The Treaty of Lisbon and the Criminal Law: Anything New Under the Sun?

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Abstract

This contribution discusses the Lisbon Treaty in the context of criminal law and examines the similarities and differences between this Treaty and the Constitution. In doing so the paper asks whether the constitutional architecture as drawn up by the Lisbon Treaty constitutes a sufficient solution for the notion of European criminal law. Hence the paper looks at the possible challenges in the present area and thereby also the meaning of the Union's proclamation of European values in the current wave of the increased focus on security aspects within the EU.

A. Introduction

This reflection piece seeks to provide some thoughts on the Lisbon Treaty from the perspective of EU criminal law.[1] Although it is true that this Treaty to a large extent simply re-enforces what the Constitutional Treaty (CT) failed to achieve, most prominently the abolition of the Union pillar-structure in unifying the EU into one 'big' pillar, the Lisbon Treaty also introduces some significant changes. One such change in the area of criminal law is the regulation of enhanced co-operation. Another novelty (although also stressed in the CT) is the Union's highly ambitious normative emphasis – despite having skipped various EU symbols such as anthem and flag – on European and humanist values. So is there anything new under the sun here? Will such a proclamation of the Union's values enable the EU to be able to act legitimately in the field of criminal law? This analysis tries to investigate the possible future of the criminal law in the era of constitutional changes. It is structured as follows. Firstly the article discusses the framework of the Lisbon Treaty as regards the criminal law and compares it with the CT. In doing so, this paper focuses especially on the provision of enhanced co-operation. Thereafter, the purpose is to dive into the question of 'security' and examine it in the light of the multifaceted EU threats of terrorism and organized crime more generally.

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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, OJ 2007 C 306/1.

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B. Reformation?

As stated above, the Lisbon Treaty will abandon the pillar structure of the Union. In spite of this, 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).[2] The current EC Treaty (first pillar) will form part of the latter category as well as the area of Justice, Home Affairs (the third pillar) while the field of foreign and security matters (the second pillar) will form part of the former.[3] Although the former cross-pillar problem of the division of competences will be settled should the Lisbon Treaty survive the ratification process, the conundrums outlined here will be solved only partially. Because, whether or not this Treaty enters into force, the big ideological questions in the Union such as the issue of legitimacy will not go away.[4] And perhaps more importantly from the perspective of the present analysis, issues of legality in criminal law and procedural safeguards of the individual will and should remain at the forefront of the (desired) debate. This takes us back to the aforementioned newly created Treaty guarantee of European values and its embedded promise of 'enlightenment' in Europe. More specifically, it begs the question of how such a noble statement connects to the increased focus on security matters within the EU. These issues will be discussed in further detail below.

As already mentioned the Lisbon Treaty will, like its ill-fated predecessor the CT, merge the pillars and it will moreover ensure that the area of freedom security and justice is no longer exempted from the Court of Justice by revolutionizing the Court's jurisdiction in these matters. However the Court would still not have the jurisdiction 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 (276 TFEU compare Art. 35(5) EU). 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.[5] A question that arises is, apart from the fact that such a provision could create interpretation difficulties of what 'internal security'[6] really is, to what extent the general principles of EU law such as solidarity and loyalty towards the Union would apply anyway.

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

3 There will also be one legal personality.

4 Although it is true that, as remarked by one commentator already in connection with the entry into force of the Amsterdam Treaty to say this is almost a banality at present, J. Shaw, *The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy*, 4 EJL 63 (1998).

5 N. Grief, '*EU Law and Security*', 33 EL Rev 752 (2007).

6 Compare Art. 72 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."

In any case, one of the most high profile changes introduced by the CT from the perspective of criminal law – 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.[7] In this respect, it should be cautiously mentioned that it could still be questioned whether the enactment of for example Regulations as regards the establishment of criminal acts or minimum binding rules at the EU level satisfies the complex principle of legality. At stake is the fact that the cornerstone of legality, which is constitutionally embedded in most of the Member States, does not depend upon the name of a regulating rule as law but upon its identity as an expression of the (democratic) principle.[8] So although it is true that the participation of the European Parliament will contribute to a less acute 'democratic deficit' it has been stressed that this does not solve the problem from the perspective of legality as the CT – and now the Lisbon Treaty – provides for the possibility to legislate even when there is no majority within the European Parliament.[9]

Moreover, the Lisbon Treaty will guarantee that mutual recognition remains – following the approach adopted in the CT and the path set out in the Tampere conclusions and subsequently the Hague programme[10] – the leading theme in European criminal law co-operation. One problem however is that there is no definition of what 'mutual recognition' means in the field of criminal law. This lack of conceptualization has previously been considered as constituting a significant

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[7] 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* (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*, (2007), available at http://shop.ceps.eu/BookDetail.php?item_id=1554.

[8] M. Kaiafa-Gbandi, *The Treaty Establishing a Constitution for Europe and Challenges for Criminal Law at the Commence of 21st Century*, 13 Eur. J. Crime Crim. L. & Crim. Just 483 (2005).

[9] *Id*.

