POST-LISBON CRIMINAL LAW COMPETENCY OF THE EUROPEAN UNION

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Abstract:

After came into force of the Lisbon Treaty, the institutional structure of the EU transformed radically. The third pillar abolished and EU instruments in criminal law principally "communitarised". This shift has the possibility to increase significantly the review of EU criminal legislation either by the European Parliament or the Court of Justice. The EU judicial cooperation in criminal matters supposed to take the appearance of mutual recognition and EU criminal law bodies instead of harmonization in the Lisbon Treaty.

As to the former provisions on criminal justice, the EU had competence over both cooperation and minimum levels of harmonisation in substantive criminal measures. In terms of procedural issues, it had implicit competences only where it was firmly essential for the operation of the principle of mutual recognition. The Lisbon Treaty maintained establishing the principle of mutual recognition at the heart of judicial cooperation in criminal matters. However, the free movement of criminal judgments is allowed without free movements of supranational safeguards for human rights across the Union. There will be significant improvement in case where EU will be party to the European Convention on Human Rights. However, the Lisbon Treaty provisions regarding criminal judicial cooperation were reshaped in light of the Constitutional Treaty in order to empower a clear EU criminal competence to ensure measures for procedural rights of the defence.

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Özet: *Lizbon Antlaşmasının yürürlüğe girmesinden sonra AB'nin kurumsal yapısı çok önemli değişiklikler geçirmiştir. Üçüncü sütun ortadan kalkmış ve ceza hukuku alanındaki mevzuat topluluk mevzuatı özelliklerini kazanmıştır. Lizbon Antlaşmasında AB ceza işlerinde işbirliğinin harmonizasyondan ziyade karşılıklı tanıma ve AB kurumları olarak ortaya çıktığı görülmektedir.*

Ceza hukuku ile ilgili Lizbon Öncesi hükümlere gelince, AB işbirliği ve maddi ceza hukuku konusunda minimum seviyede harmonizasyon yetkisinin bulunmaktaydı. Ceza usulü konusunda ise karşılıklı tanıma ilkesinin işlemesi için çok gerekli olduğu durumlarda işari yetkisi bulunmaktaydı. The Lisbon Antlaşması karşılıklı tanıma ilkesini ceza işlerinde işbirliğinin en temel ilkesi olarak kabbul etmiştir. Bununla birlikte Birlik çapında supranasyonel bir insan hakları koruması sağlanmaksızın cezai kararların serbest dolaşımı öngörülmektedir. AB'nin Avrupa İnsan Hakları Sözleşmesine taraf olması durumunda çok önemli gelişme kaydedilecektir. Lizbon Antlaşmasının ceza işlerinde adli işbirliği hükümleri AB'nin cezai yetkisi usulü savunma haklarınıda içerecek şekilde Anayasal Antlaşma ışığında yeniden şekillendirilmiştir.

Anahtar Kelimeler: *AB'nin cezai yetkisi, ceza işlerinde işbirliği, karşılıklı tanıma, Lizbon Antlaşması*

Introduction

A new Article 1a of the TEU provides that the Union is founded on the values of respect for *human dignity, freedom, democracy, equality, rule of law and respect for human rights*. Article 2, TEU provides for objective of the Union as the promotion of peace, its values and well- being of its people; "*an area of freedom, security and justice"* without internal frontiers. Fully in line with this specific objective of the EU, it further states "*the pursuit of its objectives by appropriate means commensurate with its competences on it by the Treaties*". The "*Competence*" is the capacity to act. The EU has competence where the Treaties confer on it as the requirement of the "*principle of conferral*" (TEU, Article 5). Article 67/1 of the TFEU stresses that '*the Union shall constitute an area of freedom, security and justice* with respect for fundamental rights and the different legal systems and the traditions of Member States'. This objective shall be achieved by '*cooperation*' and '*coordination*' between the judicial authorities as well as

mutual recognition of judgments in criminal matters and approximation, where necessary, rules of criminal laws in the Member States (Article 67/3 of the TFEU). The whole scope of judicial cooperation under chapter 4 of the TFEU is determined by this objective (Corstens and Pradel, 2002: 466). This constitutes the former so-called third pillar and it was abolished by the Lisbon Treaty (TEU, Article 29).

Within the area of criminal law, the EU does not have its own criminal courts except for the Court of First Instance and the Court of Justice and they have power in regard to judicial oversight on the functioning of the EU but not over criminal trials (Lööf, 2006: 422). Criminal cooperation within the EU is wholly dependent upon cooperation between and the functioning of judicial systems of the individual Member States (Nuotio, 2005: 79). Therefore, it might be argued that the area of freedom, security and justice provided to its citizens by the EU has not an autonomous criminal justice system on its own. The EU aims to establish an area of freedom, security and justice through cooperation and coordination by abolishing the borders between autonomous criminal justice systems of the Member States (Yakut, 2008: 85). There had been two important parameters within the field of criminal law: requirements for effective implementation of criminal law within the criminal justice systems of Member States and limitations on states' power concerning rights of individuals within the area of criminal law. The EU criminal law added a third parameter: *the extent to which the EU has competence in the area of criminal law.* The EU's goal of establishing a sufficient legal basis for effective implementation of criminal law is the one aspects of the EU' competence in the field of criminal law. On the other hand, the question remains *whether in regard to criminal law is there any clear legal basis for guaranteeing rights of individual parties to trial within the existing former TEU and the TFEU provisions*, amended by the Lisbon Treaty. (Lööf, 2006: 422)

In light of foregoing questions the evolution of the EU criminal cooperation can be seen in the existing legal framework within the TFEU and TEU after the Lisbon Treaty came into force. (Perron, 2005: 5)

This paper will analyse the scope of EU competence in the area of criminal justice cooperation, -in both substantive and procedural criminal law- and specifically address the question of *whether or not ambiguity of competency of the EU in the area of criminal law have been solved and the EU has gained a clear legal basis within the TFEU provisions.* Then the paper will consider *whether the Lisbon Treaty represent a step forward in*

terms of the existing ambiguity concerning the EU's criminal competence and whether the visions of the EU in the amended Treaties present a clear basis for harmonization and mutual recognition of criminal judgments.

1. Judicial Cooperation in Criminal Matters before Lisbon Treaty

1.1. Overview of Judicial Cooperation in Criminal Matters before the Lisbon Treaty

Article 29 of the TEU covers the core objectives of the EU in regard to judicial cooperation in criminal matters. Its expressed purpose is that EU citizens should enjoy a high level of safety within the area of freedom, security and justice which is to be achieved through a common area of judicial cooperation in criminal matters. It also specifies, in numerous clauses, a list of objectives. (TEU, Article 29)

In light of the foregoing, the framework of TEU provisions on criminal judicial cooperation is determined by Articles 29-42. They elaborate the exact scope of judicial cooperation under Title VI, which amounts to the so-called third pillar. However, the establishment of the three pillar structure in the TEU, which is now the framework within which cooperation in criminal matters are convened, did not create a complete supranational criminal justice system. (Monar, 2001: 747-763; Romanovska, 2005: 1624-1640) However, it seems to appear that a sui generis supranational criminal justice system has been emerging gradually, specifically after the Lisbon Treaty entered into force (TEU, Article 29-42).

The exact scope of judicial cooperation in criminal law is laid down in Article 31 of the TEU, which includes the following objectives: cooperation between ministries and judicial, or with corresponding institutions, as well as, if necessary, cooperation through Eurojust, concerning the proceedings and the execution of verdicts; easing extradition; providing approximation across the EU's respective procedures, as may be essential to enhance judicial cooperation; precluding jurisdictional disputes between Member States; and progressively introducing instruments to set out the minimum principles regarding the constituent elements of criminal crimes and offences in the areas of organised crime, terrorism and illicit drug trafficking in the Member States (TEU, Article 31).

Eurojust was inserted into Articles 29 and 32 of the TEU. Afterwards, by creating Eurojust and Europol, further changes were achieved which entail a new institutional framework for collaboration and assistance (TEU, Article 29-32).

The Eurojust will provide judicial cooperation by: supporting effective cooperation between the prosecution services of Member States; improving the criminal investigations in cases of severe trans-border offences, especially where there is organised crime (bearing in mind analyses performed by Europol); supporting close cooperation between Eurojust and the European Judicial Network, specifically, so as to assist the enforcement of letters rogatory and the execution of extradition requests (TEU, Article 29).

Article 29 of the TEU (in regard to criminal judicial cooperation) provides for, 'closer cooperation between judicial and other competent authorities of the Member States including cooperation through the Eurojust, in accordance with the provisions of Articles 31 and 32; and 'approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31(e)' (TEU, Article 29).

Article 31 of the TEU formulates methods of aspects of harmonisation by emphasising that it shall be realised by minimum principles describing the constituent elements of criminal conducts and sentences in the area of organised crime, terrorism and illicit drug trafficking (TEU, Article 31). Moreover, the safeguards for the financial interests of the community were reinforced in Article 280 of TEC, which gave rise to heated debate on whether paragraph 4 of this Article bestows competence on the Community in criminal matters.[1]

[1] See for discussions Peers S., (2007), EU Justice and Home Affairs Law, Oxford University Press, at.389-427; House of Lords European Union Committee (2007), The Criminal Competence of the EC: Follow-up Report, 11th Report, session 2006-07, HL Paper 63 (London Stationary Office); Mitsilegas V., (2008), The Competence Question: The European Community and Criminal Law, in Guild E., and Geyer F., (eds) Security versus Justice?, Ashgate Publishing Company, at. 153-171; Borgers M.J. and Kooijmans, T., (2008), The Scope of the Community's Competence in the Field of Criminal Law, European Journal of Crime, Criminal Law and Criminal Justice 16, at. 379-397; Mitsilegas V., (2006), Constitutional Principles of the European Community and European Criminal Law, European Journal of Law Reform, vol. 8 no.2/3, 301-24; Mitsilegas V., (2008), Trust-building Measures in the European Judicial Area in Criminal Matters: Issues of Competence, Legitimacy and Inter-institutional Balance, in Carrera S., and Balzacq T., (eds), Security versus Freedom? A Challenge for Europe's Future (Aldershot: Ashgate), at.279-89; Perron W., (2005), 'Perspective of the Harmonization of Criminal Law

However, even though judicial cooperation in criminal matters is articulated in the third pillar, it is also mentioned in the first pillar. Indeed, Article 61(e) EC covers, within measures to be introduced by the Council, those 'in the area of police and judicial cooperation in criminal matters' (apart from whether such measures intend a particular dimension); 'the prevention and the fight against delinquency in the Union, according to the provisions of the TEU'; and the objective of 'an area of freedom, security and justice' the latter is included in Article 61 of EC and Article 2 of TEU as well (TEC, Article 61).

The decision making procedures of the former third pillar, which requires unanimity vote, and the binding legal effects of instruments on the other side maintain a sort of sui generis procedure (Piris, 2006: 168). Article 34 of the TEU clarifies that EU judicial cooperation establishes new legal measures, which require unanimous action by the Member States, the Commission or the Council, in pursuit of the objectives of the Union. Firstly, the TEU introduces 'common positions' to identify the perspective of the Union on specific issue (TEU, Article 34). Secondly, it adopts 'framework decisions', which do not have direct effect, on the grounds of approximation of the laws of the Member States. However, the ECJ has bestowed an indirect effect for Framework Decision in the *Pupino* Case[2] where it held that domestic courts have a general duty to interpret domestic law in conformity with the requirements of the EU framework decisions. With this judgment, the ECJ vested significant effectiveness in the EU measures of the Third Pillar. A framework decision, then, is binding upon the Member States. However, national authorities have discretion about what form and methods to adopt into the domestic law they use. The Framework Decision, as a new legal tool, was driven by the TEU in order to provide better harmonisation in criminal matters and to ensure that Member States would incorporate new measures into their domestic law in accordance with common parameters and objectives (TEU, Article 34).

However, framework decisions do not ensure a drastic shift in decision making and adoption into the national legal procedures, since they require

and Criminal Procedure in European Union' in Strandbakken, A., Harmonization of Criminal Law in European, Intersentia Antwerpen-Oxford Publishing, at.8; White S., (2006), Harmonization of Criminal Law under the First Pillar, European Law Review, vol. 3 no.1, at.81-92; Wasmeier M., and Thwaites N., (2004), The Battle of Pillars: Does the European Community Have the Power to Approximate National Criminal Laws?, European Law Review, vol. 29 no.5, at.613-34.

