THE EUROPEAN JUDICIAL COOPERATION IN CRIMINAL MATTERS IN THE LIGHT OF THE LISBON TREATY

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Abstract

The judicial cooperation in criminal matters together with the police cooperation were mentioned for the first time in a treaty, as a European legal instrument, with legal binding effect, by the Maastricht Treaty in 1993 in Title VI (Provisions on cooperation in the fields of Justice and Home Affairs). In time, taking into account the political and legal realities faced by the European Union, there have been important amendments brought to the contents of the Justice and Home Affairs policy through the Treaty of Amsterdam (1997) and the Treaty of Nice (2001).

Nevertheless, the new amendments brought by the Treaty of Lisbon in 2009 in the field of judicial cooperation have determined the "rethinking" and separating it from the "police cooperation" in two different chapters of Title V of TFEU (dealing with Area of Freedom, Security and Justice) which will be briefly analysed in this paper.

Bearing in mind all mentioned above, the aim of the paper is to analyse, on the one hand, the important amendments brought in the field of judicial cooperation by Lisbon Treaty from the legislative and procedure point of view as well as the new created institutions, highlighting in the same time the relevant principles governing the European judicial cooperation, such as: principle of mutual recognition of judgements and judicial decisions by Member States, mutual assistance in criminal matters etc.

On the other hand, we will be able to devote additional focus to studying the contribution of the Court of Justice of the European Union ("CJEU") to the development of the "Judicial Cooperation in Criminal Matters" since this court has full jurisdiction over this domain by the date of the entry into force of the Lisbon Treaty.

***Key words**: Treaty of Lisbon, criminal matters, judicial cooperation, Court of Justice of the European Union, mutual assistance*

I. General considerations

The globalisation process which started to be visible since the middle of 1980s and especially since the middle of 1990s, involved, among others, the integration of international markets, capital and investment movements, migration and free movement of people for studying, leaving, travelling and the dissemination of knowledge, as the positive meaning of the term of globalisation. Much more, other domains were also linked to the globalisation process, such as climate change, cross-boundary water, air pollution and over-fishing of the ocean.

From the negative perspective, the globalisation process increased the criminal phenomenon which expanded beyond the national borders, at international and European level, representing a major problem. The main reason of this expansion was the incapacity of the national legislations to fight efficiently against the criminal phenomenon and to adopt the appropriate measures to combat it.

The first steps in this direction have been made by the UN Resolution no.808 of 22nd of February 1993, where the International Court[1] was created, with the headquarters in Hague, to trial the people who allegedly violated the provisions of the international humanitarian law on the territory of former Yugoslavia after 1991[2].

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[1] This court is also known as the International Criminal Tribunal for the former Yugoslavia.

[2] Vasile Pavaleanu, *The judicial cooperation in criminal matters within the European Union*, The Annals of "Ştefan cel Mare" University Suceava, Fascicle of The Faculty of Economics and Public Administration, Volume 9, No.1(9), 2009, pp.348.

In order to fight against the crime and especially against the transnational organized crime in a efficient manner, and to cooperate in the field of police and judicial matters, the regionalization's idea of international criminal law was mentioned for the first time during the colloquium of the International Criminal Law Association held in September 1992 in Helsinki[3] when it was proposed to create a core of laws at the European level (substantial and procedural), common to the all the EU Member States.

Since its beginning, the judicial cooperation in criminal matters between the EU Member States had experiences many alterations[4] due the different ways to legislate this domain at the national level. For this reason, almost all Western and Central European countries have joined together to form a functional and intergovernmental structure[5] with strict legislation and enforcement rules.

Presently, 27 Member States are acting together to deal with important policy issues that have cross-border implications in the field of judicial cooperation, while the legislative acts adopted by the European institutions concern not only the law enforcement and criminal justice, but also the police issues such as immigration, border control, asylum or visas, etc.

In the following we will analyze the topic from a triple perspective: legislative, institutional and procedural as follows.

II. From the legislative perspective

The beginning of the judicial cooperation in criminal matters between the Member States of the European Union (EU) was modest, with no institutional and legislative force as it is nowadays.

Due to the growing of terrorism danger in Europe – e.g. in Germany with the Red Army Faction terrorist group (RAF[6]) in the 1970s and 1980s, in Italy with the Red Brigades, during the 1970s and early 1980s or in Spain with the Euskadi Ta Askatasuna terrorist group (ETA[7]) between the late of 1970s and 2000s and other terrorist groups - the states started in the middle of 1970s to cooperate in judicial matters on an informal, intergovernmental basis[8].

Later, in the middle of 1980's *"an enforcement of this collaboration became necessary* [which determined the introduction] *of free movement of persons* [in accordance with the conditions stipulated by] *the Schengen Cooperation and Convention*[9] [and] *led to a gradual elimination of the border controls along the common borders"*. In order to balance the new freedom of movement recognized by the Schengen Convention, it was necessary to take a number of compensatory measures including those regarding the coordination and cooperation between the police, customs

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[3] *Ibid* pp.348.

[4] Webpage: http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/Criminal/Paper2_en.asp, accessed March 26, 2013.

[5] Matti Joutsen, *The European Union and Cooperation in Criminal Matters: the Search for Balance*, HEUNI Paper No.25/ 2006, edited by the European Institute for Crime Prevention and Control, affiliated with the United Nations, 2006, pp.7.

[6] Also known as the Baader-Meinhof Gang. In German the name of this group is *Rote Armee Fraktion.*

[7] In English the name of this group is *Basque Homeland and Freedom*.

[8] Niggl Philipp, Speth Maximilian, Zinsmeister Andreas, op. cit., pp.2, webpage: http://www.inm-lex.ro/fisiere/pag_60/det_881/4641.doc, accessed March 26, 2013.

[9] In July 1984 France and Germany signed an agreement in Saarbrucken to lift border controls. In October 1984 Belgium, Luxembourg and the Netherlands joined this Agreement. These five original "Schengen" member states then signed this first Schengen Agreement in June 1985, http://www.statewatch.org/semdoc/assets/files/keytexts/ktch5.pdf, accessed March 26, 2013. A further Convention was drafted and signed on 19 June 1990. In addition, Schengen cooperation has been incorporated into the European Union legal framework by the Treaty of Amsterdam of 1997. The Schengen area gradually expanded to include nearly every Member State. Presently, almost all the EU Member States are part of the Schengen area, except Bulgaria, Cyprus, Romania, United Kingdom and Ireland (webpage: http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/l33020_en.htm and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922%2802%29:en:HTML, accessed March 26, 2013.

and justice as well as those concerning the principle of *non bis in idem* which is specific in the field of extradition and enforcement of the criminal judgments[10].

During the negotiations for drafting the Maastricht Treaty, the Member States made a list of domains of common interest both for them and for the European Union and defined the intended ways of inter-institutional cooperation, considered to be an important point of common interest[11].

For this reason, the judicial cooperation in criminal matters was mentioned for the first time in a treaty, having legal biding, namely in the Maastricht Treaty (well-known as the Treaty on European Union (TEU)[12] which in former article K1 of Title VI - *"Provisions on cooperation in the fields of Justice and Home Affairs"* stipulated that "*For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:* […] *(7)* ***judicial cooperation in criminal matters***".

