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I. INTRODUCTION

The spread of cross-border crimes has been one of the most important issues with which states all over the world had faced along history. The matter of cross-border criminality, ironically, had increased once states had committed themselves in supporting each other through bilateral or multilateral treaties or agreements that represented for the state parties an environment with less restrictions and barriers politically, economically and judicially and this lack of barriers had *encouraged* people to easily resort to illicit acts as well. This was also the situation when the European Union was created, starting from the period of time where the pillar system was still applicable in the European Community and ever since then, the European Union has started to work on problems of international criminality, mainly through its third pillar (PJCCM). The first step of the Union was the adoption of the extradition procedures, marked by the European Convention on Extradition from December 13, 1957, lately analyzed by the Additional Protocol to the European Convention of Extradition from October 15, 1975 together with the Second Protocol on the same Convention signed in 1978, March 15. Unfortunately, the extradition procedures, were not that effective as expected because of their long time of execution and mostly because they were seen as a sovereign acts because, in contrast to the European Arrest Warrant, the government of the executing state had the only and final word and was a long process until the surrender was executed in the end, if the requests were accepted. In 2002, a new legal tool for facilitating the surrender and prosecution in criminal matters within the European Union, was adopted. The European Arrest Warrant is the product of the work attributed to the Council to the Framework Decision 2002/584/JHA adopted in June, 2002. This new procedure has been seen as a positive change from the Member States of the European Union and a potential strong instrument for a better strategy in order to combat cross-border crimes.

The founding of a Union at an European level has had a lot of objectives since its very beginning in order to create a more harmonized political and economic environment for the Member States of the European Union. Even so, there were still encountered thresholds on what concerned judicial cooperation in criminal matters along the Union. Besides the fields covered by the European Communities in a social, economic and political level, the two other pillars of the European Union had a major impact for the international

cooperation in Criminal law. The Common Foreign and Security Policy and the Police and Judicial Co-operation in Criminal Matters were useful *weapons* for the European Union in bringing up to discussion issues of Criminal law and international procedures concerning it. Still the initial framework at that time was frequently coming over thresholds that were slowing down national or international criminal trials at the European Union level. [1]

In order to improve this aspect, after many unfortunate worldwide events, one of the highest importance being the terrorist attacks from September 11, in New York, the European Arrest Warrant was implemented among the many other important goals of the European Union. Through this instrument, the European Union wanted to mark one of the "cornerstones", which is how the European Arrest Warrant is considered to be and additionally to this, the European Union wanted to extend the collaboration tools between the EU Member states regarding the cooperation in criminal matters and its implementation in every national legislation of the Member States.

The European Arrest Warrant is the core of the Council Framework Decision on the European Arrest Warrant and surrender procedures between Member States (2002/584/JHA), discussions that took place in Tampere, Finland, in order to establish an easy access to justice and security within the European Union. During the discussions from Tampere, it was emphasized that, to what concerns international cooperation in criminal matters, the extradition proceedings should be replaced by this simple request form, to shorten the normal time of surrender procedures, without bringing any prejudice or affecting the right to a fair trial and respect for human rights of any EU citizen provided in Article 6 of the Treaty of the European Union. The Council of Tampere from 1999 had worked on the development of the principle of mutual recognition procedures, an influence of this initiations being the terrorist attacks from the United States in 2001, as previously mentioned. These attacks led to the increase of international cooperation in criminal matters, to the evolution of judicial cooperation of the European Union having as a legal basis the third pillar: the Political and Judicial Co-operation in Criminal Matters, which was also an influential element of the Framework Decision of the Council.

[1] Libor Klimek, *European Arrest Warrant* (2014), p.2

The European Arrest Warrant concept was embraced by many lawmakers around Europe, international organizations and other judicial bodies from Member States, since this procedure has significantly shortened the time and the number of procedures in criminal and civil trials. In contrast to the extradition procedures, the European Arrest Warrant implies a period of time of maximum 17 days in cases where the consent is immediately given, and a time of 48 days when the consent from the executing state takes longer, while the extradition procedures could last almost an entire year until the surrender of the suspect would be executed. The situations where consents had been rapidly given had increased year per year, moreover, there had been controversies on whether an European Arrest Warrant should be used in all kinds of cross-border crimes. That being, said, reportedly 21% of the issued European Arrest Warrants were executed in 2005 and 2009, followed by a percentage of 29% in 2011.[2] This issue is linked to the principle of proportionality, according to which practitioners had addressed the opinion of reformation of conditions under which an EAW could be issued, because, as it was previously presented, a lot of them were denied on grounds of disproportionality between the object of the request and the general application of the European Arrest Warrant.

The Framework Decision of the Council from 2002 is considered to be most important step of the European Union towards the work on the principle of mutual recognition. It has replaced the former legal basis in international criminal procedures, i.e. the national laws that would guarantee the reciprocity between two states regarding a category of persons, treaties or agreements between two states or more and of course the principles provided by international law, namely, the principle or reciprocity, the principle of specialty, rules of international diplomacy, the Convention between the Member States of the European Communities on the Simplified Extradition Procedures and the provisions on extradition from the Schengen Convention from 1990. Besides the shorter number of procedures regarding the European Arrest Warrant, the Framework Decision has also given rights to the prosecuted person itself. Opposed to the extradition procedures, the person upon

[2] Quaqer Council for European Affairs, 'The European Arrest Warrant: One step closer to reform?' (*QCEA Discussion Paper*, December 2013) <http://www.qcea.org/wp-content/uploads/2013/12/Discussion-paper-on-European-Arrest-Warrant-final.pdf>

whom such an arrest warrant is issued has the right to appeal the document in question concerning its legitimacy, whereas during the extradition procedures, only the states involved had the right of contesting this decision. Moreover, the Framework Decision has eliminated possible rejection of surrender on behalf of a Member State to another, in cases of military, political or fiscal crimes as there could be situations as such on the prior extradition legal basis with the exception of the legal principle of ne bis in idem. The ne bis in idem principle covers for the repeatedly investigation or prosecution of a person in regard with the same crime or when that person had already been acquitted for that crime.

This instrument entails the EU Member States to respect and cooperate in each Member State criminal prosecutions or enforcement of sentences by arresting or transferring a criminal suspect to the issuing state in question. The European Arrest Warrant is a judicial decision which has to be treated as such not only by the issuing state but also by the cooperating Member State in which the suspect may be present and what it is also very important to be stressed, is that the European Arrest Warrant is different from the preventive arrest warrant issued in a Member State. Having said that, the European Arrest Warrant is issued by an EU Member State only if an initial preventive arrest warrant cannot be complied by a suspect or if the suspect had escaped from executing his penalty, by hiding in another Member State.

What will be further discussed in the present paper, will be the replacement of former procedures of the transfer of criminal suspects within the European Union, namely the extradition procedures based on the European Convention on Extradition signed in December 13, 1957 in Paris and its Additional Protocols signed in Strasbourg in October 15, 1975 and March 17, 1978 , the European Convention on the Suppression of Terrorism signed in Strasbourg in January 27, 1977 or the European Convention on Simplified Extradition procedures from September 27, 1996. In contrast to all these former procedures, the European Arrest Warrant means only the issuing of a simple form signed by the issuing state, stating the reasons for its request to another EU Member State. Even so, despite being a simplified procedure in criminal matters, the European Arrest Warrant has some conditions under which it can be issued or by whom. Firstly, the only authority that can issue an European Arrest Warrant are the Appeal Courts within the European Union.

In a nutshell the benefits of the new European Arrest Warrant has not only abolished the conditions attributed to the process extradition, but also has eliminated the previous legal instruments on which the EU Member States were considering to be elements of judicial cooperation, now through this new instrument, international law prevails over those treaties or agreements and provisions regarding extradition procedures stipulated in the Schengen Agreement.

The European Arrest Warrant not only had simplified the procedures of surrendering and arresting within EU countries, without any exceptions, but has also eliminated the possible political involvement of government in order to protect some of one's state citizen, thus now no one can reject a surrender or prevent the arrest one an EU citizen anywhere in the European Union. In order for such an arrest warrant to be issued, there are still some conditions to be fulfilled, such as the existence of criminal prosecution of a national of a EU Member State, a detention order that has a punishment of at least 4 months, a final judgement released by a EU Member state concerning a punishment of at least 1 year or if the person in question is evading from the enforcement of his/ her sentence.

II. JUDICIAL COOPERATION IN CRIMINAL MATTERS

The rapidity of international relations between states worldwide, especially the Member States of the European Union, as the majority of the European countries have acceded to the Union had have both good and negative outcomes. The positive side of this international cooperation between Member States had led to a free market space, free movement of persons, a more increased attention and development towards human rights and many other considerable changes in the present time in countless fields. The negative part of this is that together with the free movement of goods and persons, international criminality had increased in a concerning way since most of boarders, regardless of the field, have disappeared. The threats had taken different forms because of these aspects which led to the necessity of proliferation and prevention of some categories of crimes simultaneously in the territories of the EU Member States or across the globe, for that matter. The aspect of the international organized crime has been analyzed at first at a Union level following the implementation of the Schengen Area. Among its many advantages, the Schengen Area is

destined to offer a free way for the judicial organs, regardless the Member State they represent, in order to proceed with some national or international crime investigation concerning their state or a national, whether it has the purpose to start and investigation, to take into custody or to start the enforcement of a sentence.

The principle of judicial cooperation is seen as a two-way street in the applicability of criminal law procedures in the European Union as it can include overall the extradition process, the transfer of the persons for which is destined the European Arrest Warrant and the rest of the formalities that it implies, but also it represents the work at a national level of one of the States parties in the EAW, that involves the paperwork and other procedures regarding the criminal law of the executing state, constant reports and other information to the issuing state that goes only under the duty of the executing state. The Convention on the Mutual Legal Assistance in Criminal Matters, that is one main legal basis on what concerns the mutual recognition and judicial cooperation in the European Union, was previously represented by several Conventions and Framework Decisions of the Council, which were parts of what the current Convention provides in its entirety. The former instruments on mutual legal assistance and cooperation were: The European Convention on Mutual Assistance in Criminal Matters from 1959, the Benelux Treaty on Extradition and Mutual Assistance in Criminal Matters from June 27, 1962 and the Additional Protocol to the European Convention on Mutual Assistance on Criminal Matters from 1978.[3] An important step that involved the third pillar of the EU was the implementation of new provisions regarding the principle of mutual recognition of judicial decisions between the Members States, topic that was developed in Tampere in 1999, by the Council, and lately through the Hague Pogramme on Strengthening, Freedom Security and Justice in the European Union from 2005 the European Council has once again expressed the importance given to a more developed area of "*freedom, security and justice, responding to a central concern of the peoples of the States brought together in the Union*".[4]

Along this instruments, the Council had made several proposals involving the principle of proportionality and subsidiarity for reaching a better cooperation between the EU Member

[3] Ministry of justice of Romania , 'Consolidation of the legal and institutional framework in regard with international judicial
cooperation' (*Just.ro*, 2005)<http://old.just.ro/Portals/0/CooperareJudiciara/Doc%202_Manual_Criminal.pdf
[4] The Hague Programme: Strengthening freedom, Security and Justice in the European Union [2005] OJ 1 53/1

States, some of them approaching matters as: the proposal for a Framework Decision on a European Surveillance Warrant applicable during criminal investigation (2006), Opinion of the European Data Protection Supervisor on the Proposal for a Council Framework Decision on the organisation and content of the exchange of information extracted from criminal records between Member States (COM (2005) 690 final), Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings[5], Initiative of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the European Union[6], Council Framework Decision on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters[7], Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders[8], Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence and finally to the present instrument that is the 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision.[9]

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[5]COM (2005) 91: Proposal for a Council Framework Decision on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings' (*Procedure 2005/0018/CNS*, 2005) <http://eur-lex.europa.eu/procedure/EN/2005_18>

[6] Initiative of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the European enforcement order and the transfer of sentenced persons between Member States of the European Union [2005] OJ 1 150/1

[7] 'Proposal for a COUNCIL FRAMEWORK DECISION on the European Evidence Warrant for obtaining objects, documents and data for use in proceedings in criminal matters' (*COMMISSION OF THE EUROPEAN COMMUNITIES*, 14.11.2003) <http://ec.europa.eu/transparency/regdoc/rep/1/2003/EN/1-2003-688-EN-F1-1.Pdf>

[8] COUNCIL FRAMEWORK DECISION 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ 2 328/59/1

[9] Ministry of justice of Romania , 'Consolidation of the legal and institutional framework in regard with international judicial
cooperation' (*Just.ro*, 2005)<http://old.just.ro/Portals/0/CooperareJudiciara/Doc%202_Manual_Criminal.pdf

International cooperation in criminal matters between Member States is based on the principle of mutual recognition of judgements and judicial decisions having as legal basis the Council Framework Decision (2008/909/JHA) from November 2008[10]. The decision and other instruments regarding judicial cooperation[11] implies for the Member States to harmonize their national legislation under the same pace with the other national legislations for easing the access of both of a fair trial of an EU national and compensation for the victims of the crimes on the other hand. Article 83 of the Treaty on the Functioning of the European Union concentrates especially on a category of crimes such as the: 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 organized crime. [12]

The idea of implementing a common system for criminal law in the European Union was meant to cover for a broader range of fields, namely the principle of mutual recognition of judicial decisions between the EU Member States and to create not only common rules of criminal procedures, but actually to implement a single criminal law at a Union level. The concept of judicial cooperation after the enforcement of the European Arrest Warrant has been positively embraced by the EU Member states through its governments by harmonizing their national legislation with the legislation of the rest of the EU Member states.

1. Case-study. Framework Decision in the Belgian Criminal law.

The present case involves Advocated voor de Wereld that filed an application before Arbitragehof against the implementation of the Framework Decision of the Council on the European Arrest Warrant in the Belgian Law and objections towards how the European Arrest Warrant was enforced in the beginning.

