Police and Criminal Law in the Treaty of Lisbon

A New Dimension for the Community Method

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Institutional shortcomings of the Third Pillar: efficiency, effectiveness, complexity, legitimacy – Genesis of the provisions of the Treaty of Lisbon – Communitarisation of the Third Pillar – Some special institutional arrangements – *Quid pro quos*: stricter delimitation of the Union competencies and extension of the 'opt out/opt in' regimes – (New) foundations for Europol, Eurojust and a European Union Prosecutor's Office

Introduction

Over the last 15 years, the development of the European Union' policies in the areas of police co-operation and judicial co-operation in criminal matters has been marked by a strange paradox. On the one hand, it has become a commonplace among political leaders that establishing the Union as an *Area of Freedom, Security and Justice*, and particularly the fight against organised crime and terrorism, should be a top priority, given the threats that have surfaced since 11 September 2001 and the citizens' expectations *vis-à-vis* Union action in this field. High political ambition has thus been expressed by the European Council over and over again, most prominently at the European Council's special meeting of Tampere in October 1999 and then in the 'Hague Programme' adopted in October 2004. In practice, however, this policy domain is characterised by inherent inefficiencies.

As will be argued, that is mainly due to shortcomings in the institutional framework of a largely intergovernmental co-operation set up under the current *Third Pillar*. These shortcomings are addressed in a radical way in the new provisions on the Area of Freedom, Security and Justice included in the new Treaty of Lisbon signed on 13 December 2007.[1] Subsequently the genesis of the new provisions

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[1] *See* Art. 2, points 63 to 68 of the Treaty of Lisbon = Arts. 61 to 69 H of the future 'Treaty on the Functioning of the European Union' (FEU) as the EC Treaty will be renamed.

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will be traced, from the deliberations in the European Convention of 2002-2003, the IGC that agreed the Treaty establishing a Constitution for Europe in 2004 until the 2007 IGC. After that, the main thrust of the new provisions will be presented – 'communitarisation' of the Third Pillar – and an attempt will be made to explain the dynamics and compromises that made this step possible. It may well be the single most revolutionary innovation in the Treaty. Finally, the Treaty Articles on Europol, Eurojust and a European Prosecutor's Office will be discussed.

Institutional shortcomings of the present Treaty framework defined in the Third Pillar of the Union

The institutional shortcomings of the current intergovernmental Third Pillar can be summarised in four simple terms: lack of efficiency, ineffectiveness, complexity and problems of legitimacy.[2]

Lack of efficiency and of effectiveness

The first and perhaps foremost reason for the gap between ambition and results of the Union's policy in this field is the ineffectiveness of Union law in the Third Pillar coupled with inefficiency in the decision-making process leading to the production of such law. The most striking point in practice has been the fact that unanimity is required in the Council for virtually all acts in this area. Unanimity has not only caused extraordinary delays in the Council's work, despite the importance of the instruments to be adopted, but also a minimisation of the real legal content of many of the instruments finally adopted. Practitioners in the Council have found sarcastic expressions for this phenomenon. They speak of 'virtual law' and of a '*harmonisation à droit constant*' or '*à trompe l'oeil*'. Instruments are carefully drafted in such a way that no member state really has to change anything in its own legislation. This is particularly striking, e.g., in the Joint Action on participation in a criminal organisation or in the Framework Decision on the fight of corruption in the private sector.[3] The 2004 and 2007 enlargements have naturally exacerbated the difficulty of finding any useful compromise by unanimity. Examples for the impossibility of reaching consensus on important legislative initiatives include the lengthy discussions on the draft Framework De-

[2] For a similar analysis *see* G. de Kerchove and A. Weyembergh, 'Quelle Europe pénale dans le traité constitutionnel ?', in M. Dony and E. Bribosia (eds.), *Commentaire de la Constitution de l'Union européenne* (Bruxelles, Editions de l'Université de Bruxelles 2005) p. 321 et seq.; and *see* in particular discussion note CONV 69/02 in which the Secretariat first confronted the European Convention with these problems (accessible via <http://european-convention.eu.int/>).

[3] Joint Action 98/733/JHA; Framework Decision 2003/568/JHA.

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cisions on procedural rights in criminal proceedings,[4] on data protection in the Third Pillar[5] or on combating racism and xenophobia.[6]

Even where lengthy discussions in the Council finally lead to the adoption of an act, the weaknesses of the particular legal instruments at the disposal of the Union in this area result in deficits of effectiveness. Amongst the instruments listed in Article 34 TEU, conventions of international law are in fact the only instrument by which the Council can adopt norms with guaranteed uniform legal value and meaning in every member state, but their ratification by all the member states is extremely cumbersome. Even today, many of the Conventions adopted under the Third Pillar since 1993 have still not entered into force. Once in force, it is virtually impossible to amend such conventions speedily enough to respond to changing political challenges, as would be necessary in the case of Europol. That is why the Commission proposed in 2006 to replace the Europol convention by a Decision,[7] and why the Council has virtually stopped using the instrument of conventions since 2000.

Yet Framework Decisions and Decisions as alternative legal instruments provided by Article 34 TEU are struck by another problem: they cannot have direct effect. Their functioning thus depends entirely on the good will of each member state to transpose them faithfully in national law, and this all the more so since the Commission has no tools for controlling their correct implementation, such as the infringement procedure of Article 226 EC. A textbook example for how much this can weaken an instrument requiring uniform application throughout the Union is the European Arrest Warrant Framework Decision.[8] Designed to replace the classical extradition procedure by a rapid, purely judicial mechanism of surrender and to abolish the traditional double incrimination requirement, it is certainly the most ambitious instrument ever adopted under the Third Pillar. However, for such a mechanism of judicial co-operation to work smoothly, there should be a core of common provisions applying throughout the Union. Nevertheless, Article 34 TEU left no choice but to adopt a Framework Decision, whose effectiveness depends on a correct – and ideally uniform – transposition into national law, which cannot be effectively monitored by the Commission, in absence of an infringement procedure. Meanwhile, the functioning of the European Arrest Warrant had temporarily been hampered by suspended implementation following Constitutional Court Decisions in at least three member states.[9] Fortunately, these

