

**The Reform of the Area of Freedom, Security and Justice of the European Union in the Treaty of Lisbon**

**Abstract:**

In view of the recent reform of the area of freedom, security and justice in the European Union as it is codified in the Treaty of Lisbon, passed on 13 December 2007, this paper analyzes the changes put forward by the new legislation. Beginning with the system of the Treaty regulations, it goes on to provide a general outline of the changes in the six policies within this area: visas, asylum, immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation.

**Key words:** European Union; Treaty of Lisbon; area of freedom, security and justice; legislation

**Introduction**

This paper discusses the reform of the area of freedom, security and justice in the European Union as it is codified in the Treaty of Lisbon, passed on 13 December 2007. First, the paper will present the system of the Treaty regulations. Secondly, we shall proceed to outline changes in the six policies within this area: visas, asylum, immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation.

## Systematics of the Treaty provisions relating to the area of freedom, security and justice

By making changes to the TEU and the TFEU, the Treaty of Lisbon significantly strengthens the legal basis for the future establishment of the area of freedom, security and justice in the European Union. The replacement of the pillar structure with a unified international organization seems to be the most significant change. This results, among other things, in placing cooperation regarding visas, asylums, immigration, judicial cooperation in civil (Title IV TEEC) and criminal matters as well as police cooperation (Title VI TEU), under a uniform legal regime of an international organization, which “is identical with the Community’s regime.”<sup>1</sup> All of these policies are included in Title V of the TFEU, which consists of the following chapters: “General provisions,” “Policies on border checks, asylum and immigration,” “Judicial cooperation in civil matters,” “Judicial cooperation in criminal matters” and “Police cooperation.” It should also be noted that under the Lisbon Treaty, establishing the area of freedom, security and justice moves in the UE’s hierarchy from the fourth to the second place and ranks immediately after the goal of promoting peace, the Union’s values and the well-being of its peoples (Article 3 sec. 2 TEU).<sup>2</sup>

<sup>1</sup> A. Grzelak, *Reforma przestrzeni wolności, bezpieczeństwa i sprawiedliwości*, [in:] *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, J. Barcz (ed.), Urząd Komitetu Integracji Europejskiej, Warszawa 2008, p. 264; idem, *Unia Europejska na drodze do przestrzeni wolności, bezpieczeństwa i sprawiedliwości*, Centrum Europejskie Natolin, 2009, z. 37, p. 70. More on the reform of the area of freedom, security and justice: J. Monar, *Die Vertragsreformen von Lissabon in den Bereichen Inneres und Justiz: verstärkte Handlungsfähigkeit, Kontrolle und Differenzierung*, „Integration”, 2008, H. 4, pp. 379–398; A. Grzelak, T. Ostropolski, *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej. Współpraca policyjna i sądowa w sprawach karnych*, Europrawo, Warszawa 2009; A. Grzelak, *Trzeci filar Unii Europejskiej – instrumenty prawne*, Wydawnictwo Sejmowe, Warszawa 2008; W. Sadowski, M. Taborowski, *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej. Współpraca sądowa w sprawach cywilnych*, Europrawo, Warszawa 2009; E. Borawska-Kędzierska, K. Strąk, *Przestrzeń Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej. Polityka wizowa, azylowa i imigracyjna*, Warszawa 2009.

<sup>2</sup> *Traktat z Lizbony (dalej – Traktat z Lizbony), zmieniający traktat o Unii Europejskiej i traktat ustanawiający Wspólnotę Europejską, podpisany w Lizbonie 13 grudnia 2007 r.* (teksty skonsolidowane), Dziennik Urzędowy C, 2010, nr 83, p. 17.

## **Changes in the policies within the area of freedom, security and justice**

The Treaty extends the powers of the European Union in the area of freedom, security and justice, in particular in the judicial cooperation in criminal matters and police cooperation. It significantly modifies law-making procedures, decision-making, as well as the range of legal instruments in the area of freedom, security and justice. It also extends the powers of the European Council, the European Parliament and the Court of Justice of the European Union in this area, leaving the competences of the European Commission and the Council of the European Union essentially unchanged. Lastly, the Treaty also authorizes national parliaments to take action in this area for the first time.