[10] European Council Tampere 1999 and The Hague programme: Strengthening Freedom, Security and Justice in the EU, adopted in November 2004, OJ 2005 C 53/1. On mutual recognition and the CT *see e.g.* A Weyembergh, *Approximation of Criminal Laws, the Constitutional Treaty and the Hague Programme*, 42 CML Rev 1567 (2005) and S. Peers, EU Justice and Home Affairs, Chs. 8-9 (2006).

lacuna of the CT.[11] Yet this alleged gap of certainty has not been remedied in the Lisbon Treaty. And still, there has always been a clear willingness among the Member States to use mutual recognition as a way of avoiding legislation in this area. Indeed, the rather heated debate on the adequacy of, for example, the European Arrest Warrant[12] should be recalled here. Never before have the limits to the analogies to the internal market been as sharply illuminated. At stake here is on the one hand, in the wake of the Pupino case,[13] the obligation of adopting Community based reasoning in the third pillar and on the other hand the issue consisting of to what extent one could simply adopt 'trade based' principles in the area of criminal law and hence change the notion of extradition to that of surrendering, as a result of the abolition of dual criminality for many crimes, without underlying (minimum) standards and definitions.[14] In this regard, it is often pointed out that there is currently not sufficient mutual trust between the Member States in order to justify such an analogy with the internal market and mutual recognition.[15] Given this, it should perhaps not come as any major surprise that there have been suggestions for a more radical change of the Treaty than the one offered by the CT. The core of the question is consequently, as noted, whether the Lisbon Treaty offers anything new and if so whether the proposed novelties at hand are good enough.

I. What Happened to the Alternative Constitution?

Many criminal law academics expressed concern about the adequacy of the CT, in particular from the point of view of legitimacy and defence rights of the individual. This section intends to shed some light on the debate about what kind of Constitution would be warranted from the perspective of criminal law.

Accordingly, the Lisbon Treaty introduces the possibility of expedited procedures for people in custody. It is of course true that such a possibility has been on the Commission's table since 2006 when the Commission delivered a communication – in the absence of a CT – on the need to, within the area of freedom, security and justice, use the bridging clause of Art 67(2) EC and 68 EC to speed up preliminary procedures.[16] In fact, even the Court itself participated in the debate on more speedy justice in Europe by issuing a letter to the Commission

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[11] It has furthermore been suggested that a way of remedying the fogginess which characterized the CT in this respect is to stick to one language as the legal voice when issuing warrants and the like. A. Klip, *The Constitution for Europe and Criminal Law: A Step not Far Enough?*, 12 MJ 115 (2005).

[12] 2002/584/JHA; OJ 2002 L190/1.

[13] Judgment of 16 June 2005, *Case C-105/03*, *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

[14] *See e.g.* E. Herlin-Karnell, *In the Wake of Pupino: Advocaten voor der Wereld and Dell'Orto*, 8 German Law Journal 1147 (2007).

[15] *See* among many commentators, Peers, *supra* note 11, Ch. 9 and V. Mitsilegas, *The Constitutional Implications of Mutual Recognition*, 43 CML Rev 1277 (2006).

[16] COM(2006) 346 final of 28 June 2006.

on the establishment of emergency preliminary procedures.[17] Even though the regulation of expedited procedures constitutes a welcomed development for those on bail, one could nonetheless wonder whether the Court of Justice will become a criminal tribunal now. But could it become one? As nicely highlighted in AG Maduro's opinion on Kadi in the context of terrorism, there is a clear deficit in the experience in these matters in the EU.[18] After all, the Court used to deal with fundamental freedoms of another kind than issues of criminal law policy.

Yet a major dispute at the national criminal law arena appears to have been whether the national courts would be competent to interpret (in a uniform way) criminal provisions at the European level, as well as the associated risk of forum shopping.[19] Fore example, it has been suggested that an EU criminal law court, or a pre trial court in criminal matters, would constitute a prerequisite for any further transformation of criminal law to the supranational level.[20] So, there seems, in short, to have been a common view among many criminal lawyers that the CT was not an ideal solution from the perspective of criminal law and justice.[21] Indeed, a particularly detailed critique of the CT in the context of criminal law has been presented by Professor Bernd Schünmann. More concretely, Schünemann and a team of scholars drafted the 'Alternative Constitution for a European Criminal Law and Procedure'.[22] This draft was concluded as a reply to the increased focus on repression aspects within the Union and constituted, in the words of Schünemann, a call for this second enlightenment in the EU.[23] Thus, it should perhaps be recalled that viewed in a historic perspective 'Europe' stood for humanity and legality.[24] Today it is appears instead to, expressed sharply, be the opposite where basic criminal law principles such as legality and criminalization as last resort seem largely forgotten.[25] This lack of attention paid to genuine problems with single market analogies in criminal law constituted a main source of the criticism presented in the alternative draft. In particular, one of the main points of this draft was the creation of a 'Eurodefensor' institution (defence rights) as counterpart to

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[17] 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.

[18] Although in the context of the case of Kadi that does not mean that the Court should not act as guardian of fundamental rights. *See* Opinion of AG Maduro of 16 January 2008 in *Case C-402/05P, Kadi v Commission and Council*, not yet published.

[19] *See e.g.* the contributions provided in A. Klip & H. van der Wilt (Eds.), Harmonisation and Harmonising Measures in Criminal Law (2002).

[20] *Id.*

[21] *E.g.* A. von Hirsh, *Alternative Draft for European Criminal Proceedings*, 18 Criminal Law Forum 195 (2007).