[4] COM (2004)328 final.
[5] COM (2005) 475 final.
[6] COM (2001)664 final.
[7] COM (2006)817 final.
[8] Framework Decision 2002/584/JHA.
[9] Poland – decision of 27.4.2005, P 1/05; Germany – decision of 18.7.2005, 2 BvR 2236/04; Cyprus – 7.11.2005, Appl. No. 294/2005.

problems have meanwhile been overcome. Similarly, since Third Pillar Decisions establishing Union bodies with separate legal personalities have no direct effect, the Union must rely on the recognition in the law and practice of every member state of the legal personality of Eurojust – and on that of Europol if the Decision proposed by the Commission were adopted. The envisaged conversion of the Europol Convention into an Article 34 TEU Decision entails yet further risks of legal lacunae, as regards Europol's data processing activities. Such activities impinge on fundamental rights of individuals and must therefore be provided for by law; however, under the envisaged Article 34 TEU, lacking direct effect, only the national legislators can create such a legal basis, and they *must* all hence faithfully transpose a future Europol decision for Europol to operate legally *vis-à-vis* individuals in all member states. No one can be entirely sure whether this would in effect be the case by the time a decision replacing the Europol Convention would be scheduled to become effective.[10]

The decision-making process in the area of police and judicial co-operation in criminal matters is further complicated by the right of initiative enjoyed by every member state. As practice has shown, often just before taking up the Presidency and without substantial prior discussions, member states have tabled initiatives responding to a particular concern of domestic politics instead of the general European interest.

Complexity

The extraordinary complexity of the Union's system of primary law in the area of police and judicial co-operation in criminal matters was another factor that motivated the Convention to revisit the current situation. The complexity is the result, first and foremost of the *pillar structure* of the European Treaties themselves, and secondly of the variable geometry resulting from the special regimes granted to the United Kingdom, Ireland and Denmark.

Regarding the first point, the present pillar structure often forces the Union to split up its action related to a single subject-matter artificially between several legal instruments adopted pursuant to the different procedures that apply to the different pillars.[11] It also leads to lengthy discussions on where exactly to draw the

[10] *See* the provisions on transposition and applicability in Arts. 59-62 of the Commission's proposal for a Decision replacing the Europol Convention.

[11] For instance, a double legal basis is necessary for the establishment of the important Schengen Information System II (SIS II). Similarly, the Union's policy on drug abuse is split up between the first pillar for issues related to health (and notably the prevention of drug abuse) and the third pillar for judicial and police co-operation to combat drug crimes. On this issue, *see also* G. de Kerchove and A. Weyembergh, 'Quelle Europe pénale dans le traité constitutionnel?', in M. Dony and E. Bribosia (eds.), *Commentaire de la Constitution de l'Union européenne* (Bruxelles, Editions de l'Université de Bruxelles 2005) p. 321 et seq.

line between the different pillars. The best known example is the controversy about the competencies of the Community versus the Union for harmonising criminal sanctions, which has led to two rulings of the Court of Justice.[12] No less problematic is the situation as regards data protection, where, in the aftermath of the Court's judgment of 30 May 2006 on the PNR agreements with the United States,[13] paradoxically the most human-rights sensitive data treatment, i.e., that for law-enforcement purposes, is in tendency withdrawn from the protection offered by Community law and subjected to Third Pillar rules, although important grey zones remain and another case is pending before the ECJ.[14]

We cannot delve here into the many finesses of the second point of complexity, namely the current special status of the United Kingdom, Ireland and Denmark as organised in the respective Protocols, as well as that of Norway and Iceland regarding the Schengen *acquis*. As will be seen below, this is the one area where the new Treaty of Lisbon could not solve a problem.

Problems of legitimacy

Finally, the Union's action in the field of police and judicial co-operation in criminal matters is facing a twofold legitimacy problem.

Firstly, democratic and in particular parliamentary control is insufficient or ineffective. On the one hand, there is no co-decision with the European Parliament in this area and the mere consultation of that Parliament often only takes place after a compromise has been reached in the Council with great difficulties. The control exercised by national parliaments cannot, in practice, adequately compensate for this deficit. For framework decisions and decisions pursuant to Article 34 EU, their main basis for parliamentary legitimacy is the national parliaments' oversight over the conduct of ministers in the Council, which however varies greatly from the constitutional systems of one member state to the other and in practice often turns out to be illusory. To be sure, as they lack direct effect, they must be transposed by a national law formally enshrining all national constitutional guarantees and providing the legal basis for impacts on fundamental rights. However, the proceedings on the European Arrest Warrant before the German Constitutional Court[15] provide a good example for how in practice national parlia-

[12] *See* C-176/03 *Commission* v. *Council*, [2005] *ECR* I-7879, the communication of the Commission COM (2005)583 final interpreting that judgment, and the judgment of 23 Oct. 2007 in Case C-440/05, *Commission* v. *Council* (n.y.r.).

[13] *European Parliament* v. *Council of the European Union* (C-317/04) and *Commission of the European Communities* (C-318/04), [2006] *ECR* I-4721.

[14] C-301/06 *Ireland* v. *European Parliament and Council*.

[15] *See* the judgment *supra* n. 4; *see* on this judgment *also* Christian Tomuschat, 'Inconsistencies – The German Federal Constitutional Court on the European Arrest Warrant', *Euconst* (2006) p. 209.

mentarians often perceive their role in a process of transposing a scheme 'already decided in Brussels'. Conventions do of course require ratification by all national parliaments, but one might question whether the ensuing legitimacy is satisfactory, since the national parliaments are presented with a take-it-or-leave-it-situation and are thus often unable to exercise a real influence on the content of the conventions. This is also the main reason for the poor record of Third Pillar conventions that have entered into force to date.

