EU Criminal Law Relocated
Recent Developments

Ester Herlin-Karnell
Abstract
This paper seeks to chart recent developments in EU criminal law with particular emphasis on case law delivered after the entry into force of (and in the run up to) the Lisbon Treaty. It begins by setting the scene of EU criminal law post the Lisbon Treaty, by briefly sketching the main changes as provided by this Treaty. The specific focus of this paper is however the operation of mutual recognition in this area and the implications of citizenship rights as demonstrated in the Wolzenburg case. In addition, the paper cautiously looks at the notion of an ‘autonomous interpretation’ of EU criminal law as implied by the Court in the recent Mantello case as well as briefly examining the IB case regarding the scope of mutual recognition in the present field.

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EU Criminal Law Relocated: Recent Developments

Dr Ester Herlin-Karnell
Assistant Professor in EU Law

Department of Transnational Legal Studies
Faculty of Law
VU University Amsterdam
De Boelelaan 1105
1081 HV Amsterdam
e.herlinkarnell@vu.nl

Available at http://uu.diva-portal.org
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1 Introduction

This paper seeks to discuss recent developments in the area of European criminal law. Indeed, the entry into force of the Lisbon Treaty and thereby the abolition of the complex pillar system and the extended jurisdiction of the Court of Justice to cover this area have been of great importance for the credibility of the area of freedom, security and justice (AFSJ) project. Nevertheless, the obvious question is of course how much has really changed in the present area after the entry into force of the Lisbon Treaty? Has EU criminal law been (completely) relocated? The Lisbon Treaty opens up a new chapter in the history of EU criminal law by explicitly transforming it to the supranational level as forming part of title V of the Treaty of the Functioning of the European Union (TFEU). This paper seeks to chart these developments with particular emphasis on recent case law and the concept of autonomous interpretation in this area.

More specifically, this paper has three aims. I will begin by briefly sketching the main changes for the criminal law as introduced by the Lisbon Treaty including the implications of the Stockholm programme in this area. The Stockholm programme is the latest Justice and Home Affairs agenda and superseded the Hague programme. It represents an important step in the direction of more criminal law regulation at the EU level. Moreover, this paper will look more closely at recent case law in this area. I will try to investigate what this case law tells us about the relationship between the individual and the area of freedom, security and justice (AFSJ) by focussing on the implications on citizenship in this area as one of the novelties of the AFSJ. The paper concludes by supplying some general thoughts about the future of EU criminal law.

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1 The Stockholm programme – An open and secure Europe serving and protecting the citizen (OJ C115/1, 02.12.2009).

2 The Hague Programme: 10 priorities for the next five years (OJ C 236, 24.9.2005).
2 Main changes for the Criminal Law as introduced by the Lisbon Treaty

It is fitting to begin by briefly setting out the basic legal framework of EU criminal law after Lisbon. The crucial provisions are Articles 82 (procedural criminal law) and 83 TFEU (substantive criminal law). These provisions need, however, to be read in the light of Chapter 1 of Title V TFEU, which sets out the general goals to be achieved in this area. More specifically, Article 67 TFEU stipulates that the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. Moreover, it provides that the Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism, and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws. So the importance of ensuring a high level of security plays an important role here.

Procedural criminal law – basics I

Article 82 TFEU stipulates that judicial cooperation in criminal matters shall be based on the principle of mutual recognition and should include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 of the same article. This paragraph, in turn, states that the European Parliament and the Council may establish minimum rules to the extent necessary to facilitate mutual recognition of judgments and judicial decisions as well as police and judicial cooperation in criminal matters having a cross-border dimension. Such rules shall take into account the differences between the legal traditions and systems of the Member States. Article 82(2) TFEU then sets out a list of areas within which the EU has legislative competence, including the mutual admissibility of evidence between the Member States, the
rights of individuals in criminal proceedings, and provisions regarding the rights of victims. Furthermore, the provision contains a so-called ‘general clause’ stating that any other specific aspect of criminal procedure, which the Council has identified by (unanimous) decision in advance, would qualify for future approximation. Finally, Article 82(2) states that the adoption of the minimum rules should not prevent Member States from maintaining or introducing a higher level of protection for individuals. It remains to be seen whether this constitutes a far-reaching and sufficiently consistent solution as regards the protection of the individual. In particular, it remains unclear to what extent a Member State could insist on higher levels of protection of the individual in the context of the European Arrest Warrant (EAW)\textsuperscript{4} and therefore refuse to surrender even since there is no general human rights exception under the EAW. Instead the notion of mutual recognition (and trust) is the main rule here based on the assumption that the national legal orders offer a sufficient framework for analysis in this area.

