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The Lisbon Treaty and the Area of Criminal Law and Justice

Introduction

This policy analysis aims to provide an overview of the constitutional framework of the criminal law and the Lisbon Treaty.¹ As is well known, the failure of the Constitutional Treaty (CT) in 2005 resulted in a 'pause for reflection'. This period for thought and retreat was however brought to an end by the German presidency and the European Council of June 2007.² There was not to be any resurrected CT but a new Reform Treaty, which was subsequently named as the Treaty of Lisbon. There has been much debate – in particular on the political battle field – of whether this Treaty simply reinforces what the ill fated CT failed to achieve or whether the changes proposed by this Treaty are more far-reaching than mere cosmetic changes.³ In any case, just as the CT the Lisbon Treaty will result in one pillar and one legal personality. But contrary to its predecessor, the Lisbon Treaty will generate two separate bodies of law: an amended version of the Treaty of the EU (TEU) and the Treaty on the Functioning of the Union (TFEU) which will be treated equally (Art 1 TEU and TFEU).⁴ The current EC Treaty (first pillar) will form part of the latter category as well as the EU Treaty area of freedom, security and justice (the third pillar) while the field of foreign and security matters (the second pillar) will form part of the former. Yet the Lisbon Treaty no longer claims to reflect the will of the citizens and States of Europe to build a 'common future'.⁵ It also skips not

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¹ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal C 306 of 17 December 2007. On the Lisbon Treaty see the SIEPS policy analysis provided by J Hettne and F Langdal, 'Vad innebär reformfördraget?' available at http://www.sieps.se/epa/2007/EPA_4_2007A.pdf. S Kurpas et al, 'The Treaty of Lisbon: implementing the institutional innovations' (15 November 2007), available at http://shop.ceps.eu/BookDetail.php?item_id=1554. As regards the criminal law and the Reform Treaty see, analysis provided by Steve Peers, *Statewatch, the German presidency conclusions*, available at: <http://www.statewatch.org/news/2007/jul/eu-reform-treaty-teu-annotated.pdf> and S Carrero & F Geyer *The Reform Treaty and Justice and Home Affairs* (17 August 2007), available at http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf.

² See German presidency conclusions agreed on 22-23 June 2007, Brussels, available via http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf

³ In the area of CFSP, the answer is yes, see M Cremona, 'The New Treaty Structure of the EU', paper presented and distributed at the King's College London conference *Understanding the EU Reform Treaty* 8 February 2008, London.

⁴ Unlike the current Treaty regime where the third pillar EU Treaty is prohibited from intruding on the *acquis communautaire* of the EC Treaty in accordance with Art 47 EU.

⁵ A Somek, 'Postconstitutional Treaty', GLJ 8 (2007)12 available at www.germanlawjournal.com

only, as one commentator put it, ‘the semantic spectacle introducing the CT with the invocation of the peoples of Europe’, but also the anthem and the flag. An important novelty of the Lisbon Treaty is however the emphasis of the Union’s humanitarian values. Indeed the preamble of this Treaty states that it draws inspiration not only from the cultural and religious inheritance of Europe⁶ but also from its humanist values more broadly.⁷ Another innovation compared to the CT is the increased focus on the national parliaments in the legislative process as guardians of the principle of subsidiarity. These issues will be discussed below.

Before doing so, the next section aims to provide a very brief overview of the journey of criminal law in the EU.

The third pillar – from Maastricht to Lisbon via Tampere

In short, criminal law at the EU level has traditionally been dealt with through the concept of intergovernmental cooperation and appeared on the EU’s legal map in connection with the entry into force of Maastricht in 1993 as one of the three pillars – justice and home affairs – of the European Union.⁸ The Amsterdam Treaty subsequently clarified the objective of the EU in the area of justice and home affairs and created the concept of an area of ‘freedom, security and justice’.⁹ As is well known though, the intergovernmental flavour which has signified the third pillar has been accused of having a bad transparency taste and as such been criticized for constituting a democratic deficit with minimum involvement of the European Parliament in the legislative process and with minimum jurisdiction of the Court of Justice (Art 35 EU). So from an EU law perspective the third pillar framework was never considered as an ideal counterpart to the first pillar (EC) sphere.¹⁰ Yet the Member States were

concerned about retaining their competence in an extremely sensitive area such as justice and home affairs, which is the reason as to why this field – or sub EU culture – persisted.¹¹ In any event, shortly after the entry into force of the Amsterdam Treaty, the important Tampere Council of 1999 (and the subsequent Hague programme¹²) took the notion of European criminal law one step further in adopting the internal market formula of ‘mutual recognition’ in the third pillar.¹³ This concept has remained the main rule although there has also been extensive legislation here, in particular in the area of terrorism, organized crime and illicit drug trafficking in accordance with the relevant provisions set out in Art 29–31 EU.