Secondly, the judicial protection of citizens against the Union's action in the field of police and judicial co-operation in criminal matters is unduly limited under the rules of Article 35 EU. As compared to the normal Community model of judicial protection, that Article entails highly problematic lacunae of protection and a system of variable geometry: the Court's jurisdiction for preliminary references is made subject to a system of voluntary acceptance by member states, but 12 member states have still not accepted that jurisdiction at all. Direct actions by individuals against Third-Pillar Union acts are ruled out altogether, and the Court's competence is excluded from member state police actions or other actions taken for the safeguarding of internal security. These deficits of judicial protection are in sharp contrast with the human rights sensitivity of police and judicial co-operation.

Genesis of the provisions of the future Treaty of Lisbon

The provisions contained in the future Treaty are mainly the creation of the European Convention that met in 2002 and 2003, justifying a close look at these proceedings. Its draft articles were taken over in the Constitutional Treaty, subject to one major controversy in the IGC 2004 about qualified majority voting and some further minor changes. The European Council in June of 2007, agreeing the contours of the Lisbon Treaty, was able to secure an agreement on incorporating these articles largely *en bloc* in the Lisbon Treaty, after granting the United Kingdom an opt-out, the details of which were sorted out by the IGC.

The proceedings of the European Convention

The debates on the future of the Area of Freedom, Security and Justice are an example of a particularly successful functioning of the Convention method. At the start of the Convention, it was by no means predictable that this policy area would enjoy so much attention and that the political will, lacking at Nice, would be found to make the radical steps of 'communitarising' the present Third Pillar and of rewriting the legal bases. However, the various organs and stages of work

that characterised the Convention process[16] made it possible gradually to build up an astounding dynamic, in which the Convention members understood the gap between political rhetoric and citizens' expectations on the one hand, and the shortcomings of the current institutional framework on the other.

The Area of Freedom, Security and Justice was first discussed in the Convention plenary in the context of a general debate on the broader theme of the 'future missions of the European Union'. During that debate, it became apparent that there was a strong tendency in the Convention to intensify the Union's action in this field, especially regarding the fight against international crime. This prompted the Convention Praesidium to convene a second plenary meeting, on 6 June 2002, dedicated exclusively to this field.[17] In the run-up to that meeting, the Convention's Secretariat had presented a critical analysis of the present situation,[18] which was largely shared by the Convention members and considered as justifying far-reaching changes.

On that basis, Working Group X was established[19] and presented a final report[20] after meeting from September to November 2002 under the chairmanship of former Irish Prime Minister and national parliamentarian John Bruton. The Group's final report basically determined all the political compromises, with detailed directions, that led to the provisions drawn up by the Convention regarding the Area of Freedom, Security and Justice. The final report was cautious and diplomatic in language: it did not speak of 'communitarisation', and stressed the particular responsibilities of national governments, administrations and parliaments in the area. But for all important legal and institutional matters it recommended to introduce the 'general rules of the Treaty' to this area: i.e., in reality, to extend the Community method. Draft articles presented by the Convention's Praesidium[21] as well as a large number of amendments from the Convention members on these articles[22] were subject to a first reading in the Convention Plenary on 3 April 2003.[23] In the light of these amendments and the plenary discussion, the Praesidium revisited its draft articles and submitted them again to the Convention with several significant changes.[24] After this second reading in

[16] *See*, more generally, C. Ladenburger, 'Towards a Post-national Constitution – Federal, Confederal or Genuinely *sui generis*? – Introductory comments on the Convention method, and on some features of an improved Constitutional Charter', *ERPL/REDP* (2004) p. 75.

[17] For a summary of the meeting, *see* CONV 97/02.

[18] Discussion note CONV 69/02.

[19] With a quite explicit mandate (*see* CONV 258/02).

[20] CONV 426/02.

[21] *See* CONV 614/03.

[22] Analysed in CONV 644/03.

[23] For a summary of the meeting, *see* CONV 677/03.

[24] *See* CONV 727/03.

the Convention Plenary,[25] which was held on 30 and 31 May 2003 and dealt with the entire text of Part III of the draft Constitution, the Praesidium made further important changes in the revised version of Part III of the draft Constitution,[26] which was submitted to the Convention members on 27 June 2003. This revised version of the provisions related to the Area of Freedom, Security and Justice was already very close to the final text on which the Convention reached consensus on 11 July 2003.

The proceedings of the IGC 2004

The IGC 2004 also discussed the Area of Freedom, Security and Justice at length. It was impossible for delegations to unravel fundamentally the Convention *acquis* of 'communitarisation' of the Third Pillar, but the enormous problems several member states had with this *acquis* led to a strong request to return to unanimity. This was then fiercely disputed by others who, fearing the danger that the Union might be left with reduced competences (*see* below) but still have unanimity, were resolved to defend the result of the Convention. Thus, from the meetings of the Naples Ministerial Conclave in November 2003 to the last negotiating round in the IGC in June 2004, the proposals of the Italian and later the Irish Presidency consistently contained annexes on the Area of Freedom, Security and Justice.[27] In the end, a compromise could be reached by introducing a special 'emergency brake' procedure in the two legal bases concerning approximation of substantive and procedural criminal law,[28] by a certain dilution of the Article on Eurojust and by extending the existing special 'opt-out/opt-in'-regime for the United Kingdom and Ireland and that for Denmark.[29] Considering the tough line taken by certain

[25] For a summary of the meeting, *see* CONV 783/03.

[26] *See* CONV 836/03.

