

# POLICE COOPERATION IN THE EUROPEAN UNION – ORIGINS, PRESENT STATUS AND CHALLENGES<sup>1</sup>

Maja Lukić Radović, PhD<sup>2</sup>

Marija Vlajković, LL.M.<sup>3</sup>

Faculty of Law, University of Belgrade, Serbia

**Abstract:** This article lays ground for a legal analysis of the EU police cooperation, i.e. its origins in the pillar structure established in the Maastricht Treaty and present-day features based on the Lisbon Treaty.

In the first part, the institutional setting is depicted, based on the intergovernmental decision-making process. Furthermore, the emphasis is put on the “remodelling” of the EU architecture with the aim of ensuring closer cooperation through supranational decision making. The third part deals with the institutional dialogue, set up with the Lisbon Treaty, and explore common goals of Member States. Finally, our article touches upon issues such as the importance of EUROPOL for the EU common goals which are, at the same time, the policies of utmost national interest. We argue that further improvement is needed, especially when it comes to better and close cooperation in practice, not only within EU Member States, but also with neighbourhood and accessing states.

**Key Words:** Police Cooperation, Justice and Home Affairs, Maastricht Treaty, Lisbon Treaty, Europol.

## INTRODUCTION

EU police cooperation has been one of the very controversial areas of EU communitarisation process. The fear of “erosion of national sovereignty” (Tekin: 2015, 82) has been present since the beginning of the European project.

However, the creation of Common market’s four freedoms, touched many issues deeply entrenched in legal systems and had strong affinities to question national sovereignty (Lavanex: 2010, 458). With the realisation of the free movement of persons and the establishment of the Schengen area, what was once perceived as the responsibility lying solely on states’ governments, was later on stig-

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<sup>1</sup> This paper is one of the results of the project “Identity Transformation of Serbia”, executed by the Faculty of Law, University of Belgrade.

<sup>2</sup> maja.lukic@ius.bg.ac.rs

<sup>3</sup> marija.vlajkovic@ius.bg.ac.rs

matished as egoism and inconsequent behaviour (Tekin:2015,86). Consequently, police cooperation was difficult to agree upon, due to different interests, legal and constitutional traditions. For those reasons authors tend to characterize the Area of Freedom, Security and Justice(AFSJ)<sup>4</sup> as slow in communitarisation but at the same time one of the fastest growing EU policy areas.

Our paper will depict police cooperation as a sensitive political issue through the legislative and institutional evolution in the changing Treaties. With the abolishment of internal borders, police forces were constantly confronted with legal, social, technological and trans-border challenges that they needed to respond to in a proper way (Gruschinske, Hirschmann, Füger, 2015).

The need for a common response led to the remodelling of the pillar structure and piercing of the Community method: The AFSJ was declared a fundamental objective<sup>5</sup>, and in the Amsterdam and Nice era, it was the busiest one when it comes to the regulation and adoption of the EU policies.

Thus, in parallel with the analysis of institutional and legal setting, we will outline the stages in development dealing (more or less) effectively with common issues: through joint management and cooperation and through application of general institutional framework. Given the amount of opened issues surrounding its evolution, our work focuses on the EU integration path, as well as on the development of the police cooperation, in order to present its “thorny road” through the process of Europeanisation. Finally, we will also shed a light on issues of protecting core constitutional values occurring in the process.

## INSTITUTIONAL SETTING OF THE FORMER TREATIES STRUCTURES

### Pre-Maastricht cooperation and initiatives

It should be noted that prior to the Maastricht Treaty (Treaty on the European Union, Office for Official Publications of the European Communities, 1992) police cooperation remained on the intergovernmental level confronted with common cross-border issues, and the reason was difference in its nature and organization of European legal systems. Looser mechanisms of cooperation were envisaged in order to resolve, in the least „painful“ way, the ongoing debate about preservation of national sovereignty depicted in police cooperation and freedom, security and justice.

