Introduction

CHRISTINA ECKES AND THEODORE KONSTADINIDES

Over the last decade the responsibilities of the European Union (EU) in protecting its citizens from crime, organised or otherwise, have expanded incrementally. Security-led issues have gained particular relevance following the attacks of 11 September 2001, 9 March 2004 and 7 July 2005 and the last two EU enlargements of 2004 and 2007. These events have not only contributed to externalising internal security issues (e.g. through political cooperation with third countries on issues of freedom, security and justice), they have also, most significantly, legitimised pan-European initiatives or, to put it otherwise, they have 'Europeanised' internal security issues. This has occurred through the adoption of a wide range of legislative instruments related to law enforcement, cooperation on the prevention and combating of crime, intelligence exchange and public order management.

Until the entering into force of the Treaty of Lisbon much of European criminal law was tucked away in the third pillar of the EU. With the Treaty of Lisbon, the field of judicial cooperation in criminal matters has acquired an identifiable constitutional framework and has become a fully-fledged EU policy. The Treaty introduces the ordinary legislating procedure, involving the European Parliament and allowing the Council to vote by qualified majority in order to establish minimum rules. It also extends the Court's jurisdiction to cover areas of the former third pillar, albeit significantly limited by the transitional provisions (Protocol 36). Finally, the Union's available legislative instruments are strengthened and the principle of mutual recognition formally becomes the backbone of European criminal law.

The EU has with the Treaty of Lisbon renewed its commitment to combat crime as an essential component to the progressive establishment of an Area of Freedom, Security and Justice. The prioritisation of countering crime at EU level constitutes an inevitable consequence of the cross-border nature of contemporary criminal activities, on the one hand, and the fact that crime cannot be clearly separated from policy fields that

are governed by EU law, on the other. It has been accepted that convergence essentially necessitates the alignment of national prosecution systems and regulation of highly sensitive and contested policy areas, such as the maintenance of law and order. In the not so distant past, however, the pillar structure of the EU in conjunction with the principle of conferred powers created adverse conditions for a unified approach towards a European criminal policy. The former Treaty structure effectively hindered policy convergence in criminal matters. But even today, the endeavour of the Member States to take joint action against both internal and external threats openly clashes with their interest in protecting their sovereignty from the extension of EU competence. At the same time, it is widely perceived that Member States cannot deal effectively with new threats and serious cross-border crime by acting on their own. In other words, it can be contended that cross-border crime necessitates a cross-border response.

Legal and judicial cooperation under EU law appears to provide an appropriate solution. It allows reaching policy convergence through minimum standards and mutual recognition rather than harmonisation. This provides a middle ground for the establishment of an 'Area' (not a 'Community') that strikes a balance between strict European integration and national sovereignty. Yet at the same time, criminal law is an area where different standards resulting from the increasing size and heterogeneity of the EU may have adverse consequences on the freedoms of the individual, such as the right to personal liberty and safeguards as to arrest and detention. This renders law-making based on the principle of mutual recognition increasingly difficult. For the above-mentioned reasons, the establishment of a true Area of Freedom, Security and Justice in which national enforcement tools freely circulate, irrespective of the absence of a European standard, is a dangerous undertaking: fundamental constitutional principles both at the national and European level may be compromised. This requires the establishment of some sort of a European Public Order, a term used in the Court's jurisprudence to refer to, according to one commentator, 'the status of some fundamental provisions in the EC Treaty'.[1]

It follows that the maintenance of a Public Order within the EU is tantamount to the preservation of a hierarchy of principles at the supranational level with the objective of preventing disorder and as a result

[1] R. de Lange, 'The European Public Order: Constitutional Principles and Fundamental Rights' 1(1) *Erasmus Law Review* (2009) 1–24, at 8.