In another way to say, this topic was part of the Third Pillar of the Treaty called Justice and Home Affairs (JHA), which later was renamed Police and Judicial Cooperation in Criminal Matters (PJCC) in 2003 through the Treaty establishing a Constitution for Europe, which failed being ratified by the Member States because of France and the Netherlands in May and June 2005. The Third Pillar existed between 1993 and 2009, when the Treaty of Lisbon (initially known as the Reform Treaty[13]) entered into force.

The same idea of judicial cooperation was reiterated by the Treaty of Amsterdam[14], in former article 61 letter e.) of Title IV - *"Visas, Asylum, Immigration and other Policies Related to Free Movement of Persons"*. Thus, one of the concrete measures[15] was *"to establish progressively an area of freedom, security and justice* [which] *aimed at a high level of security by preventing and combating crime within the Union* […]*",* by adopting the necessary legislative, institutional and procedural measures in the field of police and **judicial cooperation[16].**

Later, during the Tampere European Council (Finland), on 15th and 16th of October 1999, in the Presidency Conclusions was introduced an important key element which was considered to be the cornerstone of the judicial cooperation between Member States, namely the mutual recognition of the judicial decisions and judgements[17], having three essential and fundamental principles: mutual trust, mutual recognition and direct contact between the Member States. The same principle was also reiterated in the Hague Programme, adopted in November 2004[18] and in the multi-annual programme

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[10] Coral Arranguena Fanego, Angel Jose Sanz Moran, Montserrat de Hoyos Sancho y Begona Vidal Fernandez, *Cooperación judicial penal en la Unión Europea: la orden europea de detención y entrega,* Instituto de Estudios Europeos, Universidad de Valladolid, editorial Lex Nova, 2005, pp.34.

[11] Niggl Philipp, Speth Maximilian, Zinsmeister Andreas, op. cit., pp.4, http://www.inm-lex.ro/fisiere/pag_60/det_881/4641.doc, accessed March 26, 2013.

[12] The Treaty was signed on 7th of February 1992 and entered into force on 1st of November 1993.

[13] The Lisbon Treaty entered into force on 1st of December 2009.

[14] The Treaty was signed on 2 October 1997, and entered into force on 1st of May 1999; Coral Arranguena Fanego, Angel Jose Sanz Moran, Montserrat de Hoyos Sancho y Begona Vidal Fernandez, op. cit., pp.34.

[15] Steiner and Woods, *EU Law*, eleventh edition, Oxford University Press, 2012, pp.552.

[16] Cyrille Fijnaut and Jannemieke Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union*, Martinus Nijhoff Publishers, 2010, pp.50.

[17] Webpage: http://www.europarl.europa.eu/summits/tam_en.htm, accessed March 26, 2013. I consider that this principle should apply to the judgments and to other decisions of judicial authorities, to the pre-trial orders, in particular to those which would enable competent authorities to secure evidence and to seize assets which are easily movable. In addition, the evidence lawfully gathered by one Member State's authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.

[18] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005PC0184:EN:HTML, accessed March 26, 2013.

in the Area of Freedom, Security and Justice for the period 2010-2014, the so-called Stockholm Programme, which was approved by the European Council in December 2009[19].

We can observe, the principle of mutual recognition is a key concept for the European judicial area, because only through it is possible to overcome difficulties created by the differences between the national judicial systems of the EU Member States. This principle can be developed only if a high level of mutual confidence or trust exists between Member States, which depends in particular on the strict upholding, by each national judicial system, of the high standards as regards the protection system ensured to the individual rights. The second key element is the mutual recognition itself, which is very important both at the pre-trial and final judgment stage and it covers the recognition of evidence, non-custodial pre-trial and post-trial supervision measures, disqualifications, enforcement of criminal penalties and decisions as well as the convictions issued in the course of new criminal proceedings in other Member States[20]. The third element is the direct contact that should be established between the Member States in order to take all the measures to harmonize their internal legislation in the field.

In 2001 the Treaty of Nice[21] amended the provisions of the Maastricht Treaty and the Treaty establishing the European Community, reforming the institutional structure of the European Union to withstand eastward expansion and extending the field of Police and Judicial Cooperation in Criminal Matters in former articles 29 – 42 of Title VI of TEU - *"Provisions on Police and Judicial Cooperation in Criminal Matters"*, where one of the objectives was: *"to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the field* [...] *of police and* ***judicial cooperation in criminal matters*** [...]*"* (former art.29 paragraph 1 of TEU).

It is worth to mention that the main objective of the European Union in the field of Justice and Home Affairs has changed in only 5 years from the intention *"to establish progressively an area of freedom, security and justice"* for its citizens as it was provided in the Treaty of Amsterdam to the action *"to provide* […] *a high level of safety within the area of freedom, security and justice"* as it was stipulated in the Nice Treaty which represents an important commitment assumed by the European institutions in ensuring a sustainable Area of Freedom, Security and Justice for all Member States, in general and an efficient judicial cooperation in criminal matters in subsidiary.

This ambitious "*goal* [was to be achieved] *by taking the following* [institutional and legislative] *measures* [in accordance with former articles 29 and 31 paragraph 1 of TEU]*: closer cooperation between police forces, customs authorities,* [competent ministries] *and other competent authorities in the Member States, both directly and through the* ***European Police Office (Europol)****; closer cooperation between judicial and other competent authorities of the Member States including cooperation through the* ***European Judicial Cooperation Unit (Eurojust)*** *and approximation, where necessary, of rules on criminal matters in the Member States"* and preventing possible conflicts of jurisdiction between Member States. By "*approximation of rules on criminal matters in the Member States"* we shall understand an adjustment of the national criminal legislations of the Member States to a common minimum standard and not full – scale unification of them, which technically was not possible to be realised taking into account the differences between them. In certain fields of the criminal legislation, such as: organised crime, trafficking in human beings, exploitation of children and child pornography, terrorism, fraud, money laundering, corruption, cyber crime, racism and xenophobia, the legal texts have been adopted or are negotiated to adopt common definitions and harmonise the level of sanctions applicable to these offences[22].

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[19] Webpages: http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.6.pdf and http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf, accessed March 26, 2013.

[20] Webpage: http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.6.pdf, accessed March 26, 2013.

[21] The Treaty was signed on 26th of February 2001 and came into force on 1st of February 2003.

[22] Webpage: http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.6.pdf, accessed March 26, 2013.

In order to eliminate as much as possible these differences existed in the criminal legislations of the Member States, the Lisbon Treaty foresees that the European Parliament and the Council, through the directives adopted in accordance with the ordinary legislative procedure, *"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"* (article 83 of TEU).

Regarding the legal instruments, the Third Pillar has consecrated the following (former article 34 of TEU): **common positions** defining the approach of the European Union to a particular matter; **framework decisions** for the purpose of approximation of the laws and regulations of the Member States; **decisions** for any other purpose consistent with the objectives of this title, excluding any approximation of the laws and regulations of the Member States and, finally, **conventions** which it shall recommend to the Member States for adoption in accordance with their respective constitutional requirements and procedures.