Accordingly, the competence to regulate European criminal law has belonged to the third pillar domain. More recently, however, the Court of Justice has concluded that there is an EC (first pillar) legislative competence in criminal law¹⁴ if this is needed for the protection of the

⁶ *ibid*

⁷ Which have developed the universal principles of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.

⁸ For the history of the development of EU criminal law see e.g. S Peers *EU Justice and Home Affairs* (OUP 2006) Ch 2

⁹ Yet it also ‘intergovernmentalized’ the criminal law even further while moving the former third pillar area of immigration and asylum and civil law to the first pillar sphere.

¹⁰ See generally, S Lavenex and W Wallace, ‘Justice and Home Affairs’ in H Wallace et al (eds) *Policy-Making in the European Union* (OUP 2005) Ch 18

¹¹ *ibid*

¹² European Council Tampere 1999 and ‘The Hague programme: Strengthening Freedom, Security and Justice in the EU, [2005] OJ C 53/1

¹³ Moreover, the Treaty of Nice created not only the Charter of Rights but also but also a new agency for the coordination and council of the judiciaries named Eurojust. OJ 2001 C 80, see the overviews in e.g. S Peers *EU Justice and Home Affairs* (OUP 2006) and W Perron, ‘Perspectives of the Harmonization of Criminal Law and Criminal Law Procedure in the European Union’ in J Husabo & A Strandbakken, *Harmonization of criminal law in Europe* (Intersentia 2005) Ch 2

¹⁴ See the earlier SIEPS European policy analysis by M Bergström, ‘Spillover or Activist Leapfrogging? Criminal Competence and the Sensitiveness of the European Court of Justice’ (June 2007) available at http://www.sieps.se/epa/2007/EPA_2_2007.pdf and the SIEPS analysis by G Persson, ‘Gränslös straffätt’, available at http://www.sieps.se/publ/rapporter/2007/2007_4_en.html SIEPS 2007 and H Goeters, ‘New Criminal Law Developments in the Community legal order’, SIEPS 2001:1 u available at http://www.sieps.se/publ/utredningar/2007_1u_en.html

environment and in order to make such legislation fully effective.¹⁵ It should also be recalled that a stream of other cases such as *Pupino*¹⁶, *Segi*¹⁷ and *OMPI*¹⁸ have demonstrated that the winds of ‘reformation’ are already blowing in the third pillar and has done so ever since the ratification crises in 2005 which demonstrates a uniform approach to the pillars.¹⁹ In spite of this, several Advocate Generals of the Court have more recently emphasized the need to respect the current structure of the pillars in accordance with Art 47 EU (concerning the delimitation of powers between the Treaties) and hence pay attention to the intergovernmental pillars as an ‘integrated but separated’ legal order.²⁰ Yet the Lisbon Treaty – assuming it enters into force – solves, as explained, this competence problem by simply merging the pillars. In doing this, the Lisbon Treaty brings the former third pillar area into the core of the Union and hence within the ambit of the Court of Justice’s jurisdiction. As already said, this is a major change as under the current third pillar the Court has a very limited jurisdiction. This issue will be addressed below.

The question we seek to understand is therefore what the Lisbon Treaty means for the question of European criminal law. Are the changes proposed by this Treaty far reaching enough, or on the contrary too intrusive, from the perspective of criminal law?²¹ In other words, does the Lisbon Treaty constitute a ‘Reform Treaty’ at all, as proclaimed by the German presidency council last summer or is such a statement rather wishful thinking?

This analysis starts by briefly comparing the Lisbon Treaty and CT from the perspective of the regulation of criminal law. Thereafter it proceeds to look more closely at the Lisbon Treaty in substance and investigates the relevant

provisions. It concludes by supplying some general remarks on the future of European criminal law.

The EU-constitutionalization of criminal law in the Lisbon Treaty

It is well known that criminal law in the CT was set out in title III, Arts 271–272 where Art 271 dealt with procedural aspect of criminal law and Art 272 concerned substantive provisions. These articles are now more or less copied into Art 69 A and Art 69 B TFEU. More specifically, the former justice and home affairs area is to be found in title IV of TFEU and consists of five chapters on:

- General provisions (Chapter 1)
- Policies on border checks, asylum and immigration (Chapter 2)
- Judicial cooperation in civil matters (Chapter 3)
- Judicial cooperation in criminal matters (Chapter 4)
- Police cooperation (Chapter 5)

The present analysis deals, as noted, naturally with Ch 4 and Ch 1.

Thus, one of the most high profile changes planned by the CT in the criminal law area – and the third pillar more broadly – was the shift to qualified majority voting (QMV) in Council and co-decision with a Commission right of initiative and away from the traditional third pillar requirement of unanimity. Contrary to the CT, the Lisbon Treaty will however keep first pillar instruments such as Directives, Decisions and Regulations instead of using the CT innovations consisting of European laws, European framework laws and European regulations.²² However just as the CT, the abolition of the pillar structure does not mean that everything will be governed by the so-

¹⁵ C-176/03, *Commission v. Council*, [2005] ECR I-7879 and its follower C-440/05 *Commission v Council*, judgment of 23 October 2007.

