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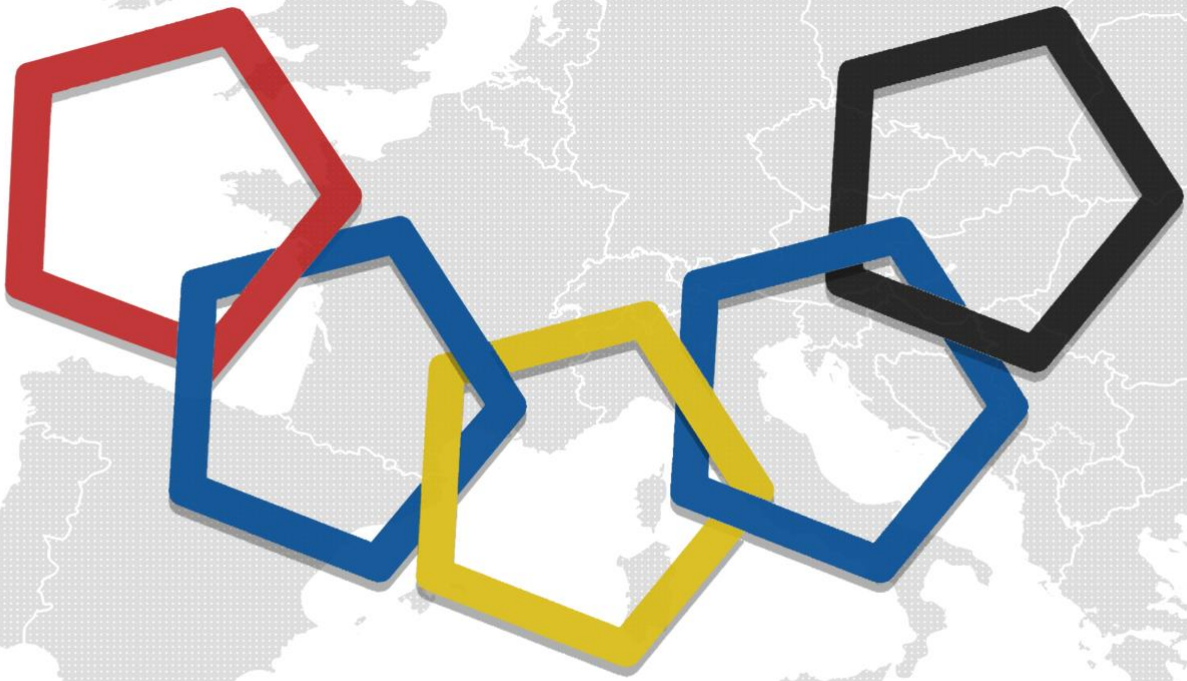
SEMI-FINAL A: EU AND EUROPEAN CRIMINAL PROCEDURE

Mutual legal assistance in criminal proceedings of drug trafficking

Challenges of a non-EU country



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Introduction

No country is immune to issues related to illicit drug production, trafficking and use.[1] Drug trafficking constitutes one of the most profitable criminal activities of organized crime across Europe, therefore, one of the EU crime priorities.[2] Due to several contributing factors such as *the geographical location, high emigration rates, low income, market rates* etc., drug trafficking remains one of the main organized crime activities in Albania. Therefore, the Albanian State acknowledges the serious nature of drug issue and its impact on both national and international level.[3]

As a cross-border crime generally committed by mobile organized crime groups (OCG) that are active in more than one country, one State acting alone cannot easily detect and fight drug trafficking. A coordinated response based on the principle of mutual trust between States is crucial.[4] Moreover, such a response would help the EU and Member States (MS) to deal more effectively with criminals even prior to their entry into the EU area.

The purpose of this paper is to present the *status quo* and challenges that Albania as a candidate country for accession to the EU[5], encounters in matters of mutual legal assistance (MLA) with the EU and MS, in criminal proceedings of drug trafficking. A crucial part is focused on the new tools used within the framework of MLA, such as JITs or controlled delivery. The sources used comprise the legal framework, the case-law of national and international courts and information gathered during the meetings with local judges and prosecutors engaged in the field of MLA in proceedings of drug trafficking.

1. Capacities of Albania in the criminal proceedings of drug trafficking

1.1. Legal and institutional framework in the fight against drug trafficking

Stressing the need to combat drug trafficking in the context of the pre-accession process to the EU, Albania has demonstrated a continuous commitment in completing its *corpus juris* and institutional framework, taking effective measures in the struggle against this phenomenon in its territory and playing an important role at the international level as well.

[1] Republic of Albania: "National Drugs Strategy 2012-2016", published in the Official Journal No. 85, dated 24.07.2012.
[2] https://ec.europa.eu/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/drug-control_en
[3] Republic of Albania: "National Drugs Strategy 2012-2016", published in the Official Journal No. 85, dated 24.07.2012.
[4] For instance, the High Court of Albania in Judgment No. 140, dated 22.11.2017, has stated that: "*...On the basis of this principle, a comparable and equivalent respect for the fundamental human rights and freedoms is presumed between States...*".
[5] On 12.06.2006, the European Communities (actually "EU") and their Member States and the Republic of Albania concluded the Stabilisation and Association Agreement, which gives particular importance to the consolidation of the rule of law, and the reinforcement of institutions at all levels.

Regarding the legal framework, Albania has adopted several laws providing the rules of drugs production, importation, exportation, control, storage and trade, in order to prevent and combat cultivation of narcotic plants and drug trafficking.[6] Improvements are made to the *Criminal Code* and *Criminal Procedure Code* regarding the new forms of organized crime and special investigation techniques.[7] In addition, in 2009, as a continuation of the previous *Law on the Prevention and Fighting of Organized Crime*[8], Albanian Parliament adopted the so-called *Anti-mafia law.*[9] This law sets forth the procedures for the implementation of preventive measures against the assets of persons suspected (based only on indicia) of participation in organised crime, trafficking, and other crimes pursuant to this law, and have an unjustified economic level as a result of suspected criminal activity.[10][11] Due to the derogation of several criminal procedure principles[12], there has been a constitutional review by the Constitutional Court, declaring the law to be in compliance with the Constitution and the European Convention on Human Rights (ECHR).[13] The decision was reasoned in light of the public interest and proportionality of limitations of human rights, by referring to the case-law of the European Court of Human Rights (ECtHR) as well.[14]

Regarding the institutional capacities, Albania has established several law enforcement agencies dealing with the struggle against drugs and strengthening their capacities as well.[15] Special attention is focused on boosting the national criminal justice system capacity to investigate and prosecute transnational organized crime, such as drug trafficking. In 2016, it was foreseen the establishment of a *Special Prosecution Office* and the *National Bureau of Investigation* fully equipped with the authority and infrastructure to fight corruption and organized crime in Albania.[16] In addition, a valuable contribution is granted by the permanent EU assistance programmes implemented in Albania. Based on this support, the continuous training of judges and prosecutors on these issues has been one of the main priorities of the Albanian School of Magistrates as well.