The new amendments brought by the Treaty of Lisbon[23] in the field of judicial cooperation in criminal matters have determined the "rethinking" and separating it from the "police cooperation" in two different chapters of Title V of TFEU (dealing with the Area of Freedom, Security and Justice), namely: in **Chapter 4** on Judicial cooperation in criminal matters (articles 82 – 86 of TFEU) and in **Chapter 5** on Police cooperation (articles 87 - 89 of TFEU), without defining in a way or another these two domains[24]. The only reference to the judicial cooperation in criminal matters is made by article 82 para.1 of TFEU where "[it] *shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of laws and regulations of the Member States in the areas referred to in paragraph 2 and in article 83*" of TFEU.

On the other hand, the doctrine[25] tried to give a concrete definition to the judicial cooperation, considering that there are three criteria to define it, as follows: the inter-state element (in this case, it is about the cooperation between the EU Member States); the degree of the organization of a formal framework or institution building (in this situation, the cooperation is developed by the national judicial authorities of each EU Member States) and the dependence of European Union Law (we can talk about the supremacy of the European Union Law upon the national law).

Under the Treaty of Lisbon, the legal instruments which can be adopted in the field of judicial cooperation in criminal matters are: regulations, directives and decisions, similar to the First Pillar. Furthermore, in accordance with article 82 of TFEU: *"the European Parliament and the Council* [...] *shall adopt* [the necessary] *measures to*: ***lay down rules and procedures*** *for ensuring recognition throughout the Union of all forms of judgments and judicial decisions; prevent and settle conflicts of jurisdiction between Member States; support the training of the judiciary and judicial staff; facilitate* ***cooperation between judicial*** *or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions"*.

As regards the innovations introduced by the Treaty on the Functioning of the European Union in the field of Justice and Home Affairs (JHA), these mainly concern:

- changes in the legal framework and the legislative procedure applicable in several areas. Thus, the legislative proposals will now be adopted by qualified majority voting in the Council in accordance with the procedure set out in article 293 of TFEU, while before the Lisbon Treaty the legislative procedure involved the unanimity voting in accordance with former article 67[26] of TEC. In addition, the European Parliament, as co-legislator, delivers its opinion by the co-decision

[23] The Treaty was signed in 13th of December 2007 and came into force at 1st of December 2009.
[24] Cyrille Fijnaut and Jannemieke Ouwerkerk, op. cit., pp. 26-27.
[25] *Ibid*, pp. 27.
[26] "[...] *The Council shall act unanimously on a proposal from the Commission or on the initiative of a Member States and after consulting the European Parliament"*.

procedure[27] and the European Commission has the right of initiative to propose new legislative acts with respect to the judicial cooperation in criminal matters. Much more, the Lisbon Treaty introduces the possibility that an initiative can also come from a quarter of EU Member States, according to article 76 of TFEU;

- the possibility to create an European Public Prosecutor's Office and the Standing Committee on Operational Cooperation on Internal Security (COSI); the role of the Court of Justice of the European Union (CJUE) is consolidated, being able to trail, without any restriction, the ordinary procedures for preliminary references and infringement proceedings initiated by the European Commission. Nevertheless, for five years following the entry into force of the Lisbon Treaty (during the period 2009 - 2014), acts issued in the field of judicial cooperation in criminal matters adopted under the previous Treaty cannot be the subject of such proceedings[28], being imposed transitional provisions in this field. Regarding this point, the United Kingdom, after long debates, managed to insert the following provision: *"At the latest six months before the end of that transitional period* [in December 2014]*, the United Kingdom can decide still not accept the powers of the EU institutions regarding that part of EU legislation"* (article 10 para.4 of the Lisbon Treaty Protocol no.36)..

As regards the **European legal instruments** adopted in the field of criminal matters, the **most well-known** are as follows:

1.The Convention of 19th of June 1990 applying the Schengen Agreement of 14th of June 1985 on the gradual abolition of checks at common borders (known as Schengen Agreement). Thus, it is possible to create direct contact between judicial authorities under article 53[29] of the Schengen Convention;

2.The Council Act of 29th of May 2000 establishing in accordance with the former article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Protocol of 16th of October 2001 to the said Convention[30]. This convention aims to encourage and modernise cooperation between judicial, police and customs authorities within the European Union by supplementing provisions in existing legal instruments, while also respecting the European Convention for the Protection of Human Rights of 1950[31];

3.**The Council Framework Decision 2002/584/JHA of 13th of June 2002 on the European Arrest Warrant (EAW)[32] and the surrender procedures between the Member States.** According to the said framework decision:

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[27] Jean-Louis Antoine-Grégoire, AN AREA OF FREEDOM, SECURITY AND JUSTICE: GENERAL ASPECTS, March 2011, pp.1 webpage: http://www.europarl.europa.eu/ftu/pdf/en/FTU_4.12.1.pdf, accessed March 26, 2013.

[28] *Ibid,* pp.1,

[29] According to the said article: The "*requests for assistance may be made directly between legal authorities and returned through the same channels*".

[30] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF, accessed March 26, 2013. The primary aim of the Convention is to improve judicial cooperation by developing and modernizing the existing provisions governing mutual assistance, mainly by extending the range of circumstances in which mutual assistance may be requested and by facilitating assistance, through a whole series of measures, so that it is quicker, more flexible and, as a result, more effective.

[31] The Convention was signed in Rome on 4th of November 1950 and entered into force on 3rd of September 1953; webpage: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf,accessed March 26, 2013.

[32] Webpages: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002F0584:en:HTML; http://ec.europa.eu/justice/criminal/recognition-decision/european-arrest-warrant/index_en.htm and https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do?init=true, accessed March 26, 2013. The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State

▪ it replaces the existing texts in this area, including the classic instruments in the field of extradition (bilateral treaties and the multilateral conventions concluded between the states);

▪ it replaces the extradition system by requiring each national judicial authority (the executing judicial authority) to recognise *ipso facto (by the fact itself)* and with a minimum of formalities the requests for the surrender of a person made by the judicial authority of another Member State (the issuing judicial authority);

▪ it simplifies and speeds up the procedures, given that the whole political and administrative phase is replaced by a *judicial mechanism;*

▪ it provides strict time limits as regards the procedure to return a person which is arrested, no later than 90 days since he/she was arrested or 10 days if the person gives his/her consent to the surrender;

▪ it applies in the following cases: where a final sentence of imprisonment or a detention order has been imposed for a period of at least **four months**; for offences punishable by imprisonment or a detention order for a maximum period of at least **one year**;

▪ the European Arrest Warrant must contain information on: the identity of the person concerned; the issuing judicial authority; the final judgment; the nature of the offence; the penalty etc. In this context, a specimen form is attached to the framework decision and includes all the information mentioned already;

▪ the EU countries can no longer refuse to surrender, to another EU country, their own citizens who have committed a serious crime or are suspected of having committed such a crime in another EU country, on the grounds that they are nationals;

▪ it stipulates simpler procedures for 32 categories of serious offences, where the dual criminality principle is abolished. These serious offences are: terrorism, trafficking in human beings, corruption, participation in a criminal organisation, counterfeiting currency, murder, racism and xenophobia, rape, trafficking in stolen vehicles, and fraud, including that affecting the financial interests of the Communities etc.;

▪ the Member States and the national courts have to respect the provisions of the European Convention on Human Rights as well. Anyone arrested under an EAW may have a lawyer, and if necessary an interpreter, as provided by the law of the country where he/she has been arrested.