[2] For the details of Pupino case, see: *Case C-105/03, Criminal Proceedings against Maria Pupino*, 16 June 2005.

unanimous votes of the member states and adoption by national legislatures, which is a time-consuming process. On the other hand, the European Parliament does not play a prominent role in the setting out and implementing of the measures. Nonetheless, the TEU gave rise to significant improvement in the legislative performance of the Union in the area of criminal law and established a formal framework which exerts pressure on the member state to develop mutual assistance and cooperation in this area, even though criminal law has remained within the domain of national sovereignty (Perron, 2005: 5).

Third, the TEU establishes 'decisions,' which are also binding but not with any direct effect, for any other function based on the objectives of judicial cooperation in criminal matters, though decisions do not govern any efforts toward including any approximation of the laws of the Member States. Lastly, it provides conventions which require unanimous votes and necessitate adoption by domestic legislators consistent with domestic preconditions of the Member States. Member States must launch the adoption proceedings within a term to be defined by the Council (TEU, Article 34).

Organisation of the institutional aspects of the Union and its decision-making procedures laid down by Article 34 of the TEU has been entirely intergovernmental and Member States hold the exclusive competences (Kuijper, 2004: 609-626).

Articles 35 and 46 of the TEU enshrine the principles of judicial review with respect to judicial cooperation. These provisions set out the rights to refer to the Court of Justice by national judges' and tribunals' within the scope of preliminary ruling on the interpretation or validity of the instruments (common positions, framework decisions, decisions and conventions) established in the Article 34 of the TEU.(TEU, Article 35)

The referral of cases by national courts for preliminary ruling procedure is attached to the declaration of Member States' admission the jurisdiction of the ECJ. The ECJ will ask whether the referral for a preliminary ruling is acceptable by domestic tribunal against verdicts (whose verdicts for which there is no legal review in the context of domestic legal order), without any indication of whether this deficiency of judicial review is related to a respective case or pertains to all circumstances. (TEU, Article 35)

Additionally, Article 35 sets out a preliminary ruling with regard to framework decisions and decisions, as stipulated by Article 230 of TEC,

(TEC, Article 230) in addition to proceeding envisaged to resolve the conflicts between the Member States in terms of the adoption of measures for catalogue in Article 34(2) (d) of the TEU (TEU, Article 34).

1.2 Problems with regard to the Former Pillars Structure

As concerns the above-mentioned organisation of judicial cooperation in criminal matters, one of the main problems is the ineffectiveness in criminal judicial cooperation because of the division between the first and third pillars. There is a dual legal personality, which arises from the ambiguity of the exact legal impact of each instrument outside of its specific area. Intricacy, vagueness and deficiency of precision are also consequences of the pillar division. An acceptable solution to this problem appears in the Lisbon Treaty which abolishes the pillar divisions. (De Hert, 2004: 55-99; Guild and Carrera, 2006: 10)

On the other hand, judicial cooperation in criminal matters is organised upon a rather flexible foundation causing difficulties with effectiveness, which is based on the intergovernmental method (Mitsilegas et.al., 2003: 40). A mechanism for supranational legislative and enforcement may provide coercive pressure for implementing a uniform and increasing legal certainty, precision in enforcement. Therefore, majority voting in the decision making procedure should be adopted. Otherwise, the result will be a disparity and inequality in the daily life of citizens with regard to rights of individuals in criminal matters. On the respective procedural rights, there are no parliamentary controls guaranteeing to prevent abuse of the system. (De Hert, 2004: 55-99).

1.3. Limits of EU Competence in the Criminal Law before the Lisbon Treaty

1.1. EU's Procedural and Substantive Criminal Competence in the Third Pillar

The third pillar is a classic case of mixed competences. The first thing which should be mentioned is that judicial cooperation in criminal matters must be dealt with in the framework of the third pillar (Mitsilegas, 2009:35; De Hert, 2004: 82). Competence to regulate in the area of criminal judicial cooperation is vested in intergovernmental method within the framework of the TEU.

The most important question concerning the criminal competence of the Union is raised in relation to legislative competence in the area of *criminal procedure*. The argument is that criminal cooperation within the EU is not a separate criminal justice mechanism, but consists of co-operation between

sovereign criminal justice systems to deal with issues across the Union. The question is 'Can the EU legislate measures regarding procedural rights with this limited competence?'

The wording of Articles 29 and 31 of the TEU specifies that, 'common action on judicial cooperation in criminal matters' contemplates either: cooperation with respect to institutional, procedural simplification in terms of the proceedings and execution of judgments and the compatibility of cooperation rules; or harmonisation of measures. These measures concern the adoption of minimum rules with respect to the constituent elements of criminal offences and sanctions in the fields of organised crime, terrorism and illicit drug trafficking (TEU, Article 29, 31). Therefore, the Third Pillar is aimed not only at improving cooperation but also at the establishment of new measures which correspond to a Community instrument. Thus harmonisation of criminal law constitutes one of the methods of the achieving the objectives of judicial cooperation on criminal matters.

On the face of the TEU, the only issue which has an explicit legal basis and consists of common action on judicial cooperation in criminal matters, is harmonization of substantial criminal law (Fletcher et al, 2008: 105). There is an issue of whether types of crimes enumerated in Article 29 and 31 are contained in indicative or enumerative clauses. These provisions delimit the types of crimes. Apparently, it seems the clauses are exhaustive, but actually they are not. For example, what of cyber crime? Prima facia computer crime would seem to fall outside this article, except where the measures are related to the listed crimes. However, the Article 29 provisions do not exhaustively describe the limits of Community action; they are only indicative (Walden, 2004: 329). The EU concurred with this opinion and enacted the Framework Decision concerning cyber crime as based on this article.

While, this article establishes the clearest basis for harmonisation, it limits harmonisation in terms of contents (some aspects of criminal law) and level of harmonisation (refers only to minimum rules). These limitations of the Article have prevented harmonisation except for those areas the Article explicitly spells out. (Weyemberg, 2005: 1569)

In light of the expression of Article 29 of the TEU, it might be inferred that criminal procedural law is not expressly denoted as a specific objective of this pillar. However, is the door left open, by means of articles 30, 31 and 32 of the TEU, to address criminal procedural law? (Schutte, 2000: 43-55)

As regards the particular competence in relation to cooperation between criminal justice systems of Member States, Article 31 (1) of the TEU stipulates to facilitate and accelerate cooperation between competent ministries and judicial or equivalent authorities of the Member States. These include where appropriate, cooperation through Eurojust, in relation to proceedings and the enforcement of decisions; facilitating extradition between Member States; ensuring compatibility of rules applicable in the Member States, as may be necessary to improve such cooperation; preventing conflicts of jurisdiction between Member States'.

These provisions enshrine EU interventions in regard to varied dimensions of criminal procedure. It might be argued that there are different levels of ambiguity. The first one is that stipulated EU actions are not exhaustive and widely crafted provisions leave the door open for different readings of the Article. Secondly, in terms of the methods EU may use to take precautions, there is also vagueness. That is, while the provisions merely refer to the term 'common action,' there is uncertainty concerning which legal instruments shall be employed to achieve goals in relation to cooperation between the justice systems of Member States. However, it can not be deduced from this that the Treaty provisions empower the Council to have discretion on criminal procedure whenever they achieve a unanimous vote. The efforts to find out the limits of EU competence along with decision maker-institutions and decision the making-procedure, the certainty on type legal instruments, the principles on judicial control and insufficient basis for competence prove that the third pillar is the area of attributed competence which means that there is limited competence and it exists whenever it is vested by the Treaty. The EU legal measures in the third pillar necessitate the Treaty legal basis in order to adopt including concepts of subsidiarity and proportionality as was appeared in two cases (environmental crimes framework decision case and ship source pollution case). These two framework decisions were annulled by the ECJ on the grounds that third pillar decision making process was employed instead of the firs pillar legal basis. (Fletcher et al., 2008: 106)

In the course of confirming the validity of EAW in the case of Advocaten voor de Wereld, the Court widened the means of harmonization beyond the substantive criminal law dimension in Article 31 (1) (e) to the criminal procedure dimension in Article 31. The ECJ also held that the Council has discretion to select between different legal instruments to lay

down principles of same issue complying with the requirements of the instruments selected.[3]

Following the Tampere Conclusion, which adopts the principle of mutual recognition as a cornerstone for criminal cooperation, in terms of mutual recognition, importance of either execution of sentences and protection of suspects and accused rights was remarked.[4] Although breakthrough developments have been achieved in the area of mutual recognition in criminal justice, less attention has been paid to defence rights (Peers, 2000: 187). In 'negative legal integration' which means extensive use of mutual recognition in criminal matters, it may be noted that the EU has neglected the minimum level of harmonisation in defence rights (Peers, 2000: 187). Remarkable procedural successes have been achieved in the implementation of the EAW. However, executing states do not have to, prima facia, check the procedural rights of the issuing state. (Alegre and Leaf, 2004: 200-217)

On the other hand, it might be argued that current TEU provisions provide no solid grounds for seeing mutual recognition as the 'cornerstone' of cooperation. The Council preferred mutual recognition politically as a method to achieve 'closer cooperation'. However, according to some writer that making mutual recognition the cornerstone of cooperation does not in itself present sufficient evidence to prove that due to exceptional features of penal law and this innovation, mutual recognition was not intended by the legislator of the TEU. Therefore, every employment of it, in cases where the measures cannot be based on other clauses of the TEU, amounts to an excess of competence by the bodies of the Union (Gbandi, 2005: 23). As a result, this causes doubts regarding legal basis of procedural rights, because there is express lack of legal basis. However, it can be considered that there is implicit competence in terms of mutual recognition (Lööf, 2006: 430).

Why have the procedural rights of suspects and the accused, at the minimum level of harmonisation standards, not been taken into consideration in adopting the European Arrest Warrant? It has been argued that this is due to lack of legal competence. While Article 31(1) (b) of the TEU vests competence in the EU to make extradition easier, it does not

[3] For the details, see: C- 303/05 Avocaten voor de Wereld, judgment of 3 May 2007, para. 32-37.

[4] For the details, see: Mutual Recognition of Final Decision in Criminal Matters (COM(2000) 495 final), at.2

bestow clear power to establish procedural rights. The Commission has found a way around this and interpreted the Article as if it confers authority implicitly (Lööf, 2006: 424). It proposed a Council Framework Decision on certain procedural rights in criminal proceedings ('FDPR').[5] By interpreting the requirements mutual recognition and given the way in which the EU institution had expressed its opinion on the issue, the Commission inferred that the drafter of Article 31(1) (c) of the TEU contemplated conceding criminal procedural competence to the EU in the proposed FDPR. The expression 'as may be necessary to improve such cooperation' authorises the EU to enact the measures in the sphere of criminal co-operation to provide the necessary harmonization of laws. (Lööf, 2006: 424)

One scholar has asserted that proposal of FDPR would clarify ambiguity concerning the EU competence on procedural rights and that it is based on a controversial reading of the existing Third Pillar (Morgan, 2005). On the other hand, some others maintain that the idea behind the empowerment of the EU concerning procedural rights is based on intergovernmental peculiarity and with its corollary the unanimous vote requirement of the Third Pillar. The third pillar has not empowered normative competence to the EU and it has not created a system of attributed competence. Hence, the EU has limited competence. Whatever the EU intergovernmental Council decide it has the competence to enact.(Mitsilegas, 2006: 301-24)

On the other hand, Advocate General Kokot in *Pupino* maintained that the phrasing of Article 31(1) of the TEU is not vague in respect of the limited competence when it states that 'common action on judicial cooperation in criminal matters shall include…' (Lööf, 2006: 425) Some argues that in the light of the expression of Article 29 of the TEU, it might be inferred that establishing procedural law is not expressly denoted as a specific objective of this pillar. However, the door for this is left open, as articles 30, 31 and 32 of TEU deal with criminal procedural rights (Schutte, 2000: 43-55). One scholar does not consider there to be any ambiguity and argues that a satisfactory legal basis for certain EU measures on procedural rights is in the expression of the Article 31(1) of the TEU. (Lööf, 2006: 425)

As regards my concern, there are no clear legal bases of EU competence in regard to the regulation of procedural rights. The door is left open to address procedural issues where it is essential to ensure the effective functioning of the mutual recognition. On the other hand, argument of that

[5] For the details, see: Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the EU(COM (2004) 328 final)

the Council has power over whatever it chooses, without this being envisioned by the provisions of the Treaty appears unreasonable, since the EU law is based upon the Treaties.