[27] *See* Presidency proposal for the Naples Ministerial Conclave, IGC 52/03 and IGC 52/03 ADD 1 (Annex 14 to 16), as well as Presidency proposals for the European Council of 17 and 18 June 2004, in particular IGC 81/04 (Annex 23 to 27), but also IGC 83/04 (Annex 12), IGC 84/04 (Annex 12) and IGC 85/04 (Annex 12). *See also* Presidency proposal for the European Council of 12 and 13 Dec. 2003, IGC 60/03 ADD 1 (Annex 18 to 21); working document from the Presidency for the Meeting of 'focal points' on 4 May 2004, IGC 73/04 (Annex 20 to 23); Presidency proposals following the meeting of 'focal points' on 4 May 2004, IGC 76/04 (Annex 17 to 19); Presidency proposal for the Ministerial Meeting on 17 and 18 May 2004, IGC 75/04 (Annex 8 and 9); Presidency proposal following the Ministerial meeting on 24 May 2004, IGC 79/04 (Annex 21 to 23).

[28] *See* below.

[29] The special 'opt-out/opt-in' regime in the Protocol on the position of the UK and Ireland, introduced in Amsterdam for title IV of the EC Treaty, was extended to certain aspects of police cooperation; the existing Protocol on the position of Denmark, exluding Denmark wholly from Title IV, was extended to the entire area of the former Third Pillar, and it was amended to offer Denmark the possibility to switch to the same position as the UK and Ireland.

member states through all the IGC, one may call it a surprise – and certainly a major success for the Irish Presidency – that the Convention's provisions on Justice and Home Affairs were saved in the final Constitutional Treaty subject only to these concessions.

The mandate for the IGC 2007 agreed under German Presidency, and the proceedings of that IGC

As radical a step as the communitarisation of the Third Pillar may be, one cannot say that the new provisions on the Area of Freedom, Security and Justice played any major role in the referenda debates in France and the Netherlands that plunged the Union into its constitutional crisis. During the discussions led by the German Presidency on how to solve that crisis, these two countries therefore had no problems with the Presidency's proposal to safeguard the innovations agreed in the Constitution in this field; indeed, one of the priorities for President Sarkozy was to ensure the Union's robust capacity to act for the fight against crime and terrorism. Instead, it was the United Kingdom that again experienced difficulty with the results of the IGC 2004 in this area. The firmness of the Presidency and the vast majority of member states in defending the innovations agreed in 2004 finally led to a compromise in which the United Kingdom was granted an extension of its opt-out/opt-in regime to the entire Area of Freedom, Security and Justice, including the whole current Third Pillar. In addition, the United Kingdom obtained 'carve-out' provisions for member state action concerning 'national security', to which we will return below. This latter request had been rejected at past occasions, including both the European Convention and the 2004 IGC. That it was taken on board now without a thorough assessment shows the limits of the method of confidential, bilateral consultations chosen by the Presidency in spring 2007 – a method that was probably without alternatives in the particular political situation but is nonetheless in stark contrast with the Convention method that previously produced the Constitutional Treaty.

The 2007 IGC itself – conducted in record speed between the end of August and mid-October – had a largely technical character, thanks to the extremely precise predeterminations in its mandate. However, the mandate left one single matter open for intense negotiation in the group of legal experts (the only body of the IGC below Heads of State or Government). That matter again concerned Justice and Home Affairs. It was how to articulate the relationship between the extension of the UK's (and Ireland's) 'opt-out/opt-in' regimes to the Third Pillar area and the pre-existing obligations of the United Kingdom in this area, in the light of communitarisation. The United Kingdom made three concrete requests in this context, all based on the same motivation: not to be forced into any com-

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munitarised legislation against the UK's will. As will be explained below, all three requests were partially met by the IGC.

The substance of the new Treaty articles: new institutional resources for a reinforced Area of Freedom, Security and Justice

The main breakthrough reached in the new Justice and Home Affairs provisions – and indeed probably the single most revolutionary innovation of the whole future Treaty – is the *de facto* 'communitarisation' of the Third Pillar. This step has become possible in a compromise, crafted largely by the European Convention, which includes some special institutional arrangements but especially a thorough overhaul of the Union's competencies in the area, as well as extended-opt outs.

The 'communitarisation' of the Third Pillar

The future Treaty amending the present EU Treaty and EC Treaty abolishes the pillar structure. Policies related to the Area of Freedom, Security and Justice that are covered today by either the first or third pillar will be regrouped in a single chapter of the future Treaty on the Functioning of the Union. Crucially, the formal abolishment of the dichotomy between Title VI of the EU Treaty and Title IV of the EC Treaty is accompanied by the application of the 'normal' rules to all the policies in the field of justice and home affairs in terms of decision-making procedures, legal instruments and judicial control. Put bluntly, the future Treaty abolishes the still largely intergovernmental system of the present Third Pillar, and 'communitarises' police co-operation and judicial co-operation in criminal matters. Admittedly, the term 'communitarisation' is not entirely precise, given that the Treaty of Lisbon will replace the Community with the Union and introduce – as the preceding Treaties (Single Act, Maastricht, Amsterdam and Nice) did – further reforms to the Community method. We nonetheless use the term here since there is not yet a better one to characterise the extension of the classic mode of functioning of the Community.

The implications of this change are significant. The Union legislator will adopt regulations, directives and decisions, i.e., the normal legal instruments of Community law. It will do so, as a rule, according to the 'ordinary legislative procedure', i.e., through co-decision between the European Parliament and the Council, voting by qualified majority, on the basis of proposals from the Commission. Such legislation may, according to the normal rules of the future Treaty, provide for the adoption by the Commission of 'delegated regulations' (Article 249 B FEU) and implementing acts (Article 249 C). Effective and uniform implementation and respect of Union law at national level will be controlled by the Commis-

sion and the Court of Justice through the normal infringement procedure. There will be full judicial protection according to the traditional model of Community law, subject to one subsisting exclusion of jurisdiction of the Court of Justice, for member state police operations and the exercise of their responsibilities concerning the maintenance of law and order and the safeguarding of internal security (*see* Article 35(5) TEU = future Article 240 B FEU). This will also mean that the acts of Europol and Eurojust become subject to the Court's jurisdiction, thus ending a problematic lacuna of judicial protection against acts of Europol affecting personal data rights.[30] The normal rules governing the Union budget will fully apply. Finally, as regards the external dimension of police co-operation and judicial co-operation in criminal matters, the present case-law on external shared and exclusive competence will in principle become applicable.[31] The Union will be represented by the Commission in international negotiations and relations, and agreements will have the full legal force provided for in Article 300(7) EC.

