The Lisbon Treaty: A Critical Analysis of its Impact on EU Criminal Law

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ABSTRACT

The Lisbon Treaty has opened up a new chapter in the history of European criminal law.
The purpose of this analysis is to guide the reader through the main changes in this area, as introduced by the Lisbon Treaty. Therefore, the present analysis is a follow-up to previous work by the author before entry into force of the Lisbon Treaty – thereby seeking to provide an account of the status of EU criminal law post-Lisbon Treaty. The paper has been structured into seven sections. Section one deals with a short introduction to the evolution of criminal law at the EU level. Section two outlines the framework of the criminal law in the Lisbon Treaty. Section three deals more specifically with the emergency brake and enhanced cooperation procedure as well as the possible establishment of a European Public Prosecutor. Thereafter, Section four looks more broadly at the Court of Justice's jurisdiction in the area of criminal law and the Area of Freedom, Security and Justice (AFSJ). Section five deals with the legally binding status of the Charter of Fundamental Rights and the possible accession to the ECHR. Section six deals with the principles of subsidiarity and proportionality with regard to criminal law. Finally, the analysis concludes by offering some thoughts about the future of European criminal law.

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I. Short Recap: European Criminal Law pre- and post-Lisbon

Generally speaking, criminal law as a European issue entered the EU scene in connection with the entry into force of the Maastricht Treaty in 1993. Subsequently, the Amsterdam Treaty in 1999 clarified the Union's objectives in the Justice and Home Affairs area and created the concept of 'freedom, security and justice.'[1] However, the third pillar was accused of having a lack of transparency and, as such, has been criticised for creating a democratic deficit, with minimum involvement of the European Parliament (EP) in the legislative process. Moreover, the Court's jurisdiction within this pillar has been very limited and based on a voluntary declaration by the Member States to confer such jurisdiction (Article 35 TEU).[2] Therefore, from an EU law perspective, the third pillar framework was never considered to be an ideal counterpart to the first pillar (EC) sphere.[3] However, the Member States were concerned about retaining their competences in such an extremely sensitive area as that of justice and home affairs, which is the reason why this field – or its EU subculture – has persisted.[4] In any case, shortly after the entry into force of the Treaty of Amsterdam, the consequential Tampere Council of 1999 and the subsequent Hague programme[5] took the notion of European criminal law one step further by introducing the adoption of the internal market formula of 'mutual recognition' into the third pillar.[6] This concept has remained the main engine of development, although there has also been extensive legislation in the area, particularly in the fields of terrorism, organised crime, and illicit drug trafficking, in accordance with the relevant provisions. Moreover, a new JHA programme was recently crafted – the Stockholm programme – to replace the previous Hague programme.[7] The Stockholm programme sets out a very ambitious agenda. It is the latest development in the creation of an AFSJ sphere. It takes the Tampere agenda and the Hague programme one step further by stipulating a number of goals to be achieved in the AFSJ field. The Commission's communication COM (2009) 262/4 and its title, '*An area of freedom, security and justice serving the citizen,*' regarding the Stockholm programme is worthy of mention here. This communication points at the current success with EU involvement in the present area. Nonetheless, it is also pointed out that the desired progress has been comparatively slow in the criminal law area because of the limited jurisdiction of the Court of Justice – and since the Commission has been unable to bring about infringement proceedings – which has led to considerable delays in the transposition of EU legislation at the national level. Therefore, the aim of this communication is to make EU policies more effective in the AFSJ field.

In any case, the Lisbon Treaty provides for a specific basis for such a crime-fighting mission by listing an entire range of crime fighting activities as set out in Articles 82 and 83 TFEU, respectively.

II. Main Changes for the Criminal Law as Introduced by the Lisbon Treaty

This section briefly sketches out the picture of EU criminal law as depicted in Lisbon. Accordingly, the former justice and home affairs area will now form part of Title V 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);

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• Police cooperation (Chapter 5).