[6] Law No. 7975, dated 21.7.1995 "On Narcotic and Psychotropic Substances"; Law No. 8750, dated 26 March 2001 "On Preventing and Combating Trafficking in Narcotic Drugs and Psychotropic Substances"; Law No. 8874, dated 29 March 2002 "On the control of substances that may be used for the production of narcotic drugs and psychotropic substances".
[7] Law No. 8813, dated 13.06.2002; Law No. 9187, dated on 12.02.2004.
[8] Law No. 9284, dated 30.09.2004, "On the Prevention and Fighting of Organized Crime".
[9] Law No. 10192, dated 03.12.2009 "On preventing and striking at organised crime, trafficking, corruption and other crimes through preventive measures against assets".
[10] Articles 1 and 2 of the Law No. 10192, dated 03.12.2009.
[11] According to Article 4 of the Law No. 10192, dated 03.12.2009, a "*preventive measure*" *is considered any measure of a property nature that the court orders in judicial proceedings, outside a criminal proceeding, through the sequestration of assets, the economic, commercial and professional activities of persons, as well as through their confiscation*.
[12] E.g. the standard of proof based on indicia, burden of proof, the presumption of innocence, etc.
[13] Judgment No. 4 of 2011 of the Constitutional Court of the Republic of Albania.
[14] ECtHR judgment of 22 February 1994, Raimondo v. Italy: "*given the dangerous economic power of "Mafia", it cannot be pretended that these proceedings are disproportionate to the purpose intended to be achieved*".
[15] E.g. *National Committee for the Coordination of the Fight against Drugs*; *National Drug Data Office*; *Central Counter Drug Service*.
[16] Law No. 95/2016 "On the organization and functioning of institutions for combating corruption and organized crime".

1.2. MLA legal framework in criminal proceedings of cross-border crimes

The adoption of a national legal framework on fighting drug trafficking is of no use, unless States cooperate, especially during the investigation phase, considering that valuable evidence come from different jurisdictions. Consequently, the effective mutual legal assistance (MLA) with the countries involved in drug trafficking and the establishment of a cooperation network between national authorities and EU and MS becomes a priority.

As a candidate country for accession to the EU, Albania is undertaking legislative and administrative reforms to fulfil the requirements of the *Stabilisation and Association Agreement* (SAA). MLA in Albania, especially in drug trafficking but not limited to it, is ruled by a set of laws, such as the Constitution, international agreements[17], the CPC and other specific laws. According to the Constitution, the ratified international law becomes part of the internal juridical system, therefore it is implemented directly, except for cases when the issuance of a law is required.[18]

Regarding multilateral agreements, in 1998, Albania signed the *European Convention on Mutual Assistance in Criminal Matters*[19], under which Parties agreed to provide MLA to each other, consisting on gathering of evidence, hearing of witnesses, experts and prosecuted persons, etc. The Convention was followed by two Additional Protocols, intended to improve the States' ability to react to cross-border crimes, in the context of political, social and technological developments in Europe and throughout the world.[20] Another core multilateral agreement, ratified by the Albanian Parliament in 2000, is the *UN Convention against illicit traffic in narcotic drugs and psychotropic substances*, promoting cooperation among the Parties in order to address more effectively the various aspects of illicit traffic in narcotic drugs and providing typical tools for international cooperation such as *extradition*, *controlled deliveries* and *MLA*. Meanwhile, as judicial international cooperation is impossible without police cooperation, in 2006, the Albanian Parliament ratified the *Police Cooperation Convention for Southeast Europe (PCC SEE)*[21], which provides several forms of cooperation, including *controlled delivery* and *joint investigation teams*.

Regarding bilateral agreements, Albania has signed the first MLA agreement with *Czechoslovakia* in 1938. Then, MLA agreements were concluded with the *Socialist Soviet Republics, Romania, Hungary, Greece, Turkey, Italy, Kuwait, Kosovo* etc. The above MLA

[17] Judgment No. 217, dated 26.11.2014 of the High Court of Albania, where the obligatory nature of the international agreements is highlighted according to the *autonomy of will* principle in concluding agreements and *pacta sunt servanda* principle.
[18] Articles 5, 116, 122 of the Constitution of the Republic of Albania.
[19] It was ratified by the Albanian Parliament on 4th of April 2000, and entered into force on the 3rd of July 2000.
[20] Albania signed the Protocol on 13th of November 2001, and ratified it on 20th of June 2002.
[21] Law No.9604, dated 11.09.2006 "On ratification of the Police Cooperation Convention for Southeast Europe".

agreements, except the one with Italy, regulate the cooperation between the judicial authorities in criminal matters with regard to conduction of procedural investigative actions, The MLA agreement with Italy, in addition to these means of mutual assistance, provides three other forms of mutual assistance during the investigation phase, such as *Joint Investigation Teams*, *controlled delivery* and *undercover of agents*.

Regarding national legislation, in 1995, Albania adopted the Criminal Procedure Code (CPC), which among others regulates the relations with foreign authorities in criminal matters, providing that they shall be governed by *international agreements* ratified by the Republic of Albania, *generally accepted principles and provisions of international law* and provisions of this Code.[22] The CPC also contains provisions regarding rogatory letters. However, a detailed regulation is subject to a special law in this field.[23]

Regarding the institutional framework on MLA between Albania and the EU MS, it is important to underline that the above legislation requires institutional structure for proper performance of MLA. *Ministry of Justice of Albania* is the central authority for mutual legal assistance. It forwards the acts, through the *Prosecutor General*, to the *prosecutor of the district* where the letter rogatory is to be executed. In addition to national agencies involved to MLA, Albania has recently concluded cooperation agreements[2425] with the EU Agencies, such as Europol, Eurojust[2627] and has nominated two representatives to the European Judicial Network (EJN) as Contact Points. Such agreements are crucial for facilitating MLA between Albania and EU MS. Parties to the above agreements are committed to cooperate, exchange information, nominate liaison officers and contact points, and facilitate the setting up of JITs.