¹⁶ C-105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-5285

¹⁷ *Segio* C-354/04 and C-355/04, *Gestoras Pro Amnestia et al* and judgment of 27 February 2007 nyr

¹⁸ T 228/02, *Organisation des Modjahedines du peuple d’Iran v. Council*, delivered on 12 December 2006 nyr,

¹⁹ See e.g. S Peers, ‘Salvation outside the Church: Judicial Protection in the Third Pillar after the *Pupino* and *Segi* Judgments’, *CML Rev* 44 (2007) 883 and E Herlin-Karnell ‘In the wake of *Pupino*: *Advocaten voor der Wereld* and *Dell’Orto*’, 8 *GLJ* (2007) available at www.germanlawjournal.com

²⁰ C-91/05, *Opinion of AG Mengozzi* delivered on 19 September 2007. See also AG Maduro in C-402/05P *Kadi v Commission and Council*, opinion of AG Maduro delivered on 16 January 2008 pending

²¹ Elaborated upon by the present author in ‘The Treaty of Lisbon and the Criminal Law: Anything New under the Sun?’ forthcoming *European Journal of Law Reform* (2008). And see the German presidency conclusions agreed on 22-23 June 2007, Brussels, available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/94932.pdf

²² As regards existing third pillar measures, Art 9 of the Protocol on transitional provisions, states: ‘The legal effects of the acts of the Union adopted on the basis of the Treaty on EU 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. Art 10 reads that acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon: the powers of the Commission under Article 226 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union. Thus, it also states that the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon. See e.g. S Carrero & F Geyer *The Reform Treaty and Justice and Home Affairs* (17 August 2007), available at http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf. S Kurpas et al, ‘The Treaty of Lisbon: implementing the institutional innovations’ (15 November 2007), available at http://shop.ceps.eu/BookDetail.php?item_id=1554

called Community method automatically (i.e. QMV in the Council and co decision with the European Parliament).²³ As will be discussed below, the criminal law has its own regime with the possibility for the Member States to 'opt out' from sensitive questions by pulling an emergency brake as well as for the remaining Member States to go further than the Treaty provides by pursuing enhanced cooperation. There is also a unanimity requirement as regards, for example, the approximation of criminal law procedure and the establishment of a European Public Prosecutor.

Before looking closer at the criminal law provisions, it should be pointed out that one of the most interesting changes in the Lisbon Treaty compared to the CT is the fact that the former second pillar regime of economic sanctions will now be moved to the EU justice and home arena and hence brought into the general part (Chapter 1). This general part mirrors the current Art 29 EU by stipulating that the Union shall constitute an area of freedom, security and justice and endeavour to ensure a high level of security through measures to prevent and combat crime. This means, in short, that the Court will have the power to review the legality of EU instruments implementing so-called terrorist sanctions even if they are adopted at the UN level. So the problems raised in, for example, the CFI judgments of *Kadi* and *Yusuf*²⁴ concerning the limits of the Court's jurisdiction in cross pillar conflicts would no longer arise after Lisbon.

Another intriguing novelty offered by the Lisbon Treaty is the increased focus on security aspects within the Union. This question is however beyond the scope of the present analysis and will therefore not be dealt with here.²⁵ Nevertheless, it should be mentioned that, the emphasis on security aspects poses question of whose security the EU is trying to safeguard at the possible expense of another's freedom and justice. This seems to be a consequence of the general suppression of terrorism within the Union as a result of 9/11 and other hideous terrorist attacks. It appears however less clear how this general part including the inclusion of economic sanctions relate to Ch 4 and the core provisions on criminal law to which we will now turn.

Mutual recognition and approximation of criminal law

The CT would have ensured that mutual recognition remained the main rule in EU criminal law, but would have provided for a more widespread possibility of minimum approximation of defence rights (III-271 CT). The Lisbon Treaty follows this road and stipulates in Art 69 A that judicial cooperation in criminal matters shall be based on the principle of mutual recognition of judgments and should include the approximation of the laws and regulations of the Member States in the areas referred to in § 2 of the same article and in Art 69 B. § 2 in turn states that to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. The provision then sets out a list of areas within the EU's competence to legislate such as mutual admissibility of evidence between the Member States, the right of the individual in criminal procedure and provisions regarding the rights of the victim.²⁶ Furthermore, the article contains a so called 'general clause' in stating that any other specific aspect of criminal procedure which the Council has identified in advance by a decision (although unanimity would apply here). Finally, the article states that the adoption of the minimum rules referred to in this paragraph should not prevent Member States from maintaining or introducing a higher level of protection for individuals. It remains to be seen whether this constitutes a far-reaching and consistent enough solution as regards the protection of the individual. This is in particular interesting, as the principle of mutual recognition has attracted much criticism from the perspective of fair trial and legal safeguards of the individual.²⁷ Indeed, the European Arrest Warrant²⁸ is perhaps the most obvious example of a legal instrument which – despite often being described as a successful story by the EU's institu-

