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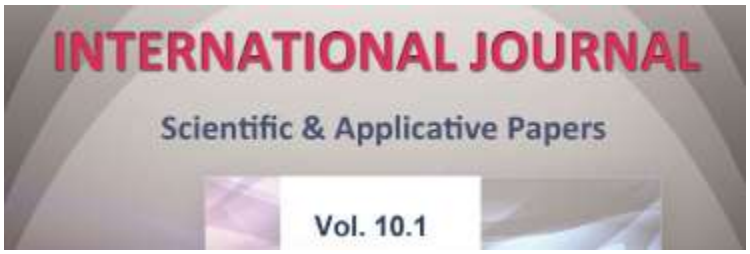

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CONTENTS

CRIMINAL LAW IN THE LISBON TREATY AND THE POLICE AND JUSTICE COOPERATION IN CRIMINAL MATTERS

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Summary: The paper presents the changes in the Area of Freedom, Security and Justice according the Lisbon Treaty, especially the Police and Justice Cooperation in criminal matters. The three pillar structure is replaced and the competences in the Area of Freedom, Security and Justice are increased and provisions transferred in the Treaty on Functioning of the European Union and within the ambit of the Court of Justice's jurisdiction. Criminal law is an issue of particular sensibility. On one side, criminal law provisions seriously endanger individual rights, and on the other side, criminal law provisions reflect the basic values of society and therefore are reserved for national legislations. However, this traditional understanding of criminal law is not appropriate to the EU integration level. Having in mind these issues, member-states transferred several competences to the European Union in order to undertake measures in the area of criminal law, criminal procedure and cooperation in criminal matters. However, the principle of transferred competences, respect of domestic criminal justice and basic principles of proportionality and subsidiarity request careful use of these competences.
Key words: Police, Justice, criminal matters, Lisbon.

1. PRECONDITIONS

The criminal law is an issue of particular sensitivity. On one side, criminal law provisions seriously endanger individual rights, not only by limitations of individual freedom and resulting with concrete penalty, but also with the effect of humiliation. On other side, criminal law provisions reflect basic values of societies and therefore are reserved for national states. However, this traditional understanding is inappropriate with the integration level of the EU and incompatible with the EU's goals as an area of freedom, security and justice.[383]

The European integration to a certain extent facilitated the transnational crime activities. While EU was promoting the free movement of four freedoms establishing the common market and the Schengen Agreements, at the same time criminals made good use of these freedoms. They were able to communicate across borders far easily, make use of criminal legislations shortages in member-states and to avoid prosecutions. Under these conditions, a member-state could be a safe place for crime activities. Moreover, EU's financial resources are attractive for criminals and not enough protected by domestic criminal law. Further, traditional mutual assistance system in criminal matters no longer secures efficient assets for fight against cross-border crime as it rely on diplomatic communications and national sovereignty with slow and inefficient procedures dependable on political decisions and member-states will.

Since criminal law is used as an exclusive right of member-states, national jurisdiction rules in criminal area often overlap. This leads to a situation where more than one state may apply its criminal law for one same case. If an Italian citizen injures a British citizen in Netherlands, all concerned states may prosecute this offence. Such jurisdiction conflicts result in numerous criminal charges, not only taking time and costs, but also harmful for defence rights and therefore unwelcomed in the area of freedom, security and justice.

Bearing in mind these issues, member-states transferred competences to EU, enabling it to take certain measures in the criminal law area, criminal procedure and cooperation in criminal matters. However, the principle of transferred competence, respect of domestic criminal justice system and basic principles of proportionality and subsidiarity request careful use of these competences.