1.2. The Question of the Community Competency in First Pillar Criminal Law

The Question of whether the Community has competence in the area of criminal law constitutes one of the impasses in the sphere of judicial cooperation in criminal matters. The TEC did not contain provisions vesting express competence to the Community in criminal matters by defining criminal offences and setting sanctions from the very beginning of the Treaties to the present versions. This approach casts doubts holding competence in regard to imposing definition of crimes and establishing sanctions on Member States. There is a tension between effort to make Community law more effective and doubts on the party of individual states about sharing sovereignty with the Community in the field of criminal law (Mitsilegas, 2008: 153-171). Those who are considered in the favor of holding competence assert that competence within the penal area ought not to be seen differently from the competence on other sphere of law. Those who hold this view believe the Community should hold competence to protect the policies of the Community by imposing criminal law. Opponents of this argument consider criminal law as the most important area of state sovereignty and believe the Community is not vested with competence in this area, as can be deduced from silence on the Treaties. (Peers, 2006:390-400; Wasmeier and Thwaites, 2004: 613-34; Mitsilegas, 2006: 301-24)

The Commission has tried to set up Community competence criminal law by drafting first pillar criminal instruments on crimes and sanctions. During the Council deliberations however, none of them could be adopted due to resistance from Member States that believe that the Community is not empowered to exercise express criminal competence. This tension between different approaches paved the way for adoption of first pillar instruments in which prohibition of certain conducts were made, definitions of crimes and sanctions though were not adopted as in the example of 1991 first money laundering directive before Maastricht. However, a change in approach was reflected by prohibiting certain conduct with first pillar instruments on the one hand, and on the other hand, defining the same actions as crimes and their sanctions are enshrined by equivalent third pillar instruments during the post-Maastricht era as was appeared in directive and framework decision concerning facilitation of unauthorized entry and ship-

source pollution. Another example was the framework decision on environmental crime which was adopted as a third pillar instrument rather than first pillar instrument and then annulled by the ECJ (Vervaele, 2006: 87-93). The ECJ addressed for the first time the issue of the criminal competence of the Community in the environmental crimes case (White, 2006: 81-92; Tobler, 2005: 835-54). [6] The Commission, concurring with European Parliament in this case asserted that as environmental protection is addressed within the first pillar competence. This issue should have been regulated by first pillar instruments. Therefore, the Commission asserted that framework decision was requited to be annulled. The Commission further maintained that the Community has been given competence to lay down sanctions for breach of environmental principles within the Community law, if it is necessary and effective to harmonize criminal law measures to protect the Community policy at stake. The Commission also had the view that criminal competence is ceded to the Community on the grounds that Member States have an obligation to cooperate faithfully according to principles of efficient and equal cooperation (Case C-176/03 para. 19-20). The Council rejected this opinion- with not least than 11 supporting member states- and defended the view that the Community does not hold competence to impose criminal law in light of the actions encompassed by the framework decision. This problem of competency is not only due to lack of express delegation of competence. It is due to the fact that that there is no implicit basis for adopting this competence which can be vested on the Community where substantive competences are bestowed under Article 175 of the TEC (Case C-176/03 para. 26-27).

The ECJ held that the framework decision was null and void. It emphasized that nothing in Articles 47 and 29 of the TEU has impact on the TEC and furthering that duty of the ECJ is to prevent third pillar measures to encroach the competence of Community conferred upon by the TEC (Case C-176/03 para. 38-39). Then the Court stated that environmental protection is one of the essential aims of the Community and the aim is to protect the environment by establishing which actions constitute serious environmental crimes (Case C-176/03 para. 45-47). As a Community goal, environmental protection is at stake to determine whether criminal law can be applicable as a tool to achieve this aim. The Court considered that, in principle criminal law and criminal procedure are not within the scope of Community competence. However, this does not prevent the EC legislature

[6] For further details, see: Case C-176/03, Commission v. Council, 13 September 2005.

from taking measures in relation to the criminal law of the member states, if the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities are essential measures to combat serious environmental crimes, when it is required that the rules which it lays down on environmental protection are fully effective (Case C-176/03 para. 47-48). The Court held that the purpose of the Article 1-7 of the framework decision regarding environmental offences is protection of environment; however these offences could have been established properly based on Article 175 of the TEC. Despite the fact that these provisions of the framework decision to specify conduct detrimental to the environment, the discretion to determine the choice of penalties- which need to be effective, proportionate and dissuasive,- are left to Member States (Case C-176/03 para. 49).

The Court conferred express criminal competence upon the Community with this judgment. Striking points within this judgment are the effectiveness of Community law and the achievement of Community aims. Where Community goals are in question, criminal law is considered as a tool rather than a particular area of law which need particular rules to adopt and seen within the scope of Community competence. However, it is not clear whether the Court's interpretation in this regard bestows general competence in the area of criminal law or is confined to environmental crimes alone. (Mitsilegas, 2006: 307-8)

The Court's ruling in *Ship Source Pollution Case*, presents a certain degree of clarity in terms of delimiting the Communities criminal competence. On the one hand, the judgment can be considered as confirmation of the Community competence in criminal law for those who support the first pillar criminal law on the one hand. On the other hand, the Court held that there is competence to adopt a wide range of criminal law measures and further clarified the ambiguities on the extent of the first pillar criminal law competence. The Court emphasized that imposing criminal law in this case is within the scope of the first pillar; however, the imposition of criminal sanctions falls within the third pillar. The Court adopted a balanced approach in regard to confining Community competence to the achievement of essential Community objectives. (Mitsilegas, 2008: 166)

1.3. Question of Supranational or Intergovernmental Competence

As concerns the question of whether judicial cooperation in criminal matters is based on supranational or intergovernmental competence; first,

draftsmen of the Treaty consistently used the term judicial 'cooperation', 'operational cooperation' and 'closer cooperation' throughout the related section of the TEU and also between the Articles 61-69 of the TEC (TEC, Article 166-169). This indicates the intent of the legislator as to what kind of competency it intended to confer upon the EU.

Secondly, the foundation of intergovernmental or supranational structure can not be reduced to only one dimension. It is a multi-dimensional phenomenon and several different factors reflect the level of integration. The first parameter may be the use of legal power encompassing the right to initiate legal action (Walter, 2004: 16). Article 34 of the TEU empowers Member States this right to initiate and, to a limited extent, to the EU institution and the Commission.

Third, the competence to adopt legal instruments is granted by the Council leaving the discretion of the Member States the method of incorporating those into national law. This is the case specifically in the third pillar in which almost all decisions are reached with participation of the Member States. There is no opportunity for parliamentary participation or co-decision. The existing measures taken within the framework of the third pillar permit the executive of the EU to impose legal instruments and the EU has enactment power within the domestic legal orders in the Union scale, with very limited discretion to the Commission or the Parliament and with limited space for judicial review. We may call this situation 'sui generis supranational competence.' (De Hert, 2004:93) Within the third pillar structure this drives the EU criminal system towards a quasi supranational criminal justice system. These supranational peculiarities - such as relations with the Commission and consultation with Parliament and the binding nature of legal measures- push the boundary of intergovernmental structure. This competence is not exclusive and is not a shared competence of the Community.

As regards the features of third pillar legal instruments, especially framework decision, especially, may be called a 'gentlemen's agreement.'(Guild and Carrera, 2005:3) It is binding in nature and is subject to preliminary rulings in terms of validity and interpretation, but it is not directly effective. However, the ECJ held that the framework decision is indirectly effective in the *Pupino*[7] judgment. The power of judicial review is conceded to interstate relationships in restricted areas. In respect to

[7] For further information about the case, see: *Case C-105/03, Criminal Proceedings against Maria Pupino.*

effectiveness, the decision making mechanism of criminal cooperation has yielded major rewards.

Lastly, the method of decision making expressed by the terms of Article 34 of the TEU requires unanimous vote with the 'initiative of any Member State' (TEU, Article 34, 35). Some writers have called the situation sui generis supranational inter governmental, due to strategic progress towards the supranational sphere, in which the EU supranational system is based on a intergovernmental in its decision-making procedure. Although the Council is intergovernmental in its organisation, in fact, it is supranational in the way in which it operates and binds member states with their corollary legal measures.(Ludlow, 2004: 14)

As to the view that considers the EU criminal matters as cooperation between sovereign criminal justice systems rather than an autonomous one; as the Union is built upon a sui generis supranational foundation with a distinctive intergovernmental features. It is not rational to expect the emergence of a complete independent Union justice system and it is not necessary to ensure such a system. As is implicit in the basic idea of the Union, 'united in diversity' reflects the most favorable approach for understanding the criminal policy of the EU.

Even though it has some sui generis or quasi-supranational features, in my opinion, bearing in mind this multi-dimensional picture, the character of the criminal judicial cooperation is intergovernmental not supranational and, the former nature outweighs the latter one. Attributing sui generis supranational characteristic to it does not have any practical consequences though.

1.4. Advocaten Voor De Wereld Case and the EAW

In *Advocaaten Voor De Wereld Case*, Belgian Arbitration Court referred to the ECJ questions on both procedural and substantive matters. Regarding the competency issue, Court called into question whether a framework decision was the suitable instrument for the purpose of approximating the laws and regulations of the member states. Advocaten voor de Wereld maintained that as the EAW was not a suitable instrument adopted for the purpose of harmonizing the laws of member states laws, and furthering a convention is the appropriate instrument for this purpose. The ECJ verified while addressing this question that the Council has the power to select which instrument to use in order to regulate specific issue, within the context of the standards envisaged for this instrument and in case where

principles laid down for this instruments are adhered to. (Fletcher et al., 2008: 120)

The Court interpreted that harmonization of national laws as a means to ensure that the common action referred to Article 31 of the TEU could not be confined merely to establishing the elements of certain crimes. At paragraph 29 the ECJ clarified the relationship between the principle of mutual recognition and harmonization as follows: '*The mutual recognition of the arrest warrants issued in the different Member States in accordance with the laws of the issuing State concerned requires the approximation of the laws and regulations of the Member States with regard to the cooperation in criminal matters and, more specifically, of the rules relating to the conditions, procedures and effects of surrender as between national authorities*'.

The ECJ enumerated the provisions of the EAW that were aimed at having a harmonizing effect, such as Article 2 (2) on double criminality and Article 3 and 4 on refusal to execution. Framework decision is suitable instrument for laying down rules for the EAW area, though international conventions were employed to regulate these fields previously. (Fletcher et al., 2008: 121)

2. Key Changes by the Treaty of Lisbon

The Treaty of Lisbon entered into force on 1st of December 2009. It amended existing organization and structure significantly and simplified decision making procedure of the European Union (EU). It changed the Treaty on European Union (TEU) and the EC Treaty and renamed as the Treaty on the Functioning of the Union (TFEU). The TEU covers general constitutional provisions and specific provisions on foreign policy, and the TFEU covers essentially provisions on the special EU policies and areas of action(Craig, 2008: 137-166; Dougan, 2008: 617-703[8] The European Union continued as a single legal personality and the European Community was abolished. New Article 1 of the TEU states that both Treaties have the equal legal value and there is no hierarchy and superiority or priority between them. A most important innovation established by the new Treaty structure is the abolition of the pillar structure and the three-pillar structure merged into one 'Union', despite the fact that some special procedure in foreign policy, security and defence remained (Mitsilegas, 2008:37; Duff, 2009). This

[8] For further details, see also: House of Lords European Union Committee, The Treaty of Lisbon: An Impact Assessment, Volume 1, 10th Report, session 2007-08, HL Paper 62-1.

amendment has important implications for the area of freedom, security and justice. Instruments on police and criminal judicial cooperation are incorporated into the former first pillar structure and consequently the area of freedom, security and justice became '*communitarised*'. On the other hand, it should be realized that without doubt considerable communautarisation of the area of freedom, security and justice is away from unqualified, with several 'intergovernmental' aspects continuing. The features of communitarising the third pillar will be examined after an outline of the number of key changes.