\textit{Substantive criminal law – basics II}

Article 83(1) TFEU concerns the regulation of substantive criminal law and stipulates that the European Parliament and the Council may establish minimum rules concerning the definition of criminal law offences and sanctions in the area of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. Thereafter, this provision sets out a list of crimes in respect of which the EU shall have legislative competence such as terrorism, organised crime, and money laundering. It also states that the Council may identify other possible areas of crime that meet the cross-border and seriousness criteria. Moreover, and interestingly, Article 83(2) establishes that the possibility exists for approximation if a measure proves essential towards ensuring the effective implementation of a Union policy in an area that has already been subject to harmonisation measures.

\textsuperscript{4} Framework Decision European Arrest Warrant, [2002] OJ L 190/1, on the EAW.
One of the most significant changes introduced by the Lisbon Treaty is the extension of the Court’s jurisdiction also to cover the former third pillar area. This is obviously one of the most important constitutional restructurings under the Lisbon Treaty and one of the most crucial changes for the individual as regards effective judicial protection. It should perhaps be recalled that prior to the entry into force of the Lisbon Treaty, jurisdiction was based on a voluntary declaration by Member States as to whether to accept the Court’s jurisdiction in accordance with Article 35 TEU. The Lisbon Treaty changes this, as it significantly extends the Court’s jurisdiction within the AFSJ field. Yet, the Lisbon Treaty Protocol on Transitional Provisions provides for a five-year transition – or alteration – period before the existing third pillar instruments will be treated in the same way as other Union instruments.

Therefore, despite the entry into force of the Lisbon Treaty and, thereby, the merging of the pillars, there will remain ‘echoes’ of the third pillar in terms of the transitional Protocol and its five-year transition period. Obviously, this means that the Commission will not have the power to bring infringement proceedings against

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7 E.g., E. Denza, The intergovernmental pillars of the European Union, (OUP, Oxford 2002), Ch. 9.

8 Article 10 of this Protocol stipulates that:

1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.
Member States as regards alleged breaches of pre-existing measures during this period. It also means that the complex inter-pillar structure which has characterised European criminal law will remain influential for some time. Moreover, as a result of the transitional rules, there will be mixed jurisdiction over different measures concerning the same subject matter, and the most feasible regime (and favourable from the perspective of the individual) should then be preferred. The crucial question seems to concern the definition of when an act is ‘amended.’ It seems likely that in the absence of any de minimis rule or any indication that acts are in any way severable as regards the Court’s jurisdiction, any amendment — no matter how minor — would suffice. In the light of the Court’s history in promoting European integration, the Court would conceivably favour the most inclusive reading of when an act is ‘amended.’

Most importantly, the Lisbon Treaty introduces the possibility of expedited procedures for persons in custody. Article 267 TFEU provides that, if a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with a minimum of delay. This is obviously an extremely important change and reflects the debate on speedier justice in Europe. However, despite the reformation of the Court of Justice’s jurisdiction effected by the Lisbon Treaty, Article 276 TFEU makes it clear that the Court will still not have the power to review the validity or proportionality of operations carried out by the police or other law enforcement agencies of a Member State, or the exercise of responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. Likewise, Article 4 (2) TEU reinstates this exception by stipulating that national security remains the sole responsibility of each Member State. This is likely to create interpretation problems as regards the notion of ‘internal Member State security’ as opposed to EU security.