2. MAASTRICHT – TAMPERE – LISBON

EU's criminal law is traditionally dealt through the concept of intergovernmental cooperation and for the first time legally introduced in the Maastricht Treaty as part of the third pillar - Justice and Home Affairs (JHA).[384] Amsterdam Treaty furthermore confirms EU's goals in JHA area and created the concept of "area of freedom, security and justice" (AFSJ). As known, intergovernmental cooperation is criticised for lack of transparency and

[383] Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, OJ C 83/1, March 30, 2010.
[384] Treaty on European Union, OJ C 191/1, July 29, 1992.

democratic deficit with minimal inclusion of the European Parliament (EP) in the legislation process and minimal jurisdiction of the Court of Justice of the EU (CJEU). From EU's perspective, the third pillar framework was never considered as an ideal part to correspond with the first pillar (EC). Anyway, member-states were concerned regarding their competences in an extremely sensitive area such as JHA. Shortly after the entry into force of the Amsterdam Treaty, the Council in Tampere and The Hague Programme[385] gave accent of the European criminal law through adoption of formula for mutual recognition in the third pillar.

Accordingly, competences for regulation of the European criminal law belonged to the third pillar. However, the CJEU concluded that there is a legislation competence of the EC in criminal law if it is necessary for the environment protection and in order to make such legislation fully effective.[386] Other cases before the adoption of the Lisbon Treaty demonstrated that a reform of the third pillar is needed and approach towards unification of pillars.[387] Regarding this, several General Advocates emphasised the need of respect for the pillar structure according article 47 of the EU and to dedicate attention on international pillars as "integrated, but separate" legal order.[388] Lisbon Treaty solves this problem with simple merge of pillars. Doing so, Lisbon Treaty puts the third pillar area in the core of the Union and under the CJEU jurisdiction.

3. CRIMINAL LAW IN THE LISBON TREATY

Criminal law provisions in the Lisbon Treaty are introduced in articles 82 and 83 of the TFEU. More specifically, the former third pillar of JHA is in part 4 of TFEU and consisting in 5 chapters: General Provisions; Policies on Border Checks, Asylum and Immigration; Judicial Cooperation in Civil Matters; Judicial Cooperation in Criminal Matters; and Police Cooperation.

Accordingly, one of the changes is the transition from traditional unanimity requirement in the third pillar towards qualified majority in the Council and co-decision with Commission having the right of initiative. However, the Lisbon Treaty keeps the instruments of the first pillar, such as regulations, directives and decisions. Still, the abolition of pillar structure does not mean that everything shall be governed automatically through the community method (qualified majority voting in the Council and co-decision with the EP). The criminal law has its own regime with possibilities for member-states to opt-out from sensitive issues through emergency brake, while other member-states may proceed with the integration further through enhanced cooperation. Also, unanimous voting is required regarding approximation of criminal procedure and establishment of the European Public Prosecutors Office.

Before considering criminal law provisions, accent should be put that one of the most interested changes in the Lisbon Treaty is the fact that the previous second pillar regime of economic sanctions is transferred in the JHA and by that set in the General Provisions. In Article 67 of the TFEU is stipulated that the Union shall constitute an area of freedom, security and justice and shall endeavour to ensure a high level of security through measures to prevent and combat crime. Shortly, this means that the Court shall have jurisdiction to review the legality of EU instruments which implemented so-called sanctions for terrorist even if they are adopted by the UN. Therefore, the issues raised regarding the limitations of the Court's jurisdiction in inter-pillar conflicts, with the Lisbon Treaty shall no longer appear.

4. MUTUAL RECOGNITION AND APPROXIMATION OF CRIMINAL LAW

In order to overrun traditional obstacles of mutual assistance in criminal matters, at the EU Summit in Tampere in 1999, member-states declared the principle of mutual recognition of judgements as a foundation of judicial cooperation. Lisbon Treaty in article 82 stipulates that the judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the member-states. In general, paragraph 1 of article 82, requires judgements issued from one member-state to be executed in other member-state without additional formalities. In the context of criminal matters, this principle may have harmful effects for individual freedoms as it leads towards recognition of judgements without further examination. Whether or not the preconditions for criminal procedure measures are met is evaluated only by the state issuing the judgement, while the state executing the judgement is only obligated to recognize and execute it according their procedural rules.