All this represents much more than simply the extension of the Community method to yet another field of policy. Nor would it yield an accurate picture if one merely added a number of legal bases found in these provisions to the overall statistics of more qualified majority voting and more co-decision powers of the European Parliament in the future Treaty. In reality, the challenges will be enormous for the EU institutions, and especially for those of marked supranational character.[32] Put simply, they will need to demonstrate that the Community method, and with it a unique model of supranational democracy, can efficiently and credibly function in an area still perceived as lying at the heart of traditional notions of state sovereignty.

How can this breakthrough of communitarisation be explained? To be sure, some (tragic) external events played a role in the political evolution of this area. The European Convention started its work only half a year after the terrifying attacks of 11 September 2001, and its debates on Freedom, Security and Justice were heavily marked by them. Later, at a moment where the IGC deliberating on the draft Constitution was at great pains, the bombing of 11 March 2004 happened in Madrid, making it more difficult in the IGC to dismantle the innovations reached in the Constitution on the fight against crime and terrorism.

[30] Subject to Art. 230(5) FEU, discussed below.

[31] *See* however Declaration No. 36 to the Treaty of Lisbon, confirming that member states may, in these areas, negotiate and conclude international agreements insofar as they comply with Union law. The concrete legal effects, if any, of this declaration will need to be examined.

[32] For more details as to the challenges for the Commission, *see* M. Petite and C. Ladenburger, 'The Evolution in the Role and Powers of the European Commission', in D. Curtin, A. Kellermann, S. Blockmans (eds.), *The EU Constitution: The Best Way Forward?* (The Hague, T.M.C. Asser Press 2005) p. 309 at p. 316-319.

Yet for the main part, the breakthrough was realised by the European Convention itself, following a collective learning process on present institutional deficiencies, thanks to a common understanding on what citizens expect from Europe in a top priority field, and through courageous and imaginative deals struck by the actors of that Convention. It is thus in this area that the Convention method was able to play out its virtues in an exemplary fashion.

Looking more closely at the Convention work, the delicate compromise it struck was to introduce the classic Community method in this area in exchange for two elements of *quid pro quo*, namely some special institutional arrangements and, above all, a more appropriate delimitation of Union competencies. The IGC 2007 had to add further complex 'opt-out/opt-in'-regimes as an additional price for communitarisation.

Some special institutional arrangements for the Area of Freedom, Security and Justice

The Convention actors – mainly Working Group X in its final report and the Praesidium – avoided speaking of a simple 'communitarisation' of the Third Pillar, and, while proposing in principle the extension of the normal Community method in all respects, built in a few special rules allowing for an enhanced participation of national governments, administrations and parliaments. It thus managed to do away with the institutional weaknesses of the current Third Pillar while nonetheless stressing some particularities of an area traditionally perceived as close to the very concept of sovereignty of the national state. Some of these special arrangements appear more cosmetic, whereas others are real, and quite appropriate for the subject-matter. None of them call into question the normal functioning of the Union institutions.

A first particularity pertains to the right of initiative of member states, as currently existing in the Third Pillar. It is not altogether abolished, but pursuant to future Article 61 I FEU, a legislative initiative can no longer be presented by a single member state, but only by at least a quarter of the member states, which not only have to agree on an initiative but also have to defend it together throughout the procedure. This will limit the number of initiatives that risk being focused on national interests. In practice, it is difficult to imagine joint legislative initiatives of seven member states coming about and much less succeeding, in the co-decision procedure, which necessitates a dialogue between the Council and the Parliament facilitated by the Commission as mediator.[33] Thus, at least as regards areas covered by the ordinary legislative procedure, one might expect this provision to remain a dead letter.

[33] Similarly, W. Bogensberger, 'Die EU-Verfassung nimmt das Strafrecht in die Pflicht', *Journal für Strafrecht* (3/2005) p. 73.

Moreover, while the European Parliament will acquire its normal role in this area, the future Treaty also provides for particular responsibilities of national parliaments. In particular, they will participate, alongside the European Parliament, in political control and oversight over Europol and Eurojust activities. Furthermore, the 'early warning mechanism' through which national parliaments will control subsidiarity is modified for this particular area, in that a lower threshold – one fourth of Parliaments expressing objections instead of one-third – is sufficient to oblige the Commission to re-examine its proposal.

Next, the Court of Justice will acquire full jurisdiction. The current limitations of Article 35 EU, heavily criticised in the Convention, are abolished almost entirely. The only remaining exception is the exclusion of the Court's jurisdiction regarding the validity or proportionality of national police or other law-enforcement operations or the exercise of national responsibilities in the field of the maintenance of law and order and the safeguarding of internal security.[34]

On the crucial issue of legislative decision-making, in the new Treaty both co-decision of the European Parliament and qualified majority voting in the Council will apply across the board for the adoption of legislative acts, except for the possible creation of a European Public Prosecutor's Office,[35] for operational police co-operation[36] and for rules on 'hot pursuit' by the authorities of a member state on the territory of another member state,[37] where the Council will, understandably, act by unanimity.

Yet, moving to qualified majority voting proved possible in the IGC 2004 only on the basis of an imaginative compromise taking the form of a so-called emergency brake, allowing a member state that considers that fundamental aspects of its criminal justice system are affected to refer the matter to the European Council, where an attempt to reach compromise can be made (Articles 69 A(3) and 69 B(3)). Failing that attempt, an enhanced co-operation is automatically established between the member states supporting the initiative in question if there are nine of them. In the original form as drafted in the Constitution, the emergency brake would have consisted of a complex procedure which could have lead to considerable delay.[38] The Treaty of Lisbon makes this mechanism more direct and opera-

[34] *See* Art. 240 B FEU (= Article 35(5) TEU).