[22] http://www.eu-strafrecht-ae.jura.lmu.de/index.html.

[23] B. Schünemann, *Alternative-Project for a European Criminal Law and Procedure*, 18 Criminal Law Forum 227 (2007). However, *see already* P. Alexis & S. Braum, *Deficiences in the Development of European Criminal Law*, 5 ELJ 293 (1999) stating that "Democratic constitutionality is a condition upon which criminal law must be based. Criminal law in Europe can only achieve legitimation by means of a new social contract – a European constitution."

[24] As is well known, the principles of legality and proportionality were born out of the Enlightenment as well as the prohibition of the death penalty (in peace time) in many European countries. For an overview in general, *see e.g.* A. Norrie, Crime, Reason and History (2003).

[25] Schünemann, *supra* note 23 and Von Hirsh, *supra* note 21.

the creation of a European Public Prosecutor. Nevertheless, in the recent horse trading for a new Treaty there seems to have been no room for such consideration on the European Council stage. This, coupled to wider issues of legitimacy, triggered Schünemann to question whether the EU, after all, is becoming a police state.[26] It is anticipated that the matters advocated in the alternative draft are far from dead – with or without the Lisbon Treaty – although the possible creation of a European criminal law code in general of the same calibre as the private law one seems at present a highly unrealistic enterprise.[27]

The next section aims to discuss the Lisbon Treaty in further detail and thereby explore whether it constitutes any enlightenment. And if not yet there, whether we approaching the dark ages or rather – as the German presidency conclusions stated[28] – this is the time of EU reformation. In doing so, this paper focuses in particular on the so-called flexibility provisions.

C. Flexibility and Enhanced Cooperation

Although, as stated, mutual recognition will remain the rule of thumb in procedural criminal law, as set out in Art. 82(1), Art. 82(2) TFEU goes further than that (as did the CT) and provides that as regards matters having a cross-border dimension "the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States."[29] Despite this appealing reassurance of attention to 'legal traditions' it is in connection with this provision that the regulation of flexibility enters the scene. Indeed, as indicated above, the possibility of enhanced cooperation in criminal law – both substantive and procedural – constituted one of the novelties of the CT. This may sound strange, as the very structure for criminal law within the framework of the third pillar has of course been through the process of judicial cooperation. So the Lisbon Treaty just like the CT includes, in Art. 82(2-3)A and Art. 83 (concerning substantive criminal law, discussed more fully below) a so-called emergency brake clause in criminal law matters where

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[26] B. Schünemann, *Europäischer Sicherheitstaat=Europäischer Polizeistaat?*, 14 Zeitschrift für Internationale Strafrechtsdogmatik 528 (2007).

[27] *See however*, the Corpus juris project on the combat against financial crime M. Delmas-Marty & J. Vervaele, The Implementation of Corpus Juris in the Member States (2000-2001) and for an early contribution on the possibility of a model code A. Cadoppi, *Towards a European Criminal Code?*, 4 Eur. J. Crime Crim. L. & Crim. Just. 21 (1996).

[28] *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.

[29] 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;
(d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

a Member State could pull a 'brake' if the proposed criminal law legislation in issue would be considered as affecting fundamental aspects of the criminal justice system. More specifically, Art. 82(3) states "In that case, the ordinary legislative procedure shall be suspended. 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." Yet this is not the end of the story, Art. 82 same paragraph continues to stipulate that within the same timeframe, 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 Art. 20(2) TEU and Art. 329(1) TFEU shall be deemed granted. This obviously lightens the possibility of enhanced co-operation for the Member States in criminal law matters.

In fact, looking closer at the Lisbon Treaty it becomes clear that this Treaty provides for something of a smorgasbord of enhanced cooperation although its practical reality remains to be seen. In particular, the provisions of Art. 20(2) TEU and Art. 329(1) are interesting although they, as previously said, are considered as already complied with when establishing criminal law co-operation under Art. 82. Nevertheless, a few general observations on closer cooperation are merited here in order to understand the proposed regulation on criminal law. Accordingly, Art. 329 reads that Member States that wish to establish enhanced cooperation between themselves in one of the areas covered by the Treaties, with the exception of fields of exclusive competence and the common foreign and security policy, shall address a request to the Commission, specifying the scope and objectives of the enhanced cooperation proposed. Art. 20(1) TEU in turn states that enhanced co-operation shall aim to further the objectives of the Union, protect its interests, and reinforce its integration process.[30] And Para. 2 of Art. 20 reads that "the decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it."[31] It remains unclear how long a 'reasonable' period is. As explained above though, Art. 83 stipulates that the authorization to proceed with enhanced co-operation stipulated in Art. 20(2) and Art. 329 should already be deemed granted. Consequently, there is no need to show 'last resort' here. It could therefore be argued that it appears as if any closer cooperation within criminal law is regarded as 'furthering the objectives of the Union' per se, which is difficult to reconcile with the principle of the ultima ratio of criminal law as last resort. Moreover, it is perhaps worth pointing out that the wording of the current Art. 43 EU, stating all the classical restrictions in the area of enhanced co-operation (such as the requirement that no co-operation may intrude on the

[30] One has to assume that this requirement is still on the agenda in EU criminal law cooperation as not mentioned as 'complied with' in the provision of Art. 82 TEU.