It is fitting to begin the present analysis by scrutinising Chapter 4 and the legal framework of the criminal law after Lisbon. The crucial provisions for the criminal law are Articles 82 TFEU (procedural criminal law) and 83 TFEU (substantive criminal law). These provisions need, however, to be read in the light of Chapter 1 of Title V of TFEU, which sets out the general goals to be achieved in this area. More specifically, Article 67 TFEU stipulates that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. Moreover, it reads that the Union shall endeavour to ensure a high level of security through 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.

1. Procedural criminal law – the continuing road to mutual recognition

Article 82 TFEU stipulates that judicial cooperation in criminal matters shall be based on the principle of mutual recognition and should include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 of the same article. This paragraph, in turn, states that the European Parliament and the Council may establish minimum rules to the extent necessary to facilitate mutual recognition of judgments and judicial decisions as well as police and judicial cooperation in criminal matters having a cross-border dimension. Such rules shall take into account the differences between the legal traditions and systems of the Member States. The provision of Article 82 TFEU then sets out a list of areas within the EU's competence for legislation, such as the mutual admissibility of evidence between the Member States, the rights of individuals in criminal proceedings, and provisions regarding the rights of victims. Furthermore, the article contains a so-called 'general clause' stating that any other specific aspect of criminal procedure, which the Council has identified by decision (unanimity would apply here) in advance, would qualify for future approximation. 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.

2. Substantive criminal law

Article 83(1) TFEU 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. Then, this provision sets out a list of crimes in which the EU shall have legislative competence such as terrorism, organised crime, and money laundering. It, accordingly, also states that the Council may identify other possible areas of crime that meet the cross-border and seriousness criteria. Moreover, and interestingly, paragraph 2 of this article reads that the possibility exists for approximation if this measure proves essential towards ensuring the effective implementation of a Union policy in an area that has already been subject to harmonisation measures.

Consequently, the question that needs to be addressed in the present context is what Articles 82(1)–(2) and 83(1)–(2) mean from the perspective of harmonisation in the more general sense. As noted, the wording in Article 83(2) TFEU is slightly different from that of Article 82 (2) TFEU. More specifically, Article 83(2) TFEU does not explicitly state that there has to be a 'cross-border dimension' or a crime of a 'serious nature' in order to qualify for legislation if, as noted, the area in question has already been subject to harmonisation

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and such legislation proves essential in ensuring the effective implementation of a Union policy. Furthermore, in contrast to Article 82(2), there is no unanimity requirement for Article 83(2) TFEU. Instead, decisions under this article follow the same procedure as their respective preceding harmonisation scheme, which is most likely to be the 'standard' procedure, namely qualified majority voting (QMV) in the Council. Why this difference? It certainly seems odd, given that mutual recognition is held to be the main rule as stipulated in Articles 67 TFEU and 82 TFEU and considering the apparent need for underlying rules ensuring adequate protection of the individual in an area based on mutual trust.

Moreover, the different parts of the Lisbon Treaty that deal with crimes give reason to uncertainty. An indication that the Union's criminal law competence may extend beyond the offences enumerated in Article 83 TFEU is the new Article 325 TFEU. Indeed, it should be recalled that the old Article 280 TEC stipulated that, although the EC's mission was to fight fraud, such an agenda could not concern the Member States' national criminal law or the national administration of justice. As Mitsilegas points out though, it is not clear whether the Union would have competence under Article 325 TFEU to adopt criminal laws on fraud or whether it would need to have recourse to Article 83 (2) TFEU.[8] The same arguments could probably be applied to Article 114 TFEU (ex Article 95 TEC) concerning the establishment and functioning of the European internal market (whether it would be possible to rely on this provision or whether Article 83 TFEU is 'exclusive' *lex specialis*).

Clearly, the framework as provided by the Lisbon Treaty means big constitutional changes as regards national sovereignty in these issues. One of the ways of persuading the Member States to surrender the criminal law was the emergency brake provision.

III. Emergency Brakes…

One of the most important changes introduced by the Lisbon treaty is the so-called 'emergency brake,' which resembles a mini opt-out. Indeed, the provisions of Articles 82 and 83 TFEU also provide the possibility of applying an emergency brake if the proposed legislation in question would affect fundamental aspects of a Member State's criminal justice system. More concretely, in such an emergency brake scenario, a Member State may request that the measure be referred to the European Council. In this case, the ordinary legislative procedure is 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.' There is, however, no such emergency suspension as regards the legal notion of mutual recognition, which will remain the main theme in matters of EU criminal law cooperation.