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3 The EU’s criminal law agenda – succinctly put

The Lisbon Treaty changes cannot be viewed in isolation from the Stockholm programme as mentioned above. Therefore, the EU’s criminal law agenda as manifested by the Stockholm programme is of central importance here. The Stockholm programme is the follow-up to the Tampere Programme (1999-2003) and The Hague Programme (2004-2009). An initial question – and against the background of the increased focus on security issues within the Union – is obviously: does the Stockholm programme serve the citizen? Whatever the answer, the Commission’s communication on the Stockholm agenda points at the current success with EU involvement in the present area. Nonetheless, it is also pointed out that before the entry into force of the Lisbon Treaty the desired progress has been comparatively slow in the criminal law area because of the limited jurisdiction of the Court – and since the Commission has been unable to bring infringement proceedings – which has led to considerable delay in the transposition of EU legislation at the national level.

More particularly, this Programme includes:

- promoting citizens’ rights – a Europe of rights;
- making life easier – a Europe of Justice;
- protecting citizens – a Europe that protects;
- promoting a more integrated society for the citizen – a Europe of solidarity.

12 The Stockholm programme – An open and secure Europe serving and protecting the citizen (OJ C115/1, 02.12.2009).
14 The Hague Programme, 10 priorities for the next five years (OJ C 236, 24.9.2005)
These ambitions are indeed very promising, albeit extremely wide-ranging, developments and the Commission deserves a lot of ‘credit’ for having taken on board the main criticisms as advocated by academics.16 According to the Commission, the internal security strategy must be construed around three complementary and now inseparable fields of activity: stronger police cooperation, a suitably adapted criminal justice system, and more effective management of access to EU territory. Thus, the Commission stresses the need for a criminal justice system that serves to protect the public. Hence, the Commission concludes that ‘faced with cross-border crime, the administration of justice must not be impeded by differences between the Member States’ judicial systems’. Accordingly, there is an apparent need to establish a successful crime-fighting agenda at the EU level. The question remains as to what extent concerns for the citizens are genuinely driving this agenda and to what degree such an agenda is driven by other aspirations such as the establishment of an autonomous EU system of criminal law. Regardless of the answer to the question asked, the Commission at least identifies the need to strengthen mutual trust by enhancing procedural safeguards for the individual. Interestingly, in the recent proposals for a Directive on the right to access to a lawyer in criminal proceedings17 and protection of the victim respectively18, the Commission specifically links the subsidiarity principle, to the importance of mutual trust. According to the Commission only action taken by the European Union will establish consistent common minimum standards that apply throughout the whole of the EU and thereby enhances trust in this area. In addition, the EU Commission recently published an evaluation of the implementation of the EAW.19

In its recent evaluation of this instrument, the Commission points out that the effective application of the EAW has been undermined by the systematic issue of EAWs for the surrender of

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16 Among the many critics, see eg Steve Peers’s many contributions posted at State-watch.org.
17 Proposal for a Directive on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest COM(2011) 326/3.
persons sought in respect of often very minor offences. Therefore, the Commission states that there is a need to apply a proportionality test to make sure that offences, even if they fall within the scope of the EAW, which are not serious enough to justify the measures and cooperation which the execution of an EAW requires are not carried out. So why has proportionality not functioned in this area? Has the very foundation of ‘mutual recognition’, which is based on the elusive notion of trust coupled with a loyalty obligation towards the EU, excluded the possibility of a proportionality review within the AFSJ? It seems ludicrous and a waste of judicial resources to issue arrest warrants for the theft of chickens and the like. As will be demonstrated below though, it could be argued that the principle of proportionality already forms part of the very notion of a ‘managed’ mutual recognition concept as such.

Consequently, there is an apparent need to find a solution for a successful crime-fighting agenda at the EU level and this presupposes mutual trust. This brings us to one of the most important playing-grounds, and EU integration in general, in contemporary EU criminal law development, namely that of the Court of Justice. It will be shown that recent case law in this area has had important implications for the development of EU criminal law.

