TREATY OF LISBON AND THE CRIMINAL LAW

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Abstract*: With the entrance into force of the Treaty of Lisbon, at 1st December 2009, the criminal law has passed from the exclusively national sphere of the Member States under the patronage of the European Union. According to the Treaty, the European Parliament and the Council now have the possibility to establish minimum norms regarding the definition of offences and sanctions in criminal areas which are extremely serious and affect a number of Member States. The areas in which the EU can establish specific norms are limited, but nevertheless, the Treaty grants the Council the possibility to adopt a decision in unanimity, after the approval of the European Parliament, in the meaning of extending the application of such regulations. This article aims to analyze this new situation and to identify some of the legal consequences in the area of criminal law of this regulation.*

Key words: *Treaty of Lisbon, European criminal law, directive, regulation, national law.*

I. Introduction. First international step on the cooperation in criminal and police matters was made in 1923 by the foundation of the International Criminal Police Organization, also known as INTERPOL. Today, the organization gathers 188 Member States, among them Romania, being the largest organization in the world. The model has evolved and, apparently, convinced all. Over almost 80 years, the European Union feels the need of some criminal and police structures. The economic community desired in the aftermath of the Second World War is not enough. Growing cross-border criminality, even within the borders of the EU, has lead to a new vision on its attraction in the area of competence and elements of criminal law.

II. The route of criminal law and police cooperation from Maastricht to Lisbon

1992 is the year of an important turning in the legal life of the European Communities. With this opportunity, the Communities became the European Union, the competencies of the EU regarding its Member States being divided into three, the three areas being named *pillars*. The three pillars were designed by the Treaty of Maastricht comprising: *first pillar* – European Communities (ECSC – European Coal and Steel Community), EAEC – (European Atomic Energy Community or Euratom) and EEC (Economic European Community); second pillar – common foreign and security policy, while the third pillar, also called JHA – Justice and Home Affairs (renamed in 2003 Police and Judicial Co-operation in Criminal Matters – PJC), was created in order to facilitate and secure the free movement of persons within the EU. Decisions were made unanimously and referred to the next areas: asylum policy, Communities' external borders crossing rules and strengthening control, immigration, combating drug trafficking, combating

international fraud, judicial cooperation in civil, criminal, customs and police matters. Based on this new organization structure, Member States could adopt three types of acts: common positions, common actions and conventions. Using this last possibility and considering the new segmentation of competences on these three pillars, starting from the third pillar, it is founded the first of the police cooperation organisms: EUROPOL. With its headquarters in Hague, Holland, its first acts aimed the combat of drug trafficking, initially designed as the Europol Drug Unit (EDU), and started its activity on 3rd January 1994, because the establishment Convention was ratified by all 15 EU Member States, since then, was on 1 October 1998 when it entered into force. Following this relatively late date of legal foundation, Europol's activity practically started on 1st July 1999[1]. The ratification of the Convention in 1998 coincide with a large opening of the Member States towards a closer cooperation in police and criminal law areas, as far as since March 1996 begun the discussions for the modification of the EU's constitutive Treaty. Discussions ended with the signing in Amsterdam on 2nd October 1997 of a high-level political agreement, known as the Treaty of Amsterdam, which entered into force a year and a half later, namely on 1st May 1999. The Treaty of Amsterdam designed the so-called Space of freedom, security and justice, which initially assumed the opening of the internal borders for all EU citizens, external EU border security, achievement of a common policy on the control and right to enter the EU space for different persons, especially regarding asylum and immigration. According to the new Treaty, certain areas which were part, according to the Treaty of Maastricht, of the third pillar were transferred to the first one. This has determined that based on these principles start the construction of a European criminal law, which belonged commonly, until recently[2], to the first and third pillar[3].

Title VI of the new Treaty, regarding judicial and police cooperation in criminal matters, preserves the prevention and combating activities of racism and xenophobia (especially emphasizing the issue of discrimination), terrorism, trafficking in human beings and offences against children, drug and weapons trafficking, corruption and economic fraud.

Though essentially modified, the entrance into force on May 1999 of the new Treaty of Amsterdam raised new issues as an effect of cooperation until then. This fact determined that at the meeting in Tampere, Finland, on 15-16 October 1999, the European Council adopt decisions with important consequences in the area of criminal law, at least similar, if not even superior, to those in the constitutive Treaties. This was the occasion for the European Council to present true nuclear principles, classifiable into 2 large areas of interest:

- Principles coordinating the relation between the internal legal order of Member States and European legal order; national-supranational relationship, *and*
- Basic principles for the cooperation between different national authorities (judges, prosecutors, police) of Member States, between them and European criminal institutions, and between the latter ones[4].