Summary of the Key Changes by the Treaty of Lisbon:

- The Union has acquired single legal personality.
- Three Pillar structure merged into one.
- Double majority rule was adopted.
- *Co-decision procedure* between the European Parliament and Council was confirmed as so-called *ordinary legislative procedure.*
- Instead of sixth month rotational Council Presidency, two and half year term European Council Presidency was adopted.
- High Represantative for Foreign and Security Policy was established.
- Right to initiative for citizens was recognized.
- Democratic participation by European and National Parliaments and for citizens sthrenghtened.

As a result of the these changes, this new Treaty will increase the efficiency of functioning of institutional structure and decision making procedure of the EU. The objective of the Union with this Treaty is to overcome the global problems arising from terorizm, crossborder crimes as such of which pose significant treat to citizens of the Union.(Duff, 2009)

Although, the Charter of Fundamental Rights was not incorporated into the Treaties, it entered into force and became binding tool with entering into force of the Treaty of Lisbon. The Charter has the same legal value with the Treaties. The Union recognizes the rights, freedoms and principles enshrined in the Charter of Fundamental Rights. The Lisbon Treaty revitalizes the Charter and strenghtens the rule of law in the Union and eliminates the democratic deficiency in the EU. (Miller, 2007:3)

3. Overview of the Criminal Judicial Cooperation in the Lisbon Treaty

3.1. Reforms on Institutional Framework

The major characteristics of institutional changes about the criminal judicial cooperation that the Lisbon Treaty brought about are mainly three, all attributable to the abolition of the pillar structure and merging them into the one structure.

The first important attributes arising from the Lisbon Treaty is pertinent to legal sources. Uniform set of legal acts is ensured for all the areas which are laid down under the competence of the Union. This refers to uniform legislative procedures, according to qualified majority voting, and the participation of the European Parliament to the legislative process[35], which is important in terms of the principles of democratic participation and the rule of law. These acts for most part pursue the areas envisaged within the previous EC Treaty: to use Union's competences, the type of legal instruments shall be *regulations*, *directives*, *decisions*, *recommendations* and *opinions*. The main feature of the regulation will be *binding its entirety* and *directly applicable* in all Member States and shall have general application. A directive shall be binding; however, form of choice and method of transposition into domestic law was left to the national authorities. (Treaty of Lisbon, Article 82, 83)

A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them. Recommendations and opinions shall have no binding force. (TFEU, Article 288)

The second important attribute arising from the Lisbon Treaty refers to the jurisdiction of the Court of Justice, which is consequently bestowed the judicial control among the diverse fields of EC/EU law provided under the EC Treaty before the Lisbon Treaty. Without considering the field, the Court has competence in annulment proceedings in so much as that it is filed by a real or a legal person (TFEU, Article 263). Furthermore, regardless of the necessity for declaration in advance in an attempt to recognize its competence, the ECJ can deliver preliminary rulings as regards the interpreting the provisions of the TEU and the TFEU and the validity and interpretation of legal acts of the institutions, bodies, offices or agencies of the Union (TFEU, Article 267). The Lisbon Treaty also envisages the responsibility of referral to courts or tribunals for the judgments and decisions of which there is no further judicial remedy within the domestic

legal order similar to that of previous system provided under Community method. This reinforced the recently adopted amendments as regards the rules of proceedings of the ECJ, which laid down rules of emergent preliminary ruling in the field encompassed by Title VI of the former TEU Treaty and Title IV of Part Three of the former EC Treaty, which target to establish an area of freedom, security and justice, through shorter deadlines and limitation of the parties and other concerned people empowered to present argument of case or written explanation. In cases of excessive necessity, even the written phase of the proceedings may be excluded. (Belfiore, 2009: 1-22)

The third attribute within the Lisbon Treaty that specified a critical point in judicial criminal cooperation as regards the remedies: infringement proceedings are generally applicable. The indefensible situation where Member States exercise the concession not to put into practice third pillar acts appropriately or at all and enjoy an absolute immunity in comparison with any violation of EU law is modified in favors of a consistent method of remedies. In fact, sanctions against non-put into practice are required in the criminal area which necessitates by its character certainty of law and non-discrimination in the midst of the addressees of the same act. For that reason, where a Member State flawed to realize an EU requirement, the Commission shall convey a reasoned view on the subject after delivering the State concerned the opportunity to present its explanation. The Commission may even carry the issue before the ECJ in case where the State does not abide by the view within the specified timeline. (Treaty of Lisbon, Article 258)

After abolishing the pillar structure by the Lisbon Treaty, judicial remedies up to now granted, for instance State legal responsibility, also became applicable to the criminal field, in order that compensation have been established even to persons affected by non applied EU criminal acts. (Belfiore, 2009: 20)

3.2. Objectives

The mutual recognition in criminal matters has been established by the case law of the ECJ, specifically after the *Cassis de Dijon case*. This concept has been enshrined first time in the Treaty, albeit its certain function in the course of action of the EU integration together with the economic and the criminal law field. (Belfiore, 2009: 20)

Through the Lisbon Treaty, mutual recognition has been officially accepted with regard to the former third pillar. Criminal judicial cooperation shall be relied on the concept of mutual recognition of judgments and other judicial decisions, and shall contain the approximation of the laws and regulations of the Member States in specified fields (Treaty of Lisbon, Article 82 para I). Especially, minimum rules may be created to the extent that requires to make possible mutual recognition of judicial decisions and police and criminal judicial cooperation in proceedings as regards the trans border dimension (Treaty of Lisbon, Article 82 para II). Minimum rules shall be related to: mutual admissibility of evidence between Member States; the rights of individuals in criminal procedure; the rights of victims of crime; any other specific aspects of criminal procedure which the Council has acknowledged beforehand by a decision (for the adoption of which the Council shall act unanimously after obtaining the consent of the European Parliament). (Belfiore, 2009: 20)

Therefore, the Lisbon Treaty promotes the principle of mutual recognition and enlarges the scope of criminal judicial cooperation. Mutual recognition is transposed into an explicit purpose of the Union and harmonization of laws, which is a mechanism by which realizing this purpose and it may be valid to new fields thus far disregarded in the EU agenda. This agenda unquestionably reveals the recognition at political stage of the mounting implication of EU criminal law. (Belfiore, 2009:20)

3.3.Transitional Measure

Article 10 of Title VII of Protocol 36 on transitional provisions envisages that instruments in the field of police cooperation and judicial cooperation in criminal matters adopted before the Lisbon Treaty, the competence of the ECJ under the former Title VI of the TEU, shall subject to the same rules, applicable for the instruments adopted under the former Article 35(2) of the TEU. These transitional provisions will be remain in force after five years the date of come into force of the Lisbon Treaty.

Within the Article 10 of Title VII of the Protocol n. 36 on transitional measure, as regards instruments in the area of police and judicial cooperation in criminal matters adopted before the Treaty of Lisbon, the competences of the Commission under Article 258 shall not be enforceable. This provisional measure will stay in force until the end of five years after the date of entry into force of the Lisbon Treaty.

The Court of Justice does not have competences of judicial control on the validity or proportionality of operations carried out by the police or

other law enforcement services of a Member State or the exercise of the responsibilities conferred on Member States in regards the preservation of law and order and the protection of domestic security. (TFEU, Article 276)

3.4. The Area of Freedom, Security and Justice in the Lisbon Treaty

The objective of the Union as an '*area of freedom, security and justice*' is improved in the Lisbon Treaty, further it acquired to a certain extent position of an outstanding area within it. The 'area of freedom, security and justice' emerges in the new EU Treaty, elevated on the listing of the Union's affirmed objectives in accordance with Article 3(2) of the TEU, the Union will '*offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'.*

Furthermore, the 'Area of Freedom, Security and Justice' embraces the title of Title V TFEU, which encompasses the rules and principles on Justice and Home Affairs covering issues formerly within the third pillar. The preliminary clause stipulates that the Union will comprise an *area of freedom, security and justice* with respect to fundamental rights and the different legal systems and customs of the Member States. (TFEU, Article 67(1))

Besides it includes further three paragraphs intending to endow with a classification of the subjects covered by the field: borders, immigration and asylum; (TFEU, Article 67(2)) criminal law, positioned under the rationale of guaranteeing a '*high level of security*'; (TFEU, Article 67(3)) and civil law, within the concept of the facilitation of `*access to justice'* (TFEU, Article 67(4)). This relatively shallow classification is unusual in that it appears to connect 'freedom' -which is though not explicitly stated in the related paragraph -with internal frontiers, immigration and asylum; 'security' with criminal law; and 'justice' with civil law. (Mitsilegas, 2008: 38)

What if any consequences can be encompassed relating to the future course of EU action in Justice and Home Affairs—whose distinction in the EU program Lisbon appears to affirm—and the connection among freedom, security and justice from the common clauses of the Lisbon Treaty? Firstly, the stress in Article 3(2) TEU on the Union proposing an area of freedom, security and justice to its citizens is significant: it entails an affirmative obligation for the EU. It has also implication merely to obligation of the EU

citizens but not necessarily to third country nationals. Furthermore, the Treaty maintains the stress on the notion of an 'area', with Article 3(2) the TEU once more connecting Union Justice and Home Affairs law—as well as criminal law—with free movement. But, this connection is not as much of overt in the genuine Title V the TFEU, specifically Article 67: there, freedom is prominently missing from the particular stipulation on criminal law (it is also missing from the stipulation on immigration); justice is even missing; criminal law is particularly, and purposely, related with security in Article 67(3) TFEU. Nevertheless, this explicitly 'securitised' approach is lessened by two different Treaty clauses: the clause on the principles of the Union, which embrace human dignity, freedom, the rule of law and respect for fundamental rights (markedly other than security) (TEU, Article 2), and the clause introducing the Charter of Fundamental Rights into Union law and bestowing a legal base for the accession of the Union to the ECHR. (TEU, Article 6; Mitsilegas, 2008: 38)

Despite the fact that the exact implication of these clauses to the rearrangement of the correlation between freedom, security and justice in the EU needs to be observed, they supply functional instruments for taking into consideration fundamental rights in the progress and construal of the EU 'Area of Freedom, Security and Justice' provisions. The responsibility of the Court of Justice will be vital in this perspective (Mitsilegas, 2008:38).

3.5. The Communautarisation of the Third Pillar

The Lisbon Treaty establishes numerous important alterations in the functioning of EU institutions in criminal law areas, '*communautarising*' considerably the third pillar. The first important alteration is related to *decision-making,* which, for the enormous amount of Title V instruments will be adopted within the scope of the '*ordinary legislative procedure*', co-decision which will be taken by majority voting between the Council and the European Parliament (TFEU, Article 289(1) and 294). This represents a substantial enhancement the role of the European Parliament, which efficiently is bestowed a right of veto. The *ordinary legislative procedure* is basically applicable to legislative actions in the areas of principle of mutual recognition and harmonisation in criminal matters (TFEU, Article 83(1) and 83(2)), framework law on restrictive measures as regards terrorism (TFEU, Article 75(1)), crime prevention (TFEU, Article 84), the development of Europol (TFEU, Article 88(2)) and Eurojust (TFEU, Article 85(2)), and police co-operation between national authorities (TFEU, Article 87(2)). The enhancement the role of the European Parliament in this scope may contribute to overcome problems concerning the lack democracy in decision

making process in the third pillar. Nonetheless, the performance of the European Parliament in deliberation of draft legislation in relation to 'communitarised' Title IV issues,[9] and the preference of EU criminal law instruments such as principle of mutual recognition and the preference of criminal law bodies reveals that the Treaty of Lisbon clauses by itself may not provide sufficient evidence to tackle the issues of transparency, democratic control and legitimacy of EU criminal law entirely.