2. *Ne bis in idem* as a principle fostering judicial cooperation in cross-border crimes

As cross-border crimes implicate more than one jurisdiction invested in their prosecution and trial, multiple criminal proceedings would be harmful both to private and public interests. The defendant would face the burden of concurrent proceedings, while authorities may waste resources and face problems of cooperation because of proceedings commenced in other States.[28] Moreover, this situation brings along the risk of being tried or punished twice for the

[22] Article 10 of Criminal Procedure Code.
[23] Law No. 10193, dated 03.12.2009 "On Jurisdictional Relations with Foreign Authorities in Criminal Matters".
[24] In 2014, Albanian Parliament ratified the *Law on ratification of the Agreement on Operational and Strategic Cooperation between The Republic of Albania and Europol*, aiming the exchange of information, expertise, reports, strategic analyses, information on criminal investigations and/or prevention, trainings, consultancy and support in individual criminal investigations.
[25] Law No. 113 of 2018 "On ratification of the Cooperation Agreement between Republic of Albania and Eurojust";
[26] Eurojust is the EU Judicial Cooperation Unit established in 2002 to support and strengthen coordination and cooperation between national investigating and prosecuting authorities when they deal with serious cross-border crime, especially if organised, such as fraud, drug trafficking, organised property crime, trafficking in human beings and terrorism; https://bit.ly/2FLqT5E
[27] http://www.europarl.europa.eu/doceo/document/A-8-2018-0275_EN.html#title1
[28] Peter Cullen: "The application of the ne bis in idem principle in the area of implementation of third pillar instruments", page 3.

same acts in different States, violating the *ne bis in idem* principle. As a prerequisite for the foundation of a European judicial area (*espace judiciare européen*),[29] it strongly requires coordination and cooperation between States deciding which jurisdiction should prosecute.

2.1. European standard

While within national criminal proceedings *ne bis in idem* represents a basic principle, its transnational application among judicial authorities of different States is still controversial. At European level, firstly, it was recognized only the "*internal*" application within the States through *Article 4 of Protocol No. 7 of ECHR*. In addition, the *Council of Europe* (CoE) has adopted several instruments providing its transnationality, where Albania is a Party as well.[30] Whereas, within the EU, the *ne bis in idem* principle is firstly recognized as a "*transnational human right*" via *Article 54 of the Convention Implementing the Schengen Agreement* (CISA)[31] and later via *Article 50 of Charter of Fundamental Rights of the EU* (CFREU).[32]

Despite obstacles standing in the way of a single, autonomous, and uniform application of *ne bis in idem* in the European and EU law,[33] there is a well-established case law[34] setting common standards and insightful recommendations on how this principle should be respected uniformly. For considering *ne bis in idem* the following requirements set out by the European Courts must be met: (i) *the "same person" requirement*, meaning the same defendant[35]; (ii) *the "bis" requirement*, concerning a final decision on the merits or "*res judicata*" decision[36]; (iii) *the "idem" requirement*, concerning same acts[37]; (iv) *the "enforcement" requirement*[38]; and (v) *the "criminal nature" requirement*[39].[40]

Within the EU, the purpose of the transnational effect of *ne bis in idem* is among others, to ensure the right to freedom of movement.[41] This principle stands at the heart of current EU debates concerning multiple prosecutions of cross-border crimes, aiming to reduce

[29] Hans-Jürgen Bartsch: "Council of Europe ne bis in idem: the European perspective".
[30] The European Convention on Extradition of 1957 (Article 9), followed by the Additional Protocol of 1975 (Article 2); the European Convention on International Validity of Criminal Judgments of 1970 (Articles 6, 53, 54, 55); the European Convention on the Transfer of Proceedings in Criminal Matters of 1972 (Articles 35, 36, 37).
[31] Integrated into EU law by the Treaty of Amsterdam.
[32] However, its transnational dimension is somehow watered down by Article 55 CISA, providing the exceptions of its application.
[33] Van Bockel and Willem Bastiaan: "The Ne Bis in Idem Principle in EU Law", Kluwer Law International, 2010: "… *These obstacles mainly consist in differently worded provisions within the different European frameworks; confusion and conflict within the case law of the Community courts; positive conflicts of jurisdiction and the allocation of cases between the MS; and the vague exception possibilities laid down in Article 55 CISA*".
[34] The ECtHR and the CJEU.
[35] Judgment of 5 April 2017, Orsi and Baldetti, C-217/15.
[36] ECtHR judgment of 7 June 2007, Zolotukhin v. Russia.
[37] Judgment of 9 March 2006, Van Esbroeck, C-436/04; Judgment of 28 September 2006, Van Straaten and others, C-150/05; Judgment of 28 September 2006, Gasparini and others, C-467/04; Judgment of 18 July 2007, Kretzinger, C-288/05; Judgment of 18 July 2007, Kraaijenbrink, C-367/05.
[38] Contrary to the "finality" and to the "same acts" requirements, which are relevant to all European *ne bis in idem* provisions, the "enforcement" criterion is only included in Article 54 CISA.
[39] Judgment of 26 February 2013, Akerberg Fransson, C-617/10; ECtHR judgment of 8 June 1976, Engel and others v. The Netherland.
[40] Eurojust: "The principle of ne bis in idem in criminal matters in the case law of CJEU", September 2017.
[41] Judgment of 10 March 2005, Miraglia, C-469/03.

unnecessary parallel investigations.[42] In order to accomplish this goal, according to the CJEU, MS must have mutual trust in their criminal justice systems and that, since there is no obligation under the EU law[43] for harmonisation of national criminal laws, each of them should recognise the criminal law of other MS, even when the outcome would be different if its own national law were applied.[44] However, the CJEU[45] has clarified that mutual trust cannot be blind and national authorities are entitled to make a critical appraisal on the foreign judgments closing a case, insofar there is an evident lack of a detailed investigation. Despite this crack in the wall of mutual recognition and mutual trust, the CJEU has shown a clear *favor integrationis* by stating that this principle can be limited only to exceptional circumstances, when it is necessary to provide a cure for the severe pathologies affecting the foreign decision.[46] In addition, in order to ensure the transnational application of the *ne bis in idem* and to avoid parallel investigations, Eurojust is entitled to request a MS to desist from prosecuting if another is in a better position to do so.[47] On deciding which jurisdiction should prosecute, Eurojust is based on several factors such as: *territoriality; location of the defendant; availability and admissibility of evidence; location and protection of witnesses; interests of victims; stage of proceedings; sentencing powers; cost and resources* etc.[48]