[31] 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." Kurpas *et al.*, *supra* note 7.

EC's existing competence), is now more or less copied into Art. 329 although the previous imperative of the preservation of the mysterious concept of the 'acquis communitaire' naturally is wiped off the agenda.

Moreover, the Lisbon Treaty somewhat broadens the possibilities of enhanced cooperation scenarios by also extending it to police cooperation as well as to the establishment of European Public Prosecutor (Art. 69E). 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.[32] Without entering into the discussion of the adequacy for a European Public Prosecutor as such and its relationship to Eurojust,[33] suffice it to say that the possibility of a 'partial' establishment of an European Public Prosecutor appears somewhat strange and raises numerous questions about consistency and legal certainty in an area based on mutual recognition such as arrest warrants executed by non participating Member States to participating ones as well as the future function of citizenship (Art. 9 in the Lisbon Treaty) here.

But the notion of enhanced cooperation in the criminal law area is, as indicated, after all not a new phenomenon. On the contrary, the past few years have witnessed significant developments within the European criminal law sphere such as the notion of 'two-speed' Europe and the Treaty of Prüm, where some Member States gone 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.[34] In connection with the recent German presidency and European Council of 2007, there were discussions about incorporating the Prüm Treaty into the failed Constitution.[35] There seems however, as far as the present author is aware, to have been no such incorporation of Prüm into the Lisbon Treaty. In any event, it remains unclear why the Prüm Treaty was regarded as – under the current regime – not intruding on existing EU third pillar competences in accordance with Art 43 EU and the general theme of loyalty. Furthermore, as has been vividly pointed out, one could ask whether this sort of 'flexibility' is not in fact likely to create many 'areas' with possibly different and even competing degrees, notions

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[32] 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.

[33] On Eurojust and the European Public Prosecutor, *see e.g*. H. G. Nilsson. *Eurojust – the Beginning or the End of the European Public Prosecutor?*, 2000 Europarättslig Tidskrift 601-621, 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 Peers, *supra* note 10, Ch. 9.

[34] Convention between Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria, singed in Prüm Germany on 27 May 2005. *See generally*, European Committee, 18th Report of 2006/07, *Prüm: An Effective Weapon Against Terrorism?*, http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/90/90.pdf.

[35] Judging from the Council website, http://www.consilium.europa.eu.

and 'speeds' of Freedoms, Securities and Justices.[36] It could also be stressed that the very concept of enhanced cooperation is still not defined.[37] This paper will now turn to some of the key issues in the present area more specifically.

Accordingly, it should perhaps be mentioned initially that the traditional EC Treaty regulation of enhanced cooperation has been a rare occurrence, which never really entered the limelight. After all, as noted, the restrictions regulating the provision of closer cooperation have been so many that almost nothing met the criteria at hand (set out in Art. 11 EC, Art. 40 EU and Art. 43 EU).[38] Yet as for the criminal law, as will be discussed below, the importance of fighting crime and terrorism are extremely high priorities for the EU and the Member States so although the hurdles at stake might not be insurmountable, they will probably not win the prize for elegance when jumping them.[39] And if not 'cleared', such a scenario could certainly increase the temptation to operate outside the treaty framework, although, as indicated, there is here a significant risk that such cooperation could touch on security questions and common foreign policy issues and therefore fall within the acquis of the Treaty and moreover be hard to reconcile with the requirement of a loyal EU spirit. Finally, it appears also less transparent how far the Court's newly won former third pillar jurisdiction extends into the misty landscape of flexibility provisions i.e. if it only covers the establishment of enhanced cooperation as such or if it encompasses its actual exercise too (which it probably does as long as the co-operation in question is Treaty based).[40] It goes without saying, that the jurisdictional question is certainly not made any easier by the various opt-outs (and ins) within justice and home affairs matters more generally.

Nevertheless, it is sometimes pointed out[41] that a way out of the difficult question of the fight against transborder crime in an enlarged union is exactly the emphasis on regional forms of cooperation as such flexibility may provide tailor made responses to region specific criminal activities instead of the 'one size fits all' template provided by programme of harmonization. Furthermore, that the very phenomenon of enhanced cooperation may prove to constitute a more effective solution than the 'lowest common dominator' agreements provided for by the Treaty.[42] Others on the contrary have characterized enhanced cooperation

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[36] Another issue beyond the scope of this analysis is the big question of data protection. *See* Carrero & Geyer, *supra* note 7.

[37] As pointed out by Shaw, *supra* note 4.

[38] *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'Keeffe & P. Twomey, Legal Issues of the Amsterdam Treaty 21 (1999).

[39] *Cf.* my paper *An Exercise in Effectiveness?*, 18 EBLR 1187 (2007).

[40] For a discussion of the Court's jurisdiction in the context of Amsterdam *see e.g.* C. Lyons, *Closer Co-operation and the Court of Justice*, *in* G. de Burca & J. Scott (Eds.), Constitutional Change in the EU, From Uniformity to Flexibility? 95 (2000).

[41] M. den Boer, *Crime and the Constitution: A Brief Chronology of Choices and Circumventions*, 11 MJ 143 (2004).