3.1 Criminal law and the emerging notion of an autonomous European legal order

This section will try to discuss recent case law in this area in the intersection of free movement law and mutual recognition in criminal law matters. Arguably, one of the most interesting cases in the context of EU criminal law cooperation and free movement rights is the *Wolzenburg* case delivered in October 2009. This case concerned the European Arrest Warrant and the possibility of the Member States for refusal to surrender under Article 4(6) EAW where the Netherlands had made such a voluntary ‘opt-out’ under Article 4(6) EAW. Such an ‘opt-out’ from surrendering in this regard means that if an arrest warrant has been issued for the purposes of executing a custodial sentence or detention order, where

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the requested person is staying in or is a national or a resident of the executing Member State, that State undertakes to execute the sentence or detention order in accordance with its domestic law. The question arose as to whether it constituted discrimination to distinguish between a state’s own nationals and non-nationals in this regard. In other words, the core question was whether the required period of residence of the person requested for surrendering in the executing state counted as “staying” or “residing” so as to be treated in the same way as nationals. Secondly, the question presented itself as to whether an additional administrative burden—such as a residence permit—was in line with the axiom of non-discrimination in EU law. The Court of Justice made it clear that the non-discrimination axiom was applicable in the (now former) third pillar area as there is a clear free movement dimension to the EAW. In the context of the EAW, this has important implications from the perspective of rehabilitation issues and the possibilities of integrating into society. And yet this case needs to be understood against the broader picture of the history of the former third pillar. The reason for this is twofold. Firstly, there had been a general assumption that before the entry into force of the Lisbon Treaty, the question of Union citizenship was not interesting outside the first pillar setting. Yet this was not the whole truth as citizenship and non-discrimination were relevant to EU criminal law cooperation already prior to the entry into force of the Lisbon Treaty not only because of the general loyalty trend within the former third pillar starting with Pupino but mainly because fundamental rights applied across the pillars as proclaimed in ex Article 6 EUT. Accordingly, the Member States and the EU institutions were under a duty to apply the same standards as regards human rights when acting in the AFSJ. Secondly, it is quite obvious that the notion of non-discrimination is also of utmost importance in criminal law cooperation as forming part of the concept of a fair trial in a broad sense. Furthermore, there has always been a clear free movement aspect here: citizens cross borders and therefore there is a free movement dimension regardless of whether a matter also concerns an EAW order.

22 Case C-123/08 Wolzenburg, Opinion of AG Bot delivered on 24 March 2009.
23 Case C-105/03 Criminal proceedings against Maria Pupino, [2005] ECR I-5285
In addition, the very goal of creating the AFSJ is often accused of not fulfilling its ambitions and for putting too much weight on the security aspects while neglecting the freedom and justice dimension. After all, there has for a long time been a debate on whether the concept of mutual recognition was adopted too early within the third pillar: namely, despite overly divergent criminal laws and overly divergent fair trial guarantees between the Member States. In other words, the wider question here has concerned the issue as regards whether the adoption of the notion of mutual recognition is feasible in EU criminal law, in the absence of a fully established regime in this area. Yet in a recent judgment concerning the operation of the EAW and trial in absentia, the Court confirmed that mutual recognition is not absolute. And yet, mutual recognition has never been absolute. As Nicolaides points out though, mutual recognition should be managed. Thus, the notion of ‘managed’ mutual recognition implies that acceptance of the norms of other Member State can and must be reciprocal. Therefore, it represents an expression of proportionality in this area. In any case, in paragraph 50 of this judgment the Court pointed out that while it is true that the EAW is based on the principle of mutual recognition, that recognition does not as is clear from Article 3 to 5 of the EAW instrument mean that there is an absolute obligation to execute an arrest warrant that has been issued. The Court stressed the importance of allowing for some national discretion in this area and particularly the importance of enabling particular weight to be given to the possibility of increasing the requested persons chances of reintegrating into society. The Court held that against the background of this here was nothing indicating that the EU legislator wished to exclude trials in absentia from the scope of

25 Ibid.
29 Ibid.
the possibilities of including extra procedural safeguards in this area.

Moreover, in the judgment of Mantello\textsuperscript{30} concerning the scope of the mandatory options for non-executions of arrest warrants under Article 3 (2) of the EAW Framework Decision the Court stated that the interpretation of \textit{ne bis in idem} in Europe should be given an autonomous interpretation. And that whether a person has been ‘finally’ judged is determined by the law of the Member State in which judgment was delivered. One could perhaps cautiously ask if the Court is very concerned with the creation of the autonomous legal order of the EU?\textsuperscript{31} In the light of the fact that Article 50 of the Charter, which set out the right not to be punished twice, such a reaffirmation of \textit{ne bis in idem} appears perhaps less controversial. Instead, what remains controversial is the application of the mutual recognition principle, developed within the framework of the internal market, to criminal law as such. From the perspective of the individual it is the trust building\textsuperscript{32} mission of establishing the legitimacy of EU criminal law cooperation based on mutual recognition by assuming trust that conceivably has taken place at the expense of adequate human rights protection.\textsuperscript{33}