[10] Council Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ 2 81

[11] Council Framework DECISION amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial[2009] OJ 2 81/24/1

[12] Treaty on the Functioning of the European Union [2007] OJ 1 326/Article 83, paragraph 2

The first issue addressed by Advocaten voor der Wereld was the method of how the transition between the extradition process and the European Arrest Warrant was made, that is, through the Framework Decision of the Council from 2002. For defending its reasons, Advocaten voor der Wereld, stressed that such an instrument should enter into force, not through a Framework Decision, but through a convention as the Article 34 (2) b[13] of the Treaty on the European Union so provides. The applicant had also contested the a national law from the Belgian criminal law (Law from December 19th, 2003), through which the provisions of the Framework Decisions are conducted in the Belgian state, concentrating on the abolishment of the principle of double jeopardy of the 32 listed crimes of the Framework, while on the other hand, for other categories of crimes for which double jeopardy could still be invoked. Following this, Advocaten voor der Wereld is under the opinion that this is against the principle of equality and non-discrimination.[14] Further on, Advocaten voor de Wereld, stated that the Belgian Law in discussion lacks explanation on matters of criminality of the crimes that fall under an issuing of an EAW and the entitled authorities may not have a clear vision regarding the applicability of an European Arrest Warrant, if received. [15] The Belgian Court of Arbitration (Arbitragehof) analyzed the complaint made by Advocaten voor de Wereld and since it was about issues raised against a Framework Decision, according to Article 35, paragraph 1 of the Treaty on the European Union, this was a matter that falls only under the jurisdiction of the Court of Justice of the European Union[16]. Arbitragehof has turned the dispute before the Court of Justice of the European Union, concentrating on two issues. The first question concerned the applicability in national legislation of the EU Member States of the Framework Decision on the European Arrest warrant according to Article 34(2) b of the Treaty on the European Union.[17] The second issue approached by the Arbitragehof addresses also the applicability of the Framework Decision on EAW, this time on the category of crimes that are not officially

[13] Ioana-Cristina Morar and Mariana Zainea, *Judicial cooperation in criminal matters* (CH Beck 2008), p. 378
[14] The Court of Justice of the European Union, 'JUDGMENT OF THE COURT (Grand Chamber) ' (*JUDGMENT OF 3 5 2007 — CASE C-303/05* , 3 May 2007)<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=61470&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=666033>
[15] Ibid.
[16] Ibid.
[17] Ibid.

provided in the Framework Decision, crimes for which the double jeopardy principle is in many cases requested.

The first issue of analysis of Article 34(2) b of the Treaty on the European Union has been contested by the Czech Government, invoking that this was a matter of primary law which does not fall under the jurisdiction of the Court of Justice of the European Union. The Court argued that it does have jurisdiction in deciding upon such cases, even if there are no specific provision on that, when it is about the applicability of such framework decisions in national legislation of one of the Member States of the European Union. [18] Moreover, the Czech Government had also argued that the reasons for which Advocaten voor de Wereld claims that the enforcement of the Framework Decision does not fulfill a big number of criterias, lack explanation.[19] On the breach of the principle of proportionality, Advocaten voor de Wereld, emphasized that the abolishment of double jeopardy only on those 32 crime provided in the Framework Decision of the European Arrest Warrant should be another issue that goes against the principle of non-discrimination and against article 6 of the Treaty of the European Union, which covers for the fundament rights of the EU citizen under any circumstantions.[20]

Overall, the Court has not found discrepancy between the official 32 crimes provided in the Framework Decision since the Council has shown concern to those particular types of crimes only because these crimes represent a bigger threat for the security and peace of the European Union, thus the abolishment of double criminalization and their punishment regardless if they or not provided in one's state national law it is justified.[21] On the other issues raised by Advocaten voor de Wereld, the Court found the Framework Decision applicable in the Belgian criminal law, reasoning that the instrument in question could not be declared void if under the opinion of some, the principle of legality on crimes and

[18] Ioana-Cristina Morar and Mariana Zainea, *Judicial cooperation in criminal matters* (CH Beck 2008) p. 379
[19] Ibid *18*
[20] Ibid *18*
[21] The Court of Justice of the European Union, 'JUDGMENT OF THE COURT (Grand Chamber) ' (*JUDGMENT OF 3 5 2007 — CASE C-303/05* , 3 May 2007)<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=61470&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=666033>

punishment of crimes provided by Article 6, paragraph 2 from the Treaty on the Functioning of the European Union is not properly followed by the Decision in question. [22]

1.1. Principles of Judicial Cooperation

Besides the mentioned areas of crimes, judicial cooperation is based on some principles that enhances the strength of mutual recognition between the Member States, the main ones being represented by the prevalence of international law, the respect for human rights provided in the European Convention of Human Rights, the *ne bis in idem* principle the *aud dedere aud judicare* principle, the principle of proportionality and the mutual recognition of decisions between EU countries. Among the mentioned applied principles, when an European Arrest Warrant is issued, there are applicable the provisions of the European Convention on Human Rights together with the recognition of fundamental rights of persons that resume to the execution of an EAW. The provisions of the European Convention on Human Rights covers for the moment of execution of an European Arrest Warrant, issued by a Member of the European Union to another EU Member State and in the same time, giving to the executing state full powers over the arrest or surrender of the suspect in question. Through this transfer of procedures, first implemented by the Council through the Framework Decision 2002/584/JHA gives all of the Member States a power of intervention during cross-border criminal investigations.[23] In contrast with the definition of the former extradition process, the European Arrest Warrant is better appreciated in the realm of criminal law as a sanctioning measure according the principle of mutual recognition and linked to that is it the broad list of rights provided by the European Convention on Human Rights under which are also stipulated fundamental rights concerning a person for whom an European Arrest Warrant is involved, in contrast with the extradition procedures, where the rights of the suspect were not provided or protected.[24] Therefore, under Article 3 of the European Convention on Human Rights, no person to whom an European Arrest

[22] The Court of Justice of the European Union, 'JUDGMENT OF THE COURT (Grand Chamber) ' (*JUDGMENT OF 3 5 2007 — CASE C-303/05* , 3 May 2007)<http://curia.europa.eu/juris/showPdf.jsf?text=&docid=61470&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=666033>

[23] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009)p. 20

[24] Ibid.

Warrant is destined, can face or go through inhuman treatment, torture or any other unmoral treatment neither in the executing state nor in the issuing state. Moreover, a person involved in a criminal trial as a suspect, after his/her surrender or imprisonment in the executing state, is entitled to invoke before the Courts of the executing state the respect for Article 5 and 6 of the European Convention on Human Rights.[25]

1.1.1. Prevalence of International Law

The most important it is, of course, the prevalence of international law over national legislations. In every situation where a European arrest warrant is issued or it is a case of judicial cooperation between two or more EU states, none of the States involved can request the applicability of its own national legislation only, because once a State is a Member of the European Union, the provisions for international criminal law apply not only to the issuing of an the European Arrest Warrant but also to judicial cooperation. Once an EU Member, every state must establish a new legal framework on what concerns international cooperation in criminal law and to prove that its legal framework has reached a unique application of the common rules of international cooperation in criminal matters. Even if international law provisions are to be respected by every EU Member State under any circumstances, there are exceptions of not following it as well. A state can chose the applicability of a national law whether its Constitution provides for it, or in cases of protection of sovereign interest, public safety or any other matters that require the urgent applicability of national law.

1.1.2. Ne bis in idem

Another important aspect is the notion of the *ne bis in idem* principle. The principle entails that the executing judicial authority in a case of an international crime must firmly refuse to continue the prosecution or the execution of a criminal sentence if the suspect has

[25] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009)p. 20

already been tried, acquitted or already served his/her sentence for the exact same crime.[26] The principle not only provides for conditions of international prosecution or surrender but it is also seen as a principle of human rights thus leading to many disputes regarding the wording of "same acts" contained in Article 3(2) of the Framework Decision of the Council.

The principle is also provided in the Schengen Agreement under Article 54, stating the following: "*A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party."*[27]

By analyzing the wording in the mentioned article, it must be emphasized that the definition of the *ne bis in idem* principle forbids both a new criminal investigation for the same crime and also a judicial decision regarding a new sentence for the same issue. The article in discussion does not concern only the two states, the executing and issuing state but also it can be used regarding a third criminal investigation or prosecution coming from a third state in an equation as such, state that must also be, of course, a member to the Schengen Convention.[28] It was also disputed in practice whether the provisions of Article 54 of the ne bis in idem principle would apply also on judicial resolutions, instruments that would discontinue a criminal prosecution.

Even if, according to the Court of Justice of the European Union, the principle of ne bis in idem could be applied also for judicial resolutions under some circumstances, still the Court has had some reservations on the matter when deciding upon some cases falling under Article 54 of the Schengen Agreement. This matter was discussed by the Court of

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[26] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190/Article 3(2) " if the executing judicial authority is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State;

[27] The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000] OJ 2 239/Article 54

[28] Ministry of justice of Romania , 'JUDICIAL COOPERATION IN CRIMINAL MATTERS' (*Union Project between Romania and Austria*, 2005)<http://old.just.ro/Portals/0/CooperareJudiciara/Doc%202_Manual_Criminal.pdf> accessed 2 August 2017

Justice of the European Union in the case of an Italian citizen, Filomeno Mario Miraglia. In the present case, the Court stated the following:

"The principle ne bis in idem, enshrined in Article 54 of the Convention implementing the Schengen Agreement, the purpose of which is to ensure that no one is prosecuted on the same facts in several Member States on account of his having exercised his right to freedom of movement, does not fall to be applied to a decision of the judicial authorities of one Member State declaring a case to be closed, after the Public Prosecutor has decided not to pursue the prosecution on the sole ground that criminal proceedings have been started in another Member State against the same defendant and for the same acts, without any determination whatsoever as to the merits of the case. Such a decision cannot in fact constitute a decision finally disposing of the case against that person within the meaning of Article 54."[29]

Following the judgement of the Court in the Miraglia case, it can be concluded that a criminal case could not be thrown out, based on a decision on formal grounds only. The instrument through which a criminal case is decided upon in the end does not matter, whether we talk about a judicial resolution or a judicial decision, what does matter is the content of the judicial act. [30]

This concept has been easily embraced in national legislations, but, on the other hand, thresholds had been encountered regarding its acceptance on a Union level. Analyzing the Article 54 from the Schengen Agreement, one can see that the article in question provides only for the jurisdiction of the same state in which a crime has been committed, not mentioning its applicability between jurisdictions from different states prosecuting the same crime.[31] Despite that, in the same article is stated that in a case where a person has already been tried and given a final judicial decision by an instance of a Contracting State of the Convention implementing the Schengen Agreement, on his/her case , the object of the case

[29]European judicial training network, 'Leading Decisions of ECJ/EUGH' (*(Excerpts from Schomburg etal, Internationale Rechtshilfe in Strafsachen/International Cooperation in Criminal Matters, 5th ed, Munich 2012)* <http://www.ejtn.eu/PageFiles/3103/ne_bis_in_idem.pdf, C-469/03 Miraglia (Judgment 10 March 2005)

[30] Ministry of justice of Romania , 'JUDICIAL COOPERATION IN CRIMINAL MATTERS' (*Union Project between Romania and Austria*, 2005)<http://old.just.ro/Portals/0/CooperareJudiciara/Doc%202_Manual_Criminal.pdf>

[31] ECtHR, Baragiola v. Switzerland, Application nr. 17265/90

can no longer be the subject of another criminal prosecution before the tribunal of another state, also party to the Convention in discussion. The uniform applicability on a larger scale of the ne bis in idem principle has been implemented in a slower pace due to the constant development of mobility and globalization that was still based on the traditional manners of applicability that is the principle of territoriality together with the principle of personality and universality under which it was still possible for a person to be tried or punished for the same crime, but on different reasons, twice or more.[32] The applicability of international law on the matters has its legal basis on article 4 of Protocol 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms, that is stating the following: "No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that state."[33] Even so, the provisions of this article do not completely eliminate the possibility of a second trial on already sentenced crimes if, in the meantime, new facts appear and could jeopardize the scope of the already existing decision.[34]

The applicability of the *ne bis in idem principle* in the European Union is based on the following: article 21 from the European Convention on Mutual Assistance in criminal matters that emphasizes the mandatory report and cooperation between EU Member States concerning a criminal complaint made by a Contracting Party in order to proceed with further criminal investigations in the territory of another Contracting Party, request that entails for the solicited state to further inform the Ministries of Justice of both Parties, the details of the request.[35] The closest approach on the discussed principle is found in the European Convention on the Transfer of Proceedings in Criminal Matters under article 35[36], stating the following: "A person in respect of whom a final and enforceable criminal

[32] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009),p. 102

[33] European convention of human rights, 'Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol no 11'(*Library Collection*, 22.11.1984) <http://www.echr.coe.int/Documents/Library_Collection_P7postP11_ETS117E_ENG.pdf>

[34] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009),p. 103

[35] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009),p. 104

[36] Council of Europe, 'European Convention on the Transfer of Proceedings in Criminal Matters' (*European Treaty Series - No 73*, 15.05.1972)<https://rm.coe.int/1680072d42>

judgment has been rendered may for the same act neither be prosecuted nor sentenced nor subjected to enforcement of a sanction in another Contracting State:

a. if he was acquitted;

b. if the sanction imposed:

i. has been completely enforced or is being enforced, or

ii. ii has been wholly, or with respect to the part not enforced, the subject of a pardon or an amnesty, or

iii. can no longer be enforced because of lapse of time;

c. if the court convicted the offender without imposing a sanction"

The concept of "same acts" has been encountered very often in practice and in most of the cases the Court of Justice of the European Union has been requested to decide whether these acts have a unique definition which is applied in every Member State or if the issuing of the executing state can decide at a national level whether it is a criminal case or not. [37]

One of them was the case of Gaetano Mantello, an Italian drug dealer, running an illicit criminal organization involved in drug trafficking, illegal possession and trade of cocaine in Italy and Germany. Before he was arrested by the German authorities he had already served a sentence of 10 months in a prison in Italy, afterwards, being accused in Germany of the same crimes. The Catania Tribunal had issued beforehand an European Arrest Warrant and argued before the Court of Justice of the European Union that the Stuttgart Tribunal had not respected the principle of ne bis in idem nor the principle of mutual recognition of decisions. In their defense, the Tribunal of Stuttgart firstly asked the Court whether Article 3(2) of the Framework Decision is applicable in this case and also accused the authorities from Catania that they were already aware of Mr. Mantello illicit acts and had the sufficient amount of proof for the crime provided in their European Arrest Warrant and besides of not informing the German authorities of that evidence they did not take any action as soon as they were aware of the situation. The Court, in its reasoning for the applicability of Article 3(2), answered that the notion of the "same acts" and institution of an European Arrest Warrant is applicable at a Union level, not for the interpretation of any of the Member States in dispute since this had eliminated the former extradition

[37] Norel Neagu, 'General principles of EU (criminal) law: legality, equality, non-discrimination, specialty and ne bis in idem in the field of the European arrest warrant ' Challenges of Knowledge Society, p.106

procedures that would have required the involvement of one of the Member States. Consequently, the executing state should analyze if there is a case of double jeopardy as the EU Legislation and statute of the Court of Justice of the European Union implies, not taking into consideration any national legal instrument.