Clearly, the notion of an emergency brake appears attractive to Member States with a strong relationship between the criminal law and the state and hence remedies Member State anxiety about the loss of national sovereignty in criminal law matters. The crux is that the mere inclusion of an emergency brake does not automatically constitute a guarantee for successful European criminal law. As argued elsewhere by the author, the problem is that the very notion of the transformation of criminal law to the supranational stage prompts the question of whether the Lisbon Treaty was drafted carefully enough in the first place to live up to the freedom, security, and justice paradigm. This is particularly important as the issue is not only a question of 'taming' protectionist states but also of the adequate protection of the individual at the EU level.[9]

1. ….and Accelerators

Regardless of whether a Member State pulls the emergency brake, if it would affect fundamental principles of its criminal law system, the Lisbon Treaty nonetheless provides for the possibility for the remaining Member States to engage in 'enhanced cooperation.' More specifically, Articles 82 and 83 TFEU of Lisbon

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state, respectively: '*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 authorization to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329 of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply*.'[10] Briefly, this means that there is neither an obligation, as set out in Article 329 TFEU of Lisbon, to address a request to the Commission specifying the scope and objectives of the enhanced cooperation in question. Nor is there an obligation (as Article 20(2) TFEU reads) that the Council adopt the decision at issue as a last resort. This poses two questions. Firstly, it is possible to argue that the mere fact that the Member States do not need to specify the last resort requirement, as stated in Article 20(2) TFEU, can be regarded as being in disharmony with the sensitive character of criminal law as the *ultimo ratio.* Secondly, there appears to be a risk that such cooperation could result in varying degrees and notions of freedom, security and justice.[11] A further aspect of this approach is the limited participation of the European Parliament in the establishment of enhanced cooperation in criminal law.[12]

In any case, a further dimension can be added here, as the possibility of enhanced cooperation in criminal law in emergency brake situations also begs the question of what it means in practice for the Member State that pulled the brake. This may sound paradoxical as, under the previous Treaty structure, it was generally accepted that the Member States pursuing enhanced cooperation were under a loyalty obligation and not the other way round (the previous fundamental principle of safeguarding the *acquis communautaire*). The thrust of the argument presented here is therefore that there are conflicting values at stake and that these values may not necessarily point in the 'moving forward' direction.

2. The possibilities of a European Public Prosecutor

The Lisbon Treaty broadens the possibilities of enhanced cooperation by also extending it to police cooperation and to the establishment of the European Public Prosecutor (Article 86 TFEU), an innovation in comparison to the Constitutional Treaty (CT). This prosecutor will 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. It is far beyond the scope of this analysis to discuss the pros and cons of a European Public Prosecutor in general.[13] It should be pointed out that there has been a debate as to whether such Prosecutor should have a wider criminal law mandate than that of the financial sphere alone.[14] Indeed, Article 86(4) provides for the possibility of a future European Council to adopt a decision amending the competences of such a prosecutor to include serious crime with a cross-border dimension in the broader sense.

IV. Reformation of the Court of Justice's Jurisdiction

One of the most significant changes introduced by the Lisbon Treaty is the extension of the Court's jurisdiction to also cover the former third pillar area. This is one of the most important constitutional restructurings when compared to the period before entry into force of the Lisbon Treaty. It should perhaps be recalled that this jurisdiction was based on a voluntary declaration by Member States as to whether to accept such jurisdiction in accordance with Article 35 TEU.[15] The Lisbon Treaty changes this, as it significantly extends the Court's jurisdiction within the AFSJ field.[16] The Lisbon Treaty Protocol on Transitional Provisions provides a five-year transition – or alteration – period before the existing third-pillar instruments will be treated in the same way as Community instruments. Article 10 of this Protocol stipulates that:

> 1. As a transitional measure, and with respect to 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 institutions shall be the following the date of entry into force of that Treaty: the powers of the Commission under Article 258 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, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.
>
> 2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.
>
> 3. In any case, 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.