In any case, as discussed above, the Court in Wolzenburg seems to have applied a reasoning which was directly reflected in the Citizenship Directive 2004/38/EC.\textsuperscript{34} One may therefore say that the Court somehow limited the degree of its intervention by also using Directive 2004/38/EC as a template in the context of the EAW and its intersection with third pillar law. This raises the familiar question of the extent to which secondary legislation should prevail over Treaty-based rights as provided in the Treaty, i.e. the relation-

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\textsuperscript{30} Case C-261/09, Mantello, 7 September 2010 not yet reported.

\textsuperscript{31} See for an extraordinary emphasis on this autonomous legal order: Case C-402/05 P, Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities [2008] ECR I-5351 para 285. In para 316, the Court reiterated that “the review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the rule of law, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system”.


\textsuperscript{33} See e.g. V Mitsilegas, \textit{EU Criminal Law} (Hart publishing Oxford 2009) Ch 3.

\textsuperscript{34} Citizenship Directive 2004/38/EC OJ I, 229/35.
ship between primary and secondary EU law. In addition, such a residency requirement might seem as being in disharmony with the cases in *Teixeira* and *Ibrahim*. It should be recalled that in these cases the applicants applied for social assistance and sought to establish rights to residence under Regulation 1612/68 as a carer of children being educated in the host state. The Court granted rights under Regulation 1612/68. Therefore, these cases seem to be about limiting the requirement of self-sufficiency when education is at stake on family members. As pointed out by one commentator, the Court seem willing to construe a more favourable scenario if the situation does not come naturally within the scope of the Directive. Nonetheless, it is submitted that the *Wolzenburg* case is not about limiting rights but expanding them. After all, at the time this case was delivered it was not even clear that citizenship and non-discrimination applied to the former third pillar even though there is a clear free movement element to the EAW as such. In other words, the former third pillar as well as the current law on mutual recognition touches upon free movement right regardless of whether it also concerns the operation of the EAW.

More generally, as regards criminal law in the free movement context, it might be interesting to mention that in the *Tsakouridis* judgment the Court made it clear that an expulsion decision can be taken even against a citizen who has resided on the territory of the host State for the previous 10 years on imperative grounds of public policy. The Court stated that a balance must be struck between the exceptional nature of the threat to public policy. Although the Court stipulated that an expulsion measure must be based on an individual examination of the specific case and can be justified on imperative grounds of public security within the meaning of Arti-

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39 Case C-145/09 *Tsakouridis* judgment of 23 November 2010 not yet reported.
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cle 28(3) of Directive 2004/38 only if, having regard to the exceptional seriousness of the threat, it raises some questions about the function of citizenship in this area. It could perhaps be argued that when drug dealing is at stake the Court is willing to assume that there are no unlimited (citizenship) rights.41

What then does a case such as Mantello42 and the notion of an autonomous interpretation of criminal law tell us? Whilst it is true that the Lisbon Treaty provides for a new framework for analysis the exact implications of this case law is probably too early to say as there is simply not enough case law in this area. As explained, the very notion of autonomous interpretation in the context of the interpretation of ne bis in idem is closely connected with the wider aspiration of creating trust in EU criminal law cooperation. Indeed, the trust building mission has been the main concern for the Court of Justice in this area for decades. After all, it was in the context of the interpretation of ne bis in idem it all started as being somewhat pioneering in the EU creation of a European criminal law space based on trust. The Court set the criminal law mutual recognition ball rolling in the Gözütok and Brugge judgment.43 The key provision in this area has been Art. 54 CISA,44 which sat out the fundamentals of ne bis in idem: namely, that a person whose trial has been finally disposed of in one Member State cannot be prosecuted in any other Member State for the same act in question.45 Nevertheless, there is a difference as regards how the Member States treat ne bis in idem at the national level and how they envisage the principle to be applied at the transnational level. In spite of this, in Gözütok and Brügge46 the Court stated that there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States, even if the out-