2.2. Albanian courts practice

Meanwhile, in the Albanian legal system, *ne bis in idem* is provided in *Article 34 of the Constitution* and *Article 7 of the CPC*, as a general principle applied within national courts.[49] Whereas, its transnational application is thoroughly provided in the CoE conventions mentioned above and partially in Article 6/2 of the Criminal Code[50]. In fact, this provision, as an expression of the "*active personality*", limits the *ne bis in idem* application only to crimes committed by Albanian citizens in the territory of another State. Therefore, it is not specifically applied in cases of cross-border crimes committed partially in Albania or for crimes committed by foreign citizens that can involve two or more jurisdictions, including

[42] Peter Cullen: "The application of the ne bis in idem principle in the area of implementation of third pillar instruments", page 1.
[43] Title VI of the Treaty on EU relating to police and judicial cooperation in criminal matters, the Schengen Agreement or the CISA itself.
[44] Judgment of 9 March 2006, Van Esbroeck, C-436/04; Judgment of 28 September 2006, Gasparini and others, C-467/04.
[45] Judgment of 29 June 2016, Kassowski, C-486/14.
[46] Stefano Montaldo: "A new crack in the wall of mutual recognition and mutual trust; Ne bis in idem and the notion of final decision determining the merits of the case".
[47] Article 6(a)(ii) and 7(a) (ii) of Council Decision of 28 February 2002 setting up Eurojust; Framework Decision 2009/948/JHA of 30 November 2009, "On prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings".
[48] Eurojust: "Guidelines for deciding which jurisdiction should prosecute".
[49] Article 34 of the Constitution provides that: "*No one may be sentenced more than once for the same criminal act, nor be tried again, except for cases when the re-adjudication of the case is decided on by a higher court, in the manner specified by law*"; Article 7 of the CPC provides that: "*No one can be judged more than once for a criminal fact for which he has been judged by a final decision of the court, except in the cases when the competent court has decided the revision of the case*".
[50] Which states that: "*The criminal law of the Republic of Albania shall also be applicable to the Albanian citizen committing a crime within the territory of another country, as long as that crime is concurrently punishable, unless a foreign court has rendered a final decision*…".

Albania.[51] Furthermore, it sets a different standard than Article 54 CISA[52] or Article 53 of the *CoE Convention on International Validity of Criminal Judgments*, where the application of *ne bis in idem* is conditioned to the enforcement and not just to the rendering of final judgment. Consequently, this lack of proper regulation, has led to several contradictory judgments by the Albanian courts on how they interpret the *ne bis in idem* principle for crimes committed in other States and for cross-border crimes as well.

In a judgment of the *Court of First Instance for Serious Crimes*[53], concerning a case of drug trafficking commenced by Albanian citizens in the Albanian territory and concluded in North Macedonia (FYROM), was underlined that: *"…The crime is partially committed even in the Albanian territory, therefore Albanian courts have jurisdiction as well… Furthermore, even though the defendant was tried and sentenced in another country, that decision was not enforced, and pursuant to Article 53 of the CoE Convention, there ne bis in idem is not in question."*. The same statement was held by the Court of Appeal[54], while the High Court[55] stated that: "*Ne bis in idem is also applied in cross-border crimes, when a judgment in another country is made, therefore, the argument that the crime is partially committed in the Albanian territory does not stand. Furthermore, Article 34 of the Constitution and Article 7 of the CPC provide the transnationality of the ne bis in idem. In addition, in light of Article 6/2 of the Criminal Code the non-enforcement of the decision is irrelevant*". Even in other judgments[56], the High Court has recognized this meaning of *ne bis in idem*.

As per above, regarding the application of *ne bis in idem* in cross-border crimes, including drug trafficking cases, it is set out by the CJEU that punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different MS party to CISA are, in principle, to be regarded as "the same acts" for the purposes of Article 54 CISA, and the definitive assessment in that respect being the task of the competent national courts.[57] In light of this interpretation, in the case presented above the High Court of Albania has accepted that it is irrelevant whether the drug trafficking has started in Albania, as long as the same criminal activity is tried in another country. However, the main issue still remains the transnational dimension of the provisions providing the *ne bis in idem* principle

[51] Since in this case it overlaps with the *territoriality principle* provided in the Article 6/1 and Article 7/1 of the Criminal Code, which provide that for criminal offences committed within the Albanian territory, its criminal law shall be applied.
[52] Article 54 CISA provides that: "*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 imposed or can no longer be enforced under the laws of the sentencing Contracting Party*".
[53] Judgment No. 53, dated 23.11.2007 of the Court of First Instance for Serious Crimes.
[54] Judgment No. 23, dated 25.05.2008 of the Court of Appeal for Serious Crimes.
[55] Judgment No. 194, dated 22.04.2009 of the High Court of the Republic of Albania.
[56] Judgment No. 154, dated 15.04.2000 of the High Court of the Republic of Albania; Judgment No. 292, dated 20.05.2009 of the High Court of the Republic of Albania.
[57] Judgment of 28 September 2006, Van Straaten and others, Judgment of of 9 March 2006, Van Esbroeck, C-436/04.

and the enforcement criteria of the foreign judicial authority judgment.

Overall, it is important to emphasize that in order to effectively combat cross-border crimes, the *ne bis in idem* principle shall have the same meaning in the European level. Considering differences in the Albanian legal system, an explicit provision providing its transnational application would foster and facilitate judicial cooperation with the EU and MS. Furthermore, as it will be explained below, while JITs are a solution to avoiding parallel investigations and preventing the breach of *ne bis in idem*, in other proceedings connected to EU MS where such tool is not applied, the involvement of the EU agencies such as Eurojust and EJN, in order to decide which jurisdiction should prosecute, seems to be very important.

3. MLA instruments with the EU Member States regarding drug trafficking

Mutual legal assistance (MLA) is the cooperation process between States for obtaining assistance during criminal proceedings.[58] The Albanian legislation provides two main forms of MLA requests: *letters rogatory* (analyzed below) and *other requests* that include requests for: *extradition*; *recognition and execution of foreign judgments*; *transfer of criminal proceedings*; *transfer of convicted persons*.[59] Beyond these traditional MLA tools, reflecting political and social developments in Europe and technological changes worldwide, aiming at modernization of the existing provisions[60], other MLA tools are recently used in Europe such as Joint Investigations Teams (JIT) and Controlled Delivery, which will be analyzed below.