providing for the polity's welfare. In that respect, it can be argued that Public Order becomes synonymous to Public Security. It is suggested in this book that it is not essential to secure the homogeneity of all actors involved but rather to invest in the establishment of a set of obligations, which are objective in character and whose scope of protection extends beyond state-centric interests, thereby protecting the fundamental rights of citizens. For instance, the development of principles and guarantees governing criminal law and criminal procedure constitutes an essential component for the survival and continuation of a European Public Order (*Ordre Public*). Steps towards the establishment of constitutional instruments of European Public Order consist of the now binding EU Charter of Fundamental Rights and the possibility for the EU to accede to the European Convention on Human Rights.[2]

Since the entry into force of the Treaty of Amsterdam, establishing the Area of Freedom, Security and Justice, as part of a consistent and coherent policy framework, has become one of the Union's main objectives. The challenge is to guarantee the free movement of persons while offering a high level of protection from threats, including terrorism and other illegal activities which have both internal and external security dimensions. The political agenda set by the European Council at Tampere (1999) and enhanced by the Hague Programme (2004) and, most recently, by the Stockholm Programme (2009), links a vast number of policy areas ranging from protection of the Union's external borders to judicial cooperation in criminal matters, from the fight against acts of terror, cross-border and organised crime to tackling fraud and corruption. The Stockholm Programme (2009) in particular, has added to the security-oriented vision of the Area of Freedom, Security and Justice. It set the agenda for the period of 2010 to 2014 and identified strategic objectives and concrete actions related to its security rationale. This places a greater emphasis on the role of the EU as a facilitator within the Area of Freedom, Security and Justice and the Member States' duty to align, via enhanced cooperation and mutual trust, their substantive laws as a vehicle to solving problems through collective action. Most significantly, in the Stockholm Programme, the European Council has recognised the need for increased harmonisation of criminal law via the establishment of minimum rules on the definition of criminal offences and sanctions.

The present collection aims at providing an in-depth analysis of the role of the EU in fighting crime within the Area of Freedom, Security and

[2] Provided that all Member States ratify the accession document: see Article 218(8) TFEU.

Justice. In doing so it deals with the broad and much contested notion of 'Europeanisation' of the fight against crime. For the purpose of this volume, the term is taken to encompass the impact of EU policies in the Member States and the progressive convergence of the latter's criminal law systems as a result of the adaptive pressures by supranational legislation; mutual recognition as an alternative to harmonisation and the incremental development of the jurisdiction of the Court. This volume also explores the limitations inherent in European counter-crime policies within the Area of Freedom, Security and Justice, and discusses changes under the new constitutional framework introduced by the Treaty of Lisbon. It assesses the contribution of the Treaty of Lisbon both collectively and within individual substantive areas, in which the EU has taken an active role in fighting crime, namely: corruption, money laundering, terrorism, organised crime and extradition. Although these areas have recently received particular attention in literature, they are still in the making and many new issues deserve further discussion. The final two chapters of this volume move away from specific subject areas and discuss certain limitations inherent in the Area of Freedom, Security and Justice. The penultimate turns to examine an internal limitation, i.e. the scope of the judicial review of the national law and order clauses in the Luxembourg courts. The last chapter gives consideration to the external implications and limitations of the Area of Freedom, Security and Justice.

The approaches taken in the different chapters, although diverse in character, are not limited in merely considering the intensification of EU action in the Area of Freedom, Security and Justice through regulation, mutual legal assistance and operational collaboration. They, most interestingly, explore the potential of mechanisms that are intended to enhance the efficiency of implementation of the Member States' obligations within the EU and their contribution to establishing a European Public Order. To that effect, they examine some of the emerging issues and sources of tension in the establishment of the Area of Freedom, Security and Justice. The legitimacy to pursue such a project at the EU level, the interaction between the national and supranational level, the search for accountability and a clear legal mandate at the European level, as well as the effectiveness of judicial protection of fundamental rights – these constitute central themes throughout this collection. They arise across all sectors of European lawmaking regarding the fight against crime and determine the degree of convergence and divergence between Member States. Of course, with the exception of their own contributions, the views and arguments expressed hereafter do not necessarily reflect those of the editors.