The Lisbon Treaty reaffirms and extends the four basic premises meant to encourage the process of building the area of freedom, security and justice of the European Union. First, this process is carried out in compliance with fundamental rights and the different legal traditions and systems of the Member States. Secondly, the European Union is committed to the abolition of personal checks at internal borders and the development of a common policy on asylum, immigration and external border control, one that will be based on “solidarity” between the Member States and also “fair to the citizens” of third countries. Thirdly, the European Union should make the necessary efforts to ensure a high level of security through measures that prevent and fight crime, racism and xenophobia, measures ensuring coordination and cooperation between police and judicial authorities and other competent authorities, as well as through mutual recognition of judgments in criminal matters and, if necessary, the approximation of criminal laws. Fourth, the EU should also facilitate the access to justice administration, in particular based on the principle of mutual recognition of judicial and extrajudicial rulings in civil matters of one country by other Member States (Article 67 sec. 1–4 TFEU).<sup>3</sup>

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<sup>3</sup> If necessary for the achievement of the objectives referred to in Article 67 TFEU,

On the other hand, under the safeguard clause, derived from the Treaty of Maastricht, the Member States still have the sole responsibility for maintaining law and order and preserving internal security (Article 72 TFEU). Still, the Lisbon Treaty strengthens the clause stating that the Union shall respect essential state functions, including maintaining law and order and safeguarding national security, which should be the sole responsibility of each Member State (Article 4 sec. 2 TEU). In addition, Member States may organize cooperation and coordination of the administrative departments responsible for national security between themselves and on their own responsibility (Article 73 TFEU).<sup>4</sup> The doctrine emphasizes that the latter provision can give rise to a future development of new forms of cooperation between Member States outside the European Union, according to the “Prüm model.”<sup>5</sup>

The new provisions of the TFEU which also point to the strengthening of the competences of the Member States in the area of freedom, security and justice, are: first, the provision stating that in the judicial cooperation in criminal matters the measures adopted by the European Parliament and the Council of the European Union in order to prevent crime may not relate to any harmonization of the laws and regulations (Article 84 TFEU); second, in the course of judicial cooperation in criminal matters and police cooperation appeal procedures discussed below can be used; third, formal

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in relation to the prevention of terrorism and related activities and to combat these phenomena, the Lisbon Treaty provides for the first time a clear legal basis for the adoption by the European Parliament and the Council of regulations setting out a frame for administrative measures relating to capital movements and payments, which belong to natural or legal persons, groups or entities other than the state, and are in their possession or disposal (Article 75 TFEU); see the Treaty of Lisbon, *op. cit.*, pp. 73, 75.

<sup>4</sup> *Ibidem*, p. 18, 73–74 .

<sup>5</sup> See: J. Barcz, *Unia Europejska na rozstajach. Traktat z Lizbony. Dynamika i główne kierunki reformy ustrojowej*. Europrawo, Warszawa 2010, p. 219. See also: A. Gruszczak, *Współpraca policyjna w Unii Europejskiej w wymiarze transgranicznym. Aspekty polityczne i prawne*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków 2009, pp. 87, 189–227. One example of such cooperation may be the Prüm Convention, concluded by the foreign ministers of Germany, France, Spain, Austria and the states of the Benelux outside Union’s legal order on 27 May 2007, which specified cross-border cooperation in fighting terrorism, cross-border crime and illegal migration. See: D. Kietz, A. Maurer, *Der Vertrag von Prüm: Vertiefungs- und Fragmentierungstendenzen in der Justiz- und Innenpolitik der EU*, „Integration”, 2006, H. 3, p. 201–212.

acts of judicial procedure in matters relating to the prosecution of offenses against the financial interests of the Union by Eurojust (Article 85 sec. 2 TFEU) and coercive measures applied during the operational activities of Europol (Article 88 sec. 3 TFEU) are reserved to the exclusive competence of the Member States; fourth, the issue of determining the number of third-country nationals entering the territory of the European Union in search of employment or self-employment is reserved to the exclusive competence of the Member States (Article 79 sec. 5 TFEU).<sup>6</sup>

