THE AREA OF FREEDOM, SECURITY AND JUSTICE AFTER THE LISBON TREATY

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Abstract:

The third pillar of the EU introduced by the Maastricht Treaty, Justice and home affairs, have rapidly developed as a core priority in the European integration process. The article will examine the area particularly in terms of changes brought by the Lisbon Treaty. After explaining the scope of the area of freedom, security and justice, the article examines general provisions of the Lisbon Treaty. The article argues the area with respect to the trends of supranationalism and intergovernmentalism, jurisdiction of the Court of Justice, the new power structure and its external dimension.

Keywords: *Lisbon Treaty, Area of Freedom, Security and Justice, Supranationalism, Intergovernmentalism*

Özet:

Maastricht Anlaşmasıyla AB'nin üçüncü sütunu olarak ortaya çıkan Adalet ve İçişleri alanı hızla gelişerek Avrupa bütünleşmesinin en öncelikli konularından biri haline gelmiştir. Bu makale Lizbon Anlaşması'yla Adalet ve İçişleri alanında yapılan değişikleri incelemektedir. Özgürlük, güvenlik ve adalet alanı incelendikten sonra makale Lizbon Anlaşması'nın genel hükümleri ele alınmaktadır. Makale, uluslarüstü ve hükümetlerarası yaklaşımlar, Adalet Divanı, yeni güç yapısı ve alının dış boyutları çerçevsinde Adalet ve İçişleri alanını incelemektedir.

Anahtar Kelimeler: *Lizbon Anlaşması, Özgürlük, Güvenlik ve Adalet Alanı, Uluslarüstü ve Hükümetlerarası Yaklaşım*

1. Introduction

Justice and home affairs, adopted as the third pillar by the Maastricht Treaty and symbolising an outstanding transition from a predominantly economic to a political Union, have rapidly developed from a peripheral

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aspect into a core priority in the European integration process albeit these affairs constitute amongst the most recent fields of cooperation in the EU. (Lavenex – Wagner, 2007: 225) The Amsterdam Treaty established the area of freedom, security and justice with the ambition to transform the Union in to an area of freedom, security and justice, by partially communautarising the justice and home affairs, i.e. visas, asylum, immigration and other policies related free movement of persons (Title IV EC), and by leaving behind the police and judicial cooperation in criminal matters under the third pillar (Title VI TEU). That structure therefore reflects a mixture of supranational and intergovernmental logic. In the footsteps of the Constitutional Treaty, the Lisbon Treaty then attempts to complete this communautarisation process and thus makes some changes and improvements with regard to the area of freedom, security and justice even though they stay behind the expectations.

The article will examine the area particularly in terms of changes brought by the Lisbon Treaty. After perusal about the raison d'être and objectives of the area of freedom, security and justice, it will explore general provisions of the Lisbon Treaty. Then follow the scrutiny of the concepts of cooperation, mutual recognition and approximation of procedural and substantive law. Balance between the trends of supranationalism and intergovernmentalism, thus compromises such as exceptions, opt-ins/opt-outs and differentiated integration will be analysed. Afterward the jurisdiction of the Court of Justice, the new power structure, external dimension of the area will be respectively explored.

2. The Area of Freedom, Security and Justice

In order to clarify the interconnected, intertwined and intersection characteristics of the matters of freedom, security and justice, the Council expressed that the development of an area of freedom, security and justice is closely linked to completion of the single market and its four freedoms. Four freedoms of the internal market (the internal market without internal borders for goods, services, persons and capital) and preclusion of their abuse could be provided by such an area. The abolition of internal borders with the controls raises questions about the internal security and has resulted in the strengthening of the Union's external borders and the development of a common asylum, visa and immigration policy. Furthermore, in the absence of measures, if police forces or judges remain confined to national borders, criminals might be able to take advantage of free movement to escape criminal proceedings. The territorial limits of criminal law increase

the need for police cooperation which is essential for effectively combating cross-border crime. Since four freedoms would fail to produce their full impact without confidence between the Member State judicial systems, the mutual recognition of judicial decisions has become the cornerstone of the developing European judicial area. (Council, 2004)