[35] *See* Art. 69 E FEU.

[36] S*ee* Art. 69 F(3) FEU.

[37] *See* Art. 69 H FEU.

[38] *See* Art. III-270(3) and (4) and Article III-271(3) and (4) of the Constitution: Referral to the European Council suspends the decision-making process and the European Council can prevent the adoption of the act in question by requesting that a new draft be submitted. However, a continued blocking of the decision-making process is excluded: if the European Council does not act within four months or if, after having requested that a new draft be submitted, the act in question is not adopted within twelve months, it automatically becomes possible to proceed within the frame-

tional. Where the European Council has not reached consensus within four months following a referral of a draft initiative, the latter can be adopted automatically in enhanced co-operation. The new version of the emergency brake is, in reality, an improvement obtained in 2007 by those interested in a dynamic development of this area; it is not merely a break but also an accelerator, since it allows to provide for an '*ad hoc* opt-out' of member states experiencing persistent problems with an initiative. The mechanism thus having become, in reality, a tool to promote integration in areas where it might prove particularly difficult to progress with all 27 member states, the Lisbon Treaty extends it to two further legal bases still subject to unanimity: operational police co-operation and the possible establishment of a European Public Prosecutor (Article 69 E and F).

Whereas the aforementioned specificities concern only the areas of the current Third Pillar, three further provisions contain particularities that apply to the whole Area of Freedom, Security and Justice, including the sectors that were integrated into Community law at Amsterdam. Firstly, future Article 61 A FEU mentions specifically the role of the European Council in this area. The rationale of that article is to stress that qualified majority voting would often take place after the European Council has defined, by consensus, the priorities and the general framework of the Union's action.

Secondly, future Article 61 D FEU institutes, within the Council, a standing committee for operational co-operation on internal security. The creation of the committee constitutes an additional arrangement linked to the specific needs of co-ordination between national authorities in the area of operational co-operation on internal security. The setting up of this committee is inspired by CATS (the 'Article 36 committee').[39] Yet, the main difference with CATS is that the tasks of the committee are now clearly limited to operational co-operation and that the committee has no legislative tasks whatsoever.

Finally, when agreeing on the need to introduce in this area the instrument of infringement procedures, brought by the Commission before the Court of Justice, the Convention recognised, at the same time, the importance of 'mutual evaluation' mechanisms,[40] inspired by the examples of mutual evaluation already conducted within the Council. This provision encapsulates another delicate equilibrium between introducing the Community method and stressing a specificity of the sector. It recognises that, while the infringement procedure as the classical instrument of enforcing legal obligations of member states is essential, an evaluation of the practical efficiency and quality of member state action in this area is

work of enhanced co-operation, on the condition that at least one third of the member states wish to do so. Note that the amount of member states needed under the Reform Treaty is nine.

[39] I.e., the Co-ordinating Committee consisting of senior officials, provided for by Art. 36 EU.

[40] *See* Art. 61 C FEU.

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equally important, and that mutual evaluation amongst the member states, if conducted properly, can usefully apply beyond the inherent limits of a judicial enforcement of strictly legal duties.

A new delimitation of Union competencies

A shift to the more powerful legal instruments and procedures of the Community method, including in particular qualified majority voting, would only be possible if at the same time the rather vague and potentially open-ended Union competencies in Articles 29 through 32 TEU would be defined more precisely, and in some instances more restrictively. This proved probably the most important precondition, developed in the Convention, that allowed the move to communitarise the Third Pillar. The Union should no longer produce 'virtual law', but instead introduce effective instruments and procedures, yet only if there is more clarity on what policy goals are to be pursued and what competencies are to be transferred to the Union level to that end. Put bluntly, one might summarise this as follows: let us at last work together efficiently in the Union, but only once we agree more precisely on which areas we actually need and want to co-operate. This rationale had however to be reconciled with the wish to preserve some flexibility to adapt to changing circumstances.

As a result, the legal bases governing police and judicial co-operation in criminal matters have been completely rewritten. The new approach can be clearly noted by comparing future Articles 69 A and B FEU to the present Articles 29 to 31 TEU. The lists of legal bases are no longer introduced by '*Common action shall include …*' (*'vise, entre autres à …'*), but they are now enumerated exhaustively. In both Article 69 A(2), on criminal procedure, and Article 69 B(1) on substantive criminal law, the legal basis consists of a general 'chapeau' setting some limitative conditions, in particular a 'cross-border' requirement, followed by an exhaustive list of areas for harmonisation. This is combined with the possibility for the Council, acting unanimously, to add further areas for harmonisation, which however must also respect the general 'chapeau', i.e., in the case of substantive harmonisation be 'particularly serious' and of a cross border dimension. In some instances, these new legal bases clearly entail some limitations of competence *vis-à-vis* the present situation. Thus, in Article 69 B(1) the scope of the approximation of material criminal law is narrower than at present, through the condition of a 'cross border dimension' and the exhaustive enumeration of the areas of crime concerned. Likewise, paragraph (2) of that Article, establishing a competence to legislate on criminal sanctions indispensable for the implementation of other Union policies, was certainly a major innovation when first included in the Constitution. Now, in the light of the two judgments of the Court on Community competence,[41] this pro-

[41] *See supra* n. 12.

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vision curtails in certain respects the Union's competencies. One might wonder, for example, whether harmonising legislation equivalent to the Framework Decision on racism and xenophobia could still be adopted under the Treaty of Lisbon. Yet the new definition of competencies also comprise some new items of now clearly defined powers competence which have been unclear under current Articles 30 and 31 TEU, such as the elements of criminal procedure listed in Article 69 A(2). Until now, Union competence on these elements could only be based on the rather vague wording 'ensuring compatibility in rules applicable […]' in Article 31(1)(c) TEU, and this has of course been heavily contested in the Council.