In a preliminary section, **Maria Fletcher** considers the implications of the Treaty of Lisbon framework to the Area of Freedom, Security and Justice. Her contribution consists of a critique of the Treaty of Lisbon and the Stockholm Programme, which brings the collection up to date. The impact of the Treaty of Lisbon is a recurrent theme in all the following chapters in the context of the specific subject area that those chapters explore.

Patrycja Szarek-Mason reviews the existing EU policy against corruption within the Member States and addresses how this policy compares to the international standards in this area. Her chapter begins with an overview of the major international anti-corruption instruments. It focuses on the activities of the Organisation for Economic Cooperation and Development (OECD), the Council of Europe and the UN. Following this discussion, she moves on to analyse the EU policy against corruption. Her chapter outlines the scope of the EU mandate to prevent and combat corruption across the Member States and the impact of the Treaty of Lisbon on this area of EU policy. Next, Szarek-Mason reviews the existing EU anti-corruption instruments in the light of international developments. She points out the areas where the EU has fallen behind international standards and identifies the added value of cooperation at the EU level. Finally, her chapter analyses the latest EU policy developments and points out that the EU is moving towards a more coherent strategy against corruption within the Member States.

Ester Herlin-Karnell reviews the Union's anti-money laundering agenda. The third money laundering directive controversially introduces not only a risk-based approach to the fight against dirty money but also includes the financing of terrorism. The directive is based on former Article 95 TEC (current Article 114 TFEU) which raises questions as to its contribution to the establishment of the internal market. Herlin-Karnell broadly explores the implications of EU risk assessment in the area of EU anti-money laundering and the implications of supranational harmonisation in the area. In doing so, she examines whether there are different notions of 'risk' at stake, i.e. within the traditional context of EU risk regulation and the area of money laundering and terrorism financing respectively. Finally, the chapter addresses the implications of the former cross-pillar overlap as well as the impact of the Treaty of Lisbon.

Maria Bergström examines the changing character of public-private cooperation within the field of EU anti-money laundering regulation, in particular, the regulatory and implementing structures on the global, regional and national arenas, with the UK and Sweden as topical examples

of different approaches. With the introduction of the risk-based approach, private actors have been given an augmented role. Yet, whereas public actors are accountable within the democratic system of command and control, private actors are not. Arguably, a new model of legal accountability is emerging. The closer elements of such a model are set down in binding legislation, and non-binding standards and recommendations are worked out by those that are then monitored by administrative and law-enforcement agencies. Bergström argues that the eventual success of such a legal accountability model depends, however, on the quality of the underlying rules and procedures in monitoring the private actors, their effect on actually combating crime, and last but not least, on their acceptance by those who are being regulated.

Christina Eckes explores the legal framework of European counter-terrorist policies. Containing terrorism is one of the ten priority action points of the Hague Programme launched by the European Council in 2005, setting out a five-year plan for developing the Area of Freedom, Security and Justice. The emphasis lies on facilitating cooperation between Member States in sharing information and in preventing and combating cross-border crime. However, the EU also adopts operational measures, such as economic sanctions against terrorist suspects. Countering terrorism at the EU level entails specific problems of justification and coordination. A basic doubt remains whether the EU is the right actor to adopt counter-terrorist measures. Also, great national differences in the perception of terrorism as a threat and in security culture create additional difficulties in the attempt to fight terrorism in an efficient but rights-compliant way at the European rather than at the Member State level.