In parallel with the strengthening of the the powers of the Member States, the Lisbon Treaty extends the powers of the European Union in the area of freedom, security and justice. And so, in the policies regarding visas, asylum and immigration – which should be based on the principle of solidarity and fair distribution of responsibility between the Member States (Article 80 TFEU) – the Treaty provides for a progressive implementation of an integrated management system for external borders, which may be a first step toward the establishment of a mechanism for future control (Article 77 TFEU), adopting measures leading to the future establishment of the European Asylum System (Article 78, sec. 2 TFEU) as well as ensuring the effective management of migration flows, preventing illegal immigration and human trafficking (Article 79 sec. 1–2 TEU).<sup>7</sup>

The most important changes, however, regard judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation. Judicial cooperation in civil matters of cross-border implications should be based on the principle of mutual recognition of judicial and non-judicial rulings as well as on the principle of approximating laws and regulations of the Member States (Article 81 sec. 1 TFEU). In the fields of judicial cooperation in civil matters the Lisbon Treaty also gives the European Union the aforementioned powers in the field of family law with cross-border implications (Article 81 sec. 3 TFEU).<sup>8</sup>

<sup>6</sup> *Traktat z Lizbony*, op. cit., pp. 77, 81–82, 84; more on that issue: A. Grzelak, *Reforma*, op. cit., pp. 275–276.

<sup>7</sup> *Traktat z Lizbony*, op. cit., pp. 75–78.

<sup>8</sup> *Ibidem*, pp. 78–79.

Judicial cooperation in criminal matters should likewise be based on the principle of mutual recognition of judgments and judicial rulings and the principle of approximation of the laws and regulations of the Member States. In order to facilitate mutual recognition of judgments and judicial rulings and police and judicial cooperation in criminal matters having a cross-border dimension, the Treaty grants the European Parliament and the Council of the European Union the right to establish minimum standards, by means of directives and in accordance with the ordinary legislative procedure (Article 82 sec. 2 TFEU), as well as the definition of criminal offenses and sanctions for particularly serious crimes of cross-border implications (Article 83 sec. 1 TFEU). The Treaty also extends the powers of Eurojust, which can henceforth launch investigations and request the initiation of prosecutions by competent national authorities, particularly in matters relating to offenses against the financial interests of the Union (Article 85 sec. 1–2 TFEU). Furthermore, the Treaty provides for the establishment of a European Public Prosecutor to combat this type of crime. Regulations in this case are passed by the Council of the European Union, acting unanimously by a special legislative procedure, after obtaining the consent of the European Parliament. The European Public Prosecutor's Office shall, in liaison with Europol when necessary, be responsible for investigating, prosecuting and bringing to judgment perpetrators or accomplices in offenses against the financial interests of the European Union. It also has the power to prefer charges of these crimes before appropriate courts of the Member States. At the same time, the European Council may, at the time of the establishment of a European Public Prosecutor or later, accept the abovementioned decision to include in its competences serious crimes with cross-border implications, inflicting one or more Member States (Article 86 sec. 1–4 TFEU).<sup>9</sup>

As far as police cooperation goes, the Lisbon Treaty extends the powers of Europol, which is now responsible, among other things, for supporting the activities of the police and other law enforcement agencies of

<sup>9</sup> *Ibidem*, pp. 79–83.

the Member States in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime affecting the common interest of the Union, as well as for the coordination, organization and implementation of investigative and operational actions carried out jointly with the competent authorities of the Member State or States, or in joint investigative teams, in liaison with Eurojust when appropriate. Operational actions by Europol must be carried out in consultation and cooperation with the authorities of the Member State or States. Moreover, the existing Europol Convention is to be replaced by a new regulation, which will determine Europol's structure, functioning and responsibilities (Article 88 sec. 1–3 TFEU).<sup>10</sup>