[42] *Id*. *See also* G. Majone, *One Market, One Law, One Money? Unintended Consequences of EMU, Enlargement and Eurocentricity*, LSE Law, Society and Economy Working Papers 1/2007, available at http://www.lse.ac.uk/collections/law/wps/wps.htm.

in connection with the CT and criminal law as a 'monstrosity' since it undermines the formal decision of the Council as well as the mandatory assessment by the Commission.[43] In any case, one could add a further dimension here as the possibility of enhanced cooperation in criminal law in emergency brake situations also begs the question of what such establishment means – from the perspective of the Member State that pulled the brake. This might sound paradoxical as under the current Treaty structure it is generally accepted that it is the Member States pursuing enhanced cooperation that are under a loyalty obligation and not the other way round. Indeed, traditionally, the provisions of closer cooperation are frequently held to lie in the same trajectory as EU subsidiarity as it accepts that there is room for action outside the EC model.[44] But in the setting of EU criminal law, here arguably the picture is less clear. In fact, such cooperation appears to be highly ambiguous if one takes into consideration the general principle of loyalty,[45] which will become EU universally codified and consequently explicitly applicable in the former third pillar field too and confronts it with principles of criminal law policy. As stated, the requirement of 'last resort' solution as set out in Art. 20(2) TEU does not need to be complied with in criminal law if a Member States has pulled the brake in question. At hand here is the fact that it may not always be in the EU's interest to move forward and it is in this regard the possibly disharmony with subsidiarity comes to the fore as well as the criminal law principle that any criminalization shall constitute the last resort as means of control.[46] It should perhaps be noted that in the absence of a CT, the Court has already begun to erase the division of powers between the Union pillars. This is in particular the judgment of C-176/03 Commission *v.* Council,[47] where the Court concluded that there is a first pillar competence in criminal law if this is needed in order to safeguard the environment effectively.[48] Accordingly, in the view of the Court, the area of Justice and Home Affairs and criminal law more generally is already a legal area fit for the supranational legislator.[49]

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[43] J. Monar, *Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the Area of Freedom, Security and Justice?*, 1 EUConst 226 (2005).

[44] S. Weatherill, *Finding Space for Closer Cooperation in the Field of Culture*, *in* G. de Burca & J. Scott (Eds.), Constitutional Change in the EU, From Uniformity to Flexibility? 237 (2000).

[45] *Case C-105/03, Criminal proceedings against Maria Pupino*.

[46] Compare E. Herlin-Karnell, *Subsidiarity in the Area of EU Justice and Home Affairs – A Lost Cause?*, forthcoming paper ELJ.

[47] Judgment of 13 September 2005, *Case C-176/03, Commission v. Council*, [2005] ECR I-7879 and the first follow up, Judgment of 23 October 2007, *Case C-440/05, Commission v Council*, not yet published.

[48] For english comments on this case *see*, E. Herlin-Karnell, *Commission v Council: Some Reflections on Criminal Law in the First Pillar*, 13 EPL 69 (2007), E. Herlin-Karnell, *Recent Developments in the Area of European Criminal Law*, 14 MJ 15 (2007), Peers, *supra* note 11, Ch. 8, V. Mitsilegas, *Constitutional Principles of the European Community and European Criminal Law*, 8 EJLR 303 (2006), S. White, *Harmonisation of Criminal Law under the First Pillar*, 31 EL Rev 81 (2006), C. Tobler, *Annotation C-176/03*, 43 CML Rev 835 (2006) and J. Arps, *Case C-176/03, Commission v. Council: Pillars Askew: Criminal Law EC-Style*, 12 Columbia Journal of European Law, 625 (2006).

[49] *See also* as regards first pillar law reasoning in the third pillar, e.g. *Case C-105/03, Criminal proceedings against Maria Pupino*.

The next section intends to highlight the increased focus on security aspects within the EU and more specifically to discuss the changes proposed by the Lisbon Treaty and accordingly what the possible reforms mean (or could mean) from the perspective of European criminal law.

D. An Ever Securer Union

As already implied, the notion of 'security' appears to constitute an important parameter in the Lisbon Treaty. For example, the Lisbon Treaty stipulates that a standing committee shall be set up in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union (71 TFEU). This is not only the case as regards the EU common foreign policy area, but is especially true in the EU criminal law sphere more broadly. After all, it should be recalled that, the concept of organized crime has for long been painted as, in slightly exaggerated terms, the prime EU criminal law threat, hand in hand with the increasingly growing need to fight terrorism.[50] In short, the suppression against organized crime as one of the specific third pillar objectives entered the Union arena in connection with the Maastricht Treaty, and was subsequently taken a step further by the Amsterdam Treaty (Art. 29 EU-31 EU) and the Tampere conclusions.[51] Thus, the infamously ill defined contours of the notion of 'organized crime' and its relationship to other forms of (often) organized criminality such as money laundering has for long been the subject of much criticism from the perspective of the legal certainty and legality.[52] Yet the Lisbon Treaty clarifies to some extent the scope of these provisions by, like the CT, explicitly listing a set of EU offences (Art. 83), namely: 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 organised crime. Thus, it should be noted that some of these offences such as 'corruption' and 'computer crime' remain without any definition at the EU level.