Therefore, despite the entry into force of the Lisbon Treaty and, thereby, the merging of the pillars, there will remain 'echoes' of the third pillar in terms of the transitional protocol and its five-year transition period. As pointed out by Professor Peers, this means that the Commission will not have the power to bring infringement procedures against Member States as regards alleged breaches of pre-existing measures during this period.[17] It also means that the complex inter-pillar structure that has characterised European criminal law will remain for some time. Moreover, as a result of the transitional rules, there will be mixed jurisdiction over different measures concerning the same subject matter, and the most feasible regime (and favourable from the perspective of the individual) should then be preferred. The crucial question seems to concern the definition of when an act is 'amended.' It has been suggested that, in the absence of any *de minimis* rule or any indication that acts are in any way severable as regards the Court's jurisdiction, any amendment – no matter how minor – would suffice. But there will obviously be less clear cases.[18] In the light of the Court's history in promoting European integration, the Court would conceivably favour the most 'Communitised' reading of when an act is 'amended.'

Most importantly, the Lisbon Treaty introduces the possibility of expedited procedures for persons in custody. More specifically, the Lisbon Treaty stipulates in Article 267 TFEU 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 a minimum of delay. This is obviously an extremely important change and reflects the debate on speedier justice in Europe.

However, despite the reformation of the Court of Justice's jurisdiction as provided by the Lisbon Treaty, the Court still will 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. This is likely to create interpretation problems as regards the notion of 'internal Member State security' as opposed to EU security.[19]

V. The Convention on Human Rights and the Legally Binding Status of the Charter of Fundamental Rights – What is a Principle/Right?

As a result of the entry into force of the Lisbon Treaty, the EU will now have one legal personality and will therefore be capable of acceding to the European Convention of Human Rights (ECHR). Thus, the new Article

6 (2) TEU will add that such accession shall not affect the Union's competences as defined in the Treaties. It is clear that this accession has great symbolic value, particularly in the area of criminal law. Such an accession would also require unanimity in the Council and ratification by the Member States. Similarly, the Charter of Fundamental Rights has finally become legally binding, even if 'dismissed' to one of the numerous protocols annexed to the Treaty. It should perhaps be mentioned that the Court has long shown a stubborn unwillingness to refer to the Charter as a valid source of interpretation, but has more recently broken this ice.[20] Although the Charter has now become legally binding, it is stated in Article 6 TEU that the provisions of the Charter shall not extend the EU's competences. Also, Article 51 of the Charter makes it clear that it is directed at the Union's institutions and to the Member States when they are implementing Union law. Given this, it could perhaps be questioned what the point of the Charter is. This is particularly the case, since the Charter, also in Article 52, distinguishes between principles and rights. The problem is how to identify fully justiciable rights as opposed to partially justiciable principles.[21] Interestingly, the principle of legality is referred to as a principle in the Charter while Article 7 ECtHR refers to the ban on retroactive criminal law (except the international law exception drafted in the aftermath of the Second World War) as an absolute right.

However, even if the Charter is applied when it is implementing Union law, it still has an important function as a source of interpretation. As for the criminal law, Articles 47-49 of the Charter have a huge influence as they guide the Union's action in this area and set the scene. It is therefore likely that the binding status of the Charter will have a significant symbolic status and therefore have a real impact on the criminal law. Although one may well speculate whether the Court will use its traditional case law on general principles and view the Charter as part of this, such an interpretation would run counter to the express will of the Member States. Or, as pointed out by Dougan[22], it is possible that the Court would continue its old case law based on general principles and then have a separate agenda for the EU's institutions and the Member States when implementing EU law. It could therefore be argued that the Charter of Fundamental Rights, consequently, not only underlines and clarifies the legal status and freedoms of the Union's citizens facing the institutions of the Union, but also gives the Union and, in particular, the policies regarding the "area of freedom, security and justice" a new explicit normative foundation.[23]

Furthermore, 'opt-outs' by the UK and Poland are well known from the Charter. These 'opt-outs' appear, however, to contain much rhetorical home propaganda, as it seems conceivable that the general principles of fundamental rights will apply anyway (as traditionally interpreted by the Court).[24] Moreover, it seems unclear how these opt-outs will work in the possible scenarios of enhanced cooperation in criminal law.[25] Again, only the future will tell.