These fundamental principles are: the principle of mutual recognition of the judicial decisions, placing in common or the availability of information, direct

[1] www.europol.europa.eu/index

[2] Namely, until the entrance into force of the Treaty of Lisbon on 1st December 2009, when the system of the three pillars was abandoned, creating a single legal and communitarian space.

[3] Adan Nieto Martin, *Fundamentos constitucionales del sistema europeo de derecho penal*, Criminal Law Review, No 1/2008, p.36

[4] Ibidem, pp. 36-38

communication between judicial and police authorities, the principle of coordinating police and judicial investigations, the principle of indirect execution and the principle of sui-generis horizontal cooperation.

Of them all, the highest interest which generated many debates, commentaries and critics was the *principle of the mutual recognition of judicial decisions*. Considered to be a transversal or structural principle of the entire communitarian law or the cornerstone of the judicial cooperation[5], operational until December 2009, both in the first and the third pillar, the principle has found its base in the jurisprudence of the Court of Justice of the European Communities since the 1970s, especially in the area of free movement of commodities, it extended over time in other areas, and recently in criminal law[6]. An immediate result of this principle is the *direct effect of the judicial decisions*. Without being the first attempt to streamline some judicial decisions beyond the national space of a state, as shown also by the European Council's Convention in 1970 on international validity of criminal decisions, the new principle presented an aspect that has drawn more attention on it: overcoming the double incrimination principle, which for some represented a true guarantee of the principle of legality of criminal law. More than that, on the one hand, was ascertained that the degree of the effect of these decisions depended, and still does, on a not negligible variable: mutual trust between Member States, and on the other hand, the direct effect over all judicial decisions, not just over some of them. The conclusion determines us to reflect further in the casuistic chain. Though the recognition of a foreign decision is a special procedure part of the criminal procedural law[7], the main effect of this framework is represented by the application of the authority of *res judicata*[8], newly expressed in Latin as *non (ne) bis in idem*, having important reflections also in the criminal material law, for instance, in the areas of recurrence and sanctions. With this latter idea, we make room for critics brought to mutual recognition. The first one aims the increment of sanctions. If, for instance, for X was suspended the right to vote in Romania, as an effect of the principle of mutual recognition, this right shall be suspended to him also in all the other Member States. A second critic regards the small amount of guarantees offered to the convicted person. The elimination of the double incrimination, affecting the principle of legality, made this principle a maximum hardness and minimum guarantees. But the stated critics, regarding the principle of equity did not remain without the expected echo. By assimilating them, the EU bodies determined the European Council to adopt a new Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of a new criminal proceeding. According to this new legislation, it is shown that it does not follows the creation of a less favorable situation for the already convicted person in a Member State, unless the decision was handed down in the state whose citizen that person is, as there is intended neither that a conviction handed down in a Member State to automatically, *de plano*, produce its effects in another national legal order, especially in the situations where the *information is available on a previous conviction in another Member State, it should as far as possible be avoided that*

[5] According to Para 6 of the Preamble to the Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.
[6] Ibidem, pp. 47-49
[7] Now stated by Law 302/2004.
[8] According to Art 10 Para 1 Point j) of the actual Criminal Procedural Code, the criminal action cannot be initiated, but when it was initiated it can no longer be exerted if…there is the *authority of res judicata*. Obstruction has effects even if the definitive judged offence was given a different legal classification.

the person concerned is treated less favorably than if the previous conviction had been a national conviction[9]. Consequently, the few years invested in analysis and critics brought to the effects and applications of the principle of mutual recognition led to the restoration of a balance between sanction and procedural guarantees offered for the convicted person.

Another notable result of the principle of mutual recognition is the *European arrest warrant*. Starting from the European Council Tampere Conclusions, from the fact that the majority of Member States had signed bilateral conventions on extradition and considering the fact that, also the majority of Member States have ratified the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union and the Convention of 27 September 1996 relating to extradition between Member States of the European Union, part of the Communitarian Acquis, the European Council adopted the Framework Decision of 13 June 2002/584/JHA[10]. This decision eliminated the procedure of extradition between Member States and established a complementary procedure, more effective and simplified, called *surrender*. Preparing its adhesion to the EU, especially by the creation of a judicial space common with the Union, Romania has abolished in 2004 the former law on extradition[11] and adopted a new unitary one, which broaches both the *extradition procedure* for the cases in which it is requested by other non-Member States of the EU, as well as the *surrender procedure*, applicable between Romania and the EU's Member States. This new regulation is the Law No 302/2004[12], modified and amended by Law No 224/2006, which transposes by its Title III[13] the provisions of the Framework Decision 2002/584/JHA on the European arrest warrant.