Furthermore, Art. 83 stipulates that "On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph."[53] What then are the criteria in question? Indeed, one could ask whether it is the notion of 'cross border' character alone which is the crucial or if it simply is an implicit recognition of the umbrella

[50] For a recent account *see e.g.* M. Kaiafa-Gbandi, *Towards a New Approach of Organized Crime in the EU – New Challenges for Human Rights*, 3 Zeitschrift für Internationale Strafrechtsdogmatik 537 (2007) available at http://www.zis-online.com/dat/artikel/2007_14_192.pdf.

[51] European Council Tampere 1999.

[52] *See generally, e.g.* V. Mitsilegas, Money Laundering Counter-Measures in the EU: A New Paradigm of Security Governance versus Fundamental Legal Principles (2003).

[53] Moreover, Art. 83 provides for the possibility to approximate in an area which has already been subject to harmonization measures if that would prove essential in order to ensure the effective implementation of a Union policy. Discussed in E. Herlin-Karnell, *The Lisbon Treaty and the Area of Criminal Law and Justice*, Swedish Institute of European Policy Analysis (2008) available at www.sieps.se/epa/2008/EPA_nr3_2008.pdf.

concept of 'organized crime' more broadly, that is the point here. It could easily be concluded, that the multifaceted notion of 'organized' crime could still be interpreted rather broadly despite these changes. Clearly, this is a rather wide-ranging mandate aimed at reflecting a Union where the phenomenon of transnational crime constitutes a global and ever changing dilemma. Yet a few issues arise. For example, as regards the EU's harmonization agenda in the area of money laundering (listed above in Art. 69B), in this area one could question the adequacy for further legislation even though it is true that the EU to a large extent follows the approach of the Financial Actions Task Force.[54] As is well known the latest 2005 Directive[55] is based on the current Art. 47(2) EC (concerning establishment) and Art. 95 EC – the internal market queen that grants the EC power to harmonize in the pursuance of market making. This Directive, for the first time, combines the suppression of dirty money with the EU's combat against the financing of terrorism. Interestingly though there are also various third pillar framework decisions in the present area.[56] Yet, as noted, the Lisbon treaty makes clear that the hey-days of Art. 47 EU are gone as everything will be dealt with under the wings of one united 'pillar'. Still the EU's anti money laundering agenda highlights the awkward question of whether the combination of the fight against dirty money and the suppression of terrorism constitute an effective duo at all, i.e. as part of the same legal instrument. At focus here is the fact that the phenomenon of terrorism has a clear psychological dimension to it which means that traditional criminological templates are not adequate or at least not sufficient as simply removing financial means or specific finance channels do not necessarily remove the original danger, namely, the commission of further acts of terror.[57] Certainly, the point here is that all the former problems within the broadly defined sphere of what belongs to the label of 'European criminal law' will, as indicated, not automatically be solved, the Lisbon Treaty notwithstanding. And yet the EU anti money laundering programme is not the whole story in the EU's combat against terrorism. Quite the reverse, it is to the freezing of funds of individuals that we will now turn and in this regard, the changes proposed by the Lisbon Treaty are rather important.

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[54] V. Mitsilegas & B. Gilmore, *The EU Legislative Framework Against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards*, 56 ICLQ 119 (2007).

[55] Directive 2005/60/EC, OJ 2005 L309/15.

[56] *See e.g.* Council Framework Decision 2002/475/JHA, 13 June 2002. For an overview of the third pillar web *see* Peers, *supra* note 10, Ch. 9. And on money laundering in general and latest developments *see* Mitsilegas & Gilmore, *supra* note 54. *See also* N. Kaye, *Freezing and Confiscation of Criminal Proceeds*, 77 Revue Internationale de Droit Penal 326 (2006).

[57] *See e.g.* M. Kliching, *Financial Counterterrorism Initiatives in Europe*, *in* C. Fijnaut *et al.*, (Eds.) Legal Instruments in the Fight Against International Terrorism, 203 (2004). *See also* more generally, R. Alexander, Insider Dealing and Money Laundering in the EU: Law and Regulation (2007).

I. The Freezing of Funds

In the aftermath of 9/11, the freezing of funds intended to finance terrorist organizations became a global tactic in the war on terrorism. In this field, the EU courts have, in short, had to handle questions of whether their jurisdiction extended as far as to review UN instruments or if such law constituted higher-ranking authority.[58] Subsequently, they have been forced to deal with the legality of EU instruments in the area in issue. This has posed numerous issues not only about the EU's competence in this area but also questions consisting of access to court, human rights protection and compliance with the rule of law. As stated, the Lisbon Treaty will move the former second pillar territory of economic sanctions to the section (V TFEU) of justice and home affairs, which means that it will fall explicitly under the Court's mandate. The following short comment will focus on the criminal law perspective.

When discussing the question of sanctions against individuals one could firstly cautiously ask whether freezing of funds are, after all, not criminal law, as their consequences are almost identical to that of a criminal law sanction.[59] Nevertheless, as the recent CFI judgment of Sison[60] confirms (once again) – in the view of the EU institutions, following the UN approach – they are not.[61] The reason for nonetheless wanting to view these sanctions as 'criminal law' is of course the fact that such a legal classification would guarantee the full protection of a criminal law procedure such as most importantly the presumption of innocence requirement (Art 6 ECHR and the case law stating autonomous interpretation of a sanction).[62] In order to remedy the lack of full criminal law protection, the Court has nevertheless started to import competition law reasoning into these cases which provides for some legal protection albeit not as far reaching as in a criminal law proceeding.[63] In any event, as stated, the Lisbon Treaty introduces some interesting changes as regards the regulation of the freezing of funds. Yet these sanctions will still not be considered as 'criminal' although they are included in the prevention of crime and security section. However, this move

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58 *See e.g.* M. Bulterman, F*undamental Rights and the UN Financial Sanction Regime: The Kadi and Yusuf Judgments*, 19 Leiden Journal of International Law 753 (2006).