A further important institutional alteration relates to the functions of the Court of Justice, and the 'communautarisation' *of judicial review.* The Court has at the present absolute power to ruling on infringement proceedings in criminal law (TFEU, Article 258-260) a progress that reinforces the Commission's position as 'watchdog of the Treaties' to supervise the accomplishment of EU criminal law by Member States. Additionally, the absolute competence of the Court in the preliminary rulings at this time be appropriate—with the restrictions presently applicable in the former third pillar (TEU, Article 267). The Court also takes for granted absolute competence to files for reparation for damages (TFEU, Article 268) and the examination of validity, with the extensive competence: to eliminate the 'individual concern' standing requirement for real or legal persons challenging regulatory acts not requiring implementing measures (TFEU Article 263(4)); review the conformity of legislative instruments with the principle of subsidiarity; and review the validity of acts of the European Council and bodies, offices or agencies of the Union anticipated to turn out legal impacts in relation to third parties (TFEU, Articles 263(1)) and 277)—revealing as a consequence the enhancing function that these institutions and bodies take part in the course of action and legislation in the EU criminal law. The entire amendments will add considerable progress in efficient judicial safeguard in the area of criminal law (TEU, Article 19(1)).[10] Broadened jurisdiction of the Court on preliminary rulings specifically will ensure

[9] For detailed information, see: House of Lords European Union Committee, The Treaty of Lisbon, HL Paper 62-1, para 4.130; The Memorandum to the Committee by Steve P., reproduced in House of Lords European Union Committee, The Treaty of Lisbon: An Impact Assessment, Volume II: Evidence, 10th Report, session 2007-08, HL Paper 62-11, at.S153 and oral evidence by Steve Peers and Tony Bunyan, same Report, QQ 82-87 (at. E15-E17).

[10] See for further information Lenaerts K., (2007), 'the Rule of Law and the Coherence of the Judicial System of the European Union', vol. 44 Common Market Law Review, at. 1629-1630.

opportunity allowing a channel of communication between domestic legal systems and the ECJ on subjects of constitutional implications (Mitsilegas, 2008; 41).

A further main shift towards 'communautarisation' has been the alteration in the legal instruments adopted for criminal law. The Treaty envisages the legal instruments of the criminal law as regulations, directives, decisions, recommendations and opinions (TFEU, Article 288(1)). This implies that according to Lisbon Treaty, laws within the scope of the 'area of freedom, security and justice', embracing criminal law, be required to adopt in the type of aforesaid instruments. The main alteration established is the likelihood for EU criminal law—which is most probable to adopt as the directives post-Lisbon—to encompass direct effect (which was explicitly debarred in the former third pillar). Generally, the elimination of the third pillar will connote that Community method be applicable to fields formerly under the third pillar. It should be also notable is that former third pillar instruments—comprising framework decisions, conventions and common positions— are not envisaged in the Lisbon Treaty. The Protocol on Transitional Provisions annexed to the Treaty, expresses that the legal impacts of these instruments will be maintained until repealed, annulled or amended in framework of the Treaties (TFEU, Article 9). The former third pillar institutional structure regarding the ECJ and Commission competence will continue concerning third pillar instruments (TFEU, Article 10(1)). The modification of an instrument will prompt the employment of the Lisbon institutional structure (TFEU, Article 10(2)). Whatever the case, the legal impacts of Union legislation enacted ahead of come into force of the Lisbon will come to an end five years subsequent to such entry into force (TFEU, Article 10(4)). It is anticipated that this clause will be a driving force for the putting forward several draft legislation in post-Lisbon era, changing former third pillar legislation with new instruments in the type of regulations, directives or decisions, ensuring therefore a new impetus to EU criminal law enactment (Mitsilegas, 2008; 41).

3.6. Opposition to communautarisation

The amendments suggested in the preparation for the Constitutional and the Lisbon Treaties regarding the third pillar have caused many sovereignty objections in several Member States. The harmonisation of these objections has been revealed in numerous occasions in the Lisbon Treaty. Analysis of its clauses -particularly Title V on the 'area of freedom, security and justice' -exposes that the 'communautarisation' of the third pillar is distant from perfect, with innumerable 'intergovernmental' constituents being

either maintained or recently established by the Treaty. This section intends to classify and analyses these intergovernmental constituents, which disclose more or less amount a distinct opposition to the 'communautarisation' of criminal law. This opposition is articulated by exclusions to the 'Community' methods on *decision-making*, *initiative* and *judicial control*; it is also indicated by insertion Member States at the heart of the enhancement and analysis of EU criminal law (Mitsilegas, 2008; 41).

3.6.1. Difference in Legal Systems of Member States

The initial constituent reflecting opposition to communautarisation—aligned with opposition to the entire sameness of EU criminal law—is the persistent stress of the Lisbon Treaty to tolerate the differences of states' legal systems. Tolerance for national differences by now takes up a essential position at the beginning Article of Title V TFEU, Article 67(1), which expresses that the Union will establish an area of freedom, security and justice as regards for fundamental rights *and the different legal systems and traditions of Member States'*. The requirement to regard the differentiations between national legal traditions and systems emerges in the stipulation setting up a legal foundation for the acceptance of definite minimum EU rules in criminal procedure, revealing once more the eagerness of Member States not to endow with the Union with an unlimited competence in the area (TFEU, Article 82(2)).

Two supplementary issues are notable to raise in this scope. The first one is that competence of the EU for harmonisation of criminal procedural laws is merely bestowed with to the extent that it is essential to facilitate mutual recognition in criminal matters. The Lisbon Treaty gives prominence to the principle of mutual recognition as a means of European criminal law cooperation, and in this occurrence harmonisation is subsidiary to mutual recognition in order to make it more efficient. This preference is important as mutual recognition does not entail technically the harmonised EU principles and in any case, on the face of it is supposed by governments, as not as much of menacing to national sovereignty because they would not have to alter their law. The second issue embraces the type of EU acts regarding harmonisation of substantive criminal law and criminal procedure. Equally in these circumstances, harmonisation will occur through Directives (TFEU, Article 82(2), 83(1) and (2)). This preference is important, as directive abandon Member States a substantial margin of discretion as regards how to adopt EU law into domestic law, subject to binding effect as to the impact to be accomplished however giving up to the national

authorities the option of form and manners (TFEU, Article 288(3)). This discretion abandoned to Member States may supply to consider the distinctiveness of their national criminal justice mechanisms while urged to realize EU legislations on subjects for example principles on the admissibility of evidence or the rights of the defendant in criminal proceedings (TFEU Article 82(2)(a) and (b)). It is evident that Member States preferred such discretion instead of entirely the same principles throughout the EU.

Criticisms concerning the tolerance of differences in domestic legal systems and the weakening of national sovereignty due to the move towards community methods in decision-making in EU criminal law have been expressed explicitly in the clauses creating a alleged 'emergency brake' in the enactment of directives in the areas of criminal procedure and substantive criminal law. Within scope of the 'emergency brake' procedure, at which a Member State deems that a draft legislation 'would affect fundamental aspects of its criminal justice system', it may demand that the draft law be sent to the European Council ensuring the suspension of the ordinary legislative procedure. Subsequent to deliberations in the European Council, if they reach compromise, in four months of this suspension the draft is returned to the Council of Ministers for the recommencement of deliberations. If there is no-compromise, in the same timeline, enhanced cooperation laid down in Articles 20(2) TEU and 329(1) TFEU with this draft for Member States which are willing to continue is deemed to be applicable.[234] By this way, unwilling Member States which may be in the minority may provide that they do not become involved in the legal instrument, whilst permitting those in supportive of the instrument to take course of action towards its enactment. As was seen in participation of the European Council in the enactment procedure, the emergency brake is a principally political means[11].

3.6.2. Security, Counter-Terrorism and Judicial Control

3.6.2.1. Internal and National Security

On numerous occurrences, the Lisbon Treaty includes clauses aspiring to maintain national sovereignty in the area of security. At the beginning stage of the TEU, in the provision subsequent the one on the principle of conferral, it is acknowledged that the Union will regard the necessary State powers of Member States, '*including ensuring the territorial integrity of the*

[11] See for detailed information House of Lords European Union Committee the Treaty of Lisbon, HL Paper 62-1, paras 6.44-6.66.

State, maintaining law and order and safeguarding national security' and that specifically, '*national security remains the sole responsibility of each Member State*' (TEU, Article 4(2)). Title V TFEU on the '*area of freedom, security and justice*' (AFSJ) encompasses a clause— evocative to the former Treaty provision—expressing that the Title will '*not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security*' (TFEU Article 72). Besides, the Treaty maintains to restrict the competence of the ECJ in enjoying its authority pertaining to criminal judicial co-operation and police co-operation within the scope of Title V. The ECJ will have no power to control the validity or proportionality of operations performed by the police or other law enforcement bodies of a Member State or the perform the obligation of Member States as regards the safeguarding of law and order and the protection of internal security (TFEU, Articles 276 and also 88(3)).

The extent to which these stipulations will restrict enactment instruments in EU criminal law and the ECJ's participation in the judicial control of operations with a domestic aspect on the one hand. On the other hand, subsequent responsibilities within the scope of the Union law are controversial and needs to be seen.[12] In analysis of the effect of these provisions, the terms used are, though, notable, there is no mentioning to the 'area of freedom, security and justice'—at the national aspect, this is reference to the 'internal security', or 'national security'. As of the concept of 'security' in the AFSJ, these notions are not described and their substance are ambiguous.[240] It is also ambiguous in terms of whether 'national security' corresponds to or partly covers with 'internal security', or whether 'internal security' ought to be considered as encompassing mainly police co-operation, as 'national security' supposed to be regarded as embracing military and/or intelligence acts. In case where this is correct, the impacts of containing referrals to 'national security' in the section on the 'area of freedom, security and justice' might require to be extra investigated (TFEU, Article73).

[12] See for detailed information House of Lords European Union Committee, The Treaty of Lisbon, HL Paper 62-1, paras 6.235-6.243; Ladenburger C., (2008), 'Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Model', European Constitutional Law Review, vol 4, at. 36.

3.6.2.2. Counter-terrorism

Restrictions to the ECJ's competence still maintain relating to EU limiting acts obliged on persons in the context of EU counter-terrorism measures. The Lisbon Treaty bestows with a legal ground for the legislating within the Title V (area of freedom, security and justice), of *'a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities'* (TFEU, Articles 75(1) and 75(2)). On the other hand, the Treaty further maintains an extra intergovernmental, Common Foreign and Security Policy (CFSP) constituent: in line with Article 215 TFEU, in case where a decision assumed under Title V TEU (on CFSP) bestows with for the interruption or lessening, partly or wholly, of economic and financial connections with one or more third states, the Council, legislating by a qualified majority on a co-suggestion from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission will enact the required instruments. If such decision is delivered, the Council can legislate limiting acts within the scope of mentioned proceedings against real or legal personality and grouping or non-governmental bodies. (TFEU, Article 215(2)).

This intergovernmental perspective is implicated in the appearance of a particular clause on the ECJ's competence: this is the case merely in the framework of case referred by real or legal persons in the concepts bestowed by Article 263(4) TFEU examination of the validity of restrictive acts enacted within the scope of Title V TEU (TFEU Article 275(2)). Whilst the explicit conceding of ability for real or legal personality in these rulings is considered positive in acknowledging the requirement and ensuring a obvious remedy for legal safeguard (TFEU, Article 75(3) and 215(3)), the authority of the ECJ in the framework of Article 275(2) TFEU is limited to the judicial control of the validity of '*decisions providing for restrictive measures against natural or legal persons*'. This appears to leave out the *implementing* measures enacted by the Council within the framework of Article 215(2) TFEU the Court's competence. But these instruments may have considerable impact on the status of persons.[13] Additionally, the

[13] See for detailed information Tridimas T., the Memorandum submitted by to the House of Lords Constitution Committee for their inquiry on the European Union (Amendment) Bill: see House of Lords Constitution Committee European Union (Amendment) Bill and the Lisbon Treaty: Implications for the UK Constitution, 6th Report, session 2007-08, HL Paper 84, at. 78.

phrasing of Article 275(2) TFEU appears to restrict the Court's power to the examination of legality, not including therefore other degrees of competence for instance preliminary ruling. It needs to be observed how this clause will appertain to the ECJ's growing attempts to expand the remedies of legal safeguard for real and legal personality in this scope (TFEU, Articles 75 and 215).