4. The Council Framework Decision no. 2002/465/JHA of 13th of June 2002 on Joint Investigation Teams (JIT)[33]. The relevant provisions of the said framework decision are:

▪ it was adopted with a view to combating trafficking in drugs and human beings, as well as terrorism;

▪ at least two or more Member States may set up a Joint Investigation Team by entering into an mutual agreement, which may also include experts of Europol, Eurojust, and European Anti-Fraud Office (OLAF). In addition, the representatives from other EU Members States can be seconded experts within the Joint Investigation Team if they are interested in participating in such team. Non-EU Member States may also participate in the activities of a Joint Investigation Team with the agreement of all other parties;

▪ each Joint Investigation Team involves direct exchange of information when it is necessary between the members of the team without any other formalities. Also, it works for a specific purpose

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of a person being sought for a criminal prosecution or a custodial sentence. It is a tool designed to strengthen the cooperation between the national judicial authorities of the Member States by eliminating the use of extradition. The framework decision was implemented into the national legislation by mid of 2005.

[33] Webpages: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:162:0001:0003:EN:PDF and http://www.europol.europa.eu/sites/default/files/council_rec_on_jit_agreement___march_2010.pdf, accessed March 26, 2013.

and a limited period, which may be extended by *mutus consensus*, while the composition of the team shall be set out in the agreement;

- so far, this instrument has not been fully developed by all the Member States and has already encountered implementation difficulties due to the different criminal procedure codes existing in the Member States; the evidence which might be administrated because is formally classified while the exchange and admissibility of such evidence can be problematic, especially if no bilateral or multilateral agreement is in place to allow for the exchange of classified information etc.

Since the 1950s, in the field of judicial cooperation in criminal matters have been concluded many **international conventions** and other legal instruments, which have been signed and ratified by the majority of the EU Member States, among which we can mention:

1.The European Convention of 20th of April 1959 on Mutual Assistance in Criminal Matters (also known as the "mother" Convention). This legal instrument served as legal tool for issuing the Council Act of 29th of May 2000 on mutual assistance in criminal matters between the Member States of EU;

2.The additional Protocol of 17th of March 1978 to the European Convention on Mutual Assistance in Criminal Matters;

3.The Council of Europe Convention of 8th of November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;

4.The United Nations Convention of 19th of December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

III. From the institutional perspective

In last 20 years, the EU Justice and Home Affair field was *"subject to a complex institutional evolution, culminating in the application of the Community' approach to the decision-making process, to the legal instruments and to the jurisdiction of the Court of Justice[34]"*, especially after entering into force of the Lisbon Treaty in December 2009.

In the following we will make a brief presentation of the institutional evolution of the issue, pointing out the most relevant moments, as well as the important amendments brought by the Lisbon Treaty.

Thus, before entering into force of the Treaty of Maastricht in November 1993, at the international level was developed only an *"informal and intergovernmental[35]"* cooperation where certain international treaties were concluded between the Member States, mostly in the field of criminal law issues, such as: asylum, visas, immigration policy etc. Unfortunately, this cooperation proved to be ineffective since many of these treaties were not ratified, except the Dublin Convention for asylum requests[36] and the civil law Conventions which were linked to the legal order of the former European Community[37], presently European Union. In this phase, we can notice that the Member States could not establish a common cooperation in this field because of the lack of internal legislative and institutional provisions that could facilitate developing of such cooperation in a more concrete and sustainable manner.

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[34] Paul Graig and Grainne de Burca, *The evolution of the EU law*, Oxford University Press, 2011, pp.269.

[35] *Ibid*, pp.269.

[36] The Dublin Convention was signed in June 1990 in conjunction with the Schengen Implementation Convention – webpage: http://www.fdcw.unimaas.nl/staff/files/users/215/Dublin%20System_EGHM.pdf, accessed March 26, 2013.

[37] Paul Graig and Grainne de Burca, op.cit., pp.270.

The period of 1993 – 1999 is described in the doctrine[38] as *"formal intergovernmentalism"*, where specific tools and rules related to the former Title VI - *"Justice and Home Affairs"* have been adopted by the Treaty on European Union. So, these tools and rules represent an important step in the intergovernmental process, while the Council "*may* [...] *draw up conventions* [...][39]*"* or other acts in this field, without clarifying which are these *"other acts"*, such as: Joint Actions, Joint Positions or Common Positions[40].

During the same period, another stone in constructing the intergovernmental process was assigning the role to the Court of Justice to have the jurisdiction over the dispute settlements or preliminary references coming from the national courts of the EU Member States as regards each Convention signed in the framework of the Third Pillar, in accordance with the provisions of former article K.3 para.2 of TEU[41]. In practice, this jurisdiction of the Court was exercised only as regards the civil law Conventions while concerning those signed in the field of criminal law and policing, the Member States could not reach a common agreement because of their different national systems but also because of their "egos" regarding the totally independence to decide in the field of Conventions, as part of the International Public law. The only thing that Member States could agree was to give to the Court of Justice the jurisdiction over the preliminary references coming from their national courts, including those who are having the status as final courts in accordance with the domestic provisions in the field[42].

From my point of view, this phase had certain gaps since, on the one hand, the European Parliament had only the right to be informed and consulted by the Member States holding the rotating Council Presidency on the "principals aspects" of debates in the field of the Third Pillar, and, on the other side, the European Commission was refused to have joint right of initiative with the Member States in specified areas, especially in the policing and criminal law[43]. To all these, we can add the fact that this phase was hampered because of the maximum control shown by the Member States' governments and their desire to transfer as little powers as possible to the European level, which imposed eventually significant limits on the effectiveness of the EU action in this field[44].

Between 1999 and 2005, the doctrine[45] argued that in the institutional evolution process occurred another phase - "*modified intergovernmentalism*" - which consisted of retaining the key features of the intergovernmental approach with certain and modest concessions to the Community method, where few issues of the EU Justice and Home Affairs domain related to the immigration and asylum law have been transferred to the First Pillar, through the Treaty of Amsterdam (1997), domain which has been communitarised step by step, by adopting special transitional rules for a five-year period with respect to the application of the European Union law to the former Title IV of TEC. On the other hand, the issues remaining from the initial Third Pillar, namely criminal law and policing, were still subjected to even fewer elements of the European Union's legal order.