According to the Council, the aim of the area of freedom is not only to extend free movement of persons but also to promote Union citizenship, protect fundamental rights, especially to respect for private life and the protection of personal data, combat all forms of discrimination and facilitate the integration of third country nationals. The aim of the area of security is therefore to deal with the fight against all forms of organised crime, such as illegal immigration, trafficking in human beings, drugs and arms, trade in human beings, crimes against children, international terrorism, corruption and fraud and etc. Lastly as regards an area of justice, despite differences between the Member States, the Union's objective is to guarantee European citizens equal access to justice and to promote cooperation between the national judicial authorities. While on civil matters judicial cooperation should be aimed at simplifying the environment of European citizens, on criminal matters it should strengthen the coordination of prosecution and provide a common sense of justice by defining minimum common rules for criminal acts, procedures and penalties with the emphasis placed upon cross-border disputes. (Council and Commission Action Plan of 3 December 1998; Council, 2005)

3. General Provisions of the Lisbon Treaty in respect of the Area of Freedom, Security and Justice

The area of freedom, security and justice covering areas such as borders, immigration, asylum, police and judicial cooperation in criminal matters touches upon on the one hand essential functions, prerogatives of the States and thus their national sovereignty concerns, on the other hand very sensitive political issues such as fight against crime, illegal immigration and asylum system.(Monar, 2005: 226)

Under Title V of the TFEU, the area of freedom, security and justice consists of five chapters: general provisions; policies on border checks, asylum and immigration; judicial cooperation in civil matters; judicial cooperation in criminal matters; police cooperation.

According to Article 3 TEU "[t]he Union shall 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." The protection of fundamental rights and respect for the rule of law are the foundational principles of the area of freedom, security and justice. According to Article 67 "the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States." Respect for fundamental rights and the different legal systems and traditions of the Member States therefore constitute the main obligations of the EU. Furthermore, the legal status and binding nature of the Charter of Fundamental Rights would strengthen the freedom dimension of the area of freedom, security and justice. (Carrera - Geyer, 2007)

Due to the pillarisation fed by the national prerogatives and sovereignty concerns, limitations in judicial protection, democratic and judicial control and jurisdiction of the Court of Justice, different procedures and legal instruments in decision-making, lack of supremacy and direct applicability of EU law and lack of infringement procedure in the third pillar, the current structure of the area of freedom, security and justice is contaminated by deficits in terms of efficiency, effectiveness, intricacy and dichotomy and legitimacy. The current pillar structure leads the Union to artificially split up its action concerning a single subject matter between different set of legal instruments adopted pursuant to different procedures under different pillars. (Ladenburger, 2008: 20) The Lisbon Treaty attempts therefore to mitigate these deficits.

In that respect, with regard to police and judicial cooperation in criminal matters, the Lisbon Treaty generally, through depillarisation and communautarisation of these matters, improves the efficiency in decision-making with the establishment of ordinary legislative procedure, legal certainty with the single and unified set of legal instruments and their legal bases, extension of the ambit of judicial review, the legal status of the Charter of Fundamental Rights, effective and uniform application of EU law with the principles of supremacy and direct effect, democratic and judicial accountability by involvement of the European Parliament and national parliaments into the legislative process and the extension of the jurisdiction of the Court of Justice in the area of freedom, security and justice and external action of the EU by conferral of new competences and shared nature of the competences.

Heterogeneity as to legal instruments due to the pillarisation with the vanishing of third pillar legal instruments (decisions, framework decisions, conventions and common positions) to be replaced by uniform traditional Community legal instruments and thus separation of decision-making procedures will end. Under the ordinary legislative procedure, through the co-decision procedure upon the initiation of the Commission the Council and the European Parliament may legislate by the qualified majority voting. Since unanimity rule feeds the lowest common denominator because of the veto powers of the Member States, qualified majority voting would improve the standards in decision making.

Besides, the Lisbon Treaty brings the provision providing imposition of financial sanctions within the area of freedom, security and justice under Article 75 TFEU according to which "[w]here necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall define 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."