Massimo Fichera examines the developments and challenges of the EU's fight against organised crime. Organised crime is an area of great concern in the Union, not only at the institutional level but also at the citizens' level. It is a highly diversified phenomenon embracing not only legal, but also economic and socio-cultural matters. Following the opening of borders between Member States and the creation of a globalised society, a number of organised criminal groups have turned into transnational 'enterprises' capable of affecting several states at once. After approaching this phenomenon from a historical perspective, Fichera provides an overview of the policy adopted by the EU to combat organised crime and the obstacles faced by it (e.g., common definitions, evidence gathering, mutual recognition). This analysis is carried out against the background of the EU's enlargement and its neighbouring policy, which raises a host of thorny issues, such as the emergence of new forms of organised crime

and the extent to which the institutions are able to tackle them. In conclusion, the results of the EU policies are assessed with a view to verifying whether or not the common approach adopted so far can be considered effective and, if not, what should be improved.

Theodore Konstadinides revisits the innovations introduced by the Framework Decision on the European Arrest Warrant (EAW) and the establishment of an EU-wide system of free movement of judicial decisions in criminal matters, covering both pre-sentence and final decisions, within an Area of Freedom, Security and Justice. He focuses upon the functionality of the principle of mutual recognition and identifies certain problem areas that limit the substantive scope of the EAW. The chapter first examines the two major reforms introduced by the Framework Decision, namely the abolition of the 'double criminality' test and the limited grounds for refusal of execution, especially the rule against surrendering nationals. It is argued that such a refusal cannot now rest on any human rights considerations, despite its constitutional premise in a number of cases. The chapter also provides a commentary on the paradox that, while the Framework Decision dispenses with verification of the double criminality test for the categories of listed offences, it leaves the definition of those offences (and the penalties applicable in each case) to the issuing Member State. And in accordance with the Framework Decision, the Member State must respect fundamental rights as enshrined in Article 6 TEU as well as the principle of legality. Konstadinides argues that 'mutual recognition' does not necessarily imply mutual trust.

Cian Murphy examines the evolution and implementation of the European Evidence Warrant. The warrant, which aims to complement rather than replace existing mechanisms for evidence transfer in the EU, took much longer to agree and implement than its sister measure, the European Arrest Warrant. His chapter demonstrates how the warrant has been carefully crafted to fit with existing mechanisms and how the EU appears to have learned from certain mistakes made with the European Arrest Warrant. It also considers the principle underpinning the warrant – mutual recognition – and what may be done to strengthen the mutual trust required for its successful operation. Murphy concludes by looking to the future, for the European Council has already proposed to replace the European Evidence Warrant with a new measure under the Stockholm Programme.

Alicia Hinarejos raises concerns as to the current process of judicial review of the law and order and internal security clauses of the Member States. She acknowledges that the maintenance of law and order and the

safeguarding of internal security are competences lying at the very core of national sovereignty. It is therefore apparent that, within the framework of an ever more dynamic Area of Freedom, Security and Justice, Member States have sought to emphasise that the EU may not lay claim to these competences, or regulate the way in which Member States discharge them. Her contribution focuses on the judicial review of national measures caught by the 'law and order and internal security' provisions introduced in the Treaties. It contends that these provisions are better interpreted as general clauses on the limits of EU law rather than as derogations comparable to those available from the law of the single market. This, however, does not exclude the possibility of review by the Court of Justice. It is submitted that Member States have responded to what they perceived as a threatening attitude on the Court's part by adding, as a second and potentially problematic safeguard, a series of provisions that explicitly limit the jurisdiction of the Court.

Ramses A. Wessel, Luisa Marin and Claudio Matera address issues associated with the external dimension of the Area of Freedom, Security and Justice. They set off by arguing that traditionally both the Union's third pillar and the Area of Freedom, Security and Justice (Title IV of the EC Treaty) have been somewhat inward looking. The reason is that most of the rules related to these areas concerned cooperation between Member States, rather than with third parties. At the same time, where external relations came in, they were considered to have remained largely in the hands of the Member States. This explains why in the study of the EU's external relations, the area of justice and home affairs has been virtually neglected and the focus was on the Community's external relations in other policy domains (trade in particular) and the Union's foreign, security and defence policy. However, with the intensification of cooperation in the justice and home affairs area, the external dimension became more apparent and complex and the EU has become an important player on the international scene. This 'internationalisation' of EU justice and home affairs was not only the result of a coming of age of this cooperation, but also of the introduction of new competences, including a treaty-making competence of the EU. The chapter, therefore, aims to analyse the main legal questions in an area that is still very much under development.