VI. Emphasis on Subsidiarity and Proportionality

The principles of subsidiarity and proportionality as regards the AFSJ have been made more 'visible' in the Lisbon Treaty than ever before. Not only does the Protocol on Subsidiarity and Proportionality reinforce this (although, admittedly, it had already been attached to the Amsterdam Treaty) as well as the monitoring process by the national parliaments but, as regards the AFSJ, there is a specific provision in Article 69 TFEU stressing the importance of respect for subsidiarity in this area. More specifically, this principle states that national parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

In short, the Lisbon Treaty increases the national parliaments' participation in the monitoring process for subsidiarity by imposing an obligation to consult widely before proposing legislative acts (Article 2 of the Protocol on subsidiarity and proportionality). In addition, the Commission must, moreover, send all legislative

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proposals to the national parliaments at the same time as to the Union institutions. The time limit for doing so has been increased from six to eight weeks (Article 4). Further, the Court will have, as is the current state of affairs, jurisdiction to consider infringements of subsidiarity under Article 263 TFEU brought about by the Member States or notified by them in accordance with their legal order on behalf of their national parliaments (Article 8). Without going into a discussion of how in-depth such a review by the Court ought to/could be in terms of substantive reasoning [26], as for the area of justice and home affairs, Article 69 TFEU, as noted, states that national parliaments shall ensure that proposals and legislative initiatives in this area comply with the principles of subsidiarity and proportionality. Obviously, paying attention to subsidiarity and proportionality is especially important in criminal law in order to avoid excessive criminalisation.

VII. Conclusion

This overview has attempted to point at the most important constitutional changes as introduced by the Lisbon Treaty in the criminal law area.

In sum, the Lisbon Treaty is a highly welcomed development because it brings the former third pillar into the jurisdiction of the Court, and it ensures that legal safeguards can be adopted. It also includes the Charter of Fundamental Rights into the *acquis,* and it makes the accession to the ECHR possible. Yet there are still aspects of the Lisbon Treaty that are far from ideal. For example, it has been far from settled as to what extent the Union will have a more far-reaching competence (than Article 83 TFEU grants) to harmonise criminal law if it would be essential for the effective implementation of a Union policy. Another concern is that of mutual recognition: does mutual recognition sufficiently respect fundamental rights in EU criminal law at present? The Court has already, in the context of the European Arrest Warrant, answered in the affirmative by stipulating that the abolishment of dual criminality and the move from extradition to surrendering did not challenge the legality principle in criminal law.[27]

Another concern is the strong focus on security within the AFSJ (as also witnessed in the Stockholm programme). There is a risk that such a security focus will relegate the freedom and justice concepts to empty promises. In spite of this, the Lisbon Treaty offers a far more attractive framework for EU criminal law compared to the previous messy pillar landscape. The five-year transitional period will still present a memory of the past and promises an interesting case law in the near future regarding the exact definition of when an act is amended. One thing seems clear: the supranationalisation and the use of traditional instruments, such as Directives, will have a significant impact on the criminal law. It is to be hoped that the new focus on subsidiarity and proportionality and the national parliament's participation in this monitoring exercise will have a strong impact on the sensitive area of criminal law and justice.

