

THE FUTURE OF EUROPEAN CRIMINAL JUSTICE

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1. A key factor in the future development of European criminal justice is the need to take full account of **the constitutional effects of the entry into force of the Lisbon Treaty for European criminal law**. The Lisbon Treaty signals a fundamental shift in the focus of European criminal law, from a system privileging inter-state judicial and police cooperation to a system where the protection of the fundamental rights of the affected individuals should be fully ensured. This shift of emphasis from the state to the individual is evident in two major post-Lisbon developments. **The application of the Charter of Fundamental Rights in the field of EU criminal law** will lead to the need by EU institutions to take fully into account the Charter rights related to EU criminal justice (in particular fair trial and effective remedy rights) when legislating or interpreting legislation. The Court of Justice has already signalled in *Fransson* that the Charter will apply to a wide range of areas of national law deemed as implementing Union law. **The application of traditional constitutional EU law principles including direct effect and state liability for damages in the field of EU criminal law** is another key development placing the individual at the heart of the European legal architecture in the field. The application of the principle of direct effect is of particular relevance with regard to the EU Directives on the rights of suspects and defendants, the majority of whose provisions meet in my view the conditions for the applicability of the principle in national courts.
2. In the field of **substantive criminal law**, the Lisbon Treaty has triggered a discussion on the limits of EU competence to define criminal offences and impose criminal sanctions, most notably under Article 83(2) TFEU. A key issue which will become increasingly relevant and needs to be addressed by the institutions is the **clarification of the relationship between criminal and administrative law**, and the impact of EU legislation on national competence to legislate in the field. Another area of priority is the **clarification of the content of the Union's competence to impose criminal sanctions**.
3. **The application of the principle of mutual recognition in criminal matters** needs to be re-examined in the light of recent judicial developments and lessons learned from the operation of the various mutual recognition Framework Decisions. **A revision of all mutual recognition instruments is necessary in order to include an express mandatory ground for refusal related to non-compliance with fundamental rights**. This move will

contribute to full compliance of the mutual recognition system with the Charter and reflect CJEU case-law in other areas of the AFSJ (see the *NS* ruling on the Dublin Regulation). **Proportionality** is another issue to be addressed, but this in my view requires a re-examination of the scope (in terms of the criminal conduct covered) of the various mutual recognition instruments which may have to become more focused. Last, but not least, **monitoring the implementation and evaluating the effectiveness of all mutual recognition measures (and not only the EAW)** is imperative. **A focus on the meaningful implementation of the FD o the European Supervision Order should be a matter of priority**, as this may address a number of issues arising from the operation of the EAW.

4. **In the field of criminal procedure**, Article 82(2) TFEU should be used further towards the tabling of **Directive proposals on admissibility of evidence and on minimum standards on detention conditions** (in particular pre-trial detention). The ultimate aim should be (as with the Common European Asylum System) a move from minimum standards to common standards. However, this move will require a Treaty change, as Article 82(2) TFEU enables the adoption of minimum rules.
5. A key priority in the future development of a European area of criminal justice should be **the monitoring and evaluation of the implementation of EU criminal law measures and their life within national criminal justice systems**. The entry into force of the Treaty of Lisbon gives the Commission its ordinary powers as the ‘guardian of the Treaties’ also with regard to EU criminal law. However, **the Commission powers to monitor the implementation of specific EU instruments in the field should be accompanied by renewed efforts to evaluate national criminal justice systems more broadly, in particular as regards their compliance with the Charter and focusing on broader issues (such as the length of the judicial process or the length and the conditions of detention)** which impact directly on the operation of EU criminal law implementing measures. The options offered by **Article 70 TFEU should be used more proactively in this context**.
6. Recent legislative proposals have provided new impetus with regard to the functioning and operations of EU criminal justice bodies and agencies. The establishment of the EPPO has raised a number of questions on the powers of these agencies and the relationship with each other. **A key priority is the adoption of a horizontal, coherent, strategic approach with regard to the respective powers, role and relationship of the various EU criminal justice bodies, offices and agencies (Europol, OLAF, Eurojust and the EPPO)** which should inform current negotiations on their future development. **In order to ensure full compliance with the Charter, avenues for judicial review of acts of EU agencies and provisions on remedies for affected individuals should be examined as a matter of priority**.
7. **The external dimension of EU criminal justice** is an area of growth. A key priority in this context is **to assess third pillar international agreements (in**

particular the EU-USA Agreements on Extradition and Mutual Legal Assistance) in the light of the entry into force of the Lisbon Treaty. A priority in this context should be the full evaluation and assessment of the implementation of these Agreements by Member States and the assessment of the implications of Lisbonisation for Member States' competence in the field. **The conclusion of an EU-US Agreement on privacy which is fully compliant with the EU *acquis* should be a matter of priority.**

8. Last, but not least, **we have to come to terms fully with the emergence of a European criminal justice area *a la carte*.** The UK opt-out from third pillar law, the selective participation of the UK and Ireland in post-Lisbon criminal law, the *sui generis* position of Denmark, and the emergence of the EPPO as a paradigm of flexibility pose complex challenges of coherence and legal certainty. The legal implications of flexibility in the field of EU criminal justice should be fully explored.