borrador del Marco Común de Referencia”.