2. Judicial assistance in criminal matters

Judicial assistance in criminal matters, as a brief definition, can be described as the cooperation between two state parties, that is the executing state and the issuing state, through the judicial authorities commonly established by the mentioned parties through either a bilateral or multilateral treaty between the states or through Conventions binding to both of the parties. The main principles that cover the field of international judicial assistance in criminal matters are the principle of reciprocity, confidentiality and the non-prosecution for the same criminal acts, by any state of a suspect originated from another state party *(Ne bis in idem).*

The principle of judicial assistance in criminal matters represents the main link between states for combating cross-border criminality, principle that is seen in practice sometimes more important than judicial cooperation in criminal matters, since the judicial assistance is based on the mutual trust states have between them, by recognizing each other's competences in crimes concerning only one state party and giving a free way to any state in criminal investigation.

The judicial assistance has two approaches for its analysis: a narrower approach that covers for the activity of the judicial authorities implicating the assistance given by the latter in cross-border criminal investigation, regarding all the required procedures including the execution of procedural acts in an EU Member State in the name of another EU Member State and the report to the issuing state in question, and on the other hand, a larger approach that signifies the constant implication of every EU Member States in combating cross-border criminality.

Under the Convention on Mutual Assistance from 2000, the Member states are entitled to make some reservations according to Article 25 of the Convention. The reservations that state parties are entitled to make are the following:

- Under article Article 6 (7) of the Convention : "Any Member State may declare, when giving the notification provided for in Article 27(2), that it is not bound by the first sentence of paragraph 5 or by paragraph 6 of this Article, or both or that it will apply those provisions only under certain conditions which it shall specify. Such a declaration may be withdrawn or amended at any time."[38]
- Article 9(6) for the temporary transfer or persons held in custody: "When giving the notification provided for in Article 27(2), each Member State may declare that, before an agreement is reached under paragraph 1 of this Article, the consent referred to in paragraph 3 of this Article will be required or will be required under certain conditions indicated in the declaration."[39]
- Article 10(9) providing for hearing by videoconference: "Member States may at their discretion also apply the provisions of this Article, where appropriate and with the agreement of their competent judicial authorities, to hearings by videoconference involving an accused person. In this case, the decision to hold the videoconference, and the manner in which the videoconference shall be carried out, shall be subject to agreement between the Member States concerned, in accordance with their national law and relevant international instruments, including the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms.[40]

[38] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ 1 197/Article 6 (7)

[39] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ 1 197/Article 9 (6)

[40] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ 1 197/Article 10 (9)

- Article 14 (4) on Covert Investigations: "When giving the notification provided for in Article 27(2), any Member State may declare that it is not bound by this Article. Such a declaration may be withdrawn at any time."[41]
- Article 18(7) on Requests for Interception of telecommunications: "When giving the notification provided for in Article 27(2), any Member State may declare that it is bound by paragraph 6 only when it is unable to provide immediate transmission. In this case the other Member State may apply the principle of reciprocity."[42]

Moreover, the new Framework Decision on the EAW also contains some conditions concerning the establishment of the competent judicial authorities and their duties with a set of exceptions under some circumstances: For instance, article 3 (1) of the mentioned Decision gives the possibility to the competent judicial authorities of the executing state to refuse an European arrest warrant if the crime that makes the object of the warrant is covered by amnesty and when the crime in question is also provided under its national criminal law.[43]

2.1.International letter rogatory. Romanian Criminal Law.

Another important aspect regarding judicial cooperation between the Member States of the European Union was to establish a more efficient and faster procedure in dealing with cross-border crimes and rogatory commissions seemed to be and still is in the present time the best alternative for transferring some of the duties between entitled judicial authorities. Since it has become a member of the European Union in 2007, Romania took also important steps in devoutly supporting the fight against cross-border crimes and international judicial

[41] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ 1 197/Article 14(4)
[42] Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union [2000] OJ 1 197/Article 18(7)
[43] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190/Article 3(1)

cooperation and implemented the Law 302/2004 on international judicial cooperation in criminal matters.[44] The mentioned Law in its first article covers for: extradition, transfer based on European Arrest Warrant, transfer of procedures in criminal matters, recognition and enforcement of decisions, transfer of sentenced persons, judicial assistance in criminal matters, other forms of judicial cooperation in criminal matters, namely the international letter rogatory, hearings performed by videoconference, appearances of witnesses, experts and persons being prosecuted in court in the requesting state, notification of judicial documents prepared or submitted in criminal trials and criminal records.[45]

This form of international cooperation under the Law 302/2004 is governed by the principle of reciprocity provided by Article 5 of the present law. Article 5 ensures the recognition of such a request, that is, a rogatory commission, on the territory of Romania, even when an international agreement on the matter, between some states does not exist. The Law refers to these situations as acts based on international courtesy or diplomatic relations assuring the issuing state in question of the existence of a rogatory commission in the Romanian territory under any circumstances.[46] The Romanian law-maker has considered that such support should be given regardless of the existence or not of an international agreement or diplomatic relations, if the crime that makes the object of the European Arrest Warrant represents a serious threat for the involved states or even to consider that it would be of much help for the suspect in question and his rights or rehabilitation to help the other state to speed up the process. [47]

Not very different from the general aspects that an international letter rogatory may contain in the European Union or worldwide, the Law 302/2004, provides the following possible duties attributed to the authoritative judicial bodies:

- localization and identification of persons and objects; hearing of the suspect, defendant, claimant, plaintiff, party with civil liabilities, witnesses and experts, as

[44] Published in the Official Journal of Romania, Part I, no. 377 dated 31st May 2011, as amended and supplemented.
[45] Bogdan Micu internationallawreview.eu, 'INTERNATIONAL LETTER ROGATORY IN THE ROMANIAN CRIMINAL LAW
' (Internationallawrevieweu, 2015)<http://www.internationallawreview.eu/fisiere/pdf/7_5.pdf>
[46] Bogdan Micu internationallawreview.eu, 'INTERNATIONAL LETTER ROGATORY IN THE ROMANIAN CRIMINAL LAW
' (Internationallawrevieweu, 2015)<http://www.internationallawreview.eu/fisiere/pdf/7_5.pdf>
[47] Ibid.

well as the confrontation; search, seizure of items and documents, sequester and special or extended confiscation; on site research and reconstruction; examinations; submission of necessary information in a particular trial, tapping phone conversations, examination of archive documents and specialized files together with other such procedure documents;[48]

- transmission of material evidence;[49]
- communication of documents or files;[50]

If the requesting state asks in particular, then and only then, the Romanian authorities will report the time and place of the requested procedures through the rogatory commissions and the judicial authorities or any other entitled personnel of the requesting state may take part in the process according only to the provisions stipulated in the Romanian Law 302/2004. The judicial bodies from Romania entitled to act as rogatory commissions are the Courts of Appeal during prosecution and the Public Prosecutor's Office attached to the Courts of Appeal, during criminal investigations.

The hearings carried out by the previously mentioned authorities are held under the following conditions:

- The hearings take place before a judge or a competent Romanian prosecutor and the suspect may be assisted, if needed, by a translator. The judge or the prosecutor starts with identifying the investigated suspect under the obligation of following the rules of fundament rights of person under the Romanian law, which in case of breaching them, the judge or the prosecutor must implement measures and ensure the respect of the mentioned rights;[51]
- The competent judicial authorities together with the competent judicial authorities of the other state party establish whether if it required or not to

[48] Bogdan Micu Internationallawreview.eu, 'INTERNATIONAL LETTER ROGATORY IN THE ROMANIAN CRIMINAL LAW
' (Internationallawrevieweu, 2015)<http://www.internationallawreview.eu/fisiere/pdf/7_5.pdf>
[49] Ibid.
[50] Ibid.
[51] Avocatoo.ro, 'Judicial assistance in Criminal Matters' (Avocatoo, 11 April 2017) <http://blog.avocatoo.ro/asistenta-judiciara-internationala-penal/>

implement measures of protection concerning witnesses or experts that take part in the criminal trial;[52]

- The hearing is directly conducted by the judicial authority of the requested state or, at least, under its coordination, according to its national provisions.[53]
- Witnesses and experts are to be assisted by a translator, under the Romanian legislation;
- The person cited as a witness or expert can invoke his/her right of not to testify according to the Romanian Criminal Procedure or to the legislation of the requesting state;[54]

Regarding the oath taken by witnesses or experts in criminal trials, this will be taken only if it was requested by the issuing state and nevertheless, the oath should be carried out only if the Romanian judicial authorities decide that this does not go against its criminal procedure code or against the provisions on fundamental rights of the persons destined to take the oath. [55]The documents and other pieces of evidence based on registered files are to be reported back to the requesting state only in the form of copies in the first place, the original pieces are send only under special request of the requesting state and thorough analysis made by the Romanian competent judicial authorities.[56]

[52] Avocatoo.ro, 'Judicial assistance in Criminal Matters' (Avocatoo, 11 April 2017) <http://blog.avocatoo.ro/asistenta-judiciara-internationala-penal/>
[53] Ibid.
[54] Ibid.
[55] Bogdan Micu Internationallawreview.eu, 'INTERNATIONAL LETTER ROGATORY IN THE ROMANIAN CRIMINAL LAW
' (Internationallawrevieweu, 2015)<http://www.internationallawreview.eu/fisiere/pdf/7_5.pdf>
[56] Bogdan Micu Internationallawreview.eu, 'INTERNATIONAL LETTER ROGATORY IN THE ROMANIAN CRIMINAL LAW
' (Internationallawrevieweu, 2015)<http://www.internationallawreview.eu/fisiere/pdf/7_5.pdf>

III. Applicability of the European Arrest Warrant

The transition from extradition to the European Arrest Warrant is marked in the Framework Decision on EAW, in particularly by the Article 31, paragragraph 1, that states the following:

"Without prejudice to their application in relations between Member States and third States, this Framework Decision shall, from 1 January 2004, replace the corresponding provisions of the following conventions applicable in the field of extradition in relations between the Member States: (a) the European Convention on Extradition of 13 December 1957, its additional protocol of 15 October 1975, its second additional protocol of 17 March 1978, and the European Convention on the suppression of terrorism of 27 January 1977 as far as extradition is concerned; (b) the Agreement between the 12 Member States of the European Communities on the simplification and modernisation of methods of transmitting extradition requests of 26 May 1989; (c) the Convention of 10 March 1995 on simplified extradition procedure between the Member States of the European Union; (d) the Convention of 27 September 1996 relating to extradition between the Member States of the European Union; (e) Title III, Chapter 4 of the Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders. "[57]

The previously mentioned conventions can still be considered binding to the states, members to them, as long as they serve to further develop the present provisions of the new Framework Decision in order to simplify the surrender procedures concerning European arrest warrants. [58] Member states can also enter new agreements or treaties, after the entering into force of the Framework Decision on the EAW, if these following instruments, as in the cases of the Conventions before the Decision, would implement more simplified procedures than what the Decision already specifies, like the length of the procedures according to Article 17 of the FD[59], or if some agreements would extend the list of the 32 crimes provided

[57] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190/Article 31(1)

[58] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009),p. 22

[59] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework

in the Framework Decision in Article 2, paragraph 2, in addition to that, narrowing down the reasons for the withdrawal of an European arrest warrant stipulated in article 3 and 4 of the Decision.[60] In the situation of entering new agreements or conventions or still remain binding to a previous convention before the implementation of the Framework Decision on the European warrant, the state in question must give notice both to the Council and to the European Commission in a three months period before or after the implementation of the Framework Decision in discussion, according to the situation. [61] An exception to this, would be the case where some of the conventions enunciated in Article 1 of the FD that are used as surrender or extradition instruments between some of EU Member States and some territories for which a Member state has jurisdiction, territory outside the European Union, circumstance under which these previous or future agreements would still remain binding only to the parties in discussion, independent from the provisions of the FD on EAW.[62]

On what concerns the provisions of the European Arrest Warrant framework, the procedures that it entails, according to article 34 (2) b of the Treaty on the European Union, they do not have a direct applicability but they need to be harmonized with the criminal law of each EU Member state separately.[63] In the beginning, the Council has established a deadline until which every EU Member state should chose an implementation method in their own national legislation, more specifically January 1st ,2004, but only a few countries managed to act until this date, namely Belgium, Denmark, Spain, Finland, Ireland, Portugal, Sweden and England.[64]

Decision [2002] OJ 2 190/Article 17: *"1. A European arrest warrant shall be dealt with and executed as a matter of urgency; 2. In cases where the requested person consents to his surrender, the final decision on the execution of the European arrest warrant should be taken within a period of 10 days after consent has been given; 3. In other cases, the final decision on the execution of the European arrest warrant should be taken within a period of 60 days after the arrest of the requested person; 4. Where in specific cases the European arrest warrant cannot be executed within the time limits laid down in paragraphs 2 or 3, the executing judicial authority shall immediately inform the issuing judicial authority thereof, giving the reasons for the delay. In such case, the time limits may be extended by a further 30 days."*

[60] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009), p. 22

[61] Ibid.