Even though the idea of European police agency dates back in the early 1970s, the first proposals were discussed in the 1980s within ministerial and police groups in Germany. TREVI, an acronym for Terrorism, Radicalism, Extremism

<sup>4</sup> Police cooperation is part of the JHA and later AFSJ policy of the EU

<sup>5</sup> Article K.1, Treaty of Amsterdam Amending the Treaty On European Union, the Treaties Establishing the European Communities and certain related acts, Office for Official Publications of the European Communities, 1997

and Violence International, set in 1976, provided an important arena for 12 MS interior ministers to exchange information for encompassing European crimes. Its work was, however criticized from the beginning and characterized as controversial and secretive (Bunyan, 1993, 2). With the Single market creation, Ad Hoc Group on Europol was established and it recognized the importance of the information and practice sharing but also emphasized the work on education and training of police forces creating the European response (Bunyan, 1993).

Moreover, Schengen Agreement was the backbone of the Third pillar, as well as strong motivation for its institutional and legal foundation. Signed in 1985<sup>6</sup>, it removed border controls and facilitated the complete freedom of movement including policing, immigration, asylum, trafficking and external border controls (Bunyan, 1993).

First cooperation mechanisms, therefore, had an important impact for the further development of the aforementioned area, but at the same time faced serious gaps in legitimacy, to name with exclusion of EU institutions in decision making, as well with secrecy that surrounded Schengen Convention<sup>7</sup> negotiations and implementation (Peers, 2011).

### The emergence of the Third Pillar Structure “Europeanization of the fight against crime”

*(Eckes, Konstadinides, 2011:4)*

Maastricht Treaty was considered to be a „catalyst for the creation of Europol“ (Monaco: 1995, 275), and, we add, first legal act that showed that European police cooperation efforts have achieved its legal results.

This phase could be described as „formal intergovernmentalism“ (Peers, 2011: 271) and it was achieved through three-pillar structure. Treaty also established a mechanism for the cooperation of MS in the areas of Common Foreign and Security Policy and Justice and Home Affairs. The crucial difference laid precisely in the fact that First- Community Pillar was governed by the supranational method while the Third Pillar functioned on the intergovernmental level, which was the result of the sharply segmented national politics (Craig, De Burca, 2011: 926).

Rules that were laid in Title V gave MS the liberty to maintain maximum control over police cooperation, still considered undeniably a part of national sovereignty. Even though participation of EU institutions was envisaged, the decision making was on the Council, while the European Commission was even refused this joint right in the area such as policing and criminal law (Peers, 2011). This ultimately imposed significant limits on the EU effectiveness.

<sup>6</sup> <https://www.schengenvisainfo.com/schengen-agreement/>, accessed on 22 May, 2019

<sup>7</sup> The Schengen Agreement and the Convention (signed on 19 June 1990), [https://ec.europa.eu/home-affairs/content/schengen-agreement-convention\\_en](https://ec.europa.eu/home-affairs/content/schengen-agreement-convention_en), accessed on 24 May, 2019

Article K.1<sup>8</sup> introduced police cooperation as an area of common interest with the aim of preventing terrorism, international crime and drug trafficking. The predominantly national decision making input is clearly stated in the article K.3, which explains that the Council could adopt Conventions or other acts, not clearly defined (Joint Actions, Joint Positions, and Common Positions)<sup>9</sup>. In addition, acts are brought by the Council, leaving the role of the EU Parliament as consultative, whose “views will be duly taken into consideration”<sup>10</sup>.

Essentially, what Maastricht brought for the first time is a “new banner” that gives legitimacy to the EU which meant institutionalisation of Member states’ forums without subjecting themselves to supranational control. However, in reality it was, as Jacques Delors described it, in November 1992: „Member states will inform and consult each other within the Council, the Commission has no power of initiative in this area” (Bunyan, 9).

### Amsterdam Treaty and the “architecture” remodeling

The establishment the AFSJ in the Amsterdam treaty, on the 1<sup>st</sup> of May 1999<sup>11</sup>, presented another step towards consistent and coherent policy (Eckes, Konstantides, 2011). It went on to adapt the decision making systems to new challenges that arose under free movement of persons incorporated under new Title IV. In reality, the driving force was European security (Lavenex: 2010). The era or the “modified intergovernmentalism (Peers, 2011: 272) consisted of three-pillars remodeling in order to adequately accept criticism that JHA policies were unsuited to the national governments’ cooperation established (Craig, De Burca, 18). However, modifications it made were modest: the issues of immigration and asylum law were transferred to the First Pillar<sup>12</sup> while policing and criminal law remained outside of the Community legal order.