59 *See e.g.* T. Anderson *et al*., *EU Blacklisting: The renaissance of Imperial Power, But on a Global Scale*, 14 EBLR 111 (2003).

60 Judgment of 11 July 2007, *Case T-47/03, Sison*, not yet published.

61 *See* for an earlier contribution raising this comment in connection with the Yusuf and Kadi cases *see* Anderson *et al.*, *supra* note 59; Judgments of 21 September 2005, *Case T-306/01, Yusuf and Al Barakaat International Foundation v. Council and Commission,* and *Case T-315/01, Kadi* v. *Council and Commission*. Now pending before the ECJ, Case 402/05 *Kadi* and Case 415/05 *Yusuf.*

62 For an overview of ECHR case law and so-called administrative sanctions in EC law *see e.g.* G. Corstens & J. Pradel, European Criminal Law (2002).

63 Indeed, as the applicants argued in Sison, for example, it would not defer the effectiveness of the sanctions to view them as criminal law as there are freezing procedures at hand within the preliminary criminal law investigation procedure as well albeit with time limits.

from the former foreign policy domain means obviously, as noted, that the Court will now have legitimate jurisdiction to review these cases.[64] The next section aims to investigate it a bit further.

II. The Provision of Art. 67 TFEU

The regulation of economic sanctions against individuals, as well as the policy on crime prevention in general, is dealt with in Art. 67 TFEU. This article mirrors to a large extent the CT in stipulating that, in short, a competence to adopt "measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws."[65] Although the new framework reflects, as noted, the CT and the current provision of Art. 29 EU, it also highlights a few issues. For example, it has been pointed out that the Lisbon Treaty does not provide for any power for the EU to adopt measures restricting the economic activities of 'domestic' groups or individuals who are deemed terrorists.[66] This could perhaps prove to create interpretation problems between the concept of a 'domestic group' and a 'European group' in the era of internet related criminality.

Moreover, the provision of Art. 75 TFEU states that where necessary to achieve the objectives set out in Art. 67, the European Parliament and the Council acting by means of regulations shall define a framework, concerning the free movement of capital, for the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities. Although this article also makes clear that the acts referred to shall include necessary provisions on legal safeguards one wonders what will be considered 'as necessary' in the fight against terrorism.

One could furthermore question the ratio for the above stated requirement of regulations here from the perspective of subsidiarity – a principle that is frequently highlighted in the Lisbon Treaty. As is well known, the Amsterdam protocol on the application of subsidiarity and proportionality states that Directives are preferable to Regulations. There is no such reference to Regulations in the protocol on subsidiarity and proportionality annexed to the Lisbon Treaty although use of Directives are commonly viewed as being an expression of subsidiarity more generally. Moreover, the Lisbon Treaty introduces an increased participation of National Parliaments in the legislative process.[67]

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[64] Compare, Judgment of 27 February 2007, *Case C-354/04, Gestoras Pro Amenstia et al* and *Case C-355/04, Segi*, not yet published.

[65] As a parenthesis, it could be noted that this means that the UK, Irish and Danish opt out will apply to this clause as the Reform Treaty moves it from the previous section concerning free movement of capital. *See* comments provided by S. Peers at http://www.statewatch.org/news/2007/aug/eu-reform-treaty-texts-analyses.htm.

[66] *Id.*

[67] Protocol on the role of national Parliaments in the European Union.

Another crucial concern is how much of the criminal law that could legitimately be brought in via Art. 67 as compared to legal basis of Arts. 82-83. It appears rather obvious that the above stated reference, in Art. 67, to, "measures to prevent and combat crime and, if necessary, through the approximation of criminal laws" constitutes a rather widely defined skeleton. Furthermore, it would not be desirable, from a defence rights point of view, if all the formal third pillar combat against terrorism through criminal co-operation were transposed to the economic sanctions area through the enactment of regulations. Again, the issue arises in what cases the fight against of terrorism should be considered as falling within the Art. 67 grid as opposed to the Art. 83 and criminal law framework or if these articles are intended to complement each other. If the latter is the case then that could create interpretation questions as the ne bis in idem requirement at the EU level only applies to 'criminal law'.[68] However, the principle of proportionality would still apply.