²³ JC Piris, *The Constitution for Europe, a legal analysis* (CUP 2007) p 66

²⁴ Case T-306/01, *Yusuf and Al Barakat International Foundation v. Council and Commission*, Case T-315/01, *Kadi* v. Council and Commission, judgments of the 21 September 2005. Now pending before the ECJ, Case 402/05 *Kadi* Opinion of AG Maduro 16 January 2008

²⁵ In brief, it could however be mentioned that a standing committee will be set up in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union.

²⁶ They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;

²⁷ See the discussion in e.g. S Lavenex, 'Mutual recognition and the monopoly of force: limits of the single market analogy', 14 *Journal of European Public Policy* (2007) 762

²⁸ [2002] OJ L 190/1, on the EAW see e.g. R. Blextoon (ed.) *Handbook on the European Arrest Warrant* (Asser, 2005) and S Peers *EU Justice and Home Affairs* (OUP 2006) Ch 9.

tions – were adopted on a kind of rush approach basis in the aftermath of terrorists attacks. In this regard, it is often pointed out that there is currently not sufficient mutual trust and too divergent criminal laws between the Member States in order to justify the application of a trade based internal market model in the present area with the abolition of the traditional requirement of dual criminality for many crimes.²⁹ At the same time, the prospect of harmonizing or introducing minimum approximation poses big challenges from the perspective of criminal justice (i.e. is it possible to harmonize at all?). The Lisbon Treaty however solves the ideological question of how to move forward with the phenomenon of European criminal law by simply setting the ball rolling.

Substantive criminal law

Art 69 B (1) in turn concerns the regulation of substantive criminal law and stipulates that the European Parliament and the Council may establish minimum rules concerning the definition of criminal law offences and sanctions in the area of particularly serious crime with a cross border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Thereafter, this provision sets out a list of crimes in which the EU shall have legislative competence such as terrorism, organized crime and money laundering.³⁰ Thus, it also states that the Council may identify other possible areas of crime, which meet the criteria of cross border nature and seriousness. Moreover, interestingly § 2 of the same article stipulates that there is a possibility to approximate if that proves essential to ensure the effective implementation of a Union policy in an area which has already been subject to harmonization measures. In such a case, the same ordinary or special procedure shall apply as was followed for the adoption of the harmonization measure in question.

Accordingly, the question that needs to be addressed in the present context is what Art 69 A (1–2) and 69 B (1–2) means from the perspective of the question of harmonization more generally. As noted, Art 69 A grants the possibility to harmonize criminal law procedure if that is needed in order to facilitate mutual recognition of

judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension (although as already said unanimity would apply here). In Art 69 B § 2, however, the wording is slightly different. First of all, § 2 does not explicitly state that there must be a ‘cross border dimension’ or involving a crime of ‘serious nature’ in order to qualify for legislation if, as previously noted, the area in question already has been subject for harmonization and if such legislation proves essential to ensure the effective implementation of a Union policy. Furthermore, as stated, in contrast to Art 69 A §2 there is no unanimity requirement in Art 69 B § 2 but rather the same procedure as the earlier harmonization scheme was enacted under which is most likely to be ‘the ordinary’ procedure, namely: QMV in the Council. Why this difference then? Indeed taking into account that the mutual recognition is held to be the main rule as stipulated in Art 61 and 69 A and considering the apparent need for underlying rules in an area based on mutual trust this seems somewhat odd.

In any case, and perhaps more interestingly, it is important to discuss the constitutional scope of Art 69 B § 2 more specifically. As indicated, this provision provides for legislation in an area which has already been subject for the EU’s harmonization programme. Here arguably one could choose a broad or narrow interpretation. One could for example interpret the lack of reiteration of § 1 of the same article concerning the cross border and serious crime requirement, that there is no limitation to this legislative mandate at all. Certainly, one commentator has in connection with the CT and the identical provision of 172 § 2 CT argued that there is no need to show that the crime in question is ‘particularly serious’ or that it has a ‘cross-border’ dimension or that there is a special need involved at all.³¹ Yet it is submitted that in the light of the principle of attribution of powers (Art 3 TEU) and furthermore in analogy with the well known internal market jurisprudence, there must arguably be a Union dimension at issue – perhaps exactly in the terms of a ‘cross border nature’ and ‘serious character’ which makes it necessary to legislate at the supranational level. This is in particular true taking into consideration that criminal

²⁹ An overview is provided in e.g. S Peers *EU Justice and Home Affairs* (OUP 2006) Ch 9 and in the Swedish context, see E Herlin-Karnell, ‘The Swedish Supreme Court and the European Arrest Warrant’ (2007) *Europarättslig tidskrift* p. 885

³⁰ The crimes are as follows: 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.