To be sure, these completely re-written legal bases will produce their own new questions of interpretation. For example, Article 69 B(1) lists 'areas of crime', not criminal offences, and some of these areas are deliberately drafted in a broad way ('computer crime', 'organised crime') such as to leave a margin to the legislator to cover a wide range of criminal behaviour. Furthermore, one may wonder whether the 'definition of criminal offences and sanctions' within the meaning of that Article also covers approximation of the 'general part' of criminal law, i.e., rules on participation in offences, on sanctions against legal persons, on confiscation, on parole, and so forth.

Two further factors that also influenced the re-writing of competencies should be mentioned. First, the Convention members were eager to reflect in the new provisions – better than in the current Treaty – the balance between 'repressive' co-operation and safeguarding fundamental rights of individuals. The impression of a 'fortress Europe', in which intensified co-operation in justice and home affairs would mainly consist in tougher law enforcement efforts to fight crime and terrorism, was to be avoided. That is why Article 61 explicitly underlines the importance of fundamental rights for the Area of Freedom, Security and Justice, and why a new legal basis was introduced on crime prevention (Article 69 C). What is more, contrary to the present Third Pillar that identifies only institutions and member state authorities as subjects of co-operation, the future provisions add another dimension, namely that of the rights of individuals, in particular of persons concerned by a criminal procedure and of the victims of crime.

Secondly, in the area of judicial co-operation in criminal matters a compromise had to be found between two conflicting schools of thought, one, favoured in particular by the United Kingdom, Ireland and the Scandinavian countries, privileging mutual recognition of judicial decisions over any harmonisation of laws, and the other, followed by other member states, putting strong emphasis on harmonisation of criminal laws before any serious mutual recognition amongst the member state judicial authorities can be envisaged. The new articles build on the conclusions of the European Council of Tampere, which recognised both mutual recognition and approximation of laws as *complementary* objectives and processes. The compromise was again a delicate one, since a general principle of

mutual recognition was only acceptable for some members of the Convention if at the same time qualified majority voting would be introduced for approximation of both substantive and procedural criminal law.

Finally, one last element has now been added to the system of division of competencies by the IGC mandate agreed by the European Council in June 2007. It consists of clauses in future Article 3a(2) TEU and Article 61 F FEU stating that 'national security remains the sole responsibility of each member state' and that 'it shall be open to member states to organise between themselves and under their responsibility forms of co-operation and co-ordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security'. The new concept of 'national security' and the legal rules attached to it in these provisions will undoubtedly provoke great difficulty of interpretation. This cannot be analysed in depth here. Suffice it to stress that both clauses are, in their sweeping formulation, unprecedented in primary law: One is a reservation of exclusive national competence going well beyond the present Articles 296 and 297 TEC; the second appears to intend to carve out an area where member states are entirely free to co-operate intergovernmentally, unaffected by the rules of the Treaty. This goes further than current Article 33 TEU with respect to member state responsibility for *internal* security, and that provision (maintained in Article 61 E FEU) is difficult enough to interpret. One may thus doubt whether the Court will be prepared to give the clauses the effect intended by their drafters. In any event, precisely their drafting, as well as the clear conceptual difference between 'internal security' and 'national security' in Articles 61 E and F FEU, suggest that the institutions and ultimately the Court will apply a narrow understanding of 'national security'. One way of interpreting this concept would be to interpret the carve-out as applying merely to member state intelligence services, provided that they do not carry out any law enforcement measures.

The extension of 'opt-out/opt-in'-regimes

As became clear in 2007, the Lisbon Treaty had to pay an additional price for communitarisation: extending the UK's (and Ireland's[42]) 'opt-out/opt-in' regimes to the Third Pillar, and devising three complex mechanisms so as to ensure that the United Kingdom is not forced to accept any communitarised act in this area against its will, despite its legal obligations pre-existing the Lisbon Treaty. The three mechanisms are to be found in new paragraphs 2-5 of Article 5 of the Schengen Protocol, in new Article 4 a of the Protocol on the position of the

[42] Ireland is put in brackets here. This is because the provisions discussed in this section had been requested politically only by the UK. Ireland felt in the end obliged to join the Treaty status of the UK in most respects, for legal reasons.

United Kingdom and Ireland, and in Articles 9 and 10 of the Protocol on transitional provisions. There is no space here to explain them in all their complexity. Put briefly, the first of them allows the United Kingdom (and Ireland) not to participate in a Schengen-building measure even though it falls within the Schengen *acquis* under which the United Kingdom was admitted. This derogates from the principle of irrevocable participation that was imposed by Article 8(2) of Council Decision 2000/365, and the consequence would be that the United Kingdom would have to leave the Schengen *acquis* at least partially. The second mechanism recognises the right of the United Kingdom (and Ireland) not to accept an amendment to a non-Schengen related measure in which it currently participates (examples include most existing Third Pillar measures such as on Europol, Eurojust and the European Arrest Warrant); but the Council may then determine that the United Kingdom has to accept the measure as such. Thirdly, the question arose: Would the Court's normal powers under Articles 226/EC et seq. become automatically applicable regarding pre-existing Third Pillar *acquis* upon entry into force of the Lisbon Treaty? The United Kingdom insisted on clarity on this question, never settled in past Treaties including the 2004 Constitution. It obtained a five-year transitional period for communitarisation, which the legislator can however shorten by making any amendment to pre-existing acts; and at the end of the period the United Kingdom has an unprecedented right to leave *en bloc* all Third Pillar *acquis* not meanwhile amended or replaced. All in all, these mechanisms were no doubt indispensable to accommodate a member state that could no longer fully support, by 2007, the communitarisation agreed in 2004. Nonetheless, they are to be deplored, for their complexity, for their potential torpedoing of ambitious legislative initiatives, and lastly for the symbolic message of the precedent: For the first time, an EU Treaty allows a member state to withdraw from existing *acquis*.