3.7. Initiative

A major institutional progress in the Lisbon Treaty is the explicit acceptance of the European Council as one of the EU institutions (TEU, Article 13(1). In accordance with the Treaty, the European Council provides the Union with the required driving force for its progress and identify the common political course of actions and main concerns thereof—however will not use lawmaking responsibilities (TEU, Article 15(1)). This is an instance classified as the 'high politics character of the European Council decisions (Dougan, 2008; 627; Yakut, 2010; 54-88). This function of the European Council is affirmed in the particular framework of EU Justice and Home Affairs, with Title V TFEU expressing that the European Council will describe '*the strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice*' (TFEU, Article 68). It is therefore Member States' head of states and governments who will continue to supply with the common principles for the improvement of EU Justice and Home Affairs law—with insignificant contribution from other EU bodies or NGOs. Right to initiative continues to stay at the hands of governments both at the phase of the commencing the procedure of policy and strategy and at the phase of the commencing legislative proceedings: Member States maintain to hold the discretion of initiative, distributed between Member States and the Commission. The draft proposals on police and criminal judicial co-operation can be put forwarded not only by the Commission but also by a quarter of the Member States (TFEU, Article 76).

In conjunction with its position as a course of action and policy *designer,* the European Council also takes for granted in Lisbon the function of a *negotiator* if Member States state have worries about the improvement of EU criminal law. As revealed above, the European Council occupies a central position in the 'emergency brake' process, by means of Member States concerned that draft legislation concerning the harmonisation of substantive or procedural law may have impact on essential aspects of their national criminal justice mechanism directing the proposal to the European Council. Deliberations of the European Council resolving the possible

dealing with the draft law may prompt enhanced co-operation in this area. A analogous course of action is foreseen, if there is no compromise on draft law creating a European Public Prosecutor, and law initiating operational co-operation among law enforcement bodies of Member States (in either circumstances, on the other hand, unanimous vote is theoretically obliged in the Council) (TFEU, Article 86(1) and 87(3)).

Furthermore, the European Council undertakes a key position in identifying the effects of non-involvement of the UK and Ireland in prospective Schengen-establishing provisions, which establish on the regulations to which these Member States have at the moment opted in. In case where the UK and Ireland come to conclusion not to take part in such cooperation, they must assume the monetary effects arising from the termination of their involvement (Protocol on the Schengen *acquis,* Declaration 47 on Article 5(3), (4) and (5)). These impacts will be identified by the Council, on the grounds of the principles of preserving 'the broadest probable measure of involvement of the Member State pertaining to devoid of gravely influencing the realistic operability of the different elements of the Schengen *acquis,* whilst regarding their consistency (Protocol No 19 on the Schengen *Acquis* integrated into the Framework of the European Union, Article 5(3)). In case where the Council does not succeed to agree on a decision on the base of these principles, a Member State may demand that the issue be submitted to the European Council, which ought to adopt a decision at its subsequent summit (Protocol No 19 on the Schengen *Acquis,* Article 5(4)).

3.8. Decision-making

Regardless of the common progress of the Lisbon Treaty as regards the "communitarisation" of decision-making in subjects previously enshrined under the third pillar, there continue numerous exemptions to the principle which is majority voting in the Council and co-decision with the European Parliament (Yakut, 2010; 54-88). The first kind of exemptions entails law which would broaden Union competency in criminal law. In these circumstances, despite the delicateness of the matters, the "Community method" diminishes regarding the Council, however is reinforced regarding the European Parliament. Therefore unanimous vote is necessitated in the Council (in company with to a large extent enhanced function for the European Parliament, which have to show its approval), for law determining fields of criminal procedure (as well as those in its entirety specified in the Treaty) at which the Union can determine minimum rules (TFEU Article 82(2)). The identical procedure is applicable for the approval of law

increasing the Union's competency in approximation of substantive criminal law for offenses except for those enlisted in the Treaty (TFEU, Article 83(1)); and for the enactment and improvement of laws setting up a European Public Prosecutor's Office (TFEU, Article 86(1) and (4)). The second kind of exemptions entail *operational co-operation,* at which the further conventional "intergovernmental" way of decision-making applicable: unanimous vote in the Council and the solely consulting with the European Parliament is needed for the enactment of law setting up provisions in relation to operational co-operation among Member States' authorised institutions especially law enforcement bodies (TFEU, Article 87(3)); laws establishing the stipulations under which police and judicial institutions may operate in the jurisdiction of other Member States (TFEU, Article 89) and provisions to guarantee administrative co-operation among the appropriate sections of Member States (TFEU, Article 74). The third type of exemptions entails stipulations *applicable restrictive counter-terrorism legislation* at which the European Parliament is in an entirely secondary position: the Treaty envisages that the Council can enact these kinds of implementation legislations (TFEU, Article 75(2) and 215(2)). The restricted function of the European Parliament in the two latter types of circumstances implicates effectively the political delicateness of the subjects for Member States (TFEU, Article 70).

3.9. Subsidiarity

A vital subject in the debates on the modification of the previous EU Treaties, bolstering equally the Constitutional and the Lisbon Treaty, has been the subject matter of "bringing Europe closer to its citizens" by means of principle of subsidiarity, accustomed to paramount distribution in the intensity of beloved achievement in Europe, in performing a fundamental element in this framework (Craig, 2006; 419-427; Tridimas, 2007a: ch 4). The move forward to a stronger emphasize on subsidiarity in the EU as a way of enhanced rationale for EU wide initiative and of linking citizens with the EU has been inseparably connected with urges to ensure *national* parliaments with a enhanced function in the improvement of EU acts.[14] The

[14] See for further details Verges B. A., Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments, Jean Monnet Working Paper 9/02, NYU School of Law, www.jeanmonnetprogram.org; Cooper I, (2006), 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU', Journal of Common Market Studies, vol 44, no 2, at. 281-304; House of Lords European Union

opinion that national parliaments can overcome the lack of democracy in the EU by ensuring a functional intermediary relationship amid the Union and citizens in the different Member States, and can grant further controls to put forwarded EU act especially by scrutinizing subsidiarity, reasoning and bolster the extension of the pertinent stipulations in the Lisbon Treaty.[15]

The Lisbon Treaty provides national parliaments significantly in the Union's legal composition. Article 12 of the TEU, Member States' parliaments involves dynamically to the sound operation of the Union in many processes, containing being reported by EU bodies on draft laws (TEU Article 12(a)) and realizing that the concept of subsidiarity is taken into consideration[16] by way of comprehensive stipulations on both functions incorporated in different Protocols annexed in the Treaty.[17] A particular stipulation on national parliaments and subsidiarity is also amalgamated in Title V TFEU, expressing that national parliaments guarantee that draft laws in the field of police criminal judicial co-operation in compliance with the principle of subsidiarity comply with the pertinent (TFEU, Protocol Article 69). The Protocol on subsidiarity sets up a alleged "early warning system" creating a "yellow card": any national parliament can refer to EU bodies, within eight weeks from the referral of proposals and their modified drafts, a rationale of views expressing why it deems that the proposal at issue does not adhere to the concept of subsidiarity (Protocol, Articles 4 and 6); if these reasoned views on drafts for EU criminal law represents in any case one forth of the votes envisaged for Member States' parliaments, the proposal be obliged to be examined (TEU, Article 7(2)). Additionally, the Protocol covers a, "orange card" system: within the framework of the ordinary legislative procedure, at which reasoned views represents in any case a plain majority of the votes envisaged for Member States' parliaments, the draft be obliged to be examined, and in case where the Commission prefers to maintain the draft, a particular procedure is commenced in the Council and the European Parliament considering

Committee (then Select Committee on the European Union), The Future of Europe: National Parliaments and Subsidiarity—the Proposed Protocols, 11th Report, session 2002-03, HL Paper 70.

[15] House of Commons European Scrutiny Committee, Democracy and Accountability in the EU and the Role of National Parliaments, 33rd Report, session 2001-02, HC 152.

[16] For the principle of subsidiarity see Articles 12(b) and 5(1) and (3) of the TEU.

[17] See for the principle of subsidiarity and proportionality Protocol No 1 on the Role of National Parliaments in the European Union and Protocol No 2 on the Application of the Principles of Subsidiarity and proportionality respectively.

whether deliberations be supposed to proceed (TEU, Article 7(3) of the). The Protocol further covers a stipulation on the previous scrutiny of subsidiarity, bestowing power to the Court of Justice in acts against enacted laws on the basis of violation of the principle of subsidiarity under Article 263 TFEU (TEU, Article 8).

There are several issues concerning the implementation of such clauses, especially regarding the process of the "yellow" and "orange" cards: would the reasoned views cover the equivalent substance/arguments on the violation of subsidiarity in order for them to attain the votes threshold necessitated by the Protocol, or are various subsidiarity challenges permitted in this framework? Will state parliaments in conjunction with the issues of applicable co-ordination they encounter center exclusively on subsidiarity, or will subsidiarity challenges be combined or mixed with challenges on proportionality and competence? Furthermore, there is a subject matter as regards the application of the Court's validity control: standing is established in this framework to Member States for their national parliament or a chamber thereof (TEU, Article 8 (1) and Article 8(2)). The wording of this clause implicates the complexities in including national parliaments in the EU lawmaking process, as the second one do not represent an EU bodies in the conditions of the Treaties. So as not to make unstable the domestic institutional equilibrium in the EU, standing is bestowed to Member States for their parliaments however, given the general formulation of Article 7, the issue of how binding a demand from a legislature to its Government to refer an act before the Court is still possible. It is presented that *Union* legislation poses on Member States' the responsibility to refer an act before the Court in case where the national parliament apply for such a demand; however it is domestic legislation which lay down the exact procedural in this scope in detail.[18] Despite such intricacies, the stipulations on subsidiarity characterize an obvious inclination towards delegating review of EU law *at the domestic legal order,* specifically by forcing EU bodies to rationalize in depth the reason *why* it is required and EU wide initiation each occasion draft law is being proposed (TEU, Article 5, Article 7(2) and Article 7(3)).

[18] For further details see Memoranda submitted by T Tridimas and J Usher to the House of Lords Constitution Committee for their inquiry on the European Union (Amendment) Bill: see House of Lords Constitution Committee, at. 76 and 81; House of Lords European Union Committee, Strengthening National Parliamentary Scrutiny, para. 228-240.

3.10. Evaluation

An additional aspect of the Lisbon Treaty representing the enhanced stress on the requirement to rationalize and verify the supposed "added value" of EU law, especially in the area of freedom, security and justice, is the legal underpinning founded in Title V TFEU allowing the initiate of systems for the "objective and impartial evaluation" of the realization of the Union policies mentioned in this Title by state institutions specifically with the aim of assist complete appliance of the principle of mutual recognition (TFEU, Article 70). Evaluation is therefore a past duty of inspection method, encompassing powerful intergovernmental aspects: it will be carried out by Member States (in cooperation with the Commission) with the European Parliament *and* national parliaments being "informed" of its substance and consequences (TFEU, Article 70). A multiparty interparliamentary participation (of the European Parliament and national parliaments) is further foreseen concerning the assessment of the actions of Eurojust (TFEU, Article 85(1) of the and TEU, 12(c), TFEU, Article 88(2) of the and TEU, 12(c)).

The Lisbon Treaty implicates mounting urges for the instituting of systems for the assessment of the realization of EU criminal law by Member States.[19] Specifically as regards the use of the principle of mutual recognition in criminal law areas, it has been suggested that assessment would boost the mutual confidence among criminal justice mechanism of Member States. Evaluation instruments in criminal law areas are not novel mechanism for Member States: the latter have been concerning in peer review methods in international medium (Levi and Gilmore , 2002; 341-368). Furthermore, many evaluation methods are used in the scope of the; presently they continue to exist in the appearance of peer reviews of Schengen attentiveness which have had a important function in enlargement and the assessment of relevance for full Schengen membership (Weyembergh and de Biolley, 2006; O de Schutter, 2008; 44-88)[20] and in the structure of evaluation methods of the realization of particular third pillar law on organised crime and terrorism (Nilsson, 2006; 115-124).[21]

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[19] See COM (2006) 332 final, 28 June 2006.