Further, interestingly, the word 'necessary' (also in Art. 83 discussed above) appears to run like a red thread throughout the Treaty and hence prompts lawyers to wonder what 'necessary' really means. In fact, if the requirement of 'necessary' could be seen as a codification of the famous above stated C-176/03 Commission v Council approach, this could prove to have an extremely wide constitutional implication. It should be recalled that this ruling, as previously implied, offers a remarkable example of a judgment which uses a vocabulary which in practice makes it very hard to understand how anything could fall outside the realm of EC law competences.[69] This is especially true if viewed, more generally, in the light of the often celebrated (slippery slope) effectiveness principle, which makes it hard to patrol the limits to which Art. 5 EC (1) EC refers.[70]

III. (In)Security

In the EU context it is common to speak about 'internal' security as opposed to 'external' security despite the fact that it is rather clear that it remains tricky to draw an exact division line here. Thus, for the present purposes the crucial concern is, as previously implied, however whether the generous reference to 'security' will be the new 'catch all phrase' of the same calibre as 'organized crime' and – much more dramatically – the internal market provision of Art. 95 EC? It would admittedly be rather far reaching to try to link security with the provision of Art. 95 EC but in the light of the academic discussion of the possibility of using non market values[71] in connection with this article, the issue could at least be stressed. Yet if a competence to harmonize can really be shown then broader

[68] COM (2005) 696 final. Compare the definition: "a decision in criminal matters which has either been taken by a judicial authority or which has been subject to an appeal to such an authority."

[69] Judgement of 13 September 2005, *Case C-176/03, Commission v. Council*, [2005] ECR I-7879 and Judgment of 23 October 2007, *Case C-440/05, Ship-source pollution case*, not yet published.

[70] On Art. 5 EC *see e.g.* S. Weatherill, *Competence Creep and Competence Control*, 23 Yearbook of European Law 1 (2004).

[71] B. De Witte, *Non Market Values in Internal Market Legislation*, *in* N. NicShuibne (Ed.) Regulating the Internal Market, Ch. 3 (2006).

matters such as procedural protection must inform the content of the harmonized regime. Furthermore, Art. 83 TFEU provides for, as noted, approximation of criminal law when 'necessary' and when a policy has already been dealt with through harmonization so this in itself – clearly – constitutes a rather imprecise constitutional threshold, which probably severely limits the need for relying on Art. 95 (new Art. 94) at all. However it is important to point out that Art. 83 TFEU does arguably not provide for a general power in criminal law but focuses on the areas exemplified in Para. 1 of the provision in question.[72] Moreover, it should perhaps be pointed out that the former third pillar area will constitute a shared competence in accordance with Art. 4(j) TFEU. In this regards it should also be stressed that the Member States agreed to codify previous case law on Art. 308 EC, that this provision could not be used to widen the EU's competence (Opinion 2/94)[73] and cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy. Looking back at EU history, on the other hand this is nothing that has necessarily hindered the EU's institutions (and not always by the EU Courts either).[74] Consequently, in short, it is very likely that the very issue of what should be considered to lie within the objectives of the Union when viewed in the light of the increased emphasize on 'security' thinking, will remain a lively issue, any such codification notwithstanding. This is in particular the case as it, as noted above, remains difficult to distinguish between internal and external security. And a blind focus on security risks not only rendering the Unions grand proclamation of humanist values empty promises but also undermining the legitimacy of any action taken.

E. Concluding Remarks

Whether or not the Lisbon Treaty will enter into force, one thing seems clear: the question of the development of European criminal law is far from settled and its contours remain to be formed. Viewed against this perspective, the Lisbon Treaty appears at least far better suited to bring the EU Justice and Home Affairs sphere into the centre of the arena than the Court of Justice. This is particular true if one takes into consideration not only the somewhat symbolic inclusion of the Charter of Fundamental Rights and the possible accession to the European Convention of Human Rights as stipulated in the Lisbon Treaty,[75] but also the proclamation, as noted, of the Union's values. So there is at least willingness among the Member States and the EU to make the area of freedom, security and justice come true. Yet, as discussed in this paper, the increased focus on security aspects in the Lisbon Treaty poses the question of whose security the EU is trying to safeguard

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72 I try to discuss this elsewhere, Herlin-Karnell, *supra* note 53.

73 Opinion 2/94, *Accession to the ECHR*, [1996] ECR 1-1759.

74 *See e.g.* J Weiler, *The Transformation of Europe*, 100 YLJ 2400 (1990-91).

75 Protocol relating to Art. 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 Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

at the possible expense of another's freedom and justice. In any case, it is to be hoped that in the future, the effectiveness of EU criminal law instruments will be judged on empirical and sound legal evidence and not on the number of EU measures regulating the area in issue.

Moreover, this paper has tried to highlight the issue of whether the Lisbon Treaty supplies a better criminal law framework than the one offered by the CT. Although, as stated, mutual recognition will remain the main rule in EU criminal law, accompanied by an explicit mandate to approximate when necessary in accordance with Art. 82 and 83, the Lisbon Treaty provides furthermore for an extensive possibility of enhanced cooperation in criminal law as well as the establishment of a European Public Prosecutor if a Member State would pull the so-called emergency brake. This illuminates the matter, as explained, consisting of how useful such an emergency brake really is when viewed in the context of fundamental principles of criminal law and moreover issues of subsidiarity and fragmentation in EU law. And yet, there should be reason to be optimistic. After all, as already said, the declaration of the Union's values constitutes an important novelty and as such intended to help to breed trust and enhance the legitimacy of the enterprise of EU law and European criminal law more broadly.[76] Now that – assuming these values are substantially and legally graspable and if taking the conundrums outlined in the present paper seriously – is something new under the sun.

[76] *Compare* note 53.