Getting back to the Framework Decision, assuring us that it respects the fundamental rights and principles established by Art 6 of the Treaty on the European Union and the Charter of Fundamental Rights of the European Union, the European extradition warrant is defined as *a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order*[14]. The Preamble of the communitarian regulation points the fact that deciding the surrender of the wanted person is made by a judicial authority, as is mentioned in the definition of the European arrest warrant, with the minimal contribution of the central authorities of the executing state[15], which only grants a practical and administrative support. One of the guarantees and motives of refusal of extradition according to the majority of conventions is also found in the situation of the European arrest warrant, referring to the fact that no person can be surrendered by a state where is a serious risk of being sentenced to death penalty, torture or other penalties or treatments which are inhuman or degrading. The warning is mostly formal, although, whereas among

[9] According to Para 6 and 8 of the Preamble of the mentioned Framework Decision

[10] Framework Decision 2002/584/JHA published in the Official Journal of the European Union L 190, 18.07.2002, pp.1-20

[11] Law No 296/2001 on the extradition, published in the Official Gazette No 326/18.06.2001

[12] Law No 302/2004 on international judicial cooperation in criminal matters, published in the Official Gazette No 594/1.07.2004

[13] Close to copy

[14] According to Art 1 Para 1 of the Framework Decision 2002/584/JHA

[15] If in the situation of an extradition are used terms such as *requesting state* and *requested state*, for the procedure of surrender the *requesting state* becomes *issuing state* of the arrest warrant, while the *requested state* becomes *executing state* of the arrest warrant.

the Member States no longer exists one who does not offer this type of human guarantees. Regarding the object of the European arrest warrant, the Framework Decision states that it can be issued for two types of offences:

- The first refers to those which are punished in the issuing state by a penalty or safety measure whose maximum is at least one year[16], or if it is about a conviction, this must sentenced by a penalty or a deprivation of liberty for at least 4 months. In this case, the text of the Framework Decision mentions nothing about the classification of the offence by its special object, identifying them only by the duration of the applicable sanction or by the fact that are already imposed by the court.
- The second type of offences are those for which in the issuing state the sanction is a penalty or a deprivation of liberty whose maximum is at least 3 years. In this case, the Framework Decision states that shall no longer be a check of the double incrimination, counts 32 offences, among the serious ones affecting the security and common liberty EU space. Of them we mention terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in narcotic drugs and psychotropic substances, corruption, fraud, murder, grievous bodily injury, rape etc. Although the enumeration is exhaustive, the Council, with the unanimous approval and after the consultation of the Parliament, enlarges the areas of offences for which the surrender is made based on the European arrest warrant[17].

In addition to a fluidization between Member States of police cooperation, Framework Decision 2002/584/JHA offer a series of procedural and criminal-material guarantees. Thus, the executing state[18] shall refuse the execution of the European arrest warrant if that offence was amnestied, was invoked the authority of *res judicata*, with the condition that that person have already executed the penalty or continues to execute, and, finally, the last possibility if the person cannot be criminally charged due to his age[19]. The executing state shall refuse the surrender of the requested person[20] when the act on which the arrest warrant is based does not constitute an offence under the law of the executing Member State, where the person who is the subject of the European arrest warrant is being prosecuted in the executing Member State for the same act as that on which the European arrest warrant is based, if the executing judicial authority is informed that the requested person has been finally judged by a third State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing country or if the European arrest warrant has been issued for the purposes of execution of a custodial sentence or detention order, where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to execute the sentence or detention order in accordance with its domestic law or where the European arrest warrant relates to offences which are regarded by the law of the executing Member State as having been committed in whole or in part in the territory of the executing Member State or in a place

[16] We are talking about the special maximum of the imprisonment or of a deprivation of liberty safety measure.

[17] According to Art 2 Para 3 of the Framework Decision 2002/584/JHA

[18] We are in the presence of some mandatory refuse clauses. They are stated by Art 3 of the Framework Decision 2002/584/JHA

[19] Following the fact that between EU Member States are differences on the age for criminal liability there is the possibility of such situations.

[20] We are in the presence of some facultative refuse clauses. They are stated by Art 4 of the Framework Decision 2002/584/JHA

treated as such and the executing Member State does not allow prosecution for the same offences when committed outside its territory.