[20] See for further details EU JHA *acquis* (Joint Action 98/429/JHA, OJ L191, 7 July 1998, p.8). On the Schengen evaluations, see Genson R., and van de Rijt W., 'L'evaluation de Schengen dans le cadre de l'elargissement', in Weyembergh and de Biolley, at. 219-234.

[21] Joint Action 97/827/JHA, OJ L344, 15 December 1997, p 7; Decision 2002/996/JHA, OJ L349, 24 December 2002, at.1.

The objective and neutral assessment of the realization of freedom, security and justice law, particularly in the fields connected to the individuals' rights, is unquestionable theoretically. On the other hand, its precise factors are still quiet disputable, given the lawful and constitutional boundaries of the existing position of EU law.[22] It is not apparent *who will assess* within the Lisbon Treaty: Article 70 TFEU relates to assessment by Member States through the participation of the Commission. But the position of the second one and the affiliation among the Commission and Member States are not obvious. Furthermore, it is not apparent as regards the whether EU agencies for example the Fundamental Rights Agency (FRA) will be taken part in these assessment applications, and if not, what would the connection be amid "Article 70 evaluations and FRA evaluations. The *technique of evaluation* is also not apparent in company with the issue of who will evaluate issues of the principles of evaluation and the achievements of its consequences are pertinent in this circumstance for example, will the outcomes be revealed, and is the objective of "naming and shaming" application?[23] The similar issue can be raised on the subject of the effects *of the evaluation.* The type of sanctions concerned for nonconformity requires being additional discussion. Similarly, the connection among the Commission's authority to initiate violation procedures by way of the evaluation method recognized within the Lisbon is imprecise: the Treaty affirms that this method is 'without prejudice' to Articles 258-260 TFEU addressing the infringement proceedings: but, it is not obvious whether a affirmative assessment under Article 70 TFEU will in fact *exclude* infringement act by the Commission—in the second circumstance, the Commission's position as 'watchdog of the Treaties' will be diminish significantly, by means of Member States themselves undertaking the vital function in evaluating their personal conformity with EU criminal law. Conversely, the effect of a negative assessment requires also to be regarded: will this kind of negative assessment cause the proceedings of Article 7 TEU?[24] As a final point, the subject matter of *aim of the assessment mechanism* is not apparent. It may not be easy to differentiate connecting the assessment of the accomplishment of a particular EU criminal law provisions for example the draft law on defence

[22] For further details see Mitsilegas V., 'Trust-building Measures'; Mitsilegas, V., (2006), 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', Common Market Law Review, vol 43, pp 1277-1311.

[23] See for evaluation COM (2008) 38 final, Brussels, 4 February 2008, p 4.

[24] For details see Article 7 of the TEU Report on the Situation of Fundamental Rights in the EU in 2004, at. 31.

rights and the assessment of a Member State's human rights protection mechanism entirely. The being continuation of EU competency to trigger this kind of far-reaching assessment is doubtful. The Commission's latest Communications nevertheless appear to foresee an extensive assessment.[25]

3.11. Non-participation opt-outs

Besides the several occasions of opposition to comunautarisation referred before, issues as regards the implication of the "communitarisation" of criminal law in the Lisbon Treaty on Member State sovereignty have driven to the increase of measures thereby Member States were presented the eventual "opt-out": the opportunity not to take part in EU criminal acts enacted within the scope of the Treaty. Subsequently the model appearing in the Maastricht and Amsterdam Treaties, major Member State which has opt outs has been the United Kingdom: in fact, the intensifying the cooperation in criminal areas has been a alleged "red line" in the UK bargaining position on the Constitutional Treaty, however further than so in the Lisbon Treaty.[26]

The initial method which may give rise perhaps to opt outs is the *emergency brake* proceedings referred previously.[27] This course of action is available to each Member State in the area of approximation of substantive criminal and criminal procedural law issues give rise to the bringing the legislative proposal to the European Council and, in case of conflict, Member States aspiring to continue may progress within the scope of enhanced co-operation. Another method of non-participation, as regards the Amsterdam, contains the opt outs of the UK and Ireland in Schengen-building measures (Protocol No 19, Article 5). As referred above, the major alteration in this framework is that the Treaty now explicitly states that these member states may prefer opt out to instruments constructed on elements of Schengen where they already involve in this circumstance, these States may be urged to abide by the express economic results of this opt out (Schengen Protocol, Article 5(3) and Final Act of the Lisbon IGC, Declaration 47). The third method of opt out expands the UK and Ireland's right of opt out in

[25] See further details COM (2005) 195 final, pp 8, 9.

[26] See for more information on position of the UK The concession for the UK (and Poland) Protocol No 30 to the Treaty, attempting to limit the application of the Charter in the domestic legal orders of these Member States. See House of Lords European Union Committee, The Treaty of Lisbon, HL Paper 62-1, n 193 above, paras 5.84-5.111.

[27] UK Government's Explanatory Memorandum to the Lisbon Treaty submitted to the House of Lords Constitution Committee, at. 26, 27 para 28.

provisions laid down within the scope of Title IV TEC to contain opt outs in the entire Title of V TFEU in the "Area of Freedom, Security and Justice", covering therefore opt outs in EU criminal law provisions.[28] The right to opt out[305] also broadens to measures modifying present instruments which are binding for the UK and Ireland.[29] In these kind of circumstances, the timeline wherein the UK and Ireland be obliged to inform their involvement is expanded in case where the Council decides that their opt outs lead to the instruments inapplicable in another Member States.[30] In the same way as the Schengen Protocol, opt outs of these states in measures modifying a present instrument whereby they are obliged to be bound, can give rise to abiding by the express financial outcomes arising from these kind of opt outs (Article 4a (3)). The final method of opt outs are laid down in the Protocol on Transitional Provisions, which referred above postpones the appliance of the Community effect in its entirety to legislations enacted within the scope of third pillar for a timeline of up to five years following the came into force of the Lisbon Treaty (Protocol No 36, Article 10(3)). This Protocol bestows the UK the right not to recognize the "Community" competencies of the bodies in areas of the third pillar (Protocol No 36, Article 10(4) and Article 10(5)) in which such instruments will stop to be applicable to the UK. This and the comparable revision to the Schengen Protocol is an extraordinary progress, enabling a Member State to abdicate from legislations which are already officially obligatory for it (Dougan, 2008; 683).

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[28] Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice. Declaration 56 annexed to the Final Act of the Lisbon Treaty). The UK has declared its intention to participate in restrictive counter-terrorism measures under Art 75 TFEU (Declaration 65 annexed to the Final Act of the Lisbon Treaty).

[29] Protocol No 22 on the position of Denmark, stating that Denmark will not take part in the adoption of all Tide V measures (Article 1(1)) and mat no Tide V measure will be binding upon or applicable to it (Art 2). Denmark has also declared that it will not block measures which contain both provisions applicable to it and provisions not applicable to it (Declaration 48 annexed to the Final Art of the Lisbon Treaty).

[30] Article 4a(2). See also Declaration 26 annexed to the Final Act of the Lisbon Treaty stating that, where a Member State opts not to participate in a Title V measure the Council will hold a 'full discussion on the possible implications and effects of such non-participation. For a discussion on the threshold required for a measure to be deemed inoperable', see House of Lords European Union Committee *(Lisbon Treaty Report),* paras 6.262-6.269.

Such non-participation, especially the radical resolution to enable Member States to successfully abdicate from EU instrument which is already obligatory for them, have been considered crucial to guarantee the decent approval of the Lisbon Treaty specifically in Westminster. But, together with the broader subject matter of changeable geometry that they put forward, they may also have major political impacts relating to the initiation of EU instruments in criminal law areas. The employment of the emergency brake proceedings may give rise to acceleration of legislative process by enthusiastic Member States within the enhanced co-operation. Furthermore, the process in which the transitional arrangement Protocol is drafted may in fact increase performance of the EU lawmaking in criminal law areas post-Lisbon. The stress on the likelihood of altering current third pillar legislation (Protocol on transitional provisions, Declaration concerning Article 10 of the Protocol on transitional provisions) may generate a considerable impetus as regards the enactment of further EU criminal instruments, and activating a set of modifications to vital third pillar legislations, for example the European Arrest Warrant.[31] The Protocol affirms that the entirety of "Community" competencies of the EU bodies will be applicable to post-Lisbon instruments which alter present third pillar instruments (Protocol on transitional provisions, Article of the 10(2)). This may generate an encouragement for the Commission to propose a set of draft law modifying and adjusting third pillar regulation right after the came into force of the Lisbon Treaty, in this way, both the legal appearances of such measures will be updated such as Framework Decisions will be substituted by Directives and the entirety of "Community" method's impact will be applicable (Protocol on transitional provisions, Declaration No 50 concerning Article 10).

The 'pick-and-choose' approach of Member States, especially the UK, along with the competing stipulations identifying Union powers in criminal law areas, may also give rise to a large extent legal intricacy as regards the implementation of EU criminal measures to Member States with non-participation. This is especially the case within the scope of the subsidiary position of EU criminal procedure instruments within the rationale of principle of mutual recognition. Given the case of EU principles of defence rights, presently the UK Government is refused to accept the enactment of an officially binding third pillar instruments in this area, and has proposed

[31] Mitsilegas V., Memorandum submitted to the House of Lords European Union Committee for the inquiry on the Lisbon Treaty (House of Lords European Union Committee, HL Paper 62-11, Evidence to the Lisbon Treaty Report, E166-E169, para 11).

another option of a non- binding resolution.[32] All at once, the UK has been a willing proponent of the European Arrest Warrant, a major model of mutual recognition which the draft proposal on defence rights intends somewhat accompany with. As referred earlier, within the scope of the Lisbon, the United Kingdom has the choice of non-participation to the Title V instruments, together with instruments on criminal procedure. The situation is not apparent, but, in circumstances at which the UK has opted in or desires to become involved in prospect mutual recognition instruments, for example the European Arrest Warrant and its altering law post-Lisbon. But does not aspire to opt in criminal procedure measures, for example measure on defence rights which are considered essential to make possible this mutual recognition. Whilst the wording of the legislation specifies that the UK has the preference not to take part in, in case where the Government so desires, the political and rational impacts of this choice may be considerable. If the EU has enacted minimum principles on the defence rights and the UK has opted out this instrument, the feasibility of the function of the European Arrest Warrant in the UK may be critically raised as an issue (Mitsilegas; 63-64; paras 14-15). The degree of which the UK will desire to non-participation of vital initiatives in EU criminal law along with these intricacies needs to be to be observed. In the area of freedom, security and justice in which progressively more integration has been achieved, the approach of the UK which is "pick and choose" may confirm to a great extent difficult to maintain (Mitsilegas, 2008; 56).

4. EU's Criminal Competence within the Lisbon Treaty

As was the case in the Constitutional Treaty, according to the Lisbon Treaty, the EU will succeed the Community as a single legal personality and the pillars structure will be abolished (Mitsilegas, 2008; 166; Borgers and Kooijmans, 2008; 379-395; Yakut, 2010; 54-88). The Treaty of Lisbon was amended after the unsuccessful attempt to adopt the EU Constitution which clarified the requirements for comprehensive reform in the area of criminal law. The Lisbon Treaty reflected these requirements to a certain extent. It appears, however, that criminal law is considered still as a field that necessitates some safeguarded area for Member States (Yakut, 2008; 124-140; Fletcher, et al., 2008; 37).

[32] See for details House of Lords European Union Committee, Breaking the Deadlock What Future for EU procedural Rights? 2nd Report, session 2006-07, HL Paper 20.

Article 2 C (2) enumerates criminal law as shared competence between the EU and Member States on the one hand. On the other hand, Declaration 36 annexed to the Treaty substantiates that Member States, can reach agreements with third states or international organisations in the area of police and criminal judicial cooperation to the extent that these agreements adhere to Union law (Craig, 2006;145-147). There is no question from the factual standpoint. However, it can be argued that this provision bestows freedom, security and justice matter to a certain extent equal to Community competency method as was in such areas internal market, environment, and transportation. It appears that discussion on whether criminal law competence of the EU is supranational or intergovernmental will not continue much longer, except for the special position of the U.K. in terms of establishing an area of freedom, security, and justice (Fletcher, et al., 2008; 37). Additionally, Title V itself also includes issue of supporting action in criminal matters, crime prevention Article 84 of the TFEU. But, crime prevention is not enlisted in the fields of supporting action envisaged in Article 6 of the TFEU.