As regards the legal instruments which have been used in the remaining Third Pillar, significant changes took place during the period 1999 - 2005, which means that the conventions and common positions from the previous period were kept, while new types of measures have been introduced and used by the Council on a regular basis during its decision-making process, such as: framework decisions and decisions, taking into consideration that these instruments should not be

[38] *Ibid* pp.270; webpage: http://www.eurotreaties.com/maastrichteu.pdf, accessed March 26, 2013.
[39] Former article K.3 of TEU.
[40] Paul Graig and Grainne de Burca, op.cit., pp.270.
[41] According to the article: *"such conventions may stipulate that the Court of Justice shall have jurisdiction to interpret their provisions and to rule on any disputes regarding their application, in accordance with such arrangements as they may lay down"*.
[42] Paul Graig and Grainne de Burca, op.cit., pp.271.
[43] *Ibid* pp.271.
[44] *Ibid* pp.271
[45] *Ibid* pp.272.

ratified by the national parliaments according to their internal constitutional rules in order to take effect. In order to eliminate as much as possible the problems raised by the ratifying of the conventions by the Member States, a number of pre-Amsterdam Joint Actions and conventions have been replaced by framework decisions and decisions, as new legal instruments[46]. Furthermore, the Treaty of Nice amended the decision-making rules on asylum, being also added a Protocol to the Treaty in order to clarify the modality to adopt the decisions under the former Title IV of TEC[47].

"A number of developments which altered the institutional framework", also known as the *"residual intergovernmental"* period[48], took place during 2005 and 2009 when significant changes have been made in the field of immigration and asylum law[49]. On the other side, no changes have been brought to the Court of Justice's jurisdiction, although several preliminary references have been received by the Court of Justice in accordance with the former article 234 of TEC and other infringement actions against Member States have been introduced by the European Commission under the former article 226 of TEC[50]. In the same line, we should mention that the roles of the European Parliament and the European Commission were not transformed into competitive ones, adapted to the realities of the middle of 2000s while *de facto* changes of the institutional framework in the field of EU Justice and Home Affairs had a limited impact on the evolution of policy as regards the adoption of legislation[51].

As for the Third Pillar, it is worth to highlight two important changes: one of them is represented by shifting the criminal law and policing policy to the First Pillar, especially as concern the competence of the EU to adopt criminal sanctions and rules on cooperation between law enforcement and the private sector, and the second change is represented by infiltrating the principles of the First Pillar into the Third Pillar, in particular as regards indirect effect, the scope of the Court's jurisdiction and the autonomous interpretation of the measures provided for in the Third Pillar[52].

Finally, the Treaty of Lisbon (2009) marks an important moment in the institutional evolution of the EU Justice and Home Affairs, representing in the same time a triumph of the EU law in this area. The relevant changes introduced by the Lisbon Treaty are: qualified majority vote applicable to: the legal migration, the most part of the criminal law and policing issues, the visa lists and visa formats; full jurisdiction of the Court of Justice in all JHA areas; the application of the regulations and directives to policing and criminal law matters; extensive revision of most competences in this area, and in particularly regarding the immigration, asylum etc. In this moment, apart from all the changes occurred, the Court of Justice still have a five-year transitional period over the Third Pillar measures adopted before the entry into force of the Lisbon Treaty, according to the provisions provided for in article 10 of Title VII of the Protocol no.36 attached to the Treaty of Lisbon[53].

As regards the judicial cooperation in criminal matters between the Member States, according to the doctrine[54] it can be grouped, as follows:

- traditional cooperation based on mutual assistance in the special fields as extradition;

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[46] *Ibid*, pp.273-274.

[47] According to the Protocol on Article 67 of the Treaty establishing the European Community said that: "[...] *From 1 May 2004, **the Council shall act by a qualified majority**, on a proposal from the Commission and after consulting the European Parliament, in order to adopt the measures referred to in Article 66 of the Treaty establishing the European Community"*.

[48] Paul Graig and Grainne de Burca, op.cit., pp.274.

[49] In this case, after the initial five-year transitional period ended en 1st of May 2004, the European Commission automatically gained its right of initiative, and the co-decision procedure with qualified majority vote.

[50] Paul Graig and Grainne de Burca, op.cit., pp.275.

[51] *Ibid*, pp. 275.

[52] *Ibid*, pp. 277.

[53] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:326:0201:0330:EN:PDF, accessed March 26, 2013.

[54] Cyrille Fijnaut and Jannemieke Ouwerkerk, op.cit., pp.29-30.

▪ networking cooperation based on a formal way, as it is the case of European Judicial Network, Liaison Magistrates or on *ad-hoc* basis, represented by the contact point networks etc.;

▪ co-active cooperation, represented by the setting-up of the Joint Investigation Teams, or other teams created *ad-hoc* in order to deal with the crisis situations, which can be intervention units of the Member States;

▪ trans - border cooperation, which can be represented by the surveillance, cross-border data sharing or cross-border cooperation teams in the combat against terrorism or organised crime etc.

Related to the institutions created and developed during this complex institutional evolution that took place in the last 20 years in the field of Justice and Home Affairs, and bearing in mind the classification of the judicial cooperation, in the following we will briefly analyse few of the networks and institutions created before and after the entry into force of the Lisbon Treaty, as follows:

1. European Judicial Network (EJN)[55] is a network of national contact points for the facilitation of judicial cooperation in criminal matters. It was created by the Joint Action 98/428 JHA of 29th of June 1998[56] in order to fulfil Recommendation no.21 of the Action Plan to combat organised crime adopted by the Council on 28th of April 1997[57] upon the Belgian initiative and it was officially inaugurated on 25th of September 1998 by the Austrian Minister of Justice acting as the Presidency of the Council of the European Union.

The EJN is composed of the representatives of the European Commission and the National Contact Points of the Member States designated by each Member State, coming from the public authorities, the judicial authorities and other competent authorities having specific responsibilities in the field of international judicial cooperation, both in general and for certain forms of serious crime, such as organized crime, corruption, drug trafficking or terrorism, while its Secretariat is based in Hague, the Netherlands.

As the national contact points are concern, they are judges, prosecutors, representatives of the Ministries of Justice, strongly committed to put their experience in the benefit of the European judicial cooperation in criminal matters. In order to be appointed in accordance with the domestic rules, legal traditions and internal structure of each country, the only condition is to provide effective coverage for all forms of crimes throughout the country. Presently, there are more than 300 national contact points throughout the 27 Member States. It is expected that the number of the national contact points to increase in the next period due to the Croatia accession to the EU, starting with 1st July 2013.

The EJN's purpose is to create more effective judicial cooperation, particularly in combating serious crimes, by means of: providing legal and practical information to competent local authorities; providing support with requests for judicial cooperation; creating a European Union judicial culture; cooperating with other Judicial Networks, third countries and judicial partners[58] etc.

Finally, according to Point V of the Madeira Declaration[59] *"the work done by the EJN in partnership with other networks, not just at the European level* […] *but also within an international framework involving the other existing judicial networks, will promote a European and international*

[55] Webpage: http://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx, accessed March 26, 2013.

[56] Joint Action 98/428 JHA of 29 June 1998 was modified by Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network, webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:348:0130:0134:EN:PDF, accessed March 26, 2013.