³¹ The same commentator has also stressed that the EU legislator nonetheless would have to demonstrate that diverse application of sanctions to enforce the relevant prohibition would result in a substantial risk of ineffectiveness. S Peers *EU Justice and Home Affairs* (OUP 2006), p 423–427

law is probably the most sensitive field of the ever growing family of EU law. Moreover, we know from the current internal market provision of Art 95 EC (which will be renamed Art 94 TFEU) that mere disparities between the states are not enough in order to trump the principle of attribution of powers (currently Art 5 EC).³² After all, the *Tobacco Advertising*³³ case made clear that there are limits to broad use of EC powers as the measure at stake must contribute to the functioning of the internal market and not just have a sweeping generality about its aim and scope. It should also be pointed out that the present area will constitute a shared power (Art 2C j TFEU). Hence viewing Art 69 B § 2 as a *carte blanche* would render not only the attribution of power rather illusory but also clash with the criminal law principle that criminal law should be the last resort as means of control. Nevertheless, even if Art 69 B § 2 TFEU would prove to have the same slipperiness as Art 95 EC³⁴ the principles of subsidiarity and proportionality would, obviously, still apply (Art 3 B TEU also reaffirmed in Art 61 B TFEU). We will return to these principles below.

Finally, Art 69 C reads that *'The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States'*. As implied above, it remains however unclear how this provision relates to the general part of Ch 1, stipulating that crime prevention and if needed through approximation of criminal laws constitutes one of the objectives of the Union. This provision will perhaps open up as much debate as the current Art 280 (4) EC (concerning the combat against fraud) and Art 135 EC, (regarding customs operation) which are often given, in the absence of Treaty guidance, as competence restricting examples (these provisions stipulate that EC law measures in this area shall not concern national criminal law or national administration of criminal law).³⁵ Alternatively, Art 69 C simply means that the EU shall have its own crime prevention programme (if such a programme is possible to distinguish

from national laws and regulation) which in turn poses criminological issues of effectiveness.

The provision on enhanced cooperation and the emergency brake – flexibility or fragmentation?

The provisions of Art 69 A (concerning § 2) and B (concerning §§ 1 and 2) also provide in § 3 respectively for the possibility to pull a so-called emergency brake if the law at stake would affect fundamental aspects of a Member States criminal justice system. More concretely, if such an emergency brake scenario occurs a Member State may request that the draft Directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended and after discussion, and 'in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure'.

It is clear that such a possibility looks attractive for Member States with a strong relationship between the criminal law and the nation state and hence remedies the Member States' anxiousness about giving up their national sovereignty in criminal law matters. Yet as regards the merits of such an emergency brake, the present author has previously argued that the 'emergency brake' procedure is too much of a politically smooth solution: *'...One gets the impression that the emergency brake, in reality, is not supposed to be used in the first place.... Instead, it seems to be as it says on public transport: 'refrain from abuse' or in the worst scenario 'abusers will be prosecuted'. It is easy to make the statement that such a possibility is not the ideal solution as regards future problems, although, certainly, it looks safer (after all, we all know that we usually don't need to pull it very often).'*³⁶ A recent policy analysis of the Lisbon Treaty and justice and home affairs, uses the same analogy with an emergency brake (this time more specifically on a train) but argues that the prohibition sign is there for a reason: it is punished in all Member States and the Member States should refrain from pulling it in order to avoid unnecessary halts.³⁷ The

³² S Weatherill *EU Law Cases and Materials* (OUP 2007) Ch 2

³³ *Tobacco Advertising*, C-376/98 *Germany v. Parliament and Council*, [2000] ECR I-8419 The judgment stands as an assertion of a constitutional reading of competence prevailing over political preferences, see S Weatherill, 'Competence Creep and Competence Control' *Yearbook of European Law* 22 (2004) p 1.

³⁴ E.g. C-491/01 *ex parte BAT and Imperial Tobacco* [2002] ECR I-11543

³⁵ On Art 280 EC, among many commentators see for a recent paper T Siebert, 'The European Fight Against Fraud – The Community Competence to Enact Criminal Laws' *European Journal of Criminal Law and Criminal Law Justice* (2008) 85

³⁶ E Herlin-Karnell, 'Recent Developments in the Area of European Criminal Law' *Maastricht Journal of European and Comparative Law* 14 (2007) 15 at p 35

³⁷ S Carrero & F Geyer *The Reform Treaty and Justice and Home Affairs* (17 August 2007), available at http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf at p 9

point the commentators make is that too much flexibility will lead to too much complexity. Although it is true that an emergency brake scenario will generate fragmentation, it is submitted that the problem is more fundamental than that. The crux is that the mere inclusion of an emergency brake does not automatically constitute a guarantee for a successful European criminal law as the very notion of the transformation of criminal law to the supranational stage prompts the question of whether the CT and now the Lisbon Treaty were drafted carefully enough in the first place in order to live up to the freedom, security and justice paradigm. This is particularly important as it is not only a question about 'taming' protectionist states but at stake is the adequate protection of the individual at the EU level.³⁸ We will return to this below.