Mutual recognition and harmonization is based on more solid ground with the new Lisbon Treaty (Fichera, 2009; 76; Treaty amending the TEU and the TEC, [2007] OJ C 306/10). This could lead to the view that the current ambiguity over the EU's criminal competence will be clarified (Mitsilegas, 2008; 166; Borgers and Kooijmans, 2008; 379-395). The EU's competence in the area of crimes and sanctions was explicitly enshrined as two competing mechanism by the Lisbon Treaty: mutual recognition and harmonization. As was mentioned before, mutual recognition which is considered as the cornerstone of criminal judicial cooperation did not have a clear foundation in a treaty so far (Yakut, 2008; 124-140). Article 61 (3) of the Lisbon Treaty recognizes the legal position of mutual recognition in criminal cooperation by emphasizing that 'the Union shall endeavor to ensure a high level of security through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.' (Lisbon Treaty, Article 61 (3)). This approach in the provision buttressed mutual recognition as a cornerstone of criminal cooperation, and harmonization is considered as a facilitator of functioning of mutual recognition. (Fletcher, et al., 2008; 37).

Provisions of the Lisbon Treaty made a clear differentiation between substantive criminal competence and criminal procedural matters. Article 69 A of the Lisbon Treaty addresses the criminal competence of the EU, while Article 69 B deals with substantive criminal competences (Fletcher, et al., 2008; 37).

4.1. Competence in Substantive Criminal Law

EU's standards in criminal competence of substantive criminal law are not a priori associated to mutual recognition. The standards envisaged by the Lisbon Treaty are based on a separation of criminal law into 'core' or 'traditional criminal law' and 'regulatory criminal law' (Fletcher, et al., 2008; 39). Regarding the core or traditional criminal law, Article 69 B (1) of the Lisbon Treaty addresses the substantive criminal law of the EU. The European Parliament and the Council were given to competence to establish minimum rules concerning the definition of serious trans-border criminal offences and sanctions by the Lizbon Treaty (Article 69B, replacing TEU, Article 31). The seriousness of these offences which have justified the need to have closer cooperation among the member states depends on the nature and impact of the crimes and a special need to combat them on a common basis. These areas of crimes are as follows: terrorism, trafficking in human being and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime. Type of crimes can be broadened by the Council acting unanimously depending on acquiring the consent of the European Parliament on the basis of developments in offences (Article 69F (1) first indent).

Although the scope of competence relating to crimes and sanctions seems to be limited compared to the ECJ's interpretation in the two cases (Ship-Source Pollution Case and Environmental Crime Case), as was in the Constitutional Treaty, the Lisbon Treaty confers on the Union expanded clear criminal law competence empowering to establish minimum rules on sanctions without necessitating that member states adopt proportionate, effective and dissuasive penalties. Instead of empowering the Union with criminal competence to reach objectives and policies, the new Treaty delimits competence with exhaustive list of crimes on the grounds of seriousness, cross-border dimensions, impact or the requirement to combat on a trans-border basis. This categorical list of types of crimes can be broadened by unanimous decision by the Council (Article 69F (1) first indent; Mitsilegas, 2008; 167). These crimes are more numerous than the crimes enlisted within the existing TEU provisions and are subject to harmonization measures (Fichera, 2009; 76).

As regards the regulatory criminal law, Article 69 B (2) enshrines a self reliant legal basis for the harmonization of criminal law in regards to infringement of EU regulation in other policy areas (Fletcher, et al., 2008;

39). In the area of core criminal law, harmonization is intended by the provisions of Article 69 B (1) TFEU, as these crimes are especially serious and have a trans-border dimension. With respect to regulatory criminal law, whereas Article 69 B (2) bestows EU competence to harmonize the definition of crimes and sanctions, effective implementation of the Union policy can be ensured by this harmonization. This approach was developed upon controversies in relation to existing ambiguities on Community competencies in area of criminal law by judgments in two cases: *environmental crimes and ship-source pollutions* (Fletcher, et al., 2008; 183).

4.2. Competence in the Criminal Procedure

Article 69 A of the Lisbon Treaty laid down principles regarding competences of the EU in the area of criminal procedure. Article 69 A reflects a priority line between the principle of mutual recognition and harmonization by differentiating between the procedures envisaged for the cooperation of justice systems of Member States (Article 69 A (1)) and aspects of criminal procedure- so-called forensic criminal procedure- for special trials (Article 69 A (2); Fletcher, et al., 2008; 38). The Lisbon Treaty adopts significant amendments concerning the EU's competence over criminal procedure and clarifies existing vagueness over the existence and scope of such competence. As was discussed above, this ambiguity on criminal procedural competence appeared to have clear legal basis regarding the proposed Framework Decision on the Rights of the Defendant in criminal proceedings. Article 69E of the Lisbon Treaty explicitly empowers the Union to have competence to establish minimum rules regarding the admissibility of evidence between the member states, rights of individuals in criminal proceedings and rights of victims of offences and furthering admissibility of other new areas by a unanimous decision by the Council with the consent of European Parliament (Lisbon Treaty, Article 69E (2)). The EU's competency on criminal procedure extends only to areas that require facilitating mutual recognition of judgments and police and judicial cooperation in criminal matters. Instruments of criminal procedure and their effects on human right issues which may have tension between efficient operation of mutual recognition are foundation for judicial cooperation in criminal matters in the EU (Mitsilegas, 2008; 168).

Article 69 A (1) of the Lisbon Treaty envisages four fields of EU action in regard to judicial cooperation in criminal matters between the judicial systems of Member States: 'lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial

decisions'; 'preventing and conflicts of jurisdiction between the Member States'; 'support the training of the judiciary and judicial staff' and, to 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 areas enlisted by Article 69 A (2) of the Lisbon Treaty, EU action may require to harmonizing distinctive aspects of forensic criminal procedure to facilitate the functioning of mutual recognition in criminal matters. The following interventions are envisaged: 'mutual admissibility of evidence between Member States'; 'the rights of individuals in criminal procedure'; 'the rights of victims of crime'; and 'any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.'

A systematic approach reflected by the provisions of the Lisbon Treaty concerning EU's criminal competence enshrined explicitly the legal basis of mutual recognition, on the one hand. On the other hand, a dividing line established by these provisions- between the procedure to arrange coordination between the judicial system of Member States and the forensic penal proceedings- ensured a clarification in existing ambiguity of EU competency (Yakut, 2008; 124-140). The legal basis of the EU's criminal competence was curved with the aim of broader employment of the principle of mutual recognition. Therefore harmonization of criminal procedure is acceptable where mere mutual recognition of disparities among laws and procedures are not capable of satisfying the requirements of closer cooperation. This objective needs to be in line with ensuring satisfactory coordination on the one hand. On the other national characters of judicial systems of individual Member States ought to be respected by these efforts. However, it should be emphasized that in terms of ambiguity in tension between harmonization and mutual recognition, these provisions maintained this vagueness between these two criminal law mechanisms (Fletcher, et al., 2008; 38). Furthermore, Article 69 A (1) (b) furthered the EU's existing competence on preventing conflicts of jurisdiction to the points where EU has power to settle these conflicts (Fletcher, et al., 2008; 39).

5. Conclusion

The progress of the institutional structure on the third pillar reveals the tension among the initiation of EU instruments and the continuation of State

sovereignty in the criminal law area. In this scope, the initiation of the third pillar measure had been a slow and inefficient process, and the result of a set of difficult consensus accomplished in the Maastricht and Amsterdam Treaties. These consensus are transposed into a very intricate lawful context, bestowing Union powers in criminal law areas however consisting of several very important intergovernmental constituents: together with the maintenance of a divided pillar for EU measures in criminal law, these constituents are especially the efficient upholding of the unanimity in the Council which means that Member States have right to veto; the significant restrictions to the authority of the Court of Justice; the inefficient, though enhanced in Amsterdam third pillar measures; and the serious lack of democracy in the third pillar, underlined above all by the inadequate consultation function for the European Parliament.

Such deficiencies are not the mere restrictions on democratic and judicial control and responsibility in the third pillar. An overview of the appearance of EU acts in third pillar areas demonstrates a shift from harmonisation, and the compromise of EU laws and regulations, in course of actions of European integration in these areas progressively more by principle of mutual recognition, the instituting of EU organs for example Europol and Eurojust and the stress on operational co-operation and EU databases. These varieties of EU acts hold numerous tough intergovernmental aspects and raise several subject matters concerning democratic control, legitimacy and accountability, since these are mainly yielded from the inspection regulations that go together with the enactment of the principles of harmonisation instruments (Mitsilegas, in Martin; 34-43).

After came into force of the Lisbon Treaty, the institutional structure of the EU transformed radically. The third pillar abolished and EU instruments in criminal law principally "communitarised". This shift has the possibility to increase significantly the review of EU criminal legislation either by the European Parliament or the Court of Justice. Nevertheless, overview of the Lisbon constitutional provisions implicates that several intergovernmental features still continue in the area of EU criminal law. Specific consequence in this circumstance that Member States is established at the heart of legislation of the EU criminal law: the differences of criminal justice systems of Member States be obliged to be esteemed; Member States' governments maintain for the most part of the right to initiate the EU criminal legislation in the European Council and the Council of Ministers. The essential alterations to EU powers in criminal law areas necessitate unanimity in the Council; operational action is envisaged to continue mostly out of bounds for the European Parliament and the Court; and EU acts in

criminal law areas are strongly reviewed at the Member States rank either ex ante (especially by means of the subsidiarity controls by national parliaments) or ex post (via the assessment of the application of EU criminal legislation by Member States). It needs to be observed how this prominence on the Member States will have an implication on the enactment of EU criminal legislation post-Lisbon, in addition to legitimacy, transparency and accountability. In this scope, it is also notable that the EU judicial cooperation in criminal matters supposed to take the appearance of mutual recognition and EU criminal law bodies instead of harmonization in the Lisbon Treaty. The ECJ jurisprudence established on the first pillar, in accordance with which the selection of legal foundation for a instrument may not rely merely on an institute's discretion in respect of the purpose chased, however ought to be depend on objective dynamics which are subject to legality check.[33] It may possibly further conflict with the ECJ's claim in the ne bis in idem circumstances that mutual confidence in Member States' criminal justice mechanisms already exists (Mitsilegas, 2008; 56).

As concerns the progressive evolution of judicial cooperation in criminal matters, it appears that a sui generis supranational criminal justice system has been emerging gradually within the EU law, with the entering into force of the Lisbon Treaty.

As to the former EU competency in the area of criminal justice, the EU had competence over both cooperation and minimum levels of harmonisation in substantive criminal measures. In terms of procedural issues, it had *implicit competences* only where it was firmly essential for the operation of the principle of mutual recognition. This does not mean that former provisions explicitly allowed regulating procedural defence rights.

As regards the perspective of criminal policy via the CT, firstly, the CT would remove the ambiguity around EU competence in the field of criminal justice; in particular it would introduce minimum principles on defence rights. Secondly, it would officially establish mutual recognition at the heart of criminal justice cooperation, which was not spelled out in the TEU. This would be accompanied by EU competency in harmonisation of substantial criminal and procedural provisions concerning certain mutual recognition standards in core areas. However, both the Hague Programme and the

[33] See for more information Case C-300/89, Commission v Council [1991], ECR1-2867.

Action Plan in terms of harmonisation and mutual recognition mostly influenced by the sprit of the CT.

However, the Lisbon Treaty maintains the idea that the border between the Member States is the boundaries of jurisdiction and court decisions being designed to have legal consequences within the jurisdiction of different Member States (notwithstanding the basic human rights concern). The free movement of criminal judgments is allowed without free movements of safeguards for human rights across the Union. This means that there is no supranational protection of procedural rights of defence in the context of the mutual recognition principle within the Lisbon Treaty, though there will be significant improvement in case where EU will be party to the European Convention on Human Rights. However, the Lisbon Treaty provisions regarding criminal judicial cooperation were reshaped in light of the Constitutional Treaty in order to empower a clear EU criminal competence to ensure measures for procedural rights of the defence.

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