[62] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009), p. 22

[63] Ibid, p. 23

[64] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009), p. 23

IV. THE ROLE OF THE EUROPEAN UNION IN THE JUDICIAL COOPERATION IN CRIMINAL MATTERS

The European Union did not have a significant involvement in matters of criminal law when it was known as the European Economic Community founded in 1957, established by the Treaty of Rome. Back then, the only cooperation between the Member States was based on bilateral or multilateral agreements signed within the Council of Europe. Later on, judicial cooperation started to take shape at a ministerial level, followed by the initiation of the TREVI Group in 1976, which was intergovernmental network of justice and home affairs ministers.[65] Further on, the Community was showing more and more attention on the implementation of a new free market, on the establishment of free movement of goods and persons which would eliminate the border controls across the Community. These were one of the reasons of which the Schengen Agreement entered into force in June 14, 1985. Belgium, the Netherlands, Luxembourg together with Germany and France had concluded this Agreement and created the Schengen Space with the purpose of eliminated board control of persons and goods in the European Community. Even so, this free movement also included some compensatory measures providing for the security maintenance of what it was the border control, a common policy covering for both the Member States and Third States as well including the police and judicial cooperation between them. The police cooperation has seen improvements in the European Union once the Treaty of Maastricht was signed in 1999. The Treaty of Maastricht has created the well-known pillar system including the European Communities, the Common Foreign and Security Policy and the third one, the Police and Judicial Cooperation in Criminal Matters.

The third pillar of the EU together with the Common Foreign and Security Policy had become, one of the most important, if not the most important field on which the European Union has concentrated most of its work lately. As previously mentioned, after the terrorist attacks from the United States, the increasing number of cross-border crimes and many other global threats[66], the European Union started to take extreme measures in order to diminish

[65] Kristina Miilt, European Parliament, 'Police Cooperation<http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_5.12.7.html>

[66] Joanna Apap and Sergio Carrera, 'Judicial cooperation in criminal matters, European arrest warrant a good testing ground for mutual recognition in the enlarged EU? ' [2004] (46) CEPS POLICY briefs, p.1

or even eliminate threats like this. As it is well known, the legal instruments of the third pillar, that is the Police and Judicial Cooperation in Criminal Matters are the articles provided by the TEU (Treaty on the European Union) in Title VI, followed by the articles contained in the Lisbon Treaty in Chapter 4 (82-86) and the Framework Decisions by the Council on the European Arrest Warrant. The PCCM pillar was subsequently eliminated by the Treaty of Lisbon, which entered into force in 2009.

The Treaty of Lisbon had abolished the pillar system and created a more efficient free market and movement for the EU citizens, but of course it has also increased the number of security obligations in that aspect. The judicial cooperation under the Treaty of Lisbon was now provided in the Title V of the Treaty on the Functioning of the European Union, under the name of the Area of Freedom, Security and Justice[67]. The Area of Freedom, Security and Justice contains provisions covering for policies in regard with border control, asylum and immigration[68], cooperation in civil matters, including family law in cross border implications[69] giving jurisdiction to the European Parliament and the Council of adopting measures in order to improve the mutual recognition system of judicial decision of EU Member States, cross-border communication of judicial and extrajudicial documents in criminal and civil matters, compatibility of international law norms with the national legislation in situations of conflict of law or conflicts of jurisdiction and development of alternative methods for the settlement of disputes.[70]

In regard with the judicial cooperation in criminal law, the Treaty of Lisbon had created a new set of responsibilities, if not more of a free way for the judicial organs, that is the implementation of new norms and procedures for the mutual recognition of judicial decisions despite of their field of application, new set of rules concerning the prevention and settlement of jurisdiction dispute between Member States, establishing a new a common notion of crimes and to what extent are they considered to be cross-border crimes and

[67] Treaty on the Functioning of the European Union [2007] OJ 1 115/73/Title V
[68] Articles 77-80, Title V, Treaty on the Functioning of the European Union
[69] Article 81, paragraph 3, Title V, Treaty on the Functioning of the European Union
[70] Article 81, Title V, Treat on the Functioning of the European Union.

applicable under EU law and the involvement of EUROPOL[71] and EUROJUST[72] in supporting Member State for combating and preventing international crimes. The Treaty of Lisbon, even after the abolition of the pillar system, had established a protocol under which the obligations of the Member States under the third pillar are still applicable. The Protocol 36 on transitional provisions contains clarification on what the acquis[73] of the European Union covers for. The legal basis of the Protocol in regard with the third pillar obligations is the Article 9 in which is stated that every framework decision, bilateral or multilateral agreements or any other legal act dated before the entry into force of the Lisbon Treaty and concerning the Police and Justice Cooperation pillar will remain in force between the parties in discussion if those acts are not annulled [74], meaning that the framework decisions or agreement prior the Lisbon Treaty do not have a direct effect but the national legislation of states parties to it still has to be harmonized in accordance to the former legal instruments.

The Protocol 36 also covers for a transition period for the Member States that were parties to previous Conventions or Agreements. Article 10 of the Protocol provides for a period of five years, binding to all of the EU Member States, parties to previous Extradition Agreements. During these five years, the obligations of the European Commission upon the observance of duties concerning the Member States, provided in Article 258 of the Treaty on the functioning of the European Union[75], cannot be enforced and the obligations of the

[71] EUROPOL is an agency of the European Union, established in 2010 by a Decision of the Council (Council Decision 2009/371/JHA (2), which offers support for the EU Member States and takes over the national police of a MS when a crime is already considered to be a cross-border crime and the implication of the European Union is needed. The collaboration with EUROPOL consists in the constant surveillance of information concerning cross-border crimes, agency composed from police officers, border police and other agents specialized in information surveillance.

[72] EUROJUST-The European Union Judicial Cooperation Unit is an agency that eases the collaboration between competent judicial organs of EU Member States, the execution of judicial decisions, providing help for the Member States judicial organs to proceed with criminal investigations in every EU country.

[73] The instrument that provides common rules and regulations applicable and binding to all EU Member States.

[74] Consolidated version of the Treaty on European Union - PROTOCOLS - Protocol (No 36) on transitional provisions [2008] OJ 1 115/Article 9 : "The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon 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 Treaty on European Union."

[75]Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ 1 326/160/article 258: " If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union."

Court of Justice of the European Union provided in Title VI of the Treaty on the European Union, before the entering into force of the Treaty of Lisbon will also remain valid, obligations that would change covering for both of the mentioned institutions if one of the previous EU Agreements or treaties would be changed or annulled.[76]

1. The presence of the European Union in matters of judicial cooperation on criminal matters

1.1. European Judicial Network

The European Judicial Network (EJN) is one of the important links, if not the most important links for the cooperation between the Member States of the European Union in criminal matters. EJN is the result of the Joint Action 98/428 JHA, adopted by the Council in 1998[77] that continues to be applicable after its annulment, under the Decision 2008/976/JHA [78] in accordance with Title VI of the Treaty on the European Union.

In the preamble of the Decision 2008/976/ JHA, the Council emphasized a set of reasons for which still recognizes the applicability and importance of the European Judicial Network, some them being: the applicability of the EJN in accordance with Article 6 of the European Convention on Mutual Assistance in Criminal Matters[79] and the legal assistance that is executed between the competent judicial authorities in the present time. Another important matter developed by the European Judicial Network was the support towards the mutual recognition of judicial decisions in criminal matters, proving once again the direct link between judicial authorities of the EU Member States and the efforts of the EJN for new simplified procedures implemented in the criminal law procedure of the Member States, the most significant period of time of the impact of these developments towards judicial

[76] National institute of magistracy, Romania, 'Chapter 5: Judicial Cooperation in Criminal Matters' (*Manual (National Institute of Magistracy, Romania) 2014-2015*, 2014-2015)<http://www.euroquod.ro/dokuwiki/lib/exe/fetch.php?media=capitolul_5-intro_si_asist_jud..pdf> accessed 24 July 2017

[77] JOINT ACTION of 29 June 1998 adopted by the Council on the basis of Article K3 of the Treaty on European Union, on the creation of a European Judicial Network [1998]OJ 2 191/4

[78] COUNCIL DECISION 2008/976/JHA of 16 December 2008 on the European Judicial Network [2008] OJ 2 348/1/30

[79] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu, 2009), p.300

cooperation was between 2005 and 2007 when new Member States had joined the European Union, thus the need for a stronger European Judicial Network was more than required.[80] In 2002, a new body teamed up with EJN. Eurojust had joined forces with the EJN team and created a privileged bond with it based on frequent consultation and complementary actions. The Council, in the same mentioned preamble had stressed that it is highly required for a better cooperation between the EU Member States, the implication of the European Judicial Network together with Eurojust, in order to create a more secure system and private modality of exchanging information in situations of cross-border crimes.

1.1.1. Contact points

The European Judicial Network acts both at a European Union level, but also in a national level, having representatives in each EU Member States. These representatives are called *contact points*, duties that are carried out by active intermediaries appointed by each EU Member State. Contact points are used to establish a connection between the authoritative bodies of the EU Member States in the situation of a surrender request or other criminal procedures, personnel that is even entitled to directly meet the other team of contact points when an agreements as such is made. The role of the contact points is also to promote in their home countries the principle of judicial cooperation by setting up several sessions on matters of criminal procedures and the meaning of judicial cooperation between the EU Member States. The personnel assigned as contact points not only promote and organize the idea of a better judicial cooperation but they also have the obligation of keeping under surveillance every request regarding an extradition or an European Arrest Warrant request, they are also the main contact, representing the EU Member state that assigned him/her, they share direct reports to the European Judicial Network and under special circumstances, they can be given the authority of assigning extra contact points personnel, if needed.[81]

[80] Idem *79*
[81] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu, 2009), p.303

1.1.2. EJN Meetings

The European Judicial Network has at least five meeting per year. Several plenary meetings are organized both on a national level but also at a Union level. Plenary meetings at Union levels are organized two times in the EU Member that holds the presidency of the Council of the European Union at that time and one more meeting is held in the Hague, Netherlands.[82] The intermediaries of the European Judicial Network take part in this plenary meetings organized by the Presidency of the Council to discuss administrative issues of every EU Member States concerning judicial cooperation, exchanging opinions about existing cases regarding cross-border criminality and how were the instruments of the European Union implemented under such circumstances.[83]

1.2. EUROJUST

Eurojust is an international body, destined to provide help for judicial authorities of the EU Member States for a better cooperation in cases of extradition or surrender of EU crime suspect. Eurojust is the product of the Framework Decision 2002/187/JHA, work attributed to the Council of the European Union in February 28, 2002.[84] The Council thought as highly required such an organization for the better functioning of the European Union in order to strengthen the judicial cooperation against cross-border criminality that is starting to take a high scale of threat within the European Union and not only, also, EUROJUST is meant to follow the objectives established at the discussions from Tampere from October 1999, where the Council has decided upon the creation of such an organization formed out from national prosecutors, judges and other judicial authoritative bodies from the EU Member States.[85]

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[82] EJN Secretariat, Unmissions.org, 'The role of the EUROPEAN JUDICIAL NETWORK' (*Unmissionsorg*, 2016) <https://ungreatlakes.unmissions.org/sites/default/files/2016-11-10_ejn-presentation_gljc_network_unsoa.pdf>

[83] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu, 2009), p.304

[84] Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ 2 063

[85] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu, 2009), p.307

In the structure of Eurojust, each EU Member state has the right to one delegate per country, according to the national legislation of every Member State in particular, delegate that is officially a prosecutor, judge or police employer in the country that designated him/ her, carrying a mandate which length is established by every Member State.

Among the domains of jurisdiction of Eurojust, the main ones are: fields of jeopardy and other types of cross-border crimes for which EUROPOL has also jurisdiction regarding them, according to Article 2 of Europol Convention from 1995[86], cybercrimes, corruption and fraud or any other type of crime that poses as a threat to the security of the European Union, international money laundering, crimes threatening the environment, the association to a criminal organization in accordance to the Joint Action of the Council on the incrimination of participation in such organizations in any EU Member State[87], or for any other crimes that, under the opinion of Europol, would fall under its jurisdiction and could further proceed to criminal investigation if considered a threat.

2. European Arrest Warrant and the protection of human rights

In the history of its development, the European Union has had a narrow approach and number of possibilities concerning the accountability of human rights violations. Prior to the Lisbon Treaty, through the Treaty of Amsterdam, the Union has decided on changing the fields of the Pillar System, leaving full responsibility on what concerning only the Police and Judicial Cooperation to third pillar, thus improving the free movement of goods and persons through the European Community Pillar and concentrating on a more easy and fair process for judicial cooperation between Member States. The Treaty of Amsterdam had also brought a new instrument for the decision making process of the European Union, namely the Framework Decision which substituted the former joint actions of the Union. Through Framework Decision, many important changes were implemented within the national legislations of the Member State by harmonizing their laws with international regulations or with national regulations as well, giving the Member States the possibility of choosing the manner of implementation of a Framework Decision in their national law. Still, back then,

[86] Ibid, p. 308
[87] Ibid.

the Union did not have enough power on controlling the mentioned procedures of the Member States nor could the Union be held accountable when a state would breach or wrongly implement such decisions. Because of that, it was often questioned who is to be held responsible in these kind of situations or why is not the Union responsible for its Member States wrongful actions.