Union bodies: Europol, Eurojust and a European Union Prosecutor's Office

A final significant gain in resources for European security lies in the radical change of Treaty foundations of the two EU bodies active in the field of police and judicial co-operation, Europol and Eurojust, supplemented with the possibility to create a European Public Prosecutor's Office from Eurojust.

Articles 69 D and G, seen in the context of the 'communitarisation' of the third pillar, are marked by a new philosophy and will permit a substantial overhaul of both bodies. The crucial novelty is that these provisions give considerable leeway to the ordinary EU legislator – i.e., the Parliament and the Council acting by qualified majority – to confer new tasks and powers, including those of an

'operational nature', on both bodies,[43] and also to settle corollary institutional issues, such as their internal functioning, the modalities of parliamentary oversight by the European Parliament together with national parliaments, and modalities of judicial control by the Court of Justice. This large power given to the legislator is in sharp contrast to the present Articles 30(2), and 31(2) EU, which define, directly in the Treaty, the tasks of both bodies in more detail and in a very limitative way. The future regulations establishing these two bodies will thus not only remedy the current malaise caused by a convention on Europol which can hardly be amended, and by Article 34 EU Decisions which attempt, without having direct effect, to establish legal personalities and regulate rights-sensitive activities of the bodies. The future Treaty also promises to entail interesting legislative choices. Thus, the more political will there is to increase Europol's operational powers, the more important it will be to provide for appropriate mechanisms of judicial control. Under the future Article 230(5) FEU, the legislator may lay down specific conditions and arrangements concerning individual access to the Court against the acts of Europol (or Eurojust), and it could thus maintain the current joint supervisory authority to control Europol's processing of personal data as a pre-trial recourse instance; however, ultimately there must now be the normal remedies before the Court of Justice as against the acts of any other Union institution or body. There would also be a margin for the legislator to address the separate, though often confused issue of a possible 'judicial direction' of Europol's investigative police action, by Eurojust or a future Prosecutor's Office.[44]

However, these increased possibilities of the legislator had to be counterbalanced by the introduction of some upper limits to the future development of both bodies. This was necessary to allow introduction of qualified-majority voting. Indeed, in accordance with Article 69 G(3) FEU whatever operational powers the Union's legislator may choose to confer on Europol in the future, any operational action by Europol must always be carried out in liaison and agreement with the authorities of the member states whose territory is concerned. In addition, the application of coercive measures remains the exclusive responsibility of the competent national authorities. These limits raise a question: What is 'operational action' within the meaning of this article? It must be a concept linked to physical action on a given territory and thus be narrower than that currently applied by Europol which includes even the exchange of 'operational data'. The same question arises for Article 69 F, which maintains unanimity only for 'operational' police co-operation, not for data exchange. 'Operational co-operation' will also need to be delineated from non-operational administrative co-operation under Article

[43] Cf. also G. de Kerchove and A. Weyembergh, *supra* n. 2, at p. 346 et seq.

[44] This possibility is alluded to in Art. 69 E 'where appropriate in liaison with Europol', and in Art. 69 G 'where appropriate in liaison with Eurojust'.

61 G FEU. Finally, it appears that Article 69 G(3) FEU would not prevent the legislator from granting Europol a power to *instruct* national authorities to apply coercive measures.

Similarly, the strengthening of Eurojust's tasks is accompanied by a guarantee that 'formal acts of judicial procedure' shall always be carried out 'by the competent national officials' (Article 69 D(2) FEU). Again, this seems not to exclude a power by Europol to enjoin national authorities to take such acts, nor the possibility for member states to empower their national Eurojust member to carry out such acts.

Finally Article 69 E FEU provides for a legal base to create a European Public Prosecutor's Office, *'from Eurojust'*. The future Treaty thus does not establish the Office directly, but only provides the Council with the possibility to do so, acting unanimously or within a simplified 'enhanced co-operation of a group of member states'.[45] This article had to arbitrate between two schools of thought, one (earlier developed by the Commission and the European Anti-Fraud Office OLAF) that favours a Prosecutor specifically for the protection of the Union's financial interests, and a second that sees a more urgent need for such a body in areas of organised crime that come under Europol's remit. The final article combines both options and leaves the choice to the European Council. The wording 'from Eurojust' also leaves various options on the relations between such a possible future body and Eurojust. One may ask where precisely the border lies between a further development of Eurojust, by qualified majority and co-decision, and the creation of a European Prosecutor's Office. This line appears to be drawn in Article 69 D(2): Eurojust cannot take formal acts of judicial procedure, i.e., act directly before a national criminal judge, whereas the whole point of creating a prosecutor's office would be for it to take precisely such formal acts itself. A last intriguing question that would have to be resolved by the legislator is about judicial control of the Prosecutor's Office. As a new Union body, acts of that Office having legal effects would be submitted in principle to Article 230 FEU. On the other hand, the whole point of the Office would be to act before national judges under national criminal law, be it simply 'in the shoes' of national prosecution authorities or pursuant to special procedural rules to be defined in accordance with Article 69 E(3) FEU. The legislator will thus need to devise a delicate formula of burden sharing between the Union's and the national judicial resources.

These various questions illustrate how challenging the legal work lying ahead will be in implementing the new Treaty. They also suggest that a European Prosecutor's Office will not be for tomorrow.

[45] The Council acts unanimously, on a proposal from the Commission or on the initiative of a quarter of the member states, after obtaining the consent of the European Parliament.

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Conclusion

The 'communitarisation' of the present Third Pillar, accompanied by thoroughly redesigned legal bases of a – now unified – Area of Freedom, Security and Justice, has been perhaps the single most revolutionary achievement in the Constitutional Treaty, and one now saved in the Treaty of Lisbon: rightly so. There can be no really credible 'Europe of results' in this field, as long as the Union lacks the instruments and procedures it needs in order to offer its citizens and residents security in a world menaced by terrorism and transnational crime, while ensuring an appropriate level of democratic legitimacy, respecting fundamental rights and guaranteeing access to adequate judicial protection.

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