Whether or not a single Member State pulls the emergency brake, the Lisbon Treaty provides nonetheless for the possibility of enhanced cooperation for the remaining Member States. More especially, § 4 of Art 69 A and B respectively states *'In case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 10(2) of the Treaty on European Union and Article 280 D(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.'*³⁹ In short, this means that there is no obligation as set out in Art 280 D to address a request to the Commission, specifying the scope and objectives of the enhanced cooperation in question. Neither is there an obligation (as Art 10 (2) reads) that the Council as a last resort shall adopt the decision at hand. This poses two questions. Firstly, it is possible to argue that the mere fact that the Member States do not need to show the last resort requirement as stated in Art

10 (2) could be seen as in disharmony with the sensitive character of criminal law as being an *ultimo ratio* (i.e. last resort). Secondly, it appears less clear how enhanced cooperation will work in practice here. In fact, it has been argued that there is a risk that such cooperation could create many speeds of varying degrees and notions of freedom, security and justice.⁴⁰ It is true that the phenomenon of 'Two-Speed' Europe already exists (e.g. the Treaty of Prüm) where some of the Member States have wished to go further than less 'integrative' states in establishing the 'highest possible' standard of cooperation especially by means of exchange of information, particularly in combating terrorism, cross-border crime and illegal migration.⁴¹ Such cooperation will now be intensified on a Treaty based footing. Hence it appears as if the previous dormant character of the establishment of closer cooperation in general because of the many EC Treaty restrictions surrounding it (set out in Art 11 EC, Art 40 EU and Art 43 EU⁴²) will come to an end as the importance of fighting crime and terrorism are currently extremely high priorities for the EU and the Member States. In other words, there seems to be a willingness to move forward.

A European public prosecutor?

The Lisbon Treaty somewhat broadens the possibilities of enhanced cooperation by also extending it to police cooperation as well as to the establishment of European Public Prosecutor (Art 69 E) and this is new compared to the CT. Such a prosecutor shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in the paragraph.⁴³ Although unanimity in the Council is still required as well as consent of the European Parliament, the possibility of closer cooperation in the absence of such

³⁸ See for example the discussion in B Schünemann, 'Alternative-Project for a European criminal law and procedure', *Criminal Law Forum* 18 (2007) 227

³⁹ It has been stated that The fact that the minimum participation which had been set at eight Member States in Nice, a third of the Member States in the draft Constitution, is now set at nine in the Reform treaty is not very significant. S Kurpas et al, 'The Treaty of Lisbon: implementing the institutional innovations' (15 November 2007), available at http://shop.ceps.eu/BookDetail.php?item_id=1554

⁴⁰ S Carrero & F Geyer *The Reform Treaty and Justice and Home Affairs* (17 August 2007), available at http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf.

⁴¹ Convention between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria, signed in Prüm Germany on 27 May 2005. See generally, European Committee '18 th Report of 2006/07, Prüm : an effective weapon against terrorism?', <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldcom/90/90.pdf>

⁴² See the discussion in S Weatherill, 'If I'd wanted you to understand I would have explained it better': What is the Purpose of the provisions on closer co-operation introduced by the Treaty of Amsterdam? In D O'Keefe and P Twomey, *Legal Issues of the Amsterdam Treaty* (Hart 1999), 21

⁴³ It remains of course unclear how the UK's, Ireland, and Denmark opt outs will function here as well as the exact impact of the so called general principles of EU law – the UK's opt out to the Charter notwithstanding. See analysis provided by Prof Steve Peers, *Statewatch, the German presidency conclusions*, available at: <http://www.statewatch.org/news/2007/jul/eu-reform-treaty-teu-annotated.pdf>

unanimity is new compared to the CT (Art III-274). It is far beyond the scope of this limited analysis to discuss the pros and cons of a European Public Prosecutor in general.⁴⁴ It could also be pointed out that there has been a debate as to whether the European Public Prosecutor should have a wider criminal law mandate than the financial sphere only.⁴⁵ In any event, Art 69 (4) provides, as did the CT, for the possibility for a future European Council to adopt a decision amending the competences of such a prosecutor to include serious crime having a cross-border dimension more broadly.