In the area of freedom, security and justice, the ordinary legislative procedure becomes the basic legislative procedure. A special legislative procedure may be used only in exceptional cases that directly relate to the criminal justice systems of the Member States or to the matters dealing with their sovereignty.<sup>11</sup> In the wake of this, legislative acts in the area of freedom, security and justice, as it was assumed in the Constitutional Treaty, shall be adopted by the Council of the European Union by a qualified majority as a rule, and unanimously only in special cases. TFEU expressly provides the Council with the possibility of deciding unanimously and in accordance with a special legislative procedure; in the following cases, among others: passing regulations on passports, identity cards, residence permits or any other such document (visa policy – Article 77, sec. 3 of the TFEU); adopting measures concerning family law with cross-border implications (judicial cooperation in civil matters – Article 81 sec. 3 TFEU); the establishment of a European Public Prosecutor (judicial cooperation in criminal matters – Article 86 sec. 1 TFEU); adopting measures for operational police cooperation between police, customs and other law enforcement agencies (police – Article 87 sec. 3 TFEU); and determining the conditions under which the competent agencies of the Member States may

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<sup>10</sup> Ibidem, p. 84.

<sup>11</sup> A. Grzelak, *Reforma*, op. cit., p. 268.

operate in the territory of another Member State, in liaison and in agreement with the authorities of that country (judicial cooperation in criminal matters and police cooperation – Article 89 TFEU). In addition, the Treaty provides that the Council may unanimously decide to extend the ability to adopt directives which establish minimum standards (directives relating to facilitating mutual recognition of judgments and judicial rulings in criminal matters, as well as police and judicial cooperation in criminal matters with a cross-border impact) so as to include other specific aspects of criminal procedure (Article 82 sec. 2 point. d TFEU) and the extension of the areas of particularly serious crime with a cross-border dimension, about which the directives would establish minimum standards (Article 83 sec. 1 TFEU).<sup>12</sup>

In the whole area of freedom, security and justice, legislative acts, i.e. regulations, directives and decisions adopted under the ordinary or special legislative procedure are in force. In addition, the TFEU expressly provides for cases of non-legislative acts, or acts passed outside the ordinary or special legislative procedure.<sup>13</sup> The placement of judicial cooperation in criminal matters and police cooperation essentially under the same legislative acts as other policies regarding the area of freedom, security and justice for the first time, results in the abandonment of the use of framework decisions, decisions, conventions and common positions in relation to these two policies, and in the allocation of a direct effect to standards in this field. Up till then it was excluded under Article 34 sec. 2 TEU.<sup>14</sup>

However, pursuant to Article 9 of Protocol No 36 on transitional provisions, the legal consequences of acts of judicial cooperation in criminal matters and of police cooperation before December 1, 2009 shall remain legal until they are repealed, annulled or amended by the use of treaties. The same shall apply to agreements concluded between Member States.<sup>15</sup>

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<sup>12</sup> *Traktat z Lizbony*, op. cit., pp. 75–76, 78–84.

<sup>13</sup> A. Grzelak, *Reforma*, op. cit., p. 268.

<sup>14</sup> More on that issue: *ibidem*, p. 260.

<sup>15</sup> *Protokół w sprawie postanowień przejściowych*, [in:] *Traktat z Lizbony*, op. cit., p.325.



This means the exclusion of all legal effect of framework decisions and decisions until they are changed: decision frameworks into directives and decisions into regulations or new decisions. Therefore, the doctrine argues that all legal consequences, including the principle of direct legal effect or the principle of the primacy of EU law over national law, can be applied only in relation to the newly adopted legislative acts or to old, but amended legislation.<sup>16</sup> Some authors emphasize, however, that the perpetuity of maintaining the legal effects of the current third pillar will not matter much, because “the vast majority (if not all)” will be changed, replaced or repealed by the new legislative acts on the basis of Declaration No 50 on the transitional provisions which is annexed to the Final Act of the Intergovernmental Conference 2007.<sup>17</sup>

The Lisbon Treaty strengthens the position of the European Council, the European Parliament and the Court of Justice of the European Union in the area of freedom, security and justice. For the first time it gives the European Council the right to adopt “strategic guidelines” in the field which define the planning of legislative and operational action (Article 68 TFEU). The European Council also obtained for the first time the position of the “court of appeal” within the four appeal procedures mentioned below. Finally, it may also, acting unanimously after obtaining the consent of the European Parliament and after consulting the Commission, decide to extend the powers of the European Public Prosecutor in such a way that the latter can not only fight crime against the financial interests of the European Union, as provided for in the current provisions of the TFEU, but also prosecute serious cross-border crime (Article 86 sec. 4 TFEU).