Paragraph 2 of article 82 stipulates that "to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border

[385] Tampere European Council, Presidency conclusions, European Council, October 15-16, 1999; "The Hague Programme: Strengthening Freedom, Security and Justice in the EU", OJ C 53/1, 2005.
[386] Commission vs. Council, C-176/03, 2005; Commission vs. Council, C-440/05, 2007
[387] Criminal proceedings against Maria Pupino, C-105/03, ECR I-5285, 2005
[388] Opinion of Advocate General Mengozzi, C-91/05, September 19, 2007; Opinion of Advocate General Maduro, C-402/05, Kadi v Commission and Council, January 16, 2008

dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the member-states." This provision further declares a list of areas in EU's competence such as mutual admissibility of evidence between member-states; the rights of individuals in criminal procedure; and the rights of victims of crime. Additionally, the article contains so-called "general clause" stressing that any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the EP. Finally, it stipulates that the adoption of the minimum rules shall not prevent member-states from maintaining or introducing a higher level of protection for individuals. This is particularly important, as the principle of mutual recognition attracted criticism from the perspective of fair trial and legal protection.

The first piece of legislation implementing the mutual recognition is the Framework Decision on European Arrest Warrant (EAW) of 2002[389], which is meant to simplify the long and complex extradition procedure. The EAW refers to offences for which is anticipated for the person whose return is sought is accused of an offence for which the maximum period of the penalty is at least one year in prison or has been sentenced to a prison term of at least four months. The Court's decision ordering arrest and return of the individual for undertaking the criminal procedure, executing sentence or take into custody shall be executed without delays within a maximum of 90 days. Basically, EAW obliges EU member-states to surrender its own citizens and to abolish double incrimination for list of 32 serious crimes. Similarities may be found in the European Evidence Warrant (EEW)[390] regulating mutual recognition of warrants for search and seizure, as well as transfer of evidence. The most recent project in this area is the European Investigation Order (EIO)[391], replacing EEW and applicable on all kinds of investigation measures and all kinds of evidence. Where the above mentioned measures mainly serve for strengthening the prosecution through mutual recognition, the same mechanism has certain advantage also for the accused when applying the *non bis in idem* principle. EU competences go further in implementation of the mutual recognition principle, but also allow additional measures for strengthening the judicial cooperation. Among others, EU, according article 82, paragraph 1 may adopt measures for prevention and settle conflicts of jurisdiction among member-states and, according paragraph 2, EU may harmonize national criminal procedure rules.

5. SUBSTANTIVE CRIMINAL LAW

Regarding substantive criminal law, EU may harmonize criminal law provisions of member-states in certain areas. These competences are two-fold: on one side, article 83, paragraph 1 of TFEU permits measures for harmonization of serious crime offences with cross-border dimension and stipulates that "the European Parliament and the Council may … establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis." This provision establishes a list of crime offences for which EU shall have legislation competence, such as terrorism, organized crime and money laundering. On other side, article 83, paragraph 2 of TFEU stipulates that there is a possibility for approximation of criminal laws and regulations of the Member States if it proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. In this case the same ordinary or special legislative procedure shall, as was followed for the adoption of the harmonisation measures in question.

Regarding directives according article 83, special legislation procedure applies, thus strengthening the member-states role in the Council: first, 1/4 of member-states may initiate legislation procedure. Second, for the rest of the member-states oriented on sovereignty approach, the emergency break mechanism exists regulated in paragraph 3 of article 83. Where a member-state considers that a draft directive would affect fundamental aspects of its criminal justice system, it may suspend the legislative and, at the end, for its legal system to avoid commitments arising from the draft directive. In that case, the procedure shall be referred to the European Council. If no consensus is reached, the draft directive is not going to be binding for the member-state concerned, while other member-states may adopt the draft directive by means of enhanced cooperation.