Article 30 of the Amsterdam Treaty was a formal attempt to strengthen and enhance community police cooperation (Heid: 2015), having in mind that the Third pillar dealt with police and judicial cooperation purely in criminal matters. It also emphasized operational cooperation, cooperation of police forces’ task experience and training<sup>13</sup>. There was a dominance of non-binding documents through activities of the Council realised in Common Positions, Framework Decisions and Conventions<sup>14</sup>. In addition, the EU Court did not have a major role, leaving it to each MS to opt for full jurisdiction over references (by the end of the

8 Art. K1, Treaty on the European (TEU)

9 Article K.3 TEU

10 Article K.6 TEU

11 <http://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties/treaty-of-amsterdam> , accessed on the May 24, 2019

12 TITLE IV: Visas, Asylum, Immigration and other Policies related to Free Movement of Persons

13 Article 30 Amsterdam treaty

14 Article 34 Amsterdam treaty

Amsterdam period nineteen MS had given the Court jurisdiction (Peers, 2011: 275).

Even though co-decision process was expanded to the benefit of the European Parliament, its actual involvement was less than satisfactory (Lavenex, 2010: 466). The reason was the thin line between the legislation of the First and Third Pillar when it comes to AFSJ issues, and thus had the elements that could be encompassed by both decision making processes: community and intergovernmental. The European Commission, however, under the president Romano Prodi, gradually expanded, with the creation of the new Directorate-General on JHA (Lavenex, 2010: 463), and CATS (Committee for Police and Judicial Cooperation in Criminal Matters) that dealt solely with Third Pillar Issues.

In a broader perspective, one of the main achievements was the initiative that JHA Council is to replace the Europol Convention with the Europol Decision that would turn Europol to a regular EU agency (Lavenex, 2010: 474). In general, the weaknesses that led to reforms and reestablishment of the “common action” did not provide adequate institutional setting and the capacities for the pending enlargement. Instead it represented a delicate compromise with a limited impact of intergovernmental cooperation.

## THE EVOLUTION OF EUROPOL

In 1989, former Metropolitan Police Commissioner Sir Peter Imbert: “The time is not right to consider a European Police Force, and those who are currently advocating it are perhaps expecting us to run before we have shown we can walk” (Woodward, 1993: 12). Conversely, in 1991 thanks to the initiative of the former German Chancellor, Helmut Kohl, internal security and task forces cooperation was recognized as “vital, overdue and essential accompaniment of the Single Market”. Kohl argued for a European response and the establishment of Europol as a model of promoting police integration, which he envisaged to be a future “European FBI” (Mitsilegas, 2009:162).

Maastricht Treaty gradually developed Europol functions, with exchange of information, followed by the power to act within the MS accompanied by the right of the Commission and States individual initiative (Mitsilegas, 2009: 162). This raised numerous issues such as the transfer of powers, mandate and the accountability that would define the relationship of the newly founded European body and MS.

Europol Convention, signed in 1995<sup>15</sup> (Europol Convention, Official Journal of the European Communities, C 316/1, 1995) found it legal basis in the articles K.3.2 (c) and K.1 (9) of the Maastricht Treaty. Article 2 of the Convention provides the Europol objectives, emphasizing its intergovernmental nature: “within

<sup>15</sup> Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office

the framework of cooperation between the Member States” and underlying goals in prevention and fight against “terrorism, unlawful drug trafficking and other serious forms of international crime”<sup>16</sup>. It stressed collection and sharing of information as primary roles, but added: “aid in investigations, strategic intelligence, and development of the specialist knowledge as well as preparation of general situation reports”<sup>17</sup>. In addition, it set tasks for both Europol and MS, crucial for the EU police cooperation: training of authorities, organization of equipment, crime prevention methods, sharing of police methods advice in investigative procedures, which provided a solid basis for the CEPOL establishment<sup>18</sup>. Stemming from the Third pillar postulates, the Council had a major role in the functioning of the Europol while the Parliament was left with a consultative role. Europol gained legal capacity and established organs that were functioning also in accordance with the intergovernmental principle. However, one of the major “downsides” was the delay of the entry into force of the Europol Convention, because it required ratification by all (15) MS. Over and above that, the jurisdiction of the European Court of Justice was extremely limited: MS were asked to make a Declaration by which they opt for the Court to give preliminary rulings on the interpretation of the Europol Convention (Mitsilegas, 2009)

Lastly, two main issues were thoroughly discussed on the European Level: Europol legal framework that would not be regulated in the form of the Convention and the change of its mandate to become more operational (Mitsilegas, 2009).