42 Case C-261/09, Mantello, 7 September 2010 not yet reported.
45 See also Art. 50 of the Charter of Fundamental Rights.
46 Case C-436/04 Criminal proceedings against Leopold Henri Van Esbroeck [2006] ECR I-2333.
come were different if its own national law were applied. In any case, the entry into force of the Lisbon Treaty are steps in the right direction most importantly because of the legally binding status of the Charter and the EU accession to the *ECHR*. A reason for the current mistrust in this area has obviously been the lack of sufficient underlying criminal law protection of the individual. For this reason, the Stockholm Programme and the action plan\(^{47}\) implementing it set out to remedy this problem by creating a so-called roadmap for safeguards of the individual within criminal law procedure.

### 4 A roadmap for procedural safeguards

The roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings is a new development in this area.\(^{48}\) This roadmap forms part of the Stockholm programme mission. The roadmap focuses on certain areas of particular importance. The areas in question are:

- Translation and interpretation
- Information on rights and information about the charges
- Legal aid and legal advice
- Communication with relatives, employers, and consular authorities
- Special safeguards for suspected or accused persons who are vulnerable.

As part of this roadmap the European Parliament and the Council adopted a Directive on the right to interpretation and translation in criminal proceeding.\(^{49}\) But it is a regrettable that in relation to the measures contained in the Roadmap elaborated by the Stockholm


programme as well as in the Directive, there is no clarification regarding the precise procedural stage at which they should be guaranteed.\(^5\) Moreover, it could be asked how much of this really differ from existing ECHR case law. The ECHR case law means that the right of fair hearing applies also to pre-trial scenarios.\(^5\) Of course as is so often pointed out, the Member States of the EU are no ‘saints’ but most of them continue to have cases pending in front of the ECtHR and that therefore it is good to have as much protection stipulated as possible. At a more sophisticated level, it could however be argued that the most important aspect is to create a European common sense of fairness which genuinely cares for the individual. Part of this mission involves pinning down just what shared values the EU has. We already know that Article 2 TEU states that the EU respects values founded on human rights, but it is somewhat unclear what it means in the context of procedural safeguards in criminal law. It goes also without saying that this is obviously what the very ambition of the creation of mutual trust in criminal law is about. The problem is that things have happened very quickly here (for example the adoption of the EAW in the aftermath of 9/11) and the EU is still trying to catch up with accompanying procedural safeguards. Also, it seems clear that in order to create such trust there is a need for some kind of a general legislative framework, which is why the Lisbon Treaty is welcome here as it provides for a legislative competence in this regard.

In what follows I will try to discuss an area where the legislative action appears particularly fast-moving and where there is an acute need to ensure that adequate protection of the individual is ensured at the EU level.

5 Concrete examples of long-lasting clashes

The Stockholm Programme stresses the importance of not only enhancing trust within the Union but also increasing security within the Union. It is stated that Europe is facing growing cross-border criminality and that it is the Commission’s obligation to do its ut-


\(^5\) Ibid.
most to ensure that EU citizens can live in a secure environment.\(^{52}\) For this reason this section will look at some concrete examples of where the EU’s approach does not seemed to be driven by citizen concerns. Instead the main focus of the EU in this area seems to be on security and effectiveness endeavours.

5.1 Brief comment on data protection and the individual

The question of data protection in the criminal law context plays a central role in the Stockholm Programme.\(^{53}\) In this programme it is repeatedly stressed that the notion of data protection needs to be strengthened. More specifically, it is stated that the Union must ensure that the fundamental right to data protection is consistently applied. Since 2008, the general framework for the protection of personal data in police and judicial cooperation has been covered by Framework Decision 2008/977/JHA.\(^{54}\) This measure has a scope limited to the processing of personal data transmitted or made available between Member States.\(^{55}\) The most important change in this regard is the inclusion of Article 16 TFEU. That provision not only contains an individual right of the data subject to the protection of his or her personal data, but it also obliges the European Parliament and Council to provide for data protection in all areas of European Union law.\(^{56}\) Article 16 TFEU stipulates that everyone has the right to the protection of personal data concerning them. This applies to all areas, i.e. also to the AFSJ (unlike the Data Protection Directive (95/46/EC\(^{57}\)) which excluded criminal law from its scope). Article 16 TFEU mirrors Article 8 of the Charter, which also states the right to data protection. In addition, Dec-

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52 The Stockholm Programme – An open and secure Europe serving and protecting the citizen (OJ C115/1, 02.12.2009).