By way of conclusion, the book addresses two separate but interlinked enquiries in the 'Europeanisation' of criminal law. It examines the different fields in which 'Europeanisation' can be witnessed and identifies the internal and external limitations to this 'Europeanisation' of criminal law, namely the complicated division of competences between the EU and

its Member States and the limited legitimacy of the EU to address certain issues. The significance of EU law has dramatically increased in a range of policy areas that either fall under what is strictly speaking criminal law or are, at least, closely connected with criminal law. Throughout the book, two driving factors can be identified behind this 'Europeanisation'. The first is the increasing cross-border nature of crime, best exemplified in the phenomenon of 'international terrorism', which goes beyond the territory and sphere of influence of Member States. In particular, European law-making in the fight against corruption, money laundering, terrorism, and organised crime has been motivated by the recognition that these international phenomena cannot be effectively contained at the national level. The second driving factor is a spill-over effect from increased EU competence in other policy fields. Close links with existing areas of competence make it necessary for the EU to take criminal law action in order to preserve its own credibility. For instance, the exercise of EU free movement rights by perpetrators, to avoid prosecution in a Member State, necessitates a European strategy to address their surrender. More recently, and this has been the main focus of this book, the creation of the Area of Freedom, Security and Justice has extended EU competence into areas that are either commonly dealt with under criminal law, or in which criminal law plays at least a significant role. For police and judicial cooperation in criminal matters the Treaty of Lisbon constitutes the final step on this way.

Since the idea for this book was conceived, it has been our expectation to identify current themes, provide reflections and raise questions. It has been a long but pleasant journey. Looking at the above synopses, one cannot do justice to our contributors' insights with regard to the pertinent issues surrounding the Area of Freedom, Security and Justice that they have so thoroughly articulated. We can only wish that this collection proves to be thought-provoking and offers the reader a complementary or corrective approach to their understanding of an ever-expanding area of EU law.

1

EU criminal justice: beyond Lisbon

MARIA FLETCHER

INTRODUCTION

The Lisbon Treaty[1] effects substantial reforms to the scope and structure of the policy domain of EU criminal justice – that is, matters of judicial cooperation in criminal matters and police cooperation, previously dealt with in the now defunct third pillar of the European Union. Adopting the familiar language associated with EU integration, these reforms broadly 'communitarise' this field and therefore establish it more firmly at the 'supra-national' (as opposed to 'intergovernmental') end of the integration scale. The advantages this promises to bring in terms of efficiency, effectiveness, transparency and legitimacy are considerable and the scale of the comunitarisation shift marks a major breakthrough in what is undoubtedly a sensitive and contested policy domain. Having said that, the communitarising impact of the Lisbon Treaty is, in a range of specific ways, heavily qualified. This reflects the continued existence of a tension between the development of an EU agenda and approach to criminal justice (even one based much more squarely than ever before on a logic of mutual recognition) and a tendency for States (some more than others) to wish to be able to safeguard their own particular interests. For political reasons, the manifestations of this tension in the Lisbon Treaty are more numerous and more wide-ranging than under the previous legal settlement. Indeed the degree of differentiation potential that has been introduced into this field has the capacity to seriously undermine the emergence of a coherent (and therefore effective and legitimate) EU criminal justice agenda in the future.

This chapter will begin with a brief context-setting section in which the Lisbon Treaty is presented as the latest *legal* framing exercise in a by now long history of criminal law cooperation in the EU. Here, the latest *political* framing exercise in the shape of the Stockholm Programme will also be

[1] For consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, see OJ C 83/01, 30.3.2010.