[57] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:51997XG0815:EN:HTML, accessed March 26, 2013.

[58] Webpage: http://www.ejn-crimjust.europa.eu/ejn/EJN_Home.aspx, accessed March 26, 2013.

[59] Madeira Declaration is the final act of the "Madeira Meeting: celebration of the EJN's 10th Anniversary" which took place in Madeira, Portugal on October 13, 2008.

judicial culture founded on the shared values affirmed by the [former] *Treaty on the European Union"* and presently Lisbon Treaty.

2. The establishment of **EUROPOL**[60] was agreed in former article K1 paragraph 9[61] of the Treaty of Maastricht. The agency started limited operations on 3rd of January 1994 as the Europol Drugs Unit (EDU) and in 1998 the Council Act 95/C 316/01 of 26th of July 1995 drawing up the Convention on the establishment of a European Police Office (Europol Convention)[62] was ratified by all the Member States of that time and came into force in October 1998. Europol commenced its full activities on 1st of July 1999. In 2009, the Europol Convention has been replaced by the Council Decision 2009/371/JHA of 6th of April 2009 establishing the European Police Office (EUROPOL)[63] starting with 1st of January 2010. Europol has more than 700 staff in the Hague headquarters, the Netherlands, which are coming from different kinds of law enforcement agencies, including regular police, border police, customs and security services.

Europol represents the European law enforcement agency aiming to make Europe safer by assisting the Member States in their fight against serious international crime and terrorism, international drug trafficking and money laundering, organised fraud, counterfeiting of the euro currency etc. It works closely with the law enforcement agencies in the 27 EU Member States, including with Croatia, the newest EU Member State and in other non-EU partner states such as: Australia, Canada, US and Norway to whom Europol develops cooperation arrangements. All these law enforcement authorities rely on the intelligence work and the services of Europol's operational coordination centre and secure information network.

3. Eurojust[64] or the *"European Union's Judicial Cooperation Unit"* was set-up by the Council Decision 2002/187/JHA of 27th of February 2002[65] to reinforce the fight against serious crime, with the premises in Hague, the Netherlands. The discussions on establishing a judicial cooperation unit started in 1999, during the European Council Meeting in Tampere, Finland on 15th and 16th of October 1999 and ended during the Spanish Presidency of the European Union[66] when the Eurojust Decision was published on 28th of February 2002, while its budget was released in May of the same year, and the Rules of Procedure were agreed in June 2002.

Eurojust fulfils its tasks through the College which nowadays is composed of 27 National Members, one from each Member States, which can be seconded by the national members. These members are judges, prosecutors or police officers of equivalent competence, appointed and detached to Eurojust in accordance with their national legal systems. Taking into account the fact that Croatia will be part of the European Union starting with 1st of July 2013, the provisions regarding the

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[60] Webpage: https://www.europol.europa.eu/content/page/about-europol-17, accessed March 26, 2013.

[61] According to this article: "*For the purposes of achieving the objectives of the Union, in particular the free movement of persons, and without prejudice to the powers of the European Community, Member States shall regard the following areas as matters of common interest:* [...] *police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)*".

[62] Webpage: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:1995:316:0001:0032:EN:PDF, accessed March 26, 2013.

[63] Webpage: https://www.europol.europa.eu/sites/default/files/council_decision.pdf, accessed March 26, 2013.

[64] In April 2012, the College elected Michèle Coninsx, National Member for Belgium, as its President. The National Members for Estonia and Luxembourg, Raivo Sepp and Carlos Zeyen, currently serve as its Vice-Presidents.

[65] Webpage: www.eurojust.europa.eu, accessed March 26, 2013. The Decision was subsequently amended by the Council Decision 2003/659/JHA of 18 June 2003 and the Council Decision 2009/426/JHA of 16th of December 2008 on the strengthening of Eurojust. The new Decision's purpose is to enhance the operational capabilities of Eurojust to fight transnational organised crime, increase the exchange of information between the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust.

[66] Between January and June 2002.

appointment of the national member within the College as well as the seconded national members to the Eurojust will be applicable in the same manner as for the rest of 27 Member States.

As the mission of Eurojust is concern, according to article 85 of TFEU it *"support*[s] *and strengthen*[s] *the coordination and cooperation between national* [competent] *investigating and prosecuting authorities in relation to serious crime*[s][67] *affecting two or more Member States* […]*"* by: facilitating the execution of international mutual legal assistance and the implementation of extradition requests; improving rendering of their investigations and prosecutions more effective when dealing with cross-border crime and assisting, upon the request of a Member State, the investigations and prosecutions concerning that particular Member State and a non-Member State if a cooperation agreement has been concluded or if an essential interest in providing such assistance is demonstrated.

In order to carry out its tasks in the best conditions, collaboration agreements were concluded by Eurojust with other European institutions, such as: the European Judicial Network, Europol, OLAF and Liaison Magistrates, including with non-Member States (e.g.: Norway, Iceland[68], Switzerland and the Former Yugoslav Republic of Macedonia), with US and Croatia[69], as well as with international organisations[70] for the exchange of information and personal data or the secondment of officers.

Furthermore, "*in order to combat crimes affecting the financial interests of the* [European] *Union, the Council, by means of regulations* [....] *may establish a European Public Prosecutor's Office from Eurojust"* (article 86 of TFEU).

As regards the main goals of Eurojust, these are: to stimulate and improve the coordination between the national authorities in which scope it works closely with EU partners such as the European Judicial Network, Europol, and OLAF where appropriate; to improve cooperation between the national competent authorities, in particular by facilitating mutual legal assistance and the execution of mutual recognition instruments such as the European Arrest Warrant, the European Evidence Warrant[71]; and finally to support competent authorities in improving the effectiveness of their investigations and prosecutions by seeking solutions to recurring problems in judicial cooperation. On the other hand, in non-operational strategic matters, Eurojust works closely with European institutions such as the European Parliament, the Council and the European Commission as well as with the national parliaments.

4. In conjunction with the previous point, in article 86 of TFEU is stipulated the possibility, but not the obligation, as well as the conditions to create "*the* ***European Public Prosecutor's Office (EPPO)***[72] *from Eurojust"* by adopting a series of regulations following a special procedure in order

[67] Eurojust's competence covers the following types of crimes and offences such as: terrorism, drug trafficking, trafficking in human beings, drugs and arms, counterfeiting, the sexual exploitation of women and children, cybercrime, money laundering, computer crime, crime against property or public goods including fraud and corruption, criminal offences affecting the European Community's financial interests, environmental crime and participation in a criminal organization. For other types of offences, Eurojust may assist in investigations and prosecutions at the request of a Member State.

[68] This agreement concluded on 15th of November 2005 can be seen on the webpage: http://eurojust.europa.eu/doclibrary/Eurojust-framework/agreements/Agreement%20Eurojust-Iceland%20%282005%29/Eurojust-Iceland-2005-12-02-EN.pdf, accessed March 26, 2013.

[69] Croatia is set to become the 28th Member State of the European Union on 1st of July 2013.