3.1. Letters rogatory as a traditional MLA tool

In the Albanian legislation *letters rogatory* consist in notifications of acts, receipt of other acts and evidence of a criminal proceeding that create international jurisdictional relations.[6162] The two main forms of letters rogatory are: *letters rogatory from abroad* (Albania acting as a requested State)[63] and *letters rogatory for abroad* (Albania acting as a requesting State)[64]. As a traditional tool of MLA, letters rogatory have the disadvantage of being a slow mechanism in the evidence gathering process, due to many bureaucratic formalities. Its transmission undergoes a complicated procedure, placing the *Ministry of Justice* in a key liaison position, to determine whether to refuse executing a letter rogatory.[65]

[58] Guideline for International Cooperation, United Nations Office on Drugs and Crime, February 2010.
[59] Article 4 of the Law No. 10193, dated 03.12.2009 "On Jurisdictional Relations with Foreign Authorities in Criminal Matters".
[60] Explanatory Report to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Strasbourg.
[61] Article 4 of the Law No. 10193, dated 03.12.2009 "On Jurisdictional Relations with Foreign Authorities in Criminal Matters".
[62] Almost the same definition as the one provided in Article 3 of the European Convention on MLA of 20 April 1959.
[63] Articles 505-508 of the Criminal Procedure Code.
[64] Articles 509-511 of the Criminal Procedure Code.
[65] Article 15 of the Law No. 10193, dated 03.12.2009 "On Jurisdictional Relations with Foreign Authorities in Criminal Matters".

The mutual assistance principle has always been favoured in the national systems, as it represents the traditional method assuring maximum respect of the States sovereignty.[66] One of the grounds the letters rogatory from abroad may be refused[67] is *when the requested actions impair the State's sovereignty.* However, the High Court of Albania has held that: *"The mutual trust principle means that there is no longer any relationship between sovereign States, but there are relations between judicial authorities on the basis of reciprocal trust".*[68] In light of the conceptual development of the mutual trust principle, a State should not use sovereignty as a random argument to refuse assistance.

Moreover, it might be difficult to understand properly a letter rogatory, due to the complex content and the language barriers. *Regarding the content*, a letter rogatory should be submitted in writing and provides detailed information[69]: *on the requesting authority and the requested authority*; *the type of request*; *a description of the criminal proceeding and the criminal fact, the charge and the text of the domestic legal provisions*; *personal information of the person mentioned in the request*; *the reasons of the urgency and the time period within which the execution is necessary* etc. *Regarding the language barriers*, letter rogatory and annexed documents shall be accompanied by an *official translation* in one of the official languages of the Council of Europe.[70] Then, it is translated in the Albanian language, with the risk of misunderstanding legal and technical information. Consequently, requested authorities for the execution of the letters rogatory are unaware of the real needs and dynamics of the case proceedings, especially in complex drug trafficking investigations.

One of the most important aspects when executing a letter rogatory is determining the applicable law i.e. *lex loci* (applying the law of the requested party) or *lex fori* (applying the law of the requesting party). Any evidence, even if acquired abroad, must then be evaluated in the individual process in which it is intended to generate its proof contribution on the basis of specific national rules.[71] Differences in the States evidentiary rules might lead to the exclusion or inadmissibility of the evidence secured abroad. In two cases of letter rogatory sent to Greek authorites for questioning witnesses, the High Court of Albania has stated that *"...the question was not conducted by a Greek judicial body, but by an investigator, without the presence of the defendant or his lawyer and prosecutor, without a sworn process of the witness. This evidence should be evaluated as inadmissible in accordance to Articles 151 and*

[66] Giuffre Editore, "Manuale di Procedura Penale Europea", a cura di Roberto E. Kostoris, terza edizione, page 408.
[67] Article 505 of the Criminal Procedure Code.
[68] Judgment No. 140, dated 22.11.2017 of the High Court of the Republic of Albania.
[69] Article 5 of the Law No. 10193, dated 03.12.2009 "On Jurisdictional Relations with Foreign Authorities in Criminal Matters".
[70] Albania has made the language reservation based on Article 16 and Article 23 of the European Convention on MLA in Criminal Matters.
[71] Giuffre Editore, "Manuale di Procedura Penale Europea", a cura di Roberto E. Kostoris, terza edizione, page 407.

152 of the CPC.[7273] The High Court has come to the same conclusion in another case[74] with Turkey as the requested State, where a co-defendant was questioned by the prosecutor.

In order to overcome the *lex loci* v. *lex fori* conflict, when MLA is afforded, the requested State *shall comply with the formalities and procedures expressly indicated by the requesting State*, provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested State.[75] In defining whether there is a violation of fundamental principles, the ECtHR case-law should serve as the main source. In a MLA case (hearing of witnesses) obtained by FYROM from the USA, the ECtHR has underlined that: *"All the evidence must normally be produced at a public hearing, in the presence of the accused, with a view to adversarial argument… These rights require that to the accused should be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage".*[76]

As cross-border crimes involve more than one jurisdiction, in most of the cases, they produce parallel investigations in different States. Evidence collected in this course is legally exchanged via formal MLA proceedings, which are time consuming and lead to ineffective coordination.[77] Therefore, the Albanian legislation on letters rogatory should be amended in order to facilitate judicial cooperation with EU MS. The European Investigation Order (EIO)[78] should serve as a model, as it constitutes a fast mechanism of evidence gathering on the basis of the principle of mutual recognition. It provides direct communication between the issuing authority and the executing authority, based on a standard form[79] and in a language commonly used in the EU. The EIO requires that the decision on the recognition and execution should be carried out with the same celerity and priority as for a similar domestic case. Once Albania has fully harmonised its legislation in these issues with the EU *Acquis* in the framework of the pre-accession process, EU must encourage MS to have the same mutual approach with candidate countries as with other MS.

In the meantime, the cross-border coordination of organized crime requires adequate solutions, such as the mutual coordinated investigations between competent authorities of the involved States, known as Joint Investigation Teams (JITs).

[72] Judgement No. 44, dated 08.02.2012 of High Court of Albania.
[73] Judgement No. 299, dated 14.11.2012 of High Court of Albania.
[74] Judgement No. 14, dated 04.02.2009 of High Court of Albania.
[75] Articles 4, 10 of the Convention on MLA in Criminal Matters between the MS of the EU (2000/C 197/01); Article 8 of Second Additional Protocol to the European Convention on MLA in Criminal Matters, Article 507/2 of Criminal Procedure Code.
[76] ECtHR Judgmenr of 31 October 2001, Solakov v. FYROM, para. 57
[77] https://bit.ly/2GaPG4C
[78] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the EIO in criminal matters.
[79] Set out in the Annex A of the Directive 2014/41/EU of the European Parliament and of the Council.