Though the issuing Member State and the executing Member State were above-mentioned, the decision of issuing and surrender a person based on a European arrest warrant is taken by a certain authority of the EU Member State, which must mandatory be a judicial one. The Framework Decision refers to this authority by naming it *issuing judicial authority*, when it decides to issue a European arrest warrant, which shall be applied in another Member State and *executing judicial authority* when it decides to surrender or not the person envisaged by the European arrest warrant[21]. According to Law No 302/2004, Art 78, in Romania all courts are issuing authorities according to the Criminal Procedure Code[22], while the executing authorities were named to be the Courts of Appeal. It creates a similitude between the active or passive decision of extradition and the decision of surrender based on a European arrest warrant, as far as according to Art 44 Para 1 of Law No 302/2004 all Courts of Appeal are competent to decide the extradition of a person.

By ending here the brief presentation of the principles of mutual recognition of judicial decisions, we must add only the fact that it should lead to a higher efficiency in combating transnational offences, without forgetting the core principles of criminal law, among which is very valued the principle of legality, as well as the fundamental human rights, as are stated in all European conventions.

Because we previously approached the issue of the European arrest warrant we must also add the fact the Framework Decision has been possible, after the previous creation of a new European body, namely EUROJUST[23]. Even if this new created body is not yet empowered to issue European arrest warrants, it has a series of competencies related to what we previously called *fluidization of judicial and police cooperation*. Created as the EU prosecution authority, its material competencies are related to those of EUROPOL, the two bodies collaborating in the anti-crime fight[24]. Also, EUROJUS promotes the collaboration between competent authorities of different Member States, in order ease the judicial cooperation between Member States and, especially, has competences in the antiterrorism fight. Based on these competencies EUROJUST can request to the national competent authorities of Member States to initiate a prosecution, to form a joint investigation team, to take special measure investigations of all kind. In this regard, according to the new modifications of its statute, entered into force on January 2009, its national members are obliged to unfold their activities at the EUROJUST headquarters and not in the origin state, the core of their work being in the EUROJUST frame. Due to its investigation and examination role, even if its members are appointed among judges, prosecutors or policemen with competences similar to magistrates, our country being not the case, EUROJUST is compelled to protect personal data, its database comprising only suspected or already sanctioned for an offence persons, victims and witnesses. Data which can be processed are personal and related to offences. Data are preserved for as long as are necessary to EUROJUST[25]. In its activity, the EUROJUST received the possibility to cooperate with other EU bodies, such as the European Judicial

[21] According to Art 6 of the Framework Decision 2002/584/JHA

[22] See Art 27-28 of the actual Criminal Procedure Code

[23] EUROJUST was created by the Council Framework Decision 2002/187/JHA of 28 February 2002

[24] According to Art 4 Point a) of the Framework Decision 2002/187/JHA modified by Decision 2009/426/JHA of 16.12.2008

[25] According to Art 14-15 of the Framework Decision 2002/187/JHA

Network, EUROPOL – already mentioned, European Anti-Fraud Office, FRONTEX. According to its Framework Decision, EUROJUST has the competence to act in all criminal areas and for all offences in or for which EUROPOL has the competence to act. Regarding Romania's cooperation with this body, we must notice the fact that our country signed on 2 December 2005 in Brussels an agreement granting support to all activities of EUROJUST.

III. The Treaty of Lisbon and modifications of the judicial cooperation in criminal matters

The last of the fundamental treaties modified the European judicial order; the Treaty of Lisbon entered in the attention of governors of the Member States with the rejection by the French and the Dutch of was desired to be the European Constitution. Being at the middle between which should be the European Constitution and to remain quartered in the old structures and treaties, this new Treaty signed in the capital of Portugal, brings significant changes in the area of the space of liberty, security and justice, removing some barriers which at that moment its edification being impeded[26].

The provisions in the space of liberty, security and justice were grouped in Title V, Art 67-89, inserted in the Treaty on the European Union, comprising 5 chapters: 1. Common provisions; 2.Provisions on borders control, asylum and immigration rights; 3. Judicial cooperation in civil matters; 4. Judicial cooperation in criminal matters; 5. Police cooperation.

It results from this new structure that the Treaty *abandoned the pillars of the Union, the Council passing from the unanimity vote to the vote of the qualified majority for almost all matters part of the space of liberty, security and justice*, while jurisdictionally the former Court of Justice of the European Communities became the European Court of Justice, with attributions of jurisdictional control for the entire communitarian law system. Also, the Charter of Fundamental Rights received judicial force, thus strengthening the space of liberty and procedural and material guarantees offered by the Union[27].