## TOWARDS A COMMUNITY METHOD

### Lisbon Treaty setting

In 2009, Vice President of the European Commission and Commissioner in charge of Justice, Freedom and Security, Jacques Barrot stated: “Politics in the area of Freedom, Security and Justice are at the heart of the people’s interest”<sup>19</sup>. Eurobarometer survey taken at the time of the Lisbon Treaty (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, Official Journal of the European Union C/306, 2007) entering into force, showed that “a majority of respondents feel concerned about all major policy areas in the AFSJ/JHA in particular the fights against organized crime, terrorism and drugs abuse (both 80%)”<sup>20</sup>. Opinion of citizens demonstrated that EU common response was indeed a priority. What is more, the dismantlement of the Pillars structure brought a greater participation of EU institutions which had effects on democratization of the entire process (Kietz: 2015). The Treaty formulates ambitious goals for the EU (J.P. Luchtman, 2013: 32) and among its core val-

16 Article 2.1 and 2.2 of the Europol Convention

17 Article 3 of the Europol Convention

18 The European Police College (CEPOL) was established by Council Decision 2005/681/JHA

19 [europa.eu/rapid/press-release\\_IP-09-70\\_en.pdf](http://europa.eu/rapid/press-release_IP-09-70_en.pdf), accessed on May 29, 2019

20 *Ibid.*

ues stated in the Article 3 lists AFSJ along with the crime prevention<sup>21</sup>. Article 67 TFEU characterizes the objectives set in Article 3.2 TEU by envisaging that: the EU “shall constitute an area of freedom, security and justice”, but it still takes note of the national legal systems and the importance of safeguarding sovereignty<sup>22</sup>.

Hereafter, policy making area was altered significantly by introducing new institutional setting<sup>23</sup> but also deeper police cooperation among MS in relation to prevention, detection and investigation of crime while legislative measures can now be enacted pursuant to the ordinary legislative procedure.

Central feature of the police cooperation was that it introduced new inter-governmental cooperation highlights, but in practice it also created room for inter-institutional conflict and depended on the will for cooperation between all actors involved (Kietz, 2015: 56). One of such was formal competence for the Council to set the strategic guidelines reinforcing “polycentric nature of EU policy making”<sup>24</sup>. Additionally, it gave EP power to exercise scrutiny over bodies operating in that field (Gruschinske, et al. 2015) and to finally be involved in the negotiations, and decision making procedure<sup>25</sup>, which was a democratic step forward. Likewise, the Commission wanted to be an agenda-setter, and the Treaty boosted its powers along with ones of the national parliaments<sup>26</sup>(Kietz, 2015: 56). Inevitably, there were some limitations imposed stating that the police cooperation will not affect in any way “maintenance of law and order and the safeguarding of internal security”<sup>27</sup> of each MS, therefore leaving the Third pillar method to still “throw a permanent shadow” over this area.

It is safe to say that new rules were more democratic and effective on the European level providing single legal order, but at the same time also complex as the Lisbon created basis for some conflict-prone intergovernmental issues.

## EUROPOL and the Lisbon Treaty

The Council already brought a Decision establishing Europol and ended constant Convention amendments (Council Decision of 6 April 2009 establishing the European Police Office (Europol), Official Journal of the European Union L 121/37, 2009). It predicted partial communitarisation of the Europol legal and operational basis and enhanced the role of the European Parliament. Europol Decision reiterated the importance of being a fully operational EU agency: establishment and further functioning simplification “can be achieved through measures aimed at widening the possibilities for Europol’s assisting and supporting the competent law enforcement authorities of the MS, without providing for ex-