The uncertainty of these disputes were clarified by the Treaty of Lisbon which made some important adjustments in the European Union. Besides the legal personality, the Lisbon Treaty has brought a new obligation in the legal framework of the European Union, which is the accession to the European Convention of Human Rights that made the EU the 48th Contracting party of the Convention.[88] Before this status, whether it was about judicial cooperation or any other procedures between member states, in cases of human rights violations, the European Union was not considering itself accountable in situations like this. Even though the Court of Justice has given often importance to the European Convention of Human Rights, it could not have a positive impact towards national judicial procedures yet.

That being said, an important impact had Council of Tampere of 1999. After the matters of discussions from Tampere, in 2000 Spain and Italy had signed a Treaty of Extradition which was often called the *historical antecedent of the European Arrest Warrant*[89] that aimed for the exclusion of some thresholds that were standing in front of or making the judicial cooperation procedures to last a long period of time. Back then it was one of the few actions taken by two states, considered to be a first step for the rest of the Union and its Member to cooperate in the facilitation of the extradition proceedings.

Even so, the European Arrest warrant has its downsides. Even if it provides for a more effective surrender procedures, evidently this implies the imprisonment of the suspect in many cases. Regardless of the object the request, whether it is about a prosecution demand, or it implies a hearing for a witness statement, or even an investigation, many people in this situations were held in prison for a very long time, even before the trial actually began. These cases concern persons which are mostly imprisoned preventively and enjoying the presumption of innocence. Still, many demands for a more detailed analysis were filed

[88] European convention of human rights, 'Accession of the European Union' (*Coeint*, 2010) <http://www.echr.coe.int/Pages/home.aspx?p=basictexts/accessionEU&c=>
[89] Libor Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer 2016),p. 170

because in most of the situations, the investigated persons were acquitted in the end and held into custody for unjustified grounds. Another aspect of this would be the unreasonable occupation of prisons along the EU Member States. Since many suspects end up in prison, whether it is a preventive detention prison or together with already convicted people, it overreached the capacity of many prisons and also the living conditions in them were very poor and also insufficient for so many people. The issue of prison overcrowding led to several application before the European Court of Human Rights and many EU Member States were held responsible for poor treatment of prisoners and for unreasonable imprisonment of people. In the last few years, Romania has been facing a lot of trials on that matter and has been given this year (i.e. 2017) a 6 months period by the European Court of Human Rights for the implementation of new conditions in national prisons and other possible forms of detention, if necessary, such as the house arrest.

In 2011, the European Commission had requested a revision of the Framework Decision 2002/584/JHA on the manner of how the European Arrest Warrant is issued and under which circumstances. Even if, since its implementation in criminal national procedures of the EU Member States, it has reached a somehow high number of warrants issued by the Member States, sometimes for not so very serious crimes. The then Vice-President of the European Commission (i.e. 2011-2014) and Commissioner for Justice, Viviane Reding, declared that this new European Arrest Warrant together with its new criminal law procedures it is indeed a very efficient strategy on combating cross-border criminality, but the European Union must also be sure that the Member States are using it proportionately and not for every sort of crime.[90] Reding stated that the "National Governments should strengthen their mutual trust in each other's judicial system and make the European Arrest Warrant more efficient following that. Taking in consideration the numerous implications of the European Union along with its Member States, an issuing of an European Arrest Warrant should not be made groundless or on not so serious crimes such as the robbery of a bicycle."[91] According to an evaluation report of the European Commission, since the implementation of the EAW, between 2005-2009 no less than 54.689

[90] Nina Dinu, Infolegal , 'European Commission recommends the revision on the issuing of the European Arrest Warrant' (*Infolegal.ro*, 4.12.2011) <http://www.infolegal.ro/ce-recomanda-imbunatatirea-modului-de-folosire-a-mandatului-european-de-arestare/2011/04/12/>
[91] Ibid.

of European Arrest Warrant were issued between the Member States which led to the surrender of 11.630 of suspects.[92]

Even so, the European Commission in 2011, had expressed some concerns regarding the excessive usage of the European Arrest Warrant throughout the 4 years of evaluation[93] and made several proposals regarding the revision of the Framework Decision, more specifically on matters of revision of national legislation, more precisely, the criminal law procedure of every Member State and thorough control of it, to check if it is or not in accordance to the provisions of the European Arrest Warrant. The European Commission had also made requests for the Member States to closely supervise the judicial authorities entitled to issue an European Arrest Warrant, not to act in cases of superficial crimes and act according to the Manual of the European Union, regardless of the procedure entitled by every sort of crime.[94] Continuing, the European Commission had pursued the EU Member States to implement in their national legislation complementary measures that would cover for the prosecution and sentence of a suspect *in absentia* , it had supported the improvement of collecting-data systems that would lead to a better surveillance of proof concerning cross-border crimes and also, the Commission expressed that it would have a closer approach in general for a constant development for the years to come, of the European Arrest Warrant.[95]

2.1. Instruments of the European Union on fundamental rights.

The European Union had showed great interests for human rights dating back from its very beginning, considering that, not only these fundamental rights must be a respected in the same manner by the EU Member States, but also has implemented them within the legal framework of the Union. The principles formerly provided in Article 6 of the Treaty on European Union, were later developed in the following treaties, the Treaty of Maastricht (1992) and the Treaty of Amsterdam (1999) in which was stipulated that together with the rest of the objectives of the European Union, the rights, principles and fundamental rights will remain binding upon the Union and its Member States as it were stipulated in former

[92] Ibid. *90*
[93] Ibid. *90*
[94] Ibid *90*
[95] Ibid *90*

legal instruments of the Union. The most significant step taken by the European Union, that took place in 2000 at the at the inter-governmental conference in Nice, was the Charter of Fundamental Rights of the European Union, that under the aegis of the Lisbon treaty, shares the same legal personality as the rest of the treaties of the European Union. The provisions of the Charter applies equally to the institutions of the European Union and to the Member States and it is considered to be a very important instrument when new laws are implemented within the European Union.[96]

3. The Stockholm Programme

Being the third programme of the kind, having as predecessors the programme from Tampere from 1999, followed by the Hague programme from 2004, the Stockholm Programme is considered to be, as ones say, the child of the Treaty of Lisbon. The Programme is planned to be a strategic action plan with a length of 5 years, concerning the development of justice and home affairs of the European Union. It is known as the initiation of the EU Future Group[97] and the Surveillance Society of the Union and it was considered to be the first policy framework of the European Union concerning the segment of security and justice and as, the back then Commissioner for Security and Justice, Jacques Barrot stated: "the development of an internal security strategy."

[96] Charter of Fundamental Rights of the European Union [2000] OJ 1 364/1/21, Article 51(1) "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers"

[97] "With the objective to consider opinions and suggestions to this document Germany proposed to create the Informal High Level Advisory Group on the Future of European Home Affairs Policy, known as Future Group, whom the Czech Republic also participated in. The work of the Future Group has been summed up in *The Final Report of the Future Group: Freedom, Security, Privacy – European Home Affairs in an open word* published in June 2008. Even though this report was not binding the European Commission and the EU Member States in preparing text of the multi-annual programme, it belongs to important sources of inspiration for debate on the Future of European Home Affairs Policy." Ministry of the interior of the Czech Republic, 'Multi-annual programme for Justice and Home Affairs' (*Agenda of the EU at the ministry of the interior*)<http://www.mvcr.cz/mvcren/article/agenda-of-the-eu-at-the-ministry-of-the-interior-hague-programme.aspx>

The objectives of the Stockholm Programme, in regard with the topic of the present paper are the police and customs cooperation in both criminal and civil matters[98], the judicial cooperation and how will the European Union enact in cases of cross-border judicial cooperation. The Treaty of Lisbon attributed a very important feature to the European Union that is, legal personality. Through the Stockholm Programme, it was expected that there will be given broader details on the functioning of the EU institutions on matters of police and custom cooperation, anti-terrorism measures and the increased surveillance of the respect for fundamental rights by the EU and the Member States. Another scope of the Programme was to create a European Union especially for citizens of the Union and concentrating more on the requests and needs of the EU population. Together with the rest of the programme objectives, there were some disputes concerning the new system of surveillance of citizens, concerning the digital passports of the EU citizens. Many State officials brought this issue into discussion, stating that the digital print which will be on every EU citizen's passport might be a two-way street problem. The European Union considered this a measurement of prevention of cross-border criminality but there were contradictions on this too. The concerning matters were that there could be the possibility for some states to misunderstand or take advantage of this new security strategy. By implementing digital passports, people feared that the government of their home country would have an easy access to their private life, private documents and most of them did not see this as an appropriate solution to keep criminality under control. Even so, this eased the efforts of the judiciary organs and of the police in cases of cross-border crimes and the criminal procedures has seen significant changes in what concern the judicial cooperation between Member States.

Another objective during the 5 years-program was the implementation of new set of rules regarding the administration of evidences in criminal matters. Through the programme it has been filed a request before the European Commission to come up with a decision that would imply a cross-border procedure that would be applicable within all the EU Member States for the recognition of any type of evidence, despite the state from which the evidence

[98]Ministry of the interior of the Czech Republic, 'Multi-annual programme for Justice and Home Affairs' (*Agenda of the EU at the ministry of the interior*)<http://www.mvcr.cz/mvcren/article/agenda-of-the-eu-at-the-ministry-of-the-interior-hague-programme.aspx>

originates, taking in consideration that until the present time there is no common principle that could conclude that.[99]

Another important tool proposed during the Stockholm Programme was the European Investigation Order. This was the most important instrument so far in the legal framework of the European Union that brought positive changes in criminal law procedures at Union level. The proposal 9288/10ADD1 took place in 2010, in Brussels, at the request of Austria, Belgium, Bulgaria, Estonia, Spain, Slovenia, Sweden and it was communicated to the European Parliament and the Council with the aim of implementing a new Directive on what the state parties called the European Investigation Order. The instrument is intended to provide for a more easy access to evidence in criminal matters, regardless the EU state they are requested from or to or ask for cooperation from judicial counterparts from the state the suspect maybe be located in. The European Investigation Order entered into force in May 2017 and is supposed to speed up the process of criminal investigations concentrating more on the manner of the process rather than the purpose of it, moreover it is aiming to radicalize what in this moment has increased in a very concerning pace, that is, arm trafficking and terrorism. The current Commissioner for Justice, Consumers and Gender Equality, Vera Jurova, shared her support for this new criminal procedure and declared her concerns for the present cross-border criminality that keeps growing and taking different shapes, stating that: *“"*Criminals and terrorists know no borders. Equipping judicial authorities with the European Investigation Order will help them cooperate effectively to fight organized crime, terrorism, drug trafficking and corruption. It will give judicial authorities access to evidence quickly wherever it is in the EU. I call on all Member States to implement it as quickly as possible to improve our common fight against crime and terrorism. In June we will also discuss with Member States solutions to facilitate the collection and exchange of

[99]'Programul Stockholm şi modul în care acesta a influenţat adoptarea unor reguli procesual penale noi' (*www.ugb.ro*)<http://www.ugb.ro/Juridica/Issue12013/3._Programul_de_la_Stockholm_si_reguli_procesual_penale_noi.Delia_Magherescu.RO.pdf>

evidence. It is time to fully modernize the tools available to judicial authorities to conduct investigations. " [100]

This step marks one of the most important steps in criminal procedures in the European Union, having the purpose of harmonizing and creating a common applicability for all the EU judicial organs for a more detailed investigation procedure within the European Union, which were discussed and agreed up by the Justice and Home Affairs Council in 2011, discussions that outlined matters such as the equivalent of judicial expenditures, meaning that, any procedure will have the same amount as it would have in the requesting state in criminal procedures, regardless if the investigating crime has the same denomination or a different approach than the issuing state, establishing a common period of time of 90 days within which the investigation procedures and expenditures must be fullfiled.[101]

With the condition of following all the mutual recognition principle, also the European Union has adopted some Directives concerning the respect for fundamental rights during a criminal investigation of an EU national. Firstly, it is mentioned in Article 82(2), b, of the Treaty on the Functioning of the European Union that the Parliament and the Council, when it is necessary, in order to facilitate the mutual recognition of judicial decisions, can decide through Directives a set of norms that concern different types of judicial tradition and analyzing them with the respect for fundamental rights in criminal proceedings and also the possibility of a state to implement its own set of norms when it comes to protect a person at a higher level in a critical situation. The most significant Directives of the European Union on the matter are[102]: the Directive 2010/64 of the European Parliament and the Council on the right to interpretation and translation in criminal proceedings[103], Directive 2012/13 on ones right to be informed in criminal proceedings[104], Directive 2013/38 which provides for

[100] European Commission, 'As of today the "European Investigation Order" will help authorities to fight crime and terrorism' (*Press Release Data Base*, 22 May 2017)<http://europa.eu/rapid/press-release_IP-17-1388_en.htm>
[101] Ibid.
[102] Mihai Mares for Juridice.ro, 'European Arrest Warrant (II) Protection of Fundamental Rights' (*Juridice.ro*, 4 April 2017) <https://www.juridice.ro/503535/mandatul-european-de-arestare-ii-protectia-drepturilor-fundamentale.html#_edn6>
[103] DIRECTIVE 2010/64/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 on the right to interpretation and translation in criminal proceedings[2010] OJ 2 280/1
[104] DIRECTIVE 2012/13/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2012 on the right to information in criminal proceedings [2012] OJ 2 142/1

legal assistance in criminal procedures and support from one's state institutions abroad and communication with third persons.[105]

Further on, these Directives will be broadly discussed, analyzing their benefits in criminal proceedings.