[70] One of these international organizations is International Criminal Police Organisation (Interpol).

[71] The European Evidence Warrant (EEW) replaces the system of mutual assistance in criminal matters between Member States for obtaining objects, documents and data for use in criminal proceedings, webpage: http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/jl0015_en.htm, accessed March 26, 2013.

[72] Webpages: http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm and http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=73791, accessed March 26, 2013.

"to investigat[e], to *prosecut*[e] *and bring to judgment* [...] *the perpetrators of, and accomplices in, offences against the Union's financial interests*[73]*"* and providing an adequate protection in this field.

If such Office will be created, in liaison with Eurojust, it shall exercise the functions of prosecutor in relation to such offences. The European Council may adopt a decision by acting unanimously after obtaining the consent of the European Parliament and consulting the European Commission to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension, if the case may be.

As we can notice, the establishment of the European Public Prosecutor's Office has a unique regime, with a special procedure taking into account the following reasons:

a.The treaty is establishing the general framework for setting up such office, as a possibility and not as an obligation, while the detailed arrangements related to its nature and operation of the office, its statute and competences, the rules of procedure applicable to its activities[74], and other rules will be determinate by the regulations;

b.This office will not be created under the ordinary legislative procedure. A special legislative procedure will be used instead. Thus, the Council is in charge to act unanimously after obtaining the consent of the European Parliament. If the unanimity cannot be reached, a group of at least nine EU Member States may refer a proposal to the European Council, in the framework of enhanced cooperation, based on articles 82 and 329 para.1 of TFEU.

In practice, the first debates regarding this project took place during the Spain's Presidency of the EU, in the first half of 2010[75]. In parallel, three projects conducted by the University of Luxembourg with the financial support of the European Commission have been drafted since 2010, having unique purpose to realize a comparative analysis of the 27 different national legal systems of investigation and prosecution, serving as a principle source of reference for the European model rules of criminal procedure for the EPPO. The comparative analysis included, among others, studies of vertical cooperation in administrative investigations in subsidy and competition cases, the accession of the EU to the European Convention on Human Rights, judicial control in cooperation in criminal matters, mutual recognition etc.

Apart from these three projects, a group of 160 European criminal law experts, practitioners, academics and policy makers[76] has examined during 2010-2012, in detail, the public prosecution systems in the 27 Member States and has scrutinised proposals for a procedural framework for the EPPO[77], while a concrete proposal to establish the European Public Prosecutor's Office is expected to be sent by the European Commission to the European Parliament in June 2013, based on *"commitment to uphold the rule of law"*.

5. Back in history, the first mention on the establishment of **Standing Committee on Operational Cooperation on Internal Security (COSI)**[78] has been made by the Stockholm Programme[79] which called for development of a comprehensive European internal security strategy, knowing that this objective is difficult to be realised since the internal security is still a national responsibility. According to the said Program, this new Committee is in charge with *"developing,*

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[73] Webpage: http://www.eppo-project.eu/, accessed March 26, 2013.

[74] The document EUROPEAN PUBLIC PROSECUTOR WORKING GROUP CONCLUSIONS, issued following the Reunion that took place in Madrid from 29th of June to 1st of July 2009, pp.4.

[75] *Ibid* pp.4.

[76] Webpage: http://wwwde.uni.lu/fdef/actualites/a_blueprint_for_the_european_public_prosecutor_s_office3, accessed March 26, 2013.

[77] Webpage: http://www.eppo-project.eu/, accessed March 26, 2013.

[78] Webpages: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/internal-security/cosi/index_en.htm and http://europa.eu/legislation_summaries/glossary/internal_security_committee_en.htm, accessed March 26, 2013.

[79] *The Stockholm Programme: An open and secure Europe serving and protecting the citizens*, Council Document 16484/1/09, point 4.1., pp.35 and the following, webpage: http://register.consilium.europa.eu/pdf/en/09/st17/st17024.en09.pdf, accessed March 26, 2013.

monitoring and implementing the internal security strategy" of the European Union. In addition, *"in order to ensure the effective enforcement of the internal security strategy* [COSI] *shall also cover* [...] *judicial cooperation in criminal matters relevant to operational cooperation in the field of internal security"*. In the same time, the European Commission supports the COSI' activities to strengthen operational cooperation and coordination of actions between the EU Member States competent authorities.

Thus, the **Standing Committee on Operational Cooperation on Internal Security** was established by the Council Decision 2010/131/EU of 25th of February 2010 on setting up the Standing Committee on operational cooperation on internal security[80], which represents another innovation brought by the Lisbon Treaty. This body is composed of members of the competent national ministries of interior who will be assisted by permanent representatives of the Member States within the European Union in Brussels (Belgium) and by the Secretariat of the Council. Eurojust, Europol, European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) and other relevant bodies may be invited to attend meetings of COSI as observers, while the European Parliament and the national Parliaments will constantly be informed of the proceedings.

According to the Council Decision setting up COSI[81], the Committee shall have the following tasks:

- to facilitate, to promote and to ensure effective operational cooperation and coordination in the field of EU internal security[82], in accordance with article 71 of TFEU, having no legislative role and no involvement in conducting these operations. In this capacity, it will act in a number of different areas including police and customs cooperation, the protection of external borders and judicial cooperation in criminal matters;
- to evaluate the general direction and efficiency of the operational cooperation;
- to assist the Council in reacting to terrorist attacks or natural or man-made disasters or the solidarity clause stipulated in article 222 of TFEU as it is well-known[83];
- finally, COSI will submit a regular report on its activities to the Council, who will then inform the European Parliament and the national Parliaments.

Except the Council Decision mentioned above, another document entitled "**The Internal Security Strategy for the European Union:** "*Towards a European Security Model"* was adopted by the Justice and Home Affairs Council on 25th of February 2010 and approved by the European Council in its meeting held on 26th of March 2010. According to the common threats for the internal security of the European Union are: terrorism, organised crime, cyber-crime, cross-border crime, natural and man-made disasters and other such threats, while "*an EU-wide approach*" capable to

[80] Webpages: http://europa.eu/legislation_summaries/glossary/internal_security_committee_en.htm and http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:052:0050:0050:EN:PDF, accessed March 26, 2013.

[81] Webpage: http://register.consilium.europa.eu/pdf/en/09/st16/st16515.en09.pdf, accessed March 26, 2013.

[82] Jorrit Jelle Rijpma, *Agencies in the Area of Freedom, Security and Justice*, 2010, pp.4, webpage: http://www.jhubc.it/ecpr-porto/virtualpaperroom/145.pdf, accessed March 26, 2013.