<sup>21</sup> Article 3 TEU

<sup>22</sup> Article 67.1 TFEU

<sup>23</sup> Chapter 5 - Police Cooperation - Article 87

<sup>24</sup> Article 68 TFEU

<sup>25</sup> Article 87.3 TFEU

<sup>26</sup> Article 69 TFEU

<sup>27</sup> Article 72 TFEU

ecutive powers for Europol staff”<sup>28</sup>. It envisaged joint investigation teams where Europol staff can directly access the Information System for all national units, which could profoundly facilitate the cross-border cooperation. Besides tasks stated in the Article 5<sup>29</sup>, Europol shall also “assist MS through support, advice and research. Europol’s main fields of action could be divided in two parts – an intelligence role and investigative and operational action with a mission to support and strengthen action by MS police authorities and their mutual cooperation in preventing and combating serious crime. To summarize, Lisbon Treaty provided Europol a legal ground to function as an international agency, reconfirmed in the Council Decision. Even though Europol, in the same way as Interpol, does not function in its own operational capacities, it grew to be support to MS in a fight against serious transnational crimes, centralizing network based information. Additionally, it ensured transfer of police educational issues to mainstream policy-making (Aden, 2011: 101), which brought attention to the importance of police professionalism in the EU (Aden, 2011)

## CONCLUSION

The evolution of EU police cooperation touched upon fields at the heart of states’ sovereignty: on the one hand we had, what is traditionally the right to protect your citizens from crime which lies very close to the core of national state, and on the other, new security issues that stemmed from “borderless” crime. This provided a middle ground for the establishment of an ‘Area’ (not a ‘Community’) that stroke a balance between European integration and national sovereignty (Eckes, Konstadinides, 2011).

Externalisation of national affairs issues through Europol clearly showed that cross-border crime urges for cross-border response (Eckes, Konstadinides, 2011: 2), as Lisbon treaty restored democratic legitimacy and aimed to bring efficiency. At the heart of all conflicts lies the never-ending struggle of national vs. supranational (Lukić Radović, 2016), especially when it comes to sensible security issues which demand police cooperation. The reforms were to facilitate political agreement by replacing unanimity rule with qualified majority voting in the Council for the majority of issues and to upgrade Commissions agenda-setting and enforcement powers. However, the role of the Commission is continuously in the conflict-zone as opposed to MS when it comes to legislative initiatives. European Parliament, although bringing a democratic “touch” to this field proved to depend on parliamentarians using their new abilities and building early public pressure on Commission and Member States (Peers, 2013: 671). Having in mind all the difficulties that burdened the process from “intergovernmentalism to communitarism” it was not clear whether the legal and institutional evolution within this field was a race to the top or bottom (Aden, 2015: 214).

<sup>28</sup> Council Decision establishing Europol-Preamble

<sup>29</sup> Article 5, Europol Decision

Although Lisbon Treaty created a solid legal base for the cooperation of the police forces in the EU, it should be noted that for example Article 87.2 TFEU expressly limits investigation solely to 'criminal offences' thus excluding other offences that ought to be handled on the European level.

Finally, leaving this article open for further discussions regarding the future development of the EU police cooperation legal basis, we would stress key points that we can draw from this brief analysis. Firstly, even though the Lisbon Treaty afforded police cooperation much greater degree of flexibility (Lukić Radović, 2016: 149) in relation to MS participation, European police leadership needs to be strengthened in order to have visible European response in and outside of the EU. Secondly, the experience gained in applying the mechanism of enhanced co-operation (Lukić, Radović, 2016) in conjunction with the need of deeper integration in order to have a European response leads us to the conclusion that sound police cooperation policy must concentrate on correcting existing deficiencies. The co-operation that has been achieved, even though improved in numerous aspects - from legitimacy of decision making to the involvement of the EU institutions in order to create a proper common response, lacks firm coherency and joint operability. Whether it is because of the slow evolution and the decades-long focus on economic integration or it is because of the "natural" opposing role of the EU Commission in contrast to national governments when it comes to sensible initiatives, we seem to miss the stable consistency in the joint institutional efforts. Europol still remains the brightest example, but we cannot say that MS completely accepted the role it strived to be from the beginning and is far from the "European FBI". However its role in supporting investigations and cooperation as well as in education and know-how sharing is important, if not crucial and it needs to be supported and developed from both sides. On the doorstep of the third decade of the XXI century, where rarely any crime or security issue is purely internal, Member States need to understand that common response to trans-border issues is the only adequate answer.

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