4. Judicial Cooperation: Mutual Recognition v Approximation of Procedural and Substantive Law

The Lisbon Treaty accordingly improved cooperation and mutual recognition in both civil and criminal matters. According to Article 81 the Union shall develop judicial cooperation in civil matters having a cross-border dimension, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States. In the same vein, under Article 82 judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States. In order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may establish minimum rules, which shall take into account the differences between the legal traditions and systems of the Member States and shall not prevent Member States from maintaining or introducing a higher level of protection

for individuals, concerning 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 adopted by unanimity.

It is a fact that mutual trust has constantly been promoted by the ECJ. It stated that "[t]here is a necessary implication ... that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied."[1]

As regards substantive criminal law, Article 83 articulates that the European Parliament and the Council may establish by qualified majority and co-decision procedure minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Article 83 sets out the areas of crime as following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives, to be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76, may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. It is worth mentioning that the ambit of the approximation of substantive criminal law is narrowed than that at present by the condition of cross-border dimension and exhaustive enumeration of the fields of crimes.(Ladenburger, 2008: 20)

The Lisbon Treaty therefore establishes increased legal cooperation based on the principle of mutual recognition in civil and criminal matters which requires each national legal system to acknowledge the decisions adopted by others valid and applicable. New measures are related to

[1] Case C-436/04 *Leopold Henri Van Esbroeck*, 9 March 2006, para. 30; Case C-150/05 *Jean Leon Van Straaten v Staat der Nederlanden, Republiek Italië*, 28 September 2006, para. 43.

effective access to justice, cooperation as to criminal prosecution and execution of judicial decisions, the establishment of rules and procedures to ensure mutual recognition of judicial decisions and cooperation in collecting evidence. With the implementation of the principle of mutual recognition, which has similarities with the Common Market project, shows its preference to the choice of approximation of laws and regulations and constitutes one of the most important means of creating the area of freedom, security and justice, a major obstacle erected because of different national criminal codes to cross-border law enforcement is removed through judicial cooperation.(Lavenex - Wagner, 2007: 225) Judicial cooperation is thus mainly provided through mutual recognition and if required through the approximation of procedural and substantive laws via the establishment of minimum rules. In this construction, it is considered that in the core issues touching upon national sovereignty, mutual recognition is accordingly preferred to approximation.

5. Balance between Supranationalism and Intergovernmentalism

The abolition of pillar structure does not lead to Community method to be used in every aspect of the area of freedom, security and justice. The Lisbon Treaty, as a compromise for communautarisation, comprises flexibility, emergency brake, exceptionalism, fragmentation, enhanced cooperation, differentiation and opt-ins/opt-outs, multi-speed Europe, variable geometry. Even the Lisbon Treaty makes it much easier for multi-speed Europe to emerge in different policy fields. (Král, 2008)

First of all, under Articles 82 and 83 the ambit of approximation of procedural and substantive laws and regulations of the Member States is restricted to minimum rules on criminal matters having a cross-border dimension by allowing the Member States to adopt more stringent rules.

Secondly, approximation of procedural and substantive criminal law, i.e. the establishment of minimum rules will be subject to emergency brake. Article 83 provides emergency brake where a member of the Council considers that a draft directive would affect fundamental aspects of its criminal justice system. The Member State may thus request that the draft directive be referred to the European Council in case of which the ordinary legislative procedure shall be suspended. "After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure." In case of disagreement,

and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission, which provides for an automatic authorisation of an enhanced co-operation mechanism for those State. In other words, those Member States which are willing to go ahead for enhanced cooperation do not have to undertake the standard authorisation procedure. In that regard, it constitutes not only brake, but also an accelerator allowing provision of *ad hoc* op-out for Member States experiencing persistent problems with legislative initiatives.(Ladenburger, 2008, 20) This automatic authorisation is probably introduced to let the Member States develop such kind of cooperation and thus stay within the framework of the EU rather than outside as avoid the cases such as the Prüm Treaty.[2] On the other hand, as articulated by Carrera and Geyer, enhanced cooperation may however create many areas with varying and even competing degrees, notions and speeds of freedoms, securities and justices. (Carrera - Geyer, 2007)