Accordingly, the question that needs to be addressed in present concept is: What the provisions means from perspective of harmonization? Article 82 allows the possibility for approximation of criminal procedure if it is necessary in order to facilitate the mutual recognition of judgements and police and judicial cooperation in criminal matters with cross-border dimension. However, in article 83, paragraph 2, the expression is partly different. First,

[389] Framework Decision 2002/584/JHA, OJ L 190/1, July 18, 2002.
[390] Framework Decision 2008/978/JHA, OJ L 350/72, December 30, 2008.
[391] Directive 2014/41/EU, OJ L 130/1, May 1, 2014.

paragraph 2 does not explicitly underline that cross-border dimension or crime of serious nature needs to exist in order to be qualified for adoption of legislation, if the area concerned previously was not a subject to harmonization and if such legislation proves essential to ensure the effective implementation of a Union policy. Further, contrary to article 82, paragraph 2, in article 83, paragraph 2, there is no unanimity requirement, but the same procedure as the previous harmonization scheme, respectively the ordinary legislative procedure or qualified majority voting in the Council. From where does this difference come from? Really, having in mind that mutual recognition is considered as a basic rule and considering the obvious need of basic rules in an area based on mutual trust, this seems somehow unnecessary.

In any case, more interestingly, it is important to discuss the constitutional extent of article 83, paragraph 2. As pointed above, this provision anticipates legislation in an area that was already a subject to harmonization. On one side, this may be interpreted as a lack of repetition of paragraph 1 regarding the need of cross-border dimension and serious crime and that there is no limitations to this legislation mandate. On other side, it may be argued that there is no need to show that the crime in question is particularly serious or that it has cross-border dimension or that there is a special need for it. Still, in light of attribution of powers principle and analogously to the jurisprudence of the internal market, for this issue a Union dimension is needed – precisely for the terms "cross border nature" and "serious crime", thus making the legislation at supranational level. This is particularly true, having in mind the consideration that the criminal law is probably the most sensitive area in more and more growing law of the EU. Further, from the internal market provisions it is well known that the differences among member-states are insufficient in order to sustain the attribution of powers principle. However, even if article 83, paragraph 2 shows certain inconstancy, principles of proportionality and subsidiarity shall continue to apply.

Finally, article 84 confirms that the "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of member states in the field of crime prevention, excluding any harmonisation of the laws and regulations of the member states". As previously implied, it remains unclear how this provision is connected with General Provisions from Chapter 1, stipulating that the crime prevention and the approximation of criminal law represent one of the Union's goals. Alternatively, article 84 simply means that the EU shall have its own crime prevention programme, meaning, in return, existence of criminological issues of effectiveness.

6. EUROPEAN PUBLIC PROSECUTOR

The establishment of the European Public Prosecutor's Office (EPPO) from Eurojust is anticipated in article 86 of TFEU and represents a judicial body with direct enforcement competences, responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Eurojust, the perpetrators of, and accomplices in, offences against the Union's financial interests. According this provision, the EPPO shall exercise the functions of prosecutor in the competent courts of the member-states. The procedure for establishing the EPPO is the same as the enhanced cooperation procedure in case of unanimity absence in the Council. Until today, such office is not created and debates continue whether the EPPO needs wider criminal justice mandate than the designated one only in the financial sphere. While the phrase "offences against the Union's financial interests" is wide and imprecise, article 86, paragraph 4 gives the possibility for the European Council to adopt a decision in order to extend the powers of the EPPO to include serious crime having a cross-border dimension.

Fully developed EPPO responsible for investigating, prosecuting and bringing to judgment the perpetrators of serious crime having a cross-border dimension on EU territory, shall represent a fully new fundamental actor in the area of judicial cooperation and therefore the development deserves a closer attention.

7. POLICE COOPERATION

The police cooperation and the establishment of instruments for enforcement of EU law in this area were firstly considered outside the EU's supranational frame. Regarding criminal law, member-states considered that the maintenance of the public order crime offence investigations are areas that belongs to the national sovereignty and therefore were careful not to allow direct application of the EC law. Besides this, member-states choose to develop its own cooperation through traditional means of international law: they created the Schengen area; created the third pillar to confront with issues regarding the police and justice cooperation in criminal matters based on intergovernmental cooperation; and establishment of Europol. All these measures were, to a larger extent, integrated in the EU frame and came under the influence of the EU law. Regarding these efforts for strengthening the cooperation and EU influence, the member-states kept its exclusive responsibilities and competences, as it is regulated in article 72 of TFEU regarding the maintenance of law and order and the safeguarding of internal security.