Making the ordinary legislative procedure the dominant legislative procedure in the area of freedom, security and justice results in strengthening the powers of the European Parliament as the legislator in this

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<sup>16</sup> A. Grzelak, *Reforma*, op. cit., p. 266.

<sup>17</sup> C. Herma, *Likwidacja „struktury filarowej” Unii – podmiotowość prawnomiędzynarodowa UE oraz reforma systemu aktów prawa pierwotnego i wtórnego*, [in:] *Traktat z Lizbony. Główne reformy ustrojowe Unii Europejskiej*, op. cit., p. 131.

field. In cases of a special legislative procedure the European Parliament is consulted, and agrees in the abovementioned extension of the powers of the European Public Prosecutor's Office. The European Parliament will be informed of the content and results of the evaluation of the implementation of policies within the area of freedom, security and justice by the Member States, and of the activities of the Standing Committee on Operational Cooperation on Internal Security (COSI) (Articles 70–71 TFEU).<sup>18</sup> Moreover, the powers of the European Parliament in the conclusion of international agreements in the policies within the area of freedom, security and justice are increased (see Section III. 6.7).

The present Treaty abolishes the existing differences in the jurisdiction of the Court of Justice of the European Union with regard to policies within the area of freedom, security and justice. However, the powers of the Court of Justice of the European Union extend only to the law enforcement actions that are taken on the basis of EU law. Still, same as before, it cannot control the legality and proportionality of actions undertaken by police or other law enforcement agencies of the Member States, or rule on the exercise of rights relating to maintenance of public order and internal security, since these activities are subject to the national law of the Member States (Article 276 TFEU).<sup>19</sup>

Unlike before, the Court of Justice of the European Union may, however, rule on measures or decisions regarding the lack of control when crossing internal borders, even if they relate to the maintenance of public order or internal security. The Court of Justice of the European Union (like the European Commission) gains full powers over the existing third pillar legislation that was converted into new directives, regulations or decisions before the expiry of the five-year transitional period, and after that period it holds those powers in every case,

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<sup>18</sup> In the course of implementation of the Lisbon Treaty provisions, by a decision of the Council of the European Union on 25 February 2010, the Standing Committee on Operational Cooperation on Internal Security (COSI) was established within it.

<sup>19</sup> *Traktat z Lizbony*, op. cit., p. 217.

including those acts which have not been changed.<sup>20</sup>The Lisbon Treaty also for the first time grants powers within the area of freedom, security and justice to national parliaments. Apart from the aforementioned specific privileges (see Section III.7.4), the Treaty, based on general rules, also gives them the competence to prepare draft legislative acts originating from the European Commission or a group of Member States (Article 1–2 of Protocol No. 1), and includes them in the newly set up early-warning mechanism, in particular in the yellow and orange card procedures (Article 1–7 of Protocol No. 2).<sup>21</sup>

Judicial cooperation in criminal matters and police cooperation, as envisaged in the Constitutional Treaty, are still characterized by some peculiarities which distinguish them from other policies in the area of freedom, security and justice. In this area, the right of legislative initiative is attributed to the Commission or to ¼ of the Member States (Article 76 TFEU), whereas the qualified majority for decisions taken on the collective request of Member States must equal at least 72% of the members of the Council of the European Union, representing at least 65% of the population of the European Union (Article 238 sec. 2 TFEU). Moreover, the implementation of certain competencies by the European Union in both these areas is limited by four appeal procedures available to the Member States (Article 82 sec. 3 TFEU, Article 83 sec. 3 TFEU, Article 86 sec. 1 TFEU and Article 87 sec. 3 TFEU).<sup>22</sup>

When it comes to procedures, the Treaty simplifies the two of them that were already included in the Constitutional Treaty, and establishes two

<sup>20</sup> A. Grzelak, *Reforma*, op. cit., pp. 274–275.