Thirdly, according to Article 72 TFEU the area of freedom, security and justice shall 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. Namely, maintenance of law and order and the safeguarding of internal security, considered still[3] as the very core of national sovereignty, remain within the responsibility of the Member States. Moreover, Article 4(2) TEU, by emphasising that national security remains the sole responsibility of each Member State, lays down that the Union shall respect the Member States' essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. Furthermore, since under Article 73 "[i]t shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security", such forms

[2] The Prüm Treaty signed by Austria, Belgium, France, Germany, The Netherlands and Spain has the objective "to play a pioneering role in establishing the highest possible standard of cooperation especially by means of exchange of information, particularly in combating terrorism, cross-border crime and illegal mi-gration, while leaving participation in such cooperation open to all other Member States of the European Union".

[3] Article 64 EC and Article 33 TEU. In the legal literature these competences have been regarded as either an indication as to the limits of Community law or a derogation within the ambit of Community law.

of cooperation and coordination, as intergovernmental residues, imply keeping the EU out of internal security of the Member States.

Fourthly, under Article 84 the European Parliament and the Council may establish measures to promote and support the action of Member States in the field of crime prevention which is excluded from harmonisation.

Fifthly, the special legislative procedure, as an exception to the ordinary legislative procedure, applies to the following cases in which the European Parliament has only consultative role, except the last one. The Council, under Article 77, acting in accordance with a special legislative procedure, which requires unanimity after consulting the European Parliament, may adopt provisions concerning passports, identity cards, residence permits or any other such identification document. Besides, according to Article 87, the adoption of measures related to operational cooperation between the competent authorities of the Member States, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences is subject to a special legislative procedure. Additionally, according to Article 89, the Council shall lay down under the special legislative procedure the conditions and limitations under which the competent authorities of the Member States may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. Moreover as regards judicial cooperation in civil matters, under Article 81 measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure which requires unanimity after consulting the European Parliament. Lastly, in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust by acting unanimously after obtaining the consent of the European Parliament.

Sixthly, opt-ins/opt-outs are extended to police and judicial cooperation in criminal matters. Opt-outs conversely lead to enhanced cooperation. According to Article 5 of Protocol (No 19) on the Schengen Acquis integrated into the Framework of the European Union, proposals and initiatives to build upon the Schengen acquis shall be subject to the relevant provisions of the Treaties and where either Ireland or the United Kingdom has not notified the Council its wish to take part, the authorisation referred to in Article 329 for an enhanced cooperation between themselves shall be deemed to have been granted to the Member States. Where either Ireland or

the United Kingdom is deemed to have given notification, it may nevertheless notify the Council that it does not wish to take part in such a proposal or initiative. Nevertheless, for the Member State having made the notification, any decision taken by the Council shall, as from the date of entry into force of the proposed measure, cease to apply to the extent considered necessary by the Council and under the conditions to be determined in a decision of the Council acting by a qualified majority on a proposal from the Commission. This Protocol provides opt-out of adoption of Schengen building measures even pursuant to opt-in to the Schengen *acquis*. This derogates from the principle of irrevocable participation imposed by Article 8(2) of Council Decision 2000/365 and signifies probably at least the partial depart of the United Kingdom or Ireland from the Schengen *acquis*. (Ladenburger, 2008: 20) Moreover, under Protocol (No 21) on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, the UK's current opt-out under Title IV EC from asylum, immigration and civil matters is extended to include police and judicial cooperation in criminal matters.

Besides, according to Protocol (No 22) on the Position of Denmark, Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title V of Part Three of the TFEU. Furthermore, there are also transitional provisions or exclusions from the rules. Protocol (No 36) on Transitional Provisions provides transitional period (five years) for police and judicial cooperation in criminal matters concerning the effects of old legal acts and Commission's supervisionary competence and jurisdiction of the Court of Justice. According to Article 9 of that Protocol, the legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the TEU prior to the entry into force of the Lisbon Treaty shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the TEU.