3.2. Joint investigation teams as a newly adopted tool in Albania

Drug trafficking is the second crime, after money laundering, most investigated by means of Joint Investigation Teams (JITs) in Europe.[80] A JIT is a mutual agreement between authorities of at least two States, agreeing to strongly cooperate for a specific purpose *(fight against a specific organized crime group (OCG)*) and for a limited period, investigating cases of international or cross-border crime.[81] JIT is a way of evidence search, a cooperation tool, a capacity development instrument and exchange of experiences[82] and a trust device between States. Due to difficulties and demanding complex investigations with a transnational dimension,[83] or due to the need to coordinate the investigations, the authorities of a State may send a letter rogatory to their homologues of another State requesting the setting up of a JIT. If the requested authority agrees, then the mutual agreement is concluded.

Joint Investigation Teams' Agreement

In JITs, similarly as in other contractual relations, the Parties regulate thoroughly their rights and obligations. They may use the EU *Model Agreement for setting up a JIT*.[84] The Parties set the purpose of the JIT, describing the circumstances of the crime(s) investigated; objectives (e.g. *collection of evidence, coordinated arrest of suspects, asset freezing*); timeline, territories of operations, the applicable law; team composition (*leaders, prosecutors and judicial officers of both countries*, and participants such as *Eurojust, Europol, OLAF*). Concerning gathering of information and evidence and its sharing, the JIT leaders *may agree on specific procedures to be followed by the JIT in the States in which it operates.* Another aspect of JIT is the exchange of information and evidence obtained prior to its creation. The Parties agree to *consult* when it is necessary for the coordination of the team activities. Jurisdiction issues need to be anticipated and discussed by the JIT partners, preferably before coordinating the operations.[85] JITs seem to be a solution that prevent conflicts of jurisdictions, avoid parallel investigations and preclude breach of the *ne bis in idem*.[86]

Legal framework of JITs at European level

The legal framework for JITs in the EU law is: *Article 13 of the MLA Convention between the MS of the EU of 29 May 2000* and *Article 1 of the Council Framework Decision of 13 June 2002 on joint investigation teams,* incorporated into the national legislations.

[80] Second JIT Evaluation Report Evaluations received between: April 2014 and October 2017.
[81] Cools M., de Kimpe S., de Ruyver B., "Readings on Criminal Justice, Criminal Law & Policing", Maklu 2009, page 331.
[82] https://bit.ly/2GaPG4C
[83] This was a recommendation of the Second JIT Evaluation Report Evaluations received between: April 2014 and October 2017, page 11.
[84] Council Resolution on a Model Agreement for setting up a Joint Investigation Team (JIT) (2017/C 18/01).
[85] This was recommended at the Second JIT Evaluation Report Evaluations received between: April 2014 and October 2017.
[86] Eurojust: "Guidelines for deciding which jurisdiction should prosecute".

For instance, the last EU MS that implemented the Framework Decision was Italy, through the *Decree No. 34, dated 15.02.2016*, providing specific regulations on JITs. In Italy, a JIT may be set up in two ways: *on the initiative* of the Public Prosecutor[87] *or upon request*[88] from the competent authority of another State. *Types of crimes (especially serious cross-border crimes, involving OCGs)* to establish a JIT are determined as well. The Decree settles the issue of the *territorial competence conflicts*, by defining that where several prosecution offices conduct related investigations, the request is formulated in an agreement between them. In addition, it regulates the *internal communication* between the Public Prosecutor, the General Prosecutor at the Court of Appeal/National Anti-mafia and Anti-Terrorism Prosecutor. Moreover, the Decree provides *the competent authorities for signing the Constituent Act* of the JIT, *the elements of the Constituent Act*, and the *operational plan* containing the organizational measures and the indications of the modalities of execution.[89] In addition, another important ruling is related to evidence and the applicable law.[90]

Lack of regulation of JITs in Albania

Within the Albanian legal framework, the setting up of JITs comprises a set of international instruments which are not self-executed.[91] As JITs are neither regulated in the CPC, nor in the MLA specific law, the international mechanisms are insufficient. A new *Law on Special Prosecution Office (SPO)*[92] provides that a section on *International Cooperation and Joint Investigation Liaison Coordinator* assigns members to joint investigation bodies, however it is still not applicable due to pending establishment of the *SPO*.

As a JIT starts with a letter rogatory[93], it should follow the same procedure and assessment, until the JIT Agreement is signed. Difficulties may arise during JIT's operation and after its completion, concerning admissibility of the gathered evidence. For instance, during the operation of an Italo-Albanian JIT[94], the Italian Party requested the Albanian authorities, to allow a private company contracted by the Italian authorities to assist in hearing and transcribing the interceptions of the offenders, in the premises of the Albanian

[87] Article 2 of the Decree No.34, dated 15.02.2016.
[88] Article 3 of the Decree No.34, dated 15.02.2016.
[89] The agreement should contain the members, the leader chosen from among its members, the object and purpose of the investigation; the period within which the investigative activities must be carried out.
[90] Decreto legislativo, 15/02/2016 n° 34, G.U. 10/03/2016, Gazzetta Ufficiale Anno 157° - Numero 58.
[91] Article 19 of the UN Convention against Transnational Organised Crime; Article 9 of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; Article 20 of the Second Additional Protocol to the MLA Convention; Article 27 of the Police Cooperation Convention for Southeast Europe; and Article 10 of the Agreement between the Italian Republic and the Republic of Albania supplementing the European Convention on Extradition of 13 December 1957 and the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959.
[92] Articles 17, 22, 23 of the Law No. 95/2016 "On the organization and functioning of institutions for combating corruption and organized crime".
[93] Article 13/1/dh of the Law No. 10 193, dated 03.12.2009 "On jurisdictional relations with foreign authorities in criminal matters".
[94] https://bit.ly/2OX5bzM In July 2018, another JIT on drug trafficking between Italian and Albanian authorities was established, with the support of *IPA/2017 Countering Serious Crime in the Western Balkans* project. For more on the project: https://cscwb.info/#objectives

authorities. The Albanian Party was concerned on how to proceed because of a Judgment of the High Court of Albania stating that the interception results (*of telephone conversations of Albanian citizens, in the Albanian territory via the Albanian telecommunications companies*) ordered by the Milan Court, consisted in violation of the Albanian State sovereignty.[95] In our opinion, this standard is not applicable because: *first*, the facts of the above case differ as there is no JIT in place; *second*, after signing a JIT Agreement, States wave their sovereignty; *third*, according to Article 10 of CPC[96], the Agreement between Italy and Albania regarding JITs, should be considered as a governing provision for relations with foreign authorities in criminal matters; and *fourth*, the Parties in the concerned JIT Agreement had agreed on specific procedures to be followed by the JIT and it was up to the leaders to specify the processes and procedures to be followed.[97] Subsequent to this provision, the Parties shall interpret "*specific procedures*" as execution of each-other requests in frame of strong cooperation, quick intervention and enhancement of mutual trust by affording the effective team work spirit to the Agreement.