<sup>21</sup> *Protokół w sprawie roli parlamentów narodowych w Unii Europejskiej*, [in:] *Traktat z Lizbony*, op. cit., pp. 203–204; *Protokół w sprawie stosowania zasad pomocniczości i proporcjonalności*, [in:] *Traktat z Lizbony*, op. cit., pp. 206–207.

<sup>22</sup> *Traktat z Lizbony*, op. cit., p. 79–84. In addition to judicial cooperation in criminal matters and police cooperation, the Lisbon Treaty, as already envisaged in the Constitutional Treaty, also establishes an appeal procedure in the field of social security. It can be initiated by a Member State which considers that a draft legislative act on the free movement of workers threatens to undermine the basic principles of the social security system or the financial balance of the system (Article 48 TFEU).

new ones. The simplified procedures are: appeal procedures in judicial cooperation in criminal matters, i.e. the procedure for facilitating mutual recognition of judgments and judicial rulings in criminal matters, as well as police and judicial cooperation in criminal matters with a cross-border aspect (Article 82 sec. 2 TFEU) and the procedure relating to particularly serious crimes with a cross-border impact (Article 83 par. 1–2 TFEU).<sup>23</sup> And so, when one Member State does not agree to the introduction, by a qualified majority, of minimum standards in these areas, the draft of a legislative act in question is submitted to the European Council, and the legislative procedure in the Council of the European Union is suspended. If a consensus is reached within a period of four months, the European Council refers the draft back to the Council of the European Union to pass it. If, however, a consensus within the European Council cannot be achieved, a minimum of nine Member States may establish an enhanced cooperation on the basis of the draft legislative act.

However, unlike the Constitutional Treaty, these procedures preclude the possibility of developing a new draft legislative act by the European Commission or 1/4 of the Member States that initiated it, and so said procedures have been simplified (Article 82 sec. 3 TFEU, and Article 83 sec. 3 TFEU).<sup>24</sup> As for the two new appeal procedures, one of them concerns judicial cooperation in criminal matters, and the other police cooperation. The first procedure regards the establishment of the European Public Prosecutor, and the other is relevant to the operational cooperation between police, customs and other proper law enforcement agencies involved in police cooperation between the Member States of the European Union. If the Council of the European Union is unable to make a unanimous decision on these matters, then a group of at least nine Mem-

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<sup>23</sup> The Treaty recognizes the following as particularly serious crimes with a cross-border aspect: terrorism, human trafficking, sexual exploitation of women and children, illicit drug trafficking and illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organized crime (Article 83 sec. 1 TFEU); see: *Traktat z Lizbony*, op. cit., pp. 81.

<sup>24</sup> *Ibidem*, pp. 80–81.

ber States may request the draft of the measures be transferred to the European Council. Then the special legislative procedure of the Council of the European Union is suspended. If a consensus is reached within four months, the European Council refers the draft back to the Council of the European Union with a view to its adoption. If, however, a consensus within the European Council will not be achieved, a minimum of nine Member States may establish an enhanced cooperation on the basis of this project (Article 86 sec. 1 TFEU, and Article 87 Sec. 3 TFEU).<sup>25</sup> Whilst the first two procedures allow for the suspension of the ordinary legislative procedure and for the submission of a draft legislative act to the European Council upon application by one Member State in danger of being outvoted by a qualified majority; the last two procedures make possible the suspension of the special legislative procedure and presenting a draft legislative act to the European Council upon application by a minimum of nine Member States, should reaching an unanimous decision in the Council of the European Union be impossible.

The Treaty of Lisbon introduces further changes in judicial cooperation in criminal matters and police cooperation, which did not feature in the Constitutional Treaty. Firstly, under Protocol No. 36 on transitional provisions, a five-year transition period in these two areas is set, regarding the right of lodging complaints by the European Commission (Article 258 TFEU) and the jurisdiction of the Court of Justice of the European Union. During this period, i.e. from 1 December 2009 to 1 December 2014, the competence of the European Commission regarding complaints and the jurisdiction of the Court of Justice of the European Union with respect to acts adopted before 1 December 2009 will remain limited, as before.<sup>26</sup> In any case, however, temporary measures no longer apply after the expiry of the transition period. A change of each of these acts before the end of the

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<sup>25</sup> *Ibidem*, pp. 82–84.