In other words, legal effects of pre-existing third pillar instruments, thus the exclusion of their direct effect and supremacy, will be preserved until these instruments are repealed, amended or annulled in accordance with the revised Treaties. (Dougan, 2008: 617) Under Article 10(4) at the latest six months before the expiry of the transitional period, the United Kingdom may notify to the Council that it does not accept, with respect to the acts and the powers of the institutions as to police and judicial cooperation in criminal matters. In case the United Kingdom has made that notification all acts, excluding the amended acts, to cease to apply. Namely, it provides for

the United Kingdom to leave *acquis* in police and judicial cooperation in criminal matters, neither replaced nor amended. As regards the pre-existing third pillar acts, for 5 years the Commission will not be able to bring infringement actions against the United Kingdom and Ireland and the jurisdiction of the Court of Justice will be restricted as currently provided under Article 35 TEU. (Dougan, 2008: 617) It is worth mentioning that for the first time the Treaty therefore allows a member state not only to opt-out from the adoption of future measures, but also to withdraw from the obligations under the pre-exinting measures and so from the existing *acquis*. (Dougan, 2007: 2008; Ladenburger, 2008: 20) What is more, positions of the United Kingdom and Poland with respect to the Charter of the Fundamental Rights signify exceptionalism. According to Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, the Charter does not extend the ability of the Court of Justice or any court or tribunal of Poland and the United Kingdom to find that the laws, regulations or administrative provisions, practices or action of Poland and the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. Nothing in Title IV of the Charter creates justiciable rights applicable to Poland and the United Kingdom except insofar as they have provided for such rights in their national law.

6. Jurisdiction of the Court of Justice

Currently under the third pillar, the jurisdiction of the ECJ to deliver preliminary ruling regarding police and judicial cooperation is not mandatory, but optional subject to the declaration of the Member States. There is no infringement procedure for breaches of obligations as well. For the natural and legal persons action for annulment procedure is not available. Besides currently under the first pillar, as regards visas, asylum, immigration and other policies related free movement of persons according to Article 68 EC merely the courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law shall apply to preliminary ruling procedure.

The jurisdiction of the Court of Justice is extended in the area of freedom, security and justice. After the communautarisation of police and judicial cooperation in criminal matters, the European Court of Justice will have jurisdiction over all matters of the area of freedom, security and justice, albeit with some exceptions. Fragmentation in the jurisdiction of the Court of Justice is therefore removed.

According to Article 256 of the TFEU, the General Court (current the CFI) shall have jurisdiction to hear and determine at first instance all actions or proceedings all actions, but preliminary rulings and infringement proceedings against the Member States. Under Article 267, with the abolition of pillar structure, preliminary ruling procedure in respect of police and judicial cooperation in criminal matters is extended to include not only all Member States and their all courts, but also interpretation of primary law. Besides, limitation merely to last instance courts is abolished in respect of visas, asylum, immigration and other policies related free movement of persons under the current first pillar. There is now sole preliminary ruling procedure encompassing all matters currently falling within the current first and third pillar. Moreover, according to Article 263 the standing conditions for natural or legal persons are extended and relaxed for a regulatory act which is of direct concern to them and does not entail implementing measures. Natural and legal persons will have *locus standi* in action for annulment and failure to act proceedings in terms of not only asylum and immigration issues under the current Title IV EC, but also police and judicial cooperation in criminal matters under the current Title VI TEU. Furthermore, the European Parliament will have *locus standi* to bring action for annulment to challenge acts adopted under the field of police and judicial cooperation in criminal matters.

Furthermore, under Articles 263, the Court of Justice of the European Union shall review also the legality of acts of the European Council and of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. The ambit of infringement procedure for breaches of obligations is extended to include police and judicial cooperation in criminal matters under Article 260 TFEU and covers the whole area of freedom, security and justice. Under Article 265 the scope of failure to act procedure is extended to include also infringement of the Treaties by the European Council and bodies, offices and agencies of the Union by failing to act. The Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established.

Moreover, any natural or legal person may therefore bring an action for failure to act by complaining to the Court that an institution, body, office or agency of the Union has failed to address to that person any legally binding act.