Today, several police cooperation dimensions exist in Europe and are reflected in the TFEU. However, they do not have to be always clearly prominent: first, law enforcement authorities in member-states mutually cooperate (horizontal cooperation). Such form of cooperation is dominated by activities which enable measures in preventing and combating serious forms of crime according article 87 of TFEU. This concerns, especially, on managing with relevant information, common investigation techniques related with detection of serious forms of organized crime and, to a certain extent, operational cooperation such as joint investigation teams or cross-border observations. Applicable legislative procedures in this area are complex and could not be identified in details. However, measures regarding operational cooperation needs to be unanimously adopted by the Council after consulting the EP. Second, law enforcement authorities of member-states cooperate with Europol, a supranational police network (vertical cooperation). EU may establish the handling of personal information and enables it to coordinate investigative and operational activities carried out jointly with the member-state's competent authorities or in the context of joint investigative teams according article 88 of TFEU. Till today, Europol does not have the competence for conducting investigations and operations independently, but may assist in operations undertaken by member-states. Third, member-states and EU raised the police cooperation on international level through conclusion of bilateral agreements with third states.

8. ENHANCED COOPERATION AND EMERGENCY BREAK

Provisions of articles 82 and 83, paragraphs 3, also anticipates the possibility for instigation of the so-called "emergency break" if the legislation in question influence the fundamental aspects of member-states criminal justice system. If emergency break scenario emerges, a member-state "may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure." It is obvious that this possibility looks attractive for member-states with strong connection between the criminal law and nation state and concern regarding withdrawal of their sovereignty on issues of criminal matters.

Whether or not a member-state initiates the emergency brake, the Lisbon Treaty, however, secures the possibility for enhanced cooperation for other member-states. More specifically, paragraph 4 of articles 82 and 83 stipulates: Within the same timeframe, in case of disagreement, and if at least nine member-states wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in article 20, paragraph 2 of the Treaty on European Union and article 329, paragraph 1 of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply. In short, this does not mean that there is an obligation as pointed out in article 329, paragraph 1 to "address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed." Also, there is no obligation, as pointed out in article 20, paragraph 2 that the Council is the last resort for adopting the decision. This anticipates two considerations. First, it is possible to argue that the mere fact that there is no need for member-states to indicate the requirement of last resort as pointed out in article 20, paragraph 2 could be seen as disharmony with the sensitive character of the criminal law as *ultimo ratio*. Second, it looks less apparent how the enhanced cooperation shall work in practice. There may be a risk that such cooperation may lead to more speeds of varying degrees. It is true that the two-Europe phenomenon exists, where some member-states are willing to continue with the integration by establishing highest possible standards of cooperation, especially by means of information exchange, in fight against terrorism, cross-border crime and illegal immigration. With the Lisbon Treaty such cooperation is now intensified.

9. CONCLUSION

- The political aim must be to establish a coherent system of substantive criminal law, based on rational European principles.
- Further improvements of judicial and police cooperation will be desirable and even necessary for the sake of crime prevention and effective prosecution within the EU.
- The implementation of the principle of mutual recognition calls for more balanced approach to European criminal proceedings.
- In order to (re-)establish balanced cross-border proceedings within the EU the position of the suspect must be emphasised;
- All other legal instruments implementing the principle of mutual recognition should take into account the interests of the concerned individuals and the interests of the executing state.

- Another possibility would consist in the additional harmonisation of procedural law. If incompatibilities between the member-state's legal systems in this field were reduced, this would considerably facilitate mutual recognition.
- A better coordination of national criminal jurisdictions is needed, thus reducing the conflicts of criminal jurisdiction.
- Some flaws of the existing system of judicial cooperation between member-states may be overcome with the establishment of an EPPO.

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