<sup>26</sup> The jurisdiction of the Court of Justice of the European Union on the issue of preliminary rulings, as put forward in Article 35 sec. 2–3 TEU (in the version of the Nice Treaty), remains the sole exception to this rule; i.e. should the Member State in question present a declaration recognizing the jurisdiction of the Court in this regard.

five-year transition period entails the use of the new powers of these institutions, as envisaged in the Lisbon Treaty (Article 10 sec. 1–3 of Protocol No. 36). Declaration No. 50 on transitional provisions clarifies the regulations of Protocol No. 36, calling on the European Parliament, the Council of the European Union and the European Commission to “do their best” to pass legislative acts amending or replacing the existing third pillar instruments before the end of the five-year transition period. On the other hand, Protocol No. 36 contains provisions unique to the United Kingdom, which the UK strongly demanded during the Intergovernmental Conference in 2007. With these, the United Kingdom may refuse to accept the European Commission’s prerogatives regarding complaints and the jurisdiction of the Court of Justice of the European Union concerning acts of the former third pillar, even after the five-year transitional period. If the United Kingdom does so (at least six months before the expiry of the transitional period), then all acts dealing with judicial cooperation in criminal matters and police cooperation, adopted before 1 December 2009, will automatically cease to apply on 1 December 2014, unless they were changed after the Lisbon Treaty came into force. For this reason this country may also be liable for financial costs. At the same time, the United Kingdom may at a later date, or in fact “at any time,” notify the Council of the European Union of its will to apply the legislation as well as to accept the European Commission’s competence concerning complaints and the jurisdiction of the Court of Justice of the European Union, which no otherwise longer apply to the United Kingdom. In this case, relevant provisions of Protocol No. 19 on the Schengen acquis, as it was incorporated into the European Union, and Protocol No. 21 on the position of the United Kingdom and Ireland in relation to the area of freedom, security and justice are to be applied (Article 10 sec. 4–5 of Protocol No. 36).<sup>27</sup> It is worth noting that the establishment of a five-year transition period for these pieces of legi-

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<sup>27</sup> *Protokół w sprawie postanowień przejściowych*, op. cit., pp. 325–326; *Deklaracja dotycząca artykułu 10 Protokołu w sprawie postanowień przejściowych*, [in:] *Traktat z Lizbony*, op. cit., pp. 354.

slation is the result of a political compromise between the countries that agreed for the change in their status as early as the Lisbon Treaty came into force, and the majority of EU Member States that strongly opposed this (including Poland, the United Kingdom, the Czech Republic and Malta). Moreover, Protocol No. 21 on the position of the United Kingdom and Ireland in relation to the area of freedom, security and justice extends – at the request of the two countries – the provisions of the Amsterdam Protocol No. 4 to include judicial cooperation in criminal matters and police cooperation as well as acts furthering the Schengen acquis. This means that the United Kingdom and Ireland will be able to freely enter and leave the cooperation within the entire area of freedom, security and justice, just as it was before December 1, 2009, with respect to the cooperation provided for in Title IV of the TEC. This also applies to legislative acts amending the acts that already bind both countries. However, if the Council of the European Union, acting by a qualified majority, (without the participation of the interested states), upon application by the European Commission, determines that such an exemption could cause failure of the legislative act in other Member States or in the European Union as a whole, it must encourage them to adopt it. If none of these countries do so, the “original” piece of legislation ceases to be obligatory.<sup>28</sup> In addition, the Council of the European Union, acting by a qualified majority on a proposal from the European Commission, may determine that the United Kingdom or Ireland, or both at the same time, bear the direct financial consequences arising from the cessation of the use of the legislative act (Articles 1–4a of Protocol No. 21).