Jurisdiction of the Court

The question of judicial control is of course of crucial concern here, as criminal law is an area closely connected with human rights and civil liberties more generally. As the current third pillar stands, as noted, the Court has a very limited jurisdiction and lacks a general competence as such jurisdiction has been based on a voluntary declaration by Member States as to whether to accept the jurisdiction of the Court.⁴⁶ Also, in a nutshell, the absence of individual standing as well as infringement proceedings initiated by the Commission against Member States has been much criticised.⁴⁷ As a consequence of the abolition of the Treaty pillar structure, the Court's jurisdiction will now be reformed. However, just as the CT and the current Art 35 (5) EU, the Court will still not have the power to review the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State or the exercise of responsibilities incumbent upon Member states with regard to the maintenance of law and order and the safeguarding of internal security.⁴⁸ It has been

observed that this looks like a statement of the obvious as even under the traditional first pillar setting the Court cannot review internal situations.⁴⁹ It has equally well been noted that although this constitutes an express restriction on the Court's ability to rule on certain acts committed by national authorities it does not restrict the Court from ruling on the validity or interpretation of EU acts.⁵⁰ In any case, the general principles of EU law would probably apply anyway, such as non-discrimination, solidarity and loyalty towards the Union. At stake, is of course whether it is (still) possible – in contemporary European law discussions – to distinguish between internal and external security.

Finally, and most importantly, the Lisbon Treaty introduces furthermore the possibility of expedited procedures for people in custody. This is new compared to the CT. More specifically, the Lisbon Treaty stipulates, in Art 218 TFEU, that a § shall be added to the current Art 234 EC stating that if a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay. This is obviously an extremely important change and reflects the debate on a more speedy justice in Europe. It should perhaps be recalled that even the Court itself has already participated in such a debate by issuing a letter to the Commission on the establishment of emergency preliminary procedures.⁵¹

Short about the principles of subsidiarity and proportionality

The principles of subsidiarity and proportionality are frequently highlighted in the Lisbon Treaty. The Protocols on the Application of the Principles of Subsidiarity and

⁴⁴ But in short it could be noted that it has been observed in connection with the CT that the relationship between this prosecutor and the existing prosecution network of Eurojust is somewhat blurred. See in general e.g. H G. Nilsson, 'Eurojust – the beginning or the end of the European Public Prosecutor?', *Europarättslig Tidskrift* (2000), 601, and C Van den Wyngaert, 'Eurojust and the European Public Prosecutor' in N Walker (ed.), *Europe's Area of Freedom, Security and Justice*, 224 (2004) and S Peers *EU Justice and Home Affairs* Ch 9 (2006). G Persson, *Gränslös straffätt*, available at http://www.sieps.se/publ/rapporter/2007/2007_4_en.html

⁴⁵ J Monar, 'Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the 'Area of Freedom, Security and Justice'? *European Constitutional Law Review* 1 (2005) 226

⁴⁶ See generally, e.g. T Balzacq & S Carrera (eds) *Security v Freedom – A Challenge for Europe's Future* (Ashgate 2006) 223

⁴⁷ E.g. S Carrero & F Geyer *The Reform Treaty and Justice and Home Affairs* (17 August 2007), available at http://www.libertysecurity.org/IMG/pdf/The_Reform_Treaty_Justice_and_Home_Affairs.pdf

⁴⁸ Compare Art 61 E TFEU stating that 'nothing in this title shall affect the exercise of the responsibilities incumbent upon Member States with regard to maintenance of law and order and safeguarding of internal security'.

⁴⁹ N Grief, 'EU law and security' *ELRev* 33 (2007) 752.

⁵⁰ S Peers, *EU Justice and Home Affairs* (OUP 2006) 41

⁵¹ Letter from Mr V Skouris, President of the Court of justice 25 September 2006, available at <http://www.statewatch.org/news/2006/oct/ecj-and-third-pillar-13272-06.pdf>. See also the Commission's communication COM(2006) 346 final of 28 June 2006 concerning the bridging clauses of Art 42 EU and Art 68 EU which were subsequently put on ice at the Tampere II European Council meeting in September 2006 in order to allow some more reflection time on the failed CT.

Proportionality and the Protocol on the Role of the National Parliaments – annexed to the Lisbon Treaty – are axiomatic here and should be read in tandem.⁵² In short, the Lisbon Treaty increases the national parliaments' participation in the monitoring process of subsidiarity in imposing an obligation to consult widely before proposing legislative acts (Art 2 of the Protocol on subsidiarity and proportionality) and the Commission must, moreover, send all legislative proposals to the national parliaments at the same time as to the Union institutions and the time limit for doing so has been increased from six to eight weeks (Art 4). Further, the Court will have, as in the current state of affairs, jurisdiction to consider infringement of subsidiarity under Art 263 TFEU brought by the Member States or notified by them in accordance with their legal order on behalf of their national Parliament (Art 8). Without going into a discussion of how deep going in the terms of substantive reasoning such a review by the Court ought/could to be, as for the area of justice and home affairs, Art 61 B explicitly states that national Parliaments shall ensure that proposals and legislative initiatives in this area comply with the principles of subsidiarity and proportionality (compare the current Art 5 TEU). Obviously, paying attention to subsidiarity and proportionality is especially important in criminal law in order to avoid excessive criminalization.