Even though there are lots of agencies such as Europol, Eurojust, CEPOL (College of European Police), EBA (European Border Agency), FRA (Fundamental Rights Agency) in the area of freedom, security and justice, since they do not, in principle, issue binding acts, their acts are not subject to judicial review, but subject to some kind of principal – agent supervision by the institution to which they are attached as well as to indirect control by the European Parliament and the Ombudsman. (Hatzopoulos, 2008) Anyway this extension would provide the removal of the lacuna in terms of judicial protection of individuals against acts of Europol especially affecting personal data rights. (Ladenburger, 2008: 20) Furthermore, the acts of other bodies or offices such as the High Level Group on Asylum and Migration, the SCIFA (Strategic Committee on Immigration, Frontiers and Asylum) and the SCIFA , the CIREFI (Centre d'Information de Réflexion et d'Echange sur les Frontières et l'Immigration), the EURASIL, the European Migration Network and the Immigration Liaison Officers Network are unlikely in the sense of Article 263 TFEU to produce legal effects vis-à-vis third parties, since they play essentially consultative and/or preparatory role in the design and management of the area of freedom, security and justice. (Hatzopoulos, 2008)

However the acts of funds such as the European Refugee Fund, the External Borders Fund, the Return Fund and the Integration Fund, which are active in the area of freedom, security and justice, seem included within the scope of review and could in the future therefore be challenged under Article 263 TFEU. (Hatzopoulos, 2008)

What is more, Articles 268 and 340 TFEU provide for individuals to bring an action for non-contractual liability against the Union with the claim for damages caused by its institutions or by its servants in the performance of their duties. In other words, individuals may claim for damages caused by the institutions or by the servants in the performance of their duties in the field of current police and judicial cooperation in criminal matters. Judicial protection of individuals will primarily be enhanced. In *Segi* and *Amnestia*, the applications were dismissed by the ECtHR with the reason that the applicants were not directly affected by the common position which has strongly intergovernmental character.[4] After the communautarisation of police and judicial cooperation in criminal affairs the barrier before judicial review of the legal instruments concerned before the ECtHR will be

[4] App. 6422/02 and 9916/02.

abolished because of their new supranational characteristics under the influence of the principles of direct applicability or effect.

Additionally, Article 267 brought urgency procedure according to which if a preliminary ruling question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay. It may provide more speedy justice. Currently, urgent preliminary ruling procedure is provided in Article 23a of the Statute of the ECJ and Article 104b of Rules of Procedure.

Lastly, as regards the ambit of jurisdiction of the Court of Justice, according to Article 275 even though the Court of Justice shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions, "the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union." It should be emphasised that that exception to the lack of jurisdiction of the Court of Justice is related to policies on border checks, asylum and immigration which form Chapter 2 of Title V, i.e. area of freedom, security and justice.

On the other hand, there is also restriction to the jurisdiction of the Court of Justice, as the residues of previous Treaties.[5] According to Article 276, as regards the Chapters 4 (judicial cooperation in criminal matters) and 5 (police cooperation) of the area of freedom, security and justice, the Court of Justice shall have no jurisdiction to review 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 incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

As regards the scope of limitation, it could be mentioned that the limitation is merely related to police and judicial cooperation of criminal

[5] Article 68 EC and Article 35 TEU.

matters by maintaining the current 35 TEU and accordingly does not cover the current limitation articulated in Article 68(2) EC.

Moreover, its jurisdiction is restricted not only in terms of preliminary ruling, but also infringement procedure. Accordingly, in that regard supervisory role of the Commission is restricted. It signifies the residues of intergovernmentalism, even after the communautarisation of whole area of freedom, security and justice, within the framework of supranational structure.

Moreover, according to Article 86, "the regulations referred to in paragraph 1 shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions." It provides for the legislature to determine the rules applicable to the judicial review of procedural measures.

7. The New Power Structure in respect of the Area of Freedom, Security and Justice

Under Article 68 TFEU the strategic guidelines for legislative and operational planning within the area of freedom, security and justice shall be defined by the European Council.