Ireland’s position on this issue is further illustrated by the unilateral declaration annexed to the Final Act of the Intergovernmental Conference 2007. In it, Ireland expresses its “firm intention” to take part in adopting acts within the area of freedom, security and justice “in as wide a range as it is considered possible,” but “as far as possible... in the field of police cooperation.” At the same time Ireland states that within three

<sup>28</sup> See: C. Herma, *Likwidacja „struktury filarowej”*, op. cit., pp. 153.

years of the Lisbon Treaty's entry into force, that is, before 1 December 2012, it will weigh the possibility of derogation from the provisions of the aforementioned Protocol (Declaration No. 56).<sup>29</sup> In relation to the newly acquired prerogatives or strengthening the existing powers of the European Union in the area of freedom, security and justice, the German Federal Constitutional Court in its judgment of 30 June 2009, noted that the EU institutions must exercise their powers in such a way as to still afford the Member States "with tasks of major relevance, which are the legal and practical premises of a living (*lebendige*) democracy."<sup>30</sup> The Federal Constitutional Court primarily objected the provisions of Article 83 sec. 1 TFEU, Article 82 sec. TFEU and Article 83 sec. 3 TFEU (judicial cooperation in criminal matters).

In particular, the Court considered the "blanket authority" of the Council of the European Union to expand the catalog of especially serious crimes with a cross-border impact, as put forward in Article 83 sec. 1 TFEU ("depending on the development of crime") may lead to the extension of the powers of the European Union, and as such it is subject to statutory claim pursuant to Article 23 sec. 1 sentence 2 of the Basic Law. While with regard to the procedures provided for in Article 82 sec. 3 TFEU and Article 83 sec. 3 TFEU, which allow for the suspension of the ordinary legislative procedure and submitting a draft legislative act to the European Council, upon application by a Member State in danger of being outvoted, when the state's vital national interests may be violated, the Federal Constitutional Court has ruled that the German government's representative in

<sup>29</sup> *Protokół w sprawie stanowiska Zjednoczonego Królestwa i Irlandii w odniesieniu do przestrzeni wolności, bezpieczeństwa i sprawiedliwości*, [in:] *Traktat z Lizbony*, op. cit., pp. 295–298; *Deklaracja Irlandii w sprawie artykułu 3 Protokołu w sprawie stanowiska Zjednoczonego Królestwa i Irlandii w odniesieniu do przestrzeni wolności, bezpieczeństwa i sprawiedliwości*, [in:] *Traktat z Lizbony*, op. cit., pp. 356–357. Prerogatives similar to those of the United Kingdom and Ireland were obtained by Denmark upon the Constitutional Treaty. See: *Protokół w sprawie stanowiska Danii*, [in:] *Traktat z Lizbony*, op. cit., pp. 299–303. Szerzej na ten temat por. C. Herma, *Likwidacja „struktury filarowej”*, op. cit., pp. 153–154.

<sup>30</sup> BVerfG, Vertrag von Lissabon – 2 BvE 2/08 – Urteil vom 30. Juni 2009, <http://www.bverfg.de/>, p. 100.



the Council of the European Union may act only in accordance with the instructions of the Bundestag and, when it relates to the legislative powers of the federal states, they must also do so in accordance with the instructions of the Bundesrat.<sup>31</sup>

### **Final remarks**

By making changes to the TEU and the TFEU, the Lisbon Treaty significantly strengthens the legal basis for the future establishment of the area of freedom, security and justice. At the same time, it reaffirms some of the peculiarities of the current judicial cooperation in criminal matters and police cooperation, which distinguish these policies from other policies within this area. The Treaty extends the powers of the European Union in the area of freedom, security and justice, in particular in judicial cooperation in criminal matters and police cooperation. On the other hand, it gives new powers to the Member States in the whole area of freedom, security and justice. The Treaty significantly modifies law-making procedures, decision-making procedures, as well as the catalog of the legislation concerning the area of freedom, security and justice. It also extends the powers of the European Council, the European Parliament and the Court of Justice of the European Union in this area, while leaving the prerogatives of the European Commission and the Council of the European Union essentially unchanged. Finally, the Treaty also grants powers in that respect to national parliaments for the first time.

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<sup>31</sup> *Ibidem*, pp. 100–107, 116.