One of the most important of them, is the last Directive concentrating on the legal assistance of a person under criminal investigation and his/her right to communicate with a third person or a consular authority if he/she is held into custody. The Article 10 of the Directive 2013/48 EU enunciates the rights of an individuals in cases of criminal prosecution in a foreign country, that is:

1. The right to have an lawyer at the moment of prosecution or when brought into custody without any unjustifiable delays of the request;
2. The right of meeting the lawyer with the respect to privacy concerning the discussion;
3. During the hearings of the suspect, it must be allowed and respected the presence of the lawyer, and his/her presence must be registered under the national laws of the executing state concerning the legal assistance;

The right of communicating with third persons provided in Article 4 until Article 6 of the Directive 2013/48 EU, such as the right of informing a third party about the detention in a foreign state, the right of informing the embassy or consulate about the status of the suspect and other temporarily derogations from the Directive, are applied *mutadis mutandis* regarding the procedures done by the executing state. [106] The communication and request of the suspect with family members or another third party has to be registered under a written report and in exceptional cases, it can be denied by the judicial organs of the executing state if is thought that this would jeopardize the course of the criminal prosecution or that this would affect the issuing of the European arrest warrant against the suspect or other people that are part of the investigation. Moreover, the executing state must permit the presence of

[105]DIRECTIVE 2013/48/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ 2 294/1/1

[106] Mihai Mares for Juridice.ro, 'European Arrest Warrant (II) Protection of Fundamental Rights' (*Juridice.ro*, 4 April 2017) <https://www.juridice.ro/503535/mandatul-european-de-arestare-ii-protectia-drepturilor-fundamentale.html#_edn6>

a lawyer from the issuing state assisting the lawyer from the executing state[107], thus they collaborate in order to respect the rights of the prosecuted persons under the Framework-Decision 2002/584 JHA[108] and the executing state must immediately inform the suspect about these rights.

V. Differences between the European Arrest Warrant and Extradition procedures

1.1. Extradition. Brief history.

Prior to the new European Arrest Warrant, the judicial cooperation in cross-border crimes in the European Union was based only on the relations between the EU states and the well-known extradition process. The extradition process to which the legal basis was the European Extradition Convention together with its two Additional Protocols was until the implementation of the European Arrest Warrant the most efficient judicial instrument, at least according to some practitioners. Even it had its privileges, the extradition process was considered to be more of a political interest instrument and had a closer approach toward sovereign states and their political interest rather than combating cross-border criminality which was and still is one of the most concerning problems worldwide.

As stated in the beginning, the extradition procedures have as a legal basis the European Convention from 1957 on Extradition together with its two Additional Protocols dated from 1975 and 1978, and of course, the multilateral or bilateral agreements between EU Member State, some of them having some reservations concerning the Convention in question and established different rules on extradition, which under the European Arrest Warrant was not permitted anymore. Further on, the extradition procedures had been improved and some conditions which were stalling the process were abolished through the

[107] Mihai Mares for Juridice.ro, 'European Arrest Warrant (II) Protection of Fundamental Rights' (*Juridice.ro*, 4 April 2017) <https://www.juridice.ro/503535/mandatul-european-de-arestare-ii-protectia-drepturilor-fundamentale.html#_edn6>

[107] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190

[108] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190

San Sebastian Agreement in 1989 on the simplification and modernization of extradition requests, later on by the European Convention on simplified procedures between Member States in 1995 and, of course, the well-known Schengen Agreement that was on was of the most considerable step for the free movement of persons and good within the European Union.

The concept of extradition was based on the fact that no EU Member State was entitled to surrender a criminal suspect if the obligation was not stipulated in a treaty or agreement. That particular reason was giving a high importance to the concept of sovereignty and also the Member States had the possibility of refusing an extradition request on political or fiscal reasons. These situations where states were given the possibility of denying an extradition request was against the priorities of the European Union, since the posibile reservations and separate treaties of some EU Member States were not marking any improvements in the judicial cooperation process regarding criminal matters. Previously, the applicability of the extradition procedures had a certain number of steps to be followed regarding the judicial instruments attributed to them. The first in line to be followed were the Conventions to which the EU Member States were part of, pursued by Declarations of Reciprocity between certain states and in some rare cases, provisions of internal legislation.[109] Regarding the last instrument, that are the norms of internal legislation, these were usually used only as a starting point, for becoming part to Extradition Conventions and afterwards using them as tools for a better comprehension of the provisions of the mentioned conventions or even to fulfill some gaps some international norms on extradition may have.[110] The execution of extradition requests has met three different systems of analysis and applicability, more specifically, the political and governmental system, the jurisdictional system and the mixed system. Under the first system, whose abolishment was the main goal of the Council when it was decided the implementation of the new European Arrest warrant, the governments of the Member States were perceiving the institution of extradition as being only an administrative act that was only under the strings of the government of the executing state, not giving any opportunity to the suspect in question, concept that has had different

[109] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009).p. 2
[110] Ibid.

turns in the present time.[111] The second system, which is the jurisdictional system provided for the exclusive power of the judicial bodies only, that had the ability of deciding upon any situation of opposing sides or on the publicity of the judicial procedure the extradition entailed. The last but not least the mixed system that represented a sort of conflict of opinions between the judicial and political system since, back then, there were no clear boundaries for the two domains and both of the sides where checking the extradition request political and judicial wise, afterwards, leaving the final word to the government which was the only one to decide upon the execution of the extradition requests.[112]

Lately this has been changed, the present treaties do not provide anymore for a short number of crimes for which such a request can be done and also the political and fiscal reasons are not even stipulated as optional reasons of refusal under the present European Arrest Warrant. One of the steps of the European Union towards improvement regarding the matter was the Vienna Action Plan which was the work of the Council and of the European Commission on implementing and improving the Area of Justice and Home Affairs, the provisions of the Treaty of Amsterdam and to establish a broader domain of liberties regarding the simplified extradition procedures between EU Member States. The European Convention on Extradition, in contrast to the current EAW, involved also an administrative procedure, which is the activity of the Ministry of Justice from the states parties of the extradition process together with a judicial process as well. Through the new simplified procedures, the administrative process has been abolished together with the jurisdiction attributed to the Ministries of Justice, the only jurisdiction now is being attributed to the authoritative bodies directly or to rogatory commissions, if the situation entails.

1.2. Transition from Extradition to European Arrest Warrant

Through the new instrument of surrender procedures, now the factors of analysis had changed. The European Arrest Warrant provides now for the relations between the suspect of the crime and both the issuing and executing state, meaning that now that the persons involved in the crime investigations have direct rights despite the state they are in

[111] Ibid *109*
[112] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009).p. 3.

and also, a new aspect is that the prior requested concordance in criminal law for the issuing and executing state has been eliminated and now there are 32 crimes applicable for every Member State concerning the issuing of and European Arrest Warrant. Only under certain circumstances of national security, the possibility of wrongful prosecution or bad treatment in one of the states or if a crime for which a warrant as such is requested is not stipulated in those 32 crimes decided upon by the Council in the Framework decision, could this concordance be required. The elements that had a major influence, in some way or another was the increased number of complaints of a certain category of persons stipulated under the European Convention on Extradition, which involved a large number of pre-surrender formalities that were stalling the pace of the final surrender, the concerning fast escalation of crimes across the European Union and the need of creating a more secure environment of the free movement of persons within the Union, the ongoing terrorists acts that called the need of a new system of rules in order to both combat and prevent terrorism, the abolishment of threshold that was the non-recognition of certain judicial decisions between the Member States of the European Union, the enforcement of the three Conventions that later created the Acquis of the European union, namely the Convention from June 1990 implementing the provisions of the Schengen Agreement from 1985 on the gradual abolition of checks from the common border of the Member states of the European Union followed in 1995 by the Convention on simplified extradition procedures between the Member states of the European Union and the last, the Convention to Extradition between EU Member states from 1996.[113] The Framework decision concentrated also on the protection of human rights and among the matters of discussion was raised the issue of the mutual trust between the Member States and the principle of mutual recognition on any judicial decision and also the possibility of refusal of an EAW request if there is the slightest chance for suspect to be treated disrespectfully regardless of his detention or when he/might face a death penalty in the executing state.[114]

[113] Craig Barker and John Grant, *International Criminal Law Deskbook* (Routledge 2013), p. 459
[114] Taralunga Victoria, 'European Arrest Warrant Transition of extradition procedures in the European Union' (Faculty of Law and Social Sciences, USARB University, Republic of Moldova) <http://dspace.usarb.md:8080/jspui/bitstream/123456789/2241/1/Taralunga_V._mandat_european_extradare.pdf>

The Framework Decision of the Council has still provided some conditions and categories of crimes for which an European Arrest Warrant could be issued. The biggest contrast between extradition and EAW is that in a situation of a surrender request, the crime that makes the object of the request can be stipulated only under the national criminal law of one the states, being eliminated the former condition of extradition requests, more specifically, that the crime in question must fall under the national criminal law of both states. Still, abolishing this condition, the EAW request must comply with a number of criterias, that is, the length of detention of the suspect. That being said, a surrender request according to the Framework Decision on EAW must have as an object a crime for which in the legislation of the issuing state it is provided a sentence or a preventive measure of at least one year, or if it only concerns momentarily a preventive measure, it has to have a length of at least four months.

a) The principle of proportionality

Even if the implementation of the European Arrest Warrant was a positive step towards the fight against cross-border crimes, it had created several disputes. There were often encountered in practice, ever since its implementation, cases for which an European Arrest Warrant together with its procedures were out of line for the object of the request or the possible detention of the suspect could be considered disproportionate by the sending state. Most of these kind of cases fall under Article 8 of the European Court of Human Rights that provides for the right to privacy and family life and are brought before the European Court of Justice. Sending states are given the responsibility of checking beforehand if the reasons of the warrant are applicable, if the fundamental rights of the suspect are known and fulfilled by the requesting state and, since the double criminality principle had been eliminated, to establish that the crime on matter falls under the 32 listed crimes by the Council. The first aspect that has to be established is that the notion of detention provided by the Council is respected by the executing state according to the Framework Decision 2002/584/JHA, more specifically that the time of detention in the executing state complies with the rules for fundamental rights, the right to freedom of the suspect and also the proof of the efficiency of the requested detention.

The principle of proportionality as previously presented could represent in many cases a ground for refusal from the executing state. Further on, a short presentation of a case as such will be described.

The case in question concerns the criminal prosecution of a Romanian citizen, Ciprian Vasile Radu, who was under criminal investigation in Romania and Germany as well. The dispute arose from the fact the German judicial bodies had issued four European arrest warrants to the Court of Appeal from Constanta (Romania) where Mr. Radu was under investigation, on the grounds that he must be tried before the German tribunal for several crimes of robbery also provided in Article 211 of the Romanian Criminal Court. The Court of Appeal from Constanta (Romania) had rejected one of the four warrants, stating that the suspect is already under investigation for the same crimes for what the EAW were issued by the German authorities. Moreover Mr. Radu invoked before the Romanian instances that his rights were violated by the German Authorities and motivated that at the time of the enforcement of the Framework Decision on the European Arrest warrant, the fundamental rights provided by the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union were not yet provided in the constituent treaties of the European Union, thus according to the Article 6 of the TEU the European arrest warrant in question should be interpreted following the provisions of Article 6. The Romanian instances suspended the trial of Mr. Radu and decided to address some questions to the Grand Chamber of the Court of Justice of the European Union regarding the interpretation of the Framework Decision on the European Arrest Warrant on this case. As Mr. Radu was under the opinion that the previously mentioned provisions should be considered the main norms of interpretation in his case, even if the motives invoked were not mandatory reasons for refusal of an EAW, The Court of Appeal of Constanta filed 6 question to the Grand Chamber concentrating on the following issues:

1. The provisions of Article 48 and 52 of the Charter of Fundamental Rights of the European Union and the other provisions invoked by the suspect could be considered to be primary judicial norms in the constituent treaty as Mr. Radu stated?[115]

[115] Emanuela Matei, Juridice.ro, 'Radu Case European Arrest Warrant C-396/11 Appeal Court of Constanta' (*Juridice.ro*, 11 October 2012) <https://www.juridice.ro/222697/cauza-radu-mandatul-european-de-arestare-c-396-11-pendinte-curtea-de-apel-constanta.html>

2. If the German judicial authorities had violated the provision of Articles 5 from the ECHR on the rights to security and freedom of a person together with Article 6 of the Treaty on the European Union, by requesting the surrender and prosecution of a person against his consent;
3. If the judicial authority from the executing state could refuse the surrender of the suspect without violating any community norms and treaty provisions, considering there are contradictions between the request of the issuing state and principle of reciprocity and proportionaly;[116]
4. If the mentioned legal provisions create of conflict of laws between the European Law and Romanian law and to what extent does the European Law prevails in this situation;[117]

In this preliminary questions, as it can well be observed, the suspect and the Romanian national courts of appeal wanted to clarify before the Grand Chamber whether an European Arrest Warrant could be denied by the executing state if human rights, implicitly the European Convention of Human Rights and article 6 of the Treaty on the European Union, are violated by the issuing state in question. This case was expected to be a completion or a developing instrument to what concerns the fundamental rights, the principle of mutual recognition and the principle of proportionality in the field of judicial cooperation in criminal matters. Unfortunately, under the opinion of several practitioners, The Grand Chamber did not concentrate on the exact merits of the case and just gave a general analysis concentrating on the questions referred by the Appeal Court of Constanta. Overall, the Advocate General Sharpston, ruled that an executing state is under no rights of refusing the surrender of a suspect, requested through an EAW, from its territory reasoning that the suspect was not previously prosecuted in national courts. In the judgement of the Grand Chamber it was also emphasized that as long as the stated reasons for refusal of an EAW that falls under the provisions of the Framework Decisions, namely Article 3 and 4, there is no reason to suspend the surrender of the suspect and to slow down more the pace of a criminal trial for unjustified reasons. [118]