Another issue that concerns the Albanian authorities is related to the extradition of perpetrators. As a rule, after the finalization of the JIT, the perpetrators are sent to court. The question that might arise is: *Which is the competent Court to try them?* Article 491 of the CPC, which provides that: *"Extradition may not be granted: ç) when the proceeding is initiated or tried in Albania, although the offence is committed abroad."*, constitutes an obstacle for JIT's effectiveness regarding the decision which jurisdiction should prosecute.[98] The non-registration of the criminal proceedings is the only way to avoid the extradition, but this means that the competent authorities would not fulfil their legal obligations. For this reason, in order to have effective JIT's implementation, we recommend amending this provision, to foresee an exception in cases investigated in the frame of JITs.

Success of the first Albanian-Italian JIT on drug trafficking

Despite the lack of legislation on JITs in the CPC or other specific laws, Albania has shown willingness in using this tool. In 2016, the *Prosecution Office of Lecce in Italy (POL)*, sent a letter rogatory to the Albanian authorities, requesting the setting up of a JIT on drug trafficking[99]. After some preliminary discussions, on 01.12.2016, the Prosecution Office for Serious Crimes of Albania (POSC) and the POL signed the first Agreement on setting up a

[95] Judgment No. 431, dated 07.05.2010, High Court of Albania.
[96] Providing: *"Relationships with foreign authorities in the field of criminal law shall be governed by international agreements, recognized by the Republic of Albania, by generally accepted principles and provisions of international law and by the provisions of this Code."*
[97] Article 7 of the JIT Agreement.
[98] Interview with Mr. Vladimir Mara, Prosecutor at the Prosecution Office for Serious Crimes.
[99] The *types of crimes to* establish a JIT via the initiative of the Public Prosecutor are provided by the Decree No. 34. dated 15.02.2016.

JIT on drug trafficking. They used the *EU Model Agreement for setting up a JIT*[100] by choosing *lex loci* as the applicable law. After signing the JIT agreement, the POSC recorded the Criminal Proceedings No. 274/2016 on: *"Drug trafficking*", "*Laundering the proceeds of criminal offence or criminal activity"* and "*The structured criminal group"*.

The JIT carried out several criminal investigation actions, such as interception of telecommunications and secret photographic, film or video recording of persons in public places, etc. The operations took place in the coastal cities of Durres, Vlora and Lezha (Albania) and in Calabria, Toscana, Emilia Romagna, Sicilia and Lombardia (Italy). They continued their interventions for more than two years. This first JIT was concluded with 20 arrested persons, 7 more suspects in international search, and with more than 3.3 tons of cannabis seized. Subsequent to the finalization of the JIT, the arrested persons are brought to trial. They will not be extradited to their countries of origin, but each Party in JIT agreed to try[101] the suspects that were arrested in the respective territories.

After the first success story of the Albanian authorities with JITs, in 2017, another JIT between Italy and Albania was set up with the Eurojust support.[102] Meanwhile, another JIT is under discussion with the *Prosecution Office of Ancona, Italy*.

To conclude, considering the increasing number of JITs in Albania and the similarities of criminal procedure rules and judicial institutions on organized crime on both sides, the Italian legislation should be a model for Albania too. It is recommended that specific regulations shall be foreseen in the CPC, to provide the competent authorities responsible for signing JIT agreements; the initiation procedure; the appointment of leaders; the types of crimes; the level of intervention of foreign officials in the territory of Albania; the value of evidence etc.

3.3. Cross-border controlled delivery as a Special Investigation Technique

Investigation and prosecution of drug trafficking pose many challenges to the law enforcement agencies, that have to collect information without alerting the suspect. The EU Commission has recommended that Albania should further make use of *special investigation techniques* (SIT)[103], such as *controlled delivery, undercover operations, interception of communications, electronic surveillance* etc.

Cross-border controlled delivery is one of the most effective techniques, *applied when a consignment of illicit drugs is detected and allowed to go forward under the control and*

[100] Council Resolution 2010/C-70/01 on a Model Agreement for setting up a Joint Investigation Team (JIT).
[101] Two of the members of the OCG (one Albanian and one Italian) were imprisoned by the Albanian First Instance Court of Serious Crimes. Judgment No.134, dated 26.12.2018.
[102] http://www.eurojust.europa.eu/press/PressReleases/Pages/2018/2018-12-12.aspx.
[103] EU Commission Progress Report 2018 for Albania, pg. 41-42.

surveillance of authorities, in order to secure evidence against other persons involved in the crime. In the framework of international law[104], controlled delivery is provided in the *UN Conventions[105]* and in the *Second Additional Protocol to the 1959 MLA Convention*. Within the national legislation, controlled delivery is first introduced in 2001, with the adoption of the *Law on Preventing and Combating Trafficking in Narcotic Drugs and Psychotropic Substances*. This law provided the establishment of an anti-drug structure (CNIS)[106], as the competent authority to implement the controlled delivery on the ground, through cooperation with the other State structures. According to this law, controlled delivery may be authorized by the *Prosecutor General*, the *prosecutor who has initiated the proceedings* or the *prosecutor of the district where drugs was discovered*.[107] In case of an emergency, the controlled delivery can also be initiated by *CNIS at the State Police*, which immediately notifies the prosecutor, and the latter may decide differently. Meanwhile, within the CPC, the controlled delivery is only provided with the last amendments of 2017, limiting its application to cross-border crimes, maintaining the same meaning of this technique.