As a consequence of abandoning the pillar structure of the Union, what was once called the space of liberty, security and justice, being mostly part of the third pillar, and, to a certain extent of the first one, entered into the global sphere of the communitarian law, namely in the area of the Court of Justice. This means that we can already discuss about a *European criminal law* overcoming its national limits. If, not long ago, the competences of the Union were limited to the areas of commodities and persons circulation, as well as in other areas part of the private law, this new modifying treaty comes deeply in the area of public law. We were discussing about a communitarian administrative law, a European fiscal law, and now about a European criminal law, and if the Constitution would have entered into force, we could have had a European constitutional law, covering almost all branches of public law, also mentioning the fact that they are the most important ones.

Lecturing the Treaty offers a few reflection issues regarding the means of integration of the criminal law into the communitarian space. We could start from the provisions of Art 3 Para 2 of the Treaty on the European Union, showing that *the Union shall ensure for its citizens a space of liberty, security and justice, guaranteeing free movement of persons, connected with adequate measures for borders control, asylum right, immigration, as well as for the prevention of crimes and combating this*

[26] Constanta Mătusescu, *Avansurile Tratatului de la Lisabona în materia spaţiului de libertate, securitate şi justiţie*
[27] Ibidem

phenomenon. The common provisions refer not only to a space of *unaltered happiness*, but to a space where crime may emerge at any moment, against which measures for prevention must be taken early. The Union's attributions are conferred to it only by the treaties, establishing the fact that despite its intention to prevent crime and create bodies to fight against it, preserving national security, territorial integrity and public order in Member States is their exclusive attribution and responsibility[28].

Regarding the means of combating crime, the Treaty on the European Union dedicates an entire chapter to base, what we have earlier called, a European criminal law. Firstly, the principle of mutual recognition of judicial decisions becomes fundamental being for the first time stated in the text of the Treaty on the EU[29]. There were previous different critics to the Treaty of Lisbon, according to which the decision of the European Council in Tampere on the creation of this vital principle for the European judicial space, which was a fundamental provision, without being stated in any treaty of the European Union.

Also, the Treaty offers for the Parliament and the Council the possibility to issue directives and to take appropriate measures according to their ordinary procedure, to establish minimum norms in order to:

- lay down rules and procedures to attenuate legislative differences in criminal matters between Member States
- prevent and settle conflicts of jurisdiction between Member States
- support the training of judiciary and judicial staff
- facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions

As a practical fact, Parliament's and Council's directives may refer to the mutual admissibility of evidences, the rights of individuals in criminal procedure and the rights of victims of crime. In this ordinary procedure of settling the differences in criminal matters, it is possible that a Member State found that the decision draft of the Council has violated its fundamental principles of its judicial system. In this case, that Member State shall announce the Council, situation in which the ordinary legislative procedure is suspended. Issues are debated. After 4 month the suspension stops. If the differences are not solved within this 4 month, if there are at least 9 Member States which agree the draft, shall inform the Parliament, the Council and the Commission, considering that by this procedure is approved a consolidated form of cooperation.

One of the most important aspects of the Treaty of Lisbon is stated by Art 83 referring to the possibility given to the Parliament and Council to issue directives establishing minimum norms on the definition of offences and sanctions in very serious transnational crime areas (resulting from its nature or impact of these offences or from the need for security).

The new Treaty offers for the Parliament and the Council the possibility to establish measures to promote and support the action of Member States in the field of crime prevention[30], acting in accordance with the ordinary legislative procedure. In this regard, EUROJUST has a statute settled by the Treaty, its mission being that to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States.

[28] According to Art 4 Para 2-5 of the Treaty on the European Union
[29] According to Art 82 of the Treaty on the European Union
[30] According to Art 84 of the Treaty on the EU

In this context, EUROJUST, settled by the Treaty, is conferred with an enlarged mission to support and consolidate cooperation and coordination between national prosecution and investigation authorities regarding different criminal offences affecting two or more Member States. By ordinary legislative procedure, the Parliament and Council can decide that EUROJUST can initiate or propose the initiation of criminal investigations or prosecutions[31]. Institutionally, the new Treaty creates a new body, namely the European Public Prosecutor's Office from EUROJUST, body with the attributions to investigate offences against Union's financial interests[32]. The competences of this Office are similar to those of a national Prosecutor's Office: investigates, prosecutes and brings to judgment, in liaison with EUROPOL the perpetrators of and accomplices in offences in its area of competence.

According to Art 86 Para 4 of the Treaty, the European Council may adopt a decision in order to extend the powers of the European Public Prosecutor's Office to include the investigation of other serious crimes.

[31] According to Art 85 of the Treaty on the EU
[32] According to Art 86 of the Treaty on the EU