[83] The European Union mobilises all the instruments, including the military resources, to prevent the terrorist threat in the territory of the Member States and to protect the democratic institutions and the civilian population from any terrorist attack. The Member State concerned, at the request of its political authorities, is assisted by the other Member States. In all the case, when we are talking about the application of the solidarity clause to the terrorist attacks we are talking about *"The Musketeer's Cloak"* which is a provision taken over for the first time in the Lisbon Treaty from article 51 of the Charter of the United Nations, where the main principle is *"all for one, and one for all"* (<<Tous pour un, un pour tous>>), which means that if a Member State is under a terrorist attack the rest of the Member States can intervene in order to help the Member State under siege and to eliminate as much as possible the terrorist attack and its effects; webpages: http://www.statewatch.org/news/2013/feb/eu-solidarity-clause-austria-10956-12.pdf and http://www.icj-cij.org/documents/index.php?p1=4&p2=1&p3=0#Chapter7, accessed March 26, 2013.

respond to all these challenges in an efficient manner has been formulated[84]. This strategy will be developed and implemented by the COSI in the coming years, without being designed yet a strict schedule.

IV. From the procedural perspective

The provisions regarding the Court of Justice's jurisdiction in point of the Justice and Home Affairs before the Lisbon Treaty, including judicial cooperation in criminal matters, are complex and purposively restrictive[85]. Thus, the Treaty of Maastricht excluded in former article L any Court's jurisdiction over the JHA[86] while the Treaty of Amsterdam provided for a limited jurisdiction as regards the cases lodged before it and formulated on the grounds of former article 35 of TEU, which established three exhaustive categories[87] of the Court's jurisdiction over the measures in the field of Justice and Home Affairs, and article 68 of TEC. These categories are, as follows:

- article 35 para.1 established an optional preliminary reference procedure on the validity and interpretation of framework decisions, decisions and conventions established under the former Title VI of TEU as well as of the measures implementing them, only if the Member States made a declaration to accept the Court's jurisdiction in accordance with former article 35 para.2 of TEU;
- article 35 para.6 established a limited judicial review procedure concerning the legality of framework decisions and decisions in actions brought by a Member State or by the European Commission in the conditions stipulated by the Treaty;
- and finally article 35 para.7 stipulated a procedure for solving Member State and institutional disputes regarding the interpretation or the application of conventions established under former article 34 para.2 letter d. of TEU. However, this article does not confer jurisdiction on the Court to rule on the validity of the measures adopted in the field of JHA including in the field of judicial cooperation in criminal matters.

In order to eliminate the deficiencies in the Court's jurisdiction and to improve its competence in the field of Justice and Home Affairs including in the field of judicial cooperation of criminal matters, it was established a Working Group X (WGX) on "Freedom, Security and Justice" to work on various procedural aspects even though its mandate did not specifically refer to reform of the judicial architecture. One of the conclusions of this group was that a fundamental reform of the Court's jurisdiction was necessary and *"the limited jurisdiction of the Court is no longer acceptable concerning acts adopted in areas as police cooperation or* ***judicial cooperation in criminal matters,*** *which directly affect fundamental rights of the individuals*[88]". In addition, *"specific mechanisms stipulated in* [former] *article 35 of TEU and article 68 of TEC should be abolished and that the general system of jurisdiction of the Court should be extended to the area of freedom, security and justice, including action by Union bodies in this field*[89] *"*.

Treaty of Lisbon was a very good occasion to include all the recommendations made by the Working Group X in the final report on judicial control of the Justice and Home Affairs. Thus, the special jurisdictional rules stipulated in former articles 35 of TEU and 68 of TEC have been abolished, being extended in the same time the jurisdiction of the Court by adding the expedited procedure as regards the Title V of TFEU – *"Area of Freedom, Security and Justice"*. According to the said procedure, the Court of Justice can give its rulings quickly in very urgent cases by reducing

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[84] Webpage: http://www.europeanfoundation.org/my_weblog/2011/03/the-eu-internal-security-strategy-promoting-more-eu-integration-rather-than-cooperation.html, accessed March 26, 2013.

[85] Stephen Carruthers, op.cit., pp.6.

[86] *Ibid,* pp.7.

[87] *Ibid,* pp.12 and the following.

[88] *Ibid,*pp.31.

[89] *Ibid,*pp.32.

the time-limits as far as possible and giving such cases absolute priority[90]. Such a procedure can also be used for references for preliminary rulings, in which situation the application is made by the national court and must set out in the application the reasons and the circumstances establishing that a ruling on the question put to the Court under discussion is a matter of exceptional urgency.

A special situation is related to article 10 of the Treaty of Lisbon Protocol on Transitional Provisions which preserves the jurisdictional powers obtained by the Court of Justice under the former Title VI of TEU in respect of the Justice and Home Affairs acts issued, including those drafted in the field of judicial cooperation in criminal matters, before the entry into force of the Lisbon Treaty with one mention that these. This transitional provision will cease in five years after the entry into force of the Treaty. As a result, the scope of the Court's jurisdiction will depend on whether an act in the field of judicial cooperation in criminal matters was adopted before or after the Lisbon Treaty effective date and, if adopted before that date, whether or not it has been amended[91].

As regards the visas, asylum, immigration and other policies related to free movement of persons (e.g.: judicial cooperation in civil matters, recognition and enforcement, which is the former Title IV TEC and the current Title V - Chapter 3 of TFEU), the Court can be notified by all the national courts, no matter the level and not only the supreme courts, having the competence to take measures which are justified on grounds of public policy having a cross-border dimension. Therefore, in this matter the Court acquires general jurisdiction, right in the moment of the entry into force of the Treaty of Lisbon.

V. Conclusions

The criminal phenomenon as the negative result of the globalization process involves, on the one hand, finding the best solutions to fight against the crime and especially against the transnational organised crime, and, on the other side, taking the necessary legislative and institutional measures even though the judicial responses to all the threats are still not enough to keep up with the development of the organized crime, which became a sophisticated and international phenomenon, especially in the last 20 years.

For this reason, we need to develop a common European criminal justice area by ensuring an effective cooperation in the field of criminal matters, by supporting the national law enforcement authorities of the Member States in taking all the appropriate measures, and by developing a very good cooperation with the European institutions, organs, offices and bodies in the field, such as: the European Commission and the European Parliament, as the key institutions in drafting the legislation; Eurojust, Europol or European Judicial Network as the key enforcement bodies etc. The starting point is the respect of one of the most crucial principles: the mutual recognition of judicial decisions in all EU Member States.

In order to achieve the main goal, the Lisbon Treaty provides a stronger basis for strengthening the legislative framework and the institutional capacity of the criminal justice area, while foreseeing new powers for the European Parliament and expending the jurisdiction of the Court of Justice of the European Union.

Nevertheless, there remain serious concerns as regards the availability of access to justice for individuals and an effective judicial control over the Justice and Home Affairs measures taken in this field before entering into force of the Lisbon Treaty.

I believe that the new European offices that will be created, EPPO and COSI, in accordance with the provisions of the Lisbon Treaty will contribute effectively in developing the judicial cooperation in criminal matters, in designing the legal framework necessary to contribute to establishing a level of common rules in this field within the European Union in fighting efficiency

[90] Webpage: http://curia.europa.eu/jcms/jcms/Jo2_7024/, accessed March 26, 2013.
[91] Stephen Carruthers, op.cit., pp.37.

against the offences in general and financial crimes in particular and in improving the collaboration with other European institutions, bodies or organs, such as: OLAF, Eurojust or FRONTEX, but not only.

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