Case study regarding the application of special investigation techniques

Cross-border controlled delivery is applied in several cases by the Albanian authorities, mainly by POSC, as competent to prosecute drug trafficking in the frame of organized crime. Special investigation techniques were applied in a criminal proceeding on drug trafficking[108], after the information that a drugs consignment (200 kg *cannabis sativa*) was planned to cross the Albanian-Greek border. (1) Firstly, upon the prosecutor's request, the Court decided to allow the *interception of communications* of the persons involved. (2) Secondly, following the police information that the suspects were seeking to recruit a transporter for the consignment, in accordance with Article 294/a of the CPC, the prosecutor authorized *simulated actions* to be conducted by two police officers. (3) In this context, in compliance with the respective provisions governing the controlled delivery and undercover operations, police officers were provided with *false identification documents*, to introduce themselves as persons involved in transportation of drugs. (4) The police officers were authorized for the *use of surveillance, filming or photographing of the actions carried out*, in accordance with the criminal procedure rules, too. Once they were "recruited" by the suspects, they agreed to drive the truck loaded with drugs, followed by the traffickers' car. (5) Immediately, the

[104] Despite the fact that this technique is provided in several international instruments, its application depends on the particular procedures in the concerned jurisdictions.
[105] UN Convention Against Transnational Organized Crime and the UN Convention Against Illicit Trafficking in Narcotic.
[106] The anti-drug service comprises the "Central Narcotics Investigation Structure" and the local anti-drug structures.
[107] Article 14 of the law.
[108] Criminal proceeding no. 90 of 2014 of the Prosecution Office for Serious Crimes, with defendant EP; FD; NM for commitment of the crime of Trafficking in Narcotics, provided by the Article 283/a of the Criminal Code.

prosecutor filed a *MLA request*, forwarded to the competent judicial authority in Greece, via the Albanian Ministry of Justice, in order to: *request authorization for the controlled delivery* of the consignment of drugs that would exit from Albania to Greece, *to grant the guarantee for the proper surveillance of the truck* and *to give consent on the simulated actions as well*. The request prescribed the details of the proceedings. (6) In the meantime, the prosecutor required the *assistance from Interpol Tirana* to contact with Interpol Athens, in order to take the proper measures.[109] (7) *Coordination with the Chief Boarder Police Officer* was established as well, to facilitate the progress of the operation by allowing the truck to cross in the Greek territory, in order to put the tracking device, while delaying the transition of the car behind the truck, with the perpetrators. (8) In order to protect the police officers involved, the Greek authorities also *authorized a group of armed police officers from Albania* pursuing the truck. This cooperation was facilitated mostly by the intervention of Interpol authorities. (9) Finally, *the controlled delivery was successfully concluded* with the arrest of persons involved in Greece and with the seizure of the drugs, used as evidence before the court.

Even in other recent cases of drug trafficking, especially with Italy, the POSC has applied the same techniques in order to apprehend the entire organized group.[110] It is important to underline that in order to be admissible, information gathered from different jurisdictions is of limited use in criminal proceedings, in accordance with the respective procedure laws.

Despite of the successful cases where cross-border controlled delivery has contributed to dismantling of several OCGs involved in drug trafficking, there are many difficulties and obstacles emerging because of involvement of multiple jurisdictions, such as: *the lack of harmonization of drug legislation between States; the lack of regulation regarding the placement of tracking devices which causes delays in the execution; the lack of coordination in cases where the exact route of drug consignment is unknown; difficulties in identifying the proper competent authority; difficulties in deploying undercover agents, including the need to testify in court and the lack of harmonization between States in their procedural status; insufficient resources* etc.[111]

According to the Albanian legislation, filling a MLA request is a pre-condition for the application of controlled delivery, which in itself causes unnecessary delays, same as in most European countries.[112] Moreover, if the route is unknown, problems may arise in the

[109] Interview with the Prosecutor of the case Mr. B. Muçi, Prosecutor at Prosecution Office for Serious Crimes.
[110] Judgment of the Court of First Instance for Serious Crimes No. 16, dated 01.03.2019.
[111] Eurojust: Issue in focus number 1 "Cross-border controlled deliveries from a judicial perspective".
[112] ibid.

identification of competent authorities.[113] In some of the MS, this situation is properly solved by appointing a subsidiary point of contact, generally to the central prosecution office, dealing with cases when the route is unknown or unexpectedly changed.[114]

Meanwhile, for practical purposes, besides filling the MLA request, prosecutors also make efforts to communicate directly with foreign judicial authorities through informal means, with the intent to coordinate the operation. Additionally, in case of urgency, they often apply requests on the police-to-police basis, through channels of communication provided by Europol or Interpol Liaison Officers. However, within the framework of JITs, there is no need for a formal MLA request concerning controlled deliveries.

Legislation must be harmonised, with a view of avoiding bureaucratic obstacles for traditional MLA requests and adopting more operative techniques such as emails, other informal means or requests on police to police basis. Exceptionally, a formal authorization by the prosecutor may be required only when undercover agents are involved in the execution of controlled delivery. In addition, the development of a cooperation network facilitating the coordination between the EU MS and the candidate countries, by establishing central contact points or involving EU agencies such as Eurojust, is crucial.

Conclusions and Recommendations:

- Albania has made efforts to complete the legal and institutional framework on judicial cooperation with the EU and the EU MS on the fight against drug trafficking. In addition, further measures must be taken to amend such legislation, in order to ensure the effectiveness of the established criminal justice institutions and other law enforcement agencies.
- In order to avoid parallel investigations and prevent the violation of *ne bis in idem*, this principle shall have the same meaning in Europe. An explicit provision in the Albanian legal system providing its transnational application, would foster judicial cooperation with EU MS. In proceedings connected to EU MS, for effectively fighting cross-border crimes, apart from JITs contribution, the involvement of the EU agencies such as Eurojust and EJN, to coordinate on deciding which jurisdiction should prosecute, seems to be crucial for candidate countries to the EU.
- Letters rogatory are a slow mechanism in the evidence gathering process due to many bureaucratic formalities. The procedure of execution of letters rogatory should

[113] ibid.
[114] ibid.

observe the fundamental human rights in order to ensure the admissibility of evidence in the requesting State. In order to facilitate judicial cooperation with EU MS, the Albanian legislation on letters rogatory should be amended having as a model the European Investigation Order. The EU must encourage MS to simplify MLA with candidate countries, once the latter have harmonised their legislation in criminal matters with the *EU Acquis*.

- As one of the main instruments in the fight against drug trafficking, Albania has recently started using JITs, responding the requests of foreign authorities. However, Albanian authorities cannot initiate a JIT due to lack of specific legislation. In order to address this omission, the Italian regulation on JITs should serve as a model. In addition, Article 491 of the Criminal Procedure Code, prohibiting extradition when the proceeding is initiated or tried in Albania, although the offence is committed abroad, is an obstacle for the JITs effectiveness, therefore it is recommended to be amended in order to properly implement JITs agreements.
- Finally, execution of the cross-border controlled delivery, as one of the main special investigation techniques in criminal proceedings of drug trafficking, requires the adoption of more operative communication tools between competent authorities. Furthermore, the development of a cooperation network facilitating the coordination between authorities of EU MS and the candidate countries, by establishing central contact points or involving EU agencies such as Eurojust is crucial.

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