[116] Idem *115.*
[117] Idem *115.*
[118] Anita Davies, Eutopialaw.com, 'Radu – A Case of Failed Dialogue' (*Eutopia law*, February 5, 2013) <https://eutopialaw.com/2013/02/05/radu-a-case-of-failed-dialogue/>

From the ruling of the Grand Chamber, as previously stated, people were hoping for a broader range of reasons for denying an European Arrest Warrant, even if the reason invoked is not part of the motives provided by the Framework Decision, but the final ruling turned out to be otherwise. The Court of Justice of the European Union did not consider that the reasons for denying an EAW is flexible and every Member State should comply to it as it is. The object of refusal stressed by the Court of Appeal of Constanta was found by the CJUE to be groundless as the Grand Chamber did not see the fact that a national court that would provide the suspect with a fair trial under the national law compared with the national laws from the executing state would make a good case for refusing an EAW in general.[119]

b) The principle of mutual recognition

The greatest achievement between the transition from the extradition procedures and the European Arrest Warrant is the, of course, the principle of mutual recognition. First of all, the transition from the former mutual legal assistance principle to that one of mutual recognition outlines the faster pace of criminal investigations that are run ever since the change of procedures. The main aspect is that now an executing state must recognize any judicial decision coming from any EU Member State, without analyzing the merits of the case and treat that legal document as it were a national one and as a statement from the European Commission in 2001 underlined "is grounded, in particular, on the shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law."[120]

The principle of mutual recognition implies the manifested recognition of a surrender request of an EU Member to another, with a short number of national formalities, if any. The principle is based on mutual trust and respect between Member States concerning the protection of human rights and mutual objectives of the EU Member States. Opposed to the extradition process, the European Arrest Warrant goes through a very short numbers of

[119] Epthinktank.eu, 'The European Arrest Warrant: between mutual recognition and fundamental rights' (European Parliamentary Research Service Blog, 11 September 2013) <https://epthinktank.eu/2013/09/11/the-european-arrest-warrant-between-mutual-recognition-and-fundamental-rights/amp/>

[120] Haggenmüller, Sarah, The Principle of Proportionality and the European Arrest Warrant (January 15, 2013). Oñati Socio-Legal Series, p.99, Vol. 3, No. 1, 2013.

procedures, more specifically, the Commission has implement 24 short measures beforehand the issuing of the warrant. The Framework Decision of the Council aims for both the development of the principle of mutual trust but also for enhancing the respect towards human rights in criminal prosecutions of executions of punishments. The principle gives the judicial decisions issued by any EU Member states full recognition within the European Union and its aim was to institute a balance between the judicial bodies from the issuing state and the executing state. The principle of mutual recognition implies both the judicial cooperation between the issuing and the executing state regarding the surrender procedures, the surveillance of the suspect during his/her transfer plus the recognition together with the execution of the request or decisions. In Romania had been encountered some exception on what concerns the execution of certain arrest warrants that were issued by a EU Member state prior to the accession of Romania to the European Union in 2007. In the light of this, it will be furtherly presented a case in which the Romanian judicial authorities had denied the execution of an European Arrest Warrant, prior to its accession to the European Union, issued by EU Member states.

One of the cases concerns a German citizen for whom it has been issued an European Arrest Warrant by the Tribunal of Arnsberg, Germany, in October 25th, 2006 to the Romanian judicial authorities. The German citizen has been brought before the Court of Appeal from Bucharest and held into custody as well, during the debates concerning his surrender. The difficulty in this regard was the membership of Romania to the European Union, which officially entered into force on the 1st of January, 2007, about which the Court of Appeal, in its reasoning, has stated the followings:

- "According to Article 108 for the modified Law 302/2004, the provisions regarding the surrender request through an European Arrest Warrant of a suspect, are applicable for the EAW that are issued after the entering into force of Romania's EU Membership, and which fall under Title III from the Law 302/2004. On what concerns the European Arrest Warrant issued by the German Authorities on the 25th of October, 2006, the Court decided that it cannot be executed since it is against the legal norms that cover the applicability and execution of an European Arrest Warrant,

which are valid only if such a request is issued after January 1st, 2007. Concluding, the Court rejects the request of the Arnsberg Tribunal, calling it ungrounded".[121]

Following the decision of the Appeal Court, the suspect, who was detained until the Court gave its final reasoning, was released, since the EAW issued by the authorities from Arnsberg was requested prior to the accession of Romania to the European Union.[122]

c) The principle of double criminality

The principle of mutual recognition it is also connected to another criteria on the issuing of the warrant, namely the principle of double criminality. At the Council of Tampere from 1999 it was discussed that it should be implemented a balance between the principle of mutual trust and the obligation that is binding for every EU Member State to respect the idea of democracy, the rights and fundamental freedoms provided in the Treaty on the Functioning of the European Union, in Article 6. The principle double criminality had raised disputes at the time of the implementation of the European arrest warrant since back then it was unusual for some states to comply with the criminal law of other EU Member States. The uncommon matter was that some actions were considered to be crimes under the criminal law of some EU Member States and some of them were not and this made the extradition proceedings last longer which in most of the cases, ended up with the prescription of the penalty. Prior to the European Arrest warrant, the principle of double criminality in cases of extradition requests entailed for the existence of the prosecuted crime in the national criminal law of the issuing and the executing state at the time of the request, even if that particular crime was under another description or criminalization. Before the implementation of the implementation of EAW, the principle of double criminality was provided in the Convention that implemented the Schengen Accord, under Article 54, that is the *ne bis in idem* principle which the Court of Justice of the European Union had firmly

[121] The Court of Appeal of Bucharest, Criminal Section nr.2, Decision nr.7, January 22nd , 2007
[122] Ioana-Cristina Morar and Mariana Zainea, *Judicial Cooperation in criminal matters* (CH Beck 2008),p. 288

recognized in its rulings.[123] In practice, mutual trust was considered to be by the Court, a situation in which "Member States have mutual trust in their criminal justice systems and that each other of them recognizes the criminal law in force in the other Member States, even when the outcome would be different if its own national law was applied."[124]

The Framework Decision of the Council from 2002 has brought changes in this regard. It has eliminated the principle of double criminality and listed 32 crimes that are applicable for the issuing of on European Arrest Warrant following a number of conditions. Therefore, the surrender of a suspect has to be executed if the crimes for which the warrant is issued falls under the criminal law of the issuing state and for it is it provided a penalty of at least 3 years of imprisonment. The Article 2[125] of the Framework Decision 2002/584/JHA has eliminated the principle of double criminality for the following crimes:

- participation in a criminal organization;
- terrorism;
- trafficking in human beings;
- sexual exploitation of children and child pornography;
- illicit trafficking in narcotic drugs and psychotropic substances;
- illicit trafficking in weapons, munitions and explosives;
- corruption;
- fraud, including that affecting the financial interests of the European Communities within the meaning of the Convention of 26 July 1995 on the protection of the European Communities' financial interests;
- laundering of the proceeds of crime;
- counterfeiting currency, including of the euro;
- computer-related crime;

[123] National Institute of Magistracy, Romania, 'the European Arrest Warrant and the necessary balance between mutual recognition and fundamental rights in the EU' (*European Judicial Training Network*) <http://www.ejtn.eu/Documents/Themis/THEMIS%20written%20paper%20-%20Romania%201.pdf>

[124] ECJ, C-187/01 and C-385/01 Hüseyin Gözütok and Klaus Brügge, par. 33.

[125] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190/Article 2 (2)

- environmental crime, including illicit trafficking in endangered animal species and in endangered plant species and varieties;
- facilitation of unauthorized entry and residence;
- murder, grievous bodily injury;
- illicit trade in human organs and tissue;
- kidnapping, illegal restraint and hostage-taking;
- racism and xenophobia;
- organized or armed robbery;
- illicit trafficking in cultural goods, including antiques and works of art;
- swindling;
- racketeering and extortion;
- counterfeiting and piracy of products;
- forgery of administrative documents and trafficking therein;
- forgery of means of payment;
- illicit trafficking in hormonal substances and other growth promoters;
- illicit trafficking in nuclear or radioactive materials;
- trafficking in stolen vehicles;
- rape;;
- arson;
- crimes within the jurisdiction of the International Criminal Court;
- unlawful seizure of aircraft/ships;
- sabotage;

These types of crimes, despite being emphasized by the Council in the Framework Decision, could be also associated to crimes under a different definition but with the same conditions of criminalization as the 32 mentioned above. Thus, this list should not be seen as a completely exhaustive list of crimes since its aims for their harmonization with national legislations of the EU Member States, in cases where such crimes are not stipulated in some national criminal laws. Every cross-border crime within the territory of the European Union should be analyzed upon its constituent elements and afterwards it must established under which of the 32 listed crimes from the Decision is more approachable, otherwise if a judicial

authority applies the direct denomination of one the 32 crimes and that crime is not provided in a national criminal legislation, it would be impossible for the judicial bodies the applicability of double jeopardy for one the specified crimes, therefore, an European arrest warrant could not be executed.[126]

d) Extradition v. Surrender

Through the Framework Decision of the new European Arrest Warrant there has been controversies on the used terms of transfer regarding the suspect. The new implemented instrument in the realm of criminal law procedure in the European Union has introduced another meaning regarding the transfer procedures, namely the notion of surrender. The changing of wording through this new implementation has raised many disputes on the matter, since it is not well specified whether the conditions for the former extradition procedure still remain valid or they had been revised during the discussions the Council held at Tampere, 1999.

Starting with the very beginning of the Framework Decision on the European Arrest Warrant, its first article refers to the term of *surrender*[127], followed by the second paragraph of the same article stating that the Member states *shall*[128] act under the provisions of the new European Arrest Warrant. That gives the somehow impression that the new set of rules are substantial but procedural and their binding to the EU Member States is not particularly stated still. The Decision in discussion yet emphasizes the fact that some of the EU Member States are part of previous Conventions under which they have obligations, more precisely the Conventions that formed the European Union Acquis that is the Schengen Agreement, the Convention on Simplified Extradition procedure and the Convention related to Extradition from 1996. All of these obligations that fall under the provisions of these

[126] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009),p. 71

[127] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190/Article 1 (1): "The European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order."

[128] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190/Article 1 (2):" Member States shall execute any European arrest warrant on the basis of the principle of mutual recognition and in accordance with the provisions of this Framework Decision."

Conventions had been presented at Tampere by the Council as the core of the new European Arrest Warrant, provisions that will not be completely abolished but further developed through new simplified procedures. The binding effect of the new EAW, as the preamble of the Framework Decisions emphasizes is more of a purpose coming from the European Union in order to further create a more secure and fair environment on what concerns criminal procedures and judicial cooperation between states: " Since the aim of replacing the system of multilateral extradition built upon the European Convention on Extradition of 13 December 1957 cannot be sufficiently achieved by the Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at Union level, the Council may adopt measures in accordance with the principle of subsidiarity as referred to in Article 2 of the Treaty on European Union and Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in the latter Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective." [129]

VI. Grounds of refusal for extradition

The Framework Decision of the Council in its Article 3 and Article 4 enunciates two categories of grounds for refusal of surrender, one being mandatory, that is Article 3 and the other one optional, situations provided by Article 4.

1. Mandatory grounds of refusal of an European Arrest Warrant are the following:

- When the crime that makes the object of an European Arrest Warrant has been granted a general pardon in the executing state and in cases where the executing state may have jurisdiction in prosecuting the crime under its national criminal law;[130]

[129] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190, Preamble, Paragraph 7

[130] E-juridic.ro , 'Grounds for refusal of the execution of the European Arrest Warrant' (*E-Juridic*, 14 July 2009) <http://e-juridic.manager.ro/articole/motive-de-refuz-ale-executarii-mandatului-european-de-arestare-3544.html>

- When the executing state, after further analysis, concludes that the persons to whom its concerned the European Arrest Warrant, has already been tried for the same crime in Court of a Member State of the European Union, with the condition for that crime to be already executed or already serving a sentence regarding that crime, or for some other legal motives of non-execution of that crime that fall under the criminal law of the Member State in which the suspect serves his/her sentence;[131]
- When the suspect to whom it is destined the European Arrest Warrant, has no longer the proper age for serving a criminal sentence, according to the criminal law of the executing state;[132]

Much more attention has been given in practice to the optional grounds of refusal of an European Arrest Warrant. Since its early implementation, Member States had contested the reasons listed in Article 4 of the Council Framework decision, condemning it to have a narrow approach when it comes to the respect for fundamental rights, petty crimes[133] and the costs that the European Arrest Warrant implies, costs that fall under the obligation of the sending state, suggesting that the Council should revise the Framework Decision and work on some alternative procedures in cases of crimes that do not represent a major threat and ask for the existence of some many procedures and costs.[134] In addition to that, the United Kingdom has implemented its own method of a possible denying of an European Arrest Warrant by exercising a *double check of proportionality* combining the notion of the principle of mutual recognition and the principle of proportionality[135]. Through this procedure, the Courts of the United Kingdom wish to make a change towards the applicability of an European Arrest Warrant by positively influencing other Member States to work on this type on changes.