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1. However, it also further 'intergovernmentalized' the criminal law when it moved the former third pillar area of immigration and asylum and civil law to the first pillar sphere.↩
2. E.g., S. Peers *EU Justice and Home Affairs*, (OUP, Oxford 2006) Ch. 2.↩
3. S. Lavenex and W. Wallace, 'Justice and Home Affairs' in H. Wallace et al. (eds) *Policy-Making in the European Union*, (OUP Oxford, 2005) Ch. 18.↩
4. Ibid.↩
5. European Council Tampere 1999 and 'The Hague Programme: Strengthening Freedom, Security and Justice in the EU," [2005] OJ C 53/1.↩
6. Peers (n 3) Ch. 8.↩
7. S. Peers, 'The EU's JHA agenda for 2009,' available at http://www.statewatch.org/analyses/eu-sw-analysis-2009-jha-agenda.pdf (accessed 20 June 2010). The Stockholm programme – An open and secure Europe serving and protecting the citizen (Council of the European Union Brussels, 2 December 2009).↩
8. Mitsilegas, *EU criminal Law* (Hart 2009) Ch 2.↩
9. 'E. Herlin-Karnell, 'The Lisbon Treaty and the Area of Criminal Law and Justice' (Swedish Institute of European Policy Studies, SIEPS 2008) available at http://www.lissabonfordraget.se/docs/sieps-2008_3epa-the-lisbon-treaty-and-the-area-of-criminal-law-and-justice.pdf (last accessed 10 June 2010).↩
10. S Kurpas and others., 'The Treaty of Lisbon: implementing the institutional innovations,' (15 November 2007), available at http://shop.ceps.eu/BookDetail.php?item_id=1554 (accessed 20 June 2010).↩

11. S. Carrero & F. Geyer, The Reform Treaty and Justice and Home Affairs, available at http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf (last accessed 20 June 2010).↩
12. Article 20 TEU and Article 329 TFEU.↩
13. E.g., C. Van den Wyngaert, 'Eurojust and the European Public Prosecutor' in N. Walker (ed), *Europe's Area of Freedom, Security and Justice*, (OUP, Oxford 2004) 224 and A. Suominen, The past, present and the future of Eurojust, MJ 15 (2008) 217, G. Conway, 'Holding to Account a Possible European Public Prosecutor: Supranational Governance and Accountability across Diverse Legal Traditions', forthcoming manuscript on file with the author.↩
14. J. Monar, 'Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the "Area of Freedom, Security and justice"?,' (2005) 1 EuConst Rev 226.↩
15. E.g., E. Denza, *The intergovernmental pillars of the European Union*, (OUP, Oxford 2002), Ch. 9.↩
16. See, however, Art. 10 of the Protocol on transitional provisions attached to the Lisbon Treaty, which reserves a five-year transition period as regards the Court's jurisdiction in matters formerly under the third pillar.↩
17. S Peers, 'EU criminal law and the Treaty of Lisbon', (2008) 33 EL Rev 507↩
18. S Peers, Finally 'Fit for Purpose"? The Treaty of Lisbon and the End of the Third Pillar Legal Order' (2008) YEL.47↩
19. See, e.g., C L adenburger., 'Police and Criminal Law in the Treaty of Lisbon,' (2008) 4 *EU Const* 20.↩
20. E.g., C-303/05, *Advocaten voor de Wereld*. Judgment of 3 May 2007 not yet reported. See also, e.g., C-275/06 *Productores de Música de España (Promusicae)* et al, judgment of 29 January 2008 not yet reported, C-450/06, *Varec SA* judgment of 14 February 2008 nyr, and C-244/06 *Dynamic Medien Vertriebs GmbH,* judgment of 14 February 2008 not yet reported.↩
21. For a much more detailed account, see Dougan M., 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts,' (2008) 45 CML Rev 613.↩
22. Ibid.↩
23. I. Pernice, 'The Treaty of Lisbon and Fundamental Rights' in S. Griller and Z. Ziller (eds) *The Lisbon Treaty EU Constitutionalism without a Constitutional Treaty?* (Springer New York 2008) 235.↩
24. See, e.g., P. Craig, 'The Lisbon Treaty, Process, Architecture and Substance' (2008) 33 *EL Rev* 137↩
25. S. Peers, *Statewatch, the German presidency conclusions*, available at: http://www.statewatch.org/news/2007/jul/eu-reform-treaty-teu-annotated.pdf (last accessed 20 June 2010).↩
26. 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.↩
27. C-303/05, *Advocaten voor de Wereld*. Judgment of 3 May 2007, not yet reported.↩

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