Furthermore, the powers of the Commission in terms of legislative initiation and supervision of their proper application by the Member States is strengthened. Under Article 76, in terms of judicial cooperation in criminal matters, police cooperation and administrative cooperation, the acts and measures will be adopted by initiative of either of the Commission or of a quarter of the Member States, which signifies specific characteristics differentiated from other policy areas of the EU and as well as intergovernmental residues in the new structure. At the current structure an initiative for legislative acts could be presented by a single Member State under the third pillar. The Commission may also bring infringement actions against the Member States as to police and judicial cooperation in criminal matters.

With the ordinary decision-making procedure (co-decision procedure via qualified majority voting) the powers of the European Parliament are also

strengthened. The European Parliament's assent is required while establishing Public Prosecutor's Office and extending its powers, establishing minimum rules. The European Parliament will have the authority to bring action for annulment. Parliament's powers in respect of conclusion of agreements and representation in the negotiations and international relations are extended.

Under Article 12 TEU national parliaments contribute actively to the smooth functioning of the Union by taking part, within the framework of the area of freedom, security and justice in terms of evaluating executive activities, in the evaluation mechanisms for the implementation of the Union policies in that area and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities.[6] According to Article 3 of Protocol (No 1) on the role of national parliaments in the European Union, as regards the ex-ante control of the application of the principle of subsidiarity national parliaments may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality. Therefore, paying attention to the principles of subsidiarity and proportionality in legislation is especially significant in criminal law so as to avoid excessive criminalisation. (Herlin-Karnell, 2008)

Additionally, under Article 86 in order to combat crimes affecting the financial interests of the Union the Lisbon Treaty paves the way to the establishment by the Council via unanimity of the European Prosecutor's Office from Eurojust, which will be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests. As a judicial body with direct enforcement authority, it will exercise the prosecutor's functions in the national courts. The European Council will be able to extend by unanimity the competence of the European Prosecutor's Office to include serious crime having a cross-border dimension such as terrorism, the trafficking in human beings and drugs trafficking. Moreover, under Article 71, a standing committee, which shall facilitate coordination of the action of Member States' competent authorities, shall be set up within the Council in order to ensure that operational cooperation on internal security is promoted and strengthened

[6] Articles 70, 71, 85 and 88 TFEU.

within the Union. Besides, the Lisbon Treaty establishes an integrated management system for external borders and strengthens the powers of FRONTEX (the European Agency for the Management of Operational Cooperation at the External Borders).

8. External Dimension of the Area of Freedom, Security and Justice

Under Article 78 as regards the common policy on asylum with the purpose of development a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties, the European Parliament and the Council shall adopt measures for a common European asylum system comprising partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. Furthermore, according to Article 79 the Union may conclude agreements with third countries for the readmission of illegal immigrants to their countries of origin or provenance.

Article 216 organised under the influence of the ERTA Doctrine stipulates that the Union may conclude an agreement with third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. Since competences in respect of police and judicial cooperation in criminal matters also become in shared nature, therefore the principle of subsidiarity applies, which is to be check by the national parliaments, the implied power to conclude agreements therefore seems important for the external action of the EU in the area of freedom, security and justice. Moreover, recognition of the legal personality of the EU under Article 47 would enhance the capability of the EU in the external dimension of the area of freedom, security and justice.

On the other hand, according to the Declaration on Article 218 concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice, the Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters 3, 4 and 5 of

Title V of Part Three insofar as such agreements comply with Union law. It seems that since those matters touch upon the national sovereignty concerns, the Member States are not eager to leave the field completely to the EU by conferring upon the institutions such nature of external competences concerning these matters.

Conclusion of agreements will be carried out under the common procedure, which leads to enhancement of the powers of the European Parliament, qualified majority voting in decision-making and removal of reservation currently used in the third pillar under Article 24 TEU by the representatives of the Member States in the Council. The Union will be represented by the Commission in the negotiations of agreements. Currently according to Article 24(5) TEU, "[n]o agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure; the other members of the Council may agree that the agreement shall nevertheless apply provisionally." Furthermore, the agreements concluded under this procedure within the scope of the area of freedom, security and justice will have the same legal force and effect as provided under the current Article 300 EC.