Before a further analysis, through a case-study of the optional grounds, here are the seven circumstances provided by Article 4 of the Framework Decision as non-mandatory reasons of refusal of an EAW:

[131] Idem *130*
[132] Idem *130*
[133] Maria Fletcher and others, *The European Union as an Area of Freedom, Security and Justice* (Routledge 2016)
[134] Idem *133*
[135] Idem *133*

- If one of the 32 crimes listed in the Framework Decision, for which an European Arrest Warrant is issued, is not considered to be a crime under the criminal law of the executing state, making a exception the cases having as on object taxes or duties, for which an executing state could not refuse the execution of an European Arrest Warrant, on the grounds that under its national law, the taxes and duties have a different system of applicability;
- An executing state may also refuse the execution of an European Arrest Warrant, when the suspect for whom the request is destined, is already under criminal prosecution for the same crime in the executing state;
- Another case would be when the judicial authorities from the executing state had decided not to start the criminal investigation or even to end the criminal investigation that represents the object of the EAW; or when it is concluded that the suspect in question has already served a criminal sentence or had been already investigated by another EU Member State, for the same crime stated in the new EAW;
- the crime that makes the object of the EAW is already considered to under prescription by the executing state;
- the requested person has already been tried or served a sentence in a third-state, for the exact same crime provided in the EAW, assuming that the person it is still serving the sentence or has not executed the penalty because of some provisions on criminal law of the sentencing state;
- the executing state refuses the execution of an EAW and commits itself to prosecute the suspect in question for the crime stipulated in the EAW under its criminal law;
- The object of the EAW concerns crimes that were executed in total or in part in the executing state, or the crime in the EAW was committed outside the territory of the issuing state and the executing state does not accept an EAW that concerns such a category of crimes;[136]

[136] E-juridic.ro , 'Grounds for refusal of the execution of the European Arrest Warrant' (*E-Juridic*, 14 July 2009) <http://e-juridic.manager.ro/articole/motive-de-refuz-ale-executarii-mandatului-european-de-arestare-3544.html>

1.1. Case-study. Statute-barred Crime.

The present case concerns a Romanian citizen for whom the German authorities had issued an European Arrest Warrant, having as object 6 crimes regarding human trafficking taken place between 1997-1999. The Romanian citizen was suspected of illegally transporting people in countries like France and Belgium, crossing the territory of Germany. The German authorities from the city of Hof addressed the European Arrest Warrant to the Court of Appeal of Timisoara (Romania) asking the surrender of the suspect in question. [137]

The Court of Appeal of Timisoara has accepted in 2007, through the criminal decision 56/PI/18 from 18th of May, the surrender of the Romanian citizen to the judicial authorities from Hof, deciding also to institute a preventive arrest to what concerns him for a one month period. The respondent argued in his defense that the crimes attributed to him are already state-barred crimes taking in consideration the length of time that has passed between the time of the crimes and the accept of his surrender. The Romanian Court of Appeal had stated in the appeal of the respondent that the crimes he had committed are considered to be crimes of high risk under the German criminal law and for that section of crimes, the German criminal law does not provide for state-barred crimes under any circumstances. [138] The High Court of Cassation and Justice of Bucharest, has also maintained the judgement of the Court of Appeal adding that even the crime that made the object of the EAW was to be considered state-barred, a refusal of surrender from the Romanian Authorities would have been unreasonable since the German authorities consider it to be a serious crime, excepted from the state-barred principle.[139]

[137] Ioana-Cristina Morar and Mariana Zainea, *Judicial Cooperation in criminal matters* (CH Beck 2008) ,p. 351
[138] Idem *137*
[139] Idem *137*

2. Withdrawal or refusal of the European Arrest Warrant. Analysis under the Romanian legislation-Law 302/2004

The Romanian criminal law provides certain circumstances under which the Romanian authorities are entitled to refuse or withdraw a surrender request from an EU Member State. The law that governs these circumstances is the Law 302/2004 regarding the international judicial cooperation in criminal matters, later modified by the Law 304/2004 which emphasizes the following situations: a withdrawal from the Romanian judicial authorities of an European arrest warrant could be valid if the grounds that represented the object of the request were not valid anymore or did not exist, if the suspect to whom is destined the surrender request has died, if the suspect that makes the subject of the surrender request together with an international arrest warrant has already been extradited or surrendered in Romania.[140] The withdrawal of a surrender request is officially done by the issuing state through an entitled judicial authority or in the name of a judicial body of another EU Member State, sent to the judicial authorities that already proceeded to further criminal investigations or proceeding on what concerns the suspect in question. The most frequent cases of withdrawal of an EAW are the annulment or the replacement of the preventive arrest of the suspect, the annulment of the judicial decision on the preventive arrest or any other complimentary measures regarding the suspect.[141] A more rare situation of annulment of an EAW would be the case where a second European Arrest Warrant is issued for the same crime and person but having as a new object- a new criminal punishment in the issuing state. Under the Romanian legislation, the legal basis for these kind of situations is provided in Article 449 of the Romanian Criminal Law Procedure Code on the annulment of a judicial decision and its content, emphasizing that: "A final decision can be annulled concerning only a part of the crimes or persons, subjected to the trial, only on what concerns the civil or criminal matters of the case, only if this annulment will not jeopardize the fair settlement of the case."[142]

[140] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009), p.66
[141] Georgiana Tudor and Mariana Constantinescu, *European Arrest Warrant* (Hamangiu 2009), p.67
[142] Romanian Criminal Law Procedure Code, Article 449 (2)

2.1. Case-study. Withdrawal of an European Arrest Warrant

The presented case concerns a Romanian citizen for whom an European arrest warrant was issued by the Tribunal of Mako, Hungary on the 12th of July, 2006. The National Central Bureau (Interpol) from Romania has been requested to execute the warrant on the 30th of January 2007, followed with the surrender of the suspect in question.

According to the file of the crime, a Romanian citizen P.V. was charged with illicit cigarette trade, cigarettes bought from Romania with the intention of smuggling the merchandise in Paris. The mentioned suspect was helped by another Romanian citizen E.V when his car broke during the illicit transport of the cigarettes and it was continued by the latter, for whom the European Arrest Warrant was issued in the end by the Tribunal of Eger, Hungary.[143] The crime for which the latter suspect was accused of under the Hungarian criminal law concerned excise goods under the Hungarian Legislation, but this is not provided under the Romanian legislation. Even so, the crime it is stipulated among the 32 crimes provided by the Framework Decision on the European Arrest Warrant, so the Court of Appeal of Cluj (Romania) has accepted and proceeded with the preventive detention of the suspect requested by the Hungarian judicial authorities, informing the National Central Bureau from Budapest about the arrest of E.V. [144]Following this, the National Central Bureau of Budapest has informed the National Central Bureau of Romania that the European arrest warrant in discussion has been annulled by the Tribunal of Eger (Hungary) without them being notified beforehand, therefore the Hungarian Authorities requested the release of the suspect because of that. The suspect was released afterwards, but in his name was issued another European arrest warrant by another Hungarian tribunal, for the same act, namely the Tribunal of Mako.[145] Taking in consideration that the first surrender request of the suspect E.V. has been previously annulled by the Tribunal of Eger regarding the same person and crime, the Court of Appeal of Cluj (Romania), according to its national law as well, that is the Law 302/2004, article 94, declared the following:

[143] Ioana-Cristina Morar and Mariana Zainea, *Judicial cooperation in criminal matters* (CH Beck 2008), p.347
[144] Ibid.
[145] Ibid. p. 349

"Considering that the European Arrest Warrant issued on July 12th, 2006 by the Hungarian judicial authorities concerning the suspect E.V, was annulled by the Tribunal of Eger, Hungary, according to article 94 of the Law 302/2004, the surrender request regarding the execution of the European arrest warrant, on July 12th, 2006, by the Tribunal of Mako (Hungary), regarding the criminal file 116B741/2005, is to be dismissed as groundless. "[146]

Another reason for refusing the execution of an European arrest warrant is stipulated under article 88 of the Law 302/2004. The mentioned article emphasized that in the situation of amnestied crimes under the Romanian Legislation, a surrender request having one them as on object, should be considered a mandatory ground of refusal of such a request, from the Romanian judicial authorities. However, this ground has too, a set of conditions to fulfill. The requirement, firstly, relate to the existing jurisdiction of the Romanian authorities regarding the crime for which the European arrest warrant has been issued and, of course, the proof that for the crime in question, there is an order of amnesty, valid under the Romanian Criminal law.

VII. Conclusion

As it was broadly presented in the present paper, the implementation of a new simplified procedure that is the European Arrest Warrant has been the most significant step taken by the European Union towards a developed judicial cooperation in criminal matters, a faster procedure of recognition of judicial decisions between the Member States and slightly intervening in the national legislations of the Member States of the European Union in order to eliminate the thresholds that were stalling the surrender process of criminal suspects. The development of the mentioned aspects has taken a completely different turn from what they meant before the European Union started to show concern on how the judicial decisions were approached by the Member States in international criminal trials involving them. The Tampere European Council had marked this new procedure in October 15 and 16, 1999 where the Council has emphasized the considerable value of the principle of mutual recognition and international judicial assistance between Member States, turning

[146] Court of Appeal of Cluj, judicial decision nr. 8 of 28th of February, nr 2007

the Framework Decision from 2002, the cornerstone of the international cooperation in criminal matters.

- *Abstract*

As exposed in the present paper, the development of Europe along with the development of the European Union itself, has also put a weigh upon controlling criminality, especially regarding organized crime within the European Union. In order to abolish that, the European Union together with its Member States, had to come up with a solution. International organized crimes had increased since the free movement of goods and persons has been implemented within the European Union and not only, and following that, the Union had to implement several legal instruments or any other adjustments in order to combat or even progressively eliminate the criminality affecting the Member States of the European Union.

These adjustments would lead to a closer judicial cooperation between the Member States of the European Union, as it were the extradition agreements that were broadly presented in the present thesis or the implementation and harmonization between the Framework Decisions of the European Union with national legislations of the Member States. The first main step towards a close-knit cooperation between the EU Member States was first marked by the Treaty of Maastricht under which it was established the base regarding judicial cooperation in criminal matters, lately followed by the Treaty of Amsterdam when it was created a more developed institutional framework in order to facilitate the judicial cooperation and judicial assistance in criminal matters as well.

Later on, the most important step of the Council of the European Union was taken in Tampere in October 15th and 16th in 1999 where the main point of discussion was that the mutual recognition of judicial decisions of the EU Member States and how this would be the strongest instrument in order to facilitate criminal prosecutions or investigations, regardless of the state in question. Therefore, the cornerstone of judicial cooperation in criminal matters, as practitioners are calling it, has been implemented, namely, the European Arrest Warrant.

The European Arrest Warrant had officially entered into force through the Framework Decision 2002/584/JHA and it is considered to be the first and most efficient measure taken by the European Union concerning the mutual recognition in criminal matters between the EU Member States. As it is stated article 1 (1)[147] of the Framework Decision, the European Arrest Warrant is "judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order", instrument that marked an increased number of solved criminal cases compared to the period of time before its implementation.

Wie die vorliegenden Arbeit zeigt, kommt durch die Entwicklung Europas—, verbunden mit der Entwicklung der Europäischen Union, auch der Kontrolle der Kriminalität, insbesondere im Hinblick auf die organisierte Kriminalität, immer größere Bedeutung zu. Um die Kriminalität zu bekämpfen, musste die Europäische Union zusammen mit ihren Mitgliedstaaten eine gemeinsame Lösung finden. Seit der Freizügigkeit von Waren und Personen in der Europäischen Union ist die Kriminalitätsrate an international organisierten Verbrechen (sowie anderen Kriminalitätsfeldern) angestiegen, somit musste die Union mehrere Rechtsakte oder sonstige Instrumente erlassen, um die Kriminalität in den Mitgliedstaaten der Europäischen Union zu bekämpfen oder sogar schrittweise zu beseitigen.

Diese Anpassungen führen zu einer engeren justiziellen Zusammenarbeit zwischen den Mitgliedstaaten der Europäischen Union , so zB. die Auslieferungsvereinbarungen, die in der vorliegenden Arbeit weitgehend dargestellt wird, oder die Umsetzung und Harmonisierung zwischen den Rahmenbeschlüssen der Europäischen Union mit den nationalen Rechtsvorschriften der Mitgliedsstaaten der Europäischen Union. Der erste Hauptschritt hin zu einer engmaschigen Zusammenarbeit zwischen den EU-Mitgliedstaaten wurde durch den Vertrag von Maastricht getätigt, der die Grundlage für die justizielle

[147] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190/Article 1 (1)

Zusammenarbeit in Strafsachen bildete. Der Vertrag von Amsterdam vertiefte später die justizielle Zusammenarbeit und erleichterte die gerichtliche Rechtshilfe in Strafsachen..

Später tätigte der Rat der Europäischen Union den wichtigsten Schritt in Tampere am 15. und 16. Oktober 1999. Der wichtigste Diskussionspunkt war, dass die gegenseitige Anerkennung gerichtlicher Entscheidungen der EU-Mitgliedstaaten eingeführt und die Modalitäten dieser gegenseitigen Anerkennung besprochen wurden. Dieser Rechtsakt ist das stärkste Instrument zur Erleichterung der grenzüberschreitenden Strafverfolgung oder Ermittlungen. In der Praxis wird dieser Rechtsakt - der Europäische Haftbefehl - als „der Eckpfeiler der justiziellen Zusammenarbeit in Strafsachen“ bezeichnet.

Der Europäische Haftbefehl ist durch den Rahmenbeschluss 2002/584 /JI offiziell in Kraft getreten und gilt als die erste und effizienteste Maßnahme der Europäischen Union zur gegenseitigen Anerkennung in Strafsachen zwischen den EU-Mitgliedstaaten. Wie aus Artikel 1 Absatz 1[148] des Rahmenbeschlusses hervorgeht, ist der Europäische Haftbefehl „eine justizielle Entscheidung, die in einem Mitgliedstaat ergangen ist und die Festnahme und Übergabe einer gesuchten Person durch einen anderen Mitgliedstaat zur Strafverfolgung oder zur Vollstreckung einer Freiheitsstrafe oder einer freiheitsentziehenden Maßregel der Sicherung bezweckt. ". Dieses Instrument zeigt seine Wirksamkeit durch eine höhere Aufklärungsrate von Straftaten verglichen mit dem Zeitraum vor seinem Inkrafttreten.

[148] Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision [2002] OJ 2 190/Article 1 (1)