This brings us to the conclusion of the present paper. The matter that still needs to be addressed further is what the Lisbon treaty means for the notion of a European criminal law in terms of competences more specifically. Expressed differently, are the above stated constitutionalization of the criminal law in the terms of an official Treaty any different from the current regime as interpreted by the Court?

Conclusions

The EU's time for reflection in the wake of the failure of the CT turned out to be a rather busy time for the Commission, the Court and the criminal law. As noted above the Court has already concluded that there is a criminal law competence in the first pillar to safeguard the environment and the Commission has issued a controversial communication⁵⁴ eagerly suggesting such competence in a number of areas without any link to the environment at all.⁵⁵ As also mentioned above the so-called Pupino trend demonstrated that there already could be Community reasoning in the intergovernmental pillars. Thus, the Lisbon Treaty will now legitimately abandon the pillars and hence supranationalize the criminal law. One could readily ask whether this constitutes anything new at all as regards competences or whether such a restructure rather concerns the question of capacity in terms of more efficient and transparent law making and a less acute democratic deficit because of the new powers of the EU's institutions. Notwithstanding this, it is hardly possible to separate so sharply between capacity and competences.⁵⁶ After all, the Lisbon Treaty as did the CT provides not only for a supranationalization of the criminal law but actually for new specific areas of EU criminal law such as the fight against money laundering at the supranational level. Even though the importance of anti money laundering legislation has of course been on the EU's legal agenda since 1991, it has never constituted a criminal law competence *strictu sensu* but rather found its expression in the notion of administrative penalties.⁵⁷ Moreover, as explained, the provision of Art 69 B § 2 stipulating a competence when necessary and when a policy has already been dealt with through harmonization, constitutes a rather imprecise

⁵² For an overview, see P Craig, 'The Lisbon Treaty, Process, Architecture and Substance' forthcoming (2008) April EL Rev

⁵³ See the classical discussion e.g. S Weatherill, 'Better competence monitoring' (2005) 39 EL Rev 5, S Weatherill, *EU Law Cases and Materials* (OUP 2007), T Tridimas *General Principles of EU Law* (OUP 2006), G Davies 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time', (2006) 43 CML Rev 63, G De Búrca, 'The Principle of Subsidiarity and the Court of Justice as an institutional Actor', (1998) 36 JCMS 217, P Craig *EU Administrative Law* (OUP 2006) Ch 12

⁵⁴ COM (2005) 583 final, 24 Nov 2005

⁵⁵ E.g. COM (2006) 168 final, 26 April 2006

⁵⁶ Thanks to Steve Weatherill for this input.

⁵⁷ See the third money laundering Directive 2005/60/EC OJ L309/15, 25 Nov 2005

threshold. Although, this provision still has to be tied to the principle of the attribution of powers and prove to be 'necessary', there is reason to believe that the Court's interpretation of it could, in practice, prove to be far-reaching. The most important change as regards the constitutional question is therefore perhaps the protocol on subsidiarity and proportionality – here there is a possibility to allocate EU competences where they are best undertaken. Accordingly, there is to be hoped that the traditional 'efficiency' test will not always rule in favour of the supranational playing field.⁵⁸

Nevertheless, and most significantly, due to the highly sensitive character of the criminal law, there is not only the risk of a self scoring/backlashes as regards the adequate protection of fundamental rights and the ever continuing work of enhancing respect and trust for the Union project but this is an area where extensive research and data is needed. In spite of this, it appears clear that the Lisbon

Treaty offers a more attractive framework in the terms of competences and protection of the individual than the current regime. This is particular true if one takes into consideration not only the somewhat symbolic inclusion of the Charter of Fundamental Rights and the accession to the European Convention of Human Rights⁵⁹, but also the proclamation, as noted, of the Union's values – there is at least a willingness among the Member State and the EU to make the area of freedom, security and justice come true. It remains of course to be seen whether this will truly happen depending on what kind of security, freedom and justice we are referring to. The good news is that even in the current wave of increased security within the Union, there seems as if it has never been more opportunity to influence the discussion. Indeed the era of impact assessments, consultations and 'better regulation'⁶⁰ – if taken seriously – promises at least a healthy debate on the development of European criminal law. ●

⁵⁸ Compare more generally, see P Craig, 'The Lisbon Treaty, Process, Architecture and Substance' forthcoming (2008) April EL Rev and S Weatherill, 'Better competence monitoring' (2005) 30 EL Rev 23

⁵⁹ Protocol relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms and Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom

⁶⁰ The notion of 'impact assessments' have found their way into the third pillar sphere, see e.g. Amending Framework Decision 2002/475/JHA on combating terrorism' COM(2007) 650 final, 6 November 2007 and proposal for a 'Framework Decision on the use of Passenger Name Record for law enforcement purposes', COM (2007) 564, 6 November 2007. See also as regards the EC context the contributions in S Weatherill (ed) *Better regulation* (Hart 2007)