9. Conclusion

The Lisbon Treaty reinforces democratic legitimacy and accountability, efficient and comprehensive response by the Union action and enhances legal certainty, trust-building among the Member States. (Zemanek, 2008) The Lisbon Treaty promotes judicial protection, democratic and judicial control, efficiency and effectiveness in decision-making and the rule of law. With regard to the area of freedom, security and justice, with the paranoia especially sparked off by September 11, London and Madrid terrorist attacks, there is growing concern about the fact that security while has becoming the overriding imperative largely crowding out freedom and justice. (Lindahl, 2004: 461) The Lisbon Treaty is able to pave the way to strike fair and appropriate balance amongst security, freedom and justice aspects through the extension of jurisdiction of the Court of Justice and the binding legal status of the Charter of the Fundamental Rights in EU law.

Justice and home affairs, now the area of freedom, security and justice, signify significant development and evolution in the European integration process. Even though the Lisbon Treaty by abolishing the pillar structure communautarised the whole area of freedom, security and justice, there

remain intergovernmentalist residues in the new structure. In that regard, it reflects a cooperative rather than integrated area of freedom, security and justice. (Monar, 2005: 226) It is understandable that these matters touch upon the very core of the national sovereignty and prerogatives and so the Member States are anxious about losing the entire control. In that regard, as declared by Dougan, the Lisbon Treaty continues the trend of balancing two polar forces, supranationalism and intergovernmentalism, one against the other, thus each step towards greater supranational governance is counter-weighted by more effective checks and balances to protect national concerns and prerogatives and to ensure the Union remains responsive to them. (Dougan, 2008: 617)

References:

Carrera, S. - Geyer, F. (2007). The Reform Treaty & Justice and Home Affairs Implications for the common Area of Freedom, Security & Justice, CEPS Policy Brief, No. 141, at http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf.

Council and Commission Action Plan of 3 December 1998 on how best to implement the provisions of the Treaty of Amsterdam on the creation of an area of freedom, security and justice, retrieved April 2008 from http://europa.eu/scadplus/leg/en/lvb/l33080.htm.

Council of the European Union, (2004) Living in An Area of Freedom, Security and Justice, retrieved March 2008 from http://www.consilium.eu.int/uedocs/cms_data/librairie/PDF/PU2086-EN.pdf.

Dougan, M. (2008). The Treaty of Lisbon 2007: Winning Minds, Not Hearts, 45 CMLRev. 617.

Hatzopoulos, V. (2008) Casual but Smart: The Court's new clothes in the Area of Freedom Security and Justice (AFSJ) after the Lisbon Treaty, College of Europe, Research Papers in Law 2/2008.

Herlin-Karnell, E. (2008) The Lisbon Treaty and the Area of Criminal Law and Justice", Sieps, European Policy Analysis, Issue 3, at http://www.lissabonfordraget.se/docs/sieps-2008_3epa-the-lisbon-treaty-and-the-area-of-criminal-law-and-justice.pdf.

Král, D. (2008). Multi-speed Europe and the Lisbon Treaty – Threat or Opportunity?, EUROPEUM, Institute for European Policy.

Ladenburger, C. (2008). Police and Criminal Law in the Treaty of Lisbon – A New Dimension for the Community Method, 4 Eur. Const. LR 20.

Lavenex, S. - Wagner, W. (2007) Which European Public Order? Sources of Imbalance in the European Area of Freedom, Security and Justice, 16 European Security 225.

Lindahl, H. (2004) Finding A Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity, 29 ELRev. 461.

Monar, J. (2005) Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the 'Area of Freedom, Securiy and Justice'?, 1 European Constitutional Law Review 226.

Zemanek, J. (2008) The Criminal Cooperation within the area of Freedom, Security and Justice under the Treaty of Lisbon, p. 171, retrieved August 2008 from http://www.ecln.net/documents/sofia_2008/buch/ecln_2008.pdf.