53 Ibid.

54 Framework Decision, on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters OJ L 350, 30/12/2008 P. 0060.

55 Yet according to Protocol 21, the United Kingdom and Ireland shall not be bound by the rules laid down on the basis of Article 16 TFEU which relate to the processing of personal data by the Member States when carrying out activities which fall within the scope of Chapter 4 or Chapter 5 of Title, that is criminal law and police cooperation.


57 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281, 23/11/1995 P. 0031.
laration 21 states that specific rules on the protection of personal data and the free movement of such data in the fields of judicial cooperation in criminal matters and police cooperation based on Article 16 TFEU may prove necessary because of the specific nature of these fields. Interestingly, it has been suggested that Article 16 TFEU is drafted in a way that echoes citizenship. It is true that Framework Decision 2008/977 still applies in this area but it is not as far reaching as Article 16 TFEU. As pointed out by Hijmans and Scirocco, it could be argued that Framework Decision 2008/977 does not fulfil the criteria of Article 16 TFEU since it does not apply to all processing of data, since domestic processing is excluded from it. Therefore, Article 16 TFEU has a much broader scope.

Cautiously expressed, it seems as this is an area where citizens’ rights and the protection of data and the efficient fight against crime creates friction when brought together.

5.2 Joint investigation orders

The initiative for a Directive on a European Investigation Order offers – in procedural rather than substantive criminal law – an interesting narrative with respect to clashes between the efficiency of criminal law cooperation and the protection of the individual. This European Investigation Order would repeal (the politically sensitive and therefore long debated) European Evidence Warrant (EEW) Framework Decision by proposing an initiative for a new directive on the basis of Article 82 (2) TFEU. Accordingly, this means that, first, the proposed directive is subject to mutual

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58 Declaration 21 attached to the Lisbon Treaty.
60 Framework Decision 2008/977, on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters OJ L 350, 30/12/2008 P. 0060 – 0071.
61 Also discussed in E Herlin-Karnell, ‘The development of EU precautionary criminalization’ (2011) 1 European criminal law review 149.
recognition. Secondly, it means that the so-called emergency brake, under which the Member States could pull a so-called brake if the legislation in issue were to affect fundamental principles of their criminal justice systems (see Article 82 (3) and Article 83 (3) TFEU respectively) and where a Member State can request a draft directive be referred to the European Council would not apply. The reason for this is that general issues concerning the operation of the mutual recognition rule under the directive as stipulated in Article 82 (1) TFEU does not entail such an emergency brake possibility. The reason for this is that the emergency brake applies to Article 82 (2) TFEU only, but not to the very application of mutual recognition as such. Given the controversy with mutual recognition and the long-standing question of trust building in this area such a divergence seem highly regrettable.65 Furthermore, somewhat interestingly, the sacred notion of ne bis in idem is abolished, as is the role of territoriality, where the Member States have had the option to investigate and punish crimes committed on their territory. Although the proposed directive ensures in Article 1 that it complies with fundamental rights and that it would not require the Member States to breach fundamental rights, there is a risk that the general efficiency focus will have a negative impact in this regard and undermine rights without necessarily serving effectiveness and security. As pointed out by Peers, the reassurances given are too vague to be taken adequately seriously. 66

The other example worth mentioning in the present context is the recent Communication on EU Counter-Terrorism Policy.67 This Communication is to be read in conjunction with a Commission staff working paper, ‘Taking stock of EU Counter-Terrorism Measures’68 and the Stockholm Programme. The Commission staff working paper includes a table with concrete achievements and future challenges to be achieved by focussing on four prestigious words, ‘prevent, protect, pursue and respond’. This Communication points to the success with current instruments, such as the

European Arrest Warrant and the Third Money Laundering Directive,\textsuperscript{69} as well as a whole range of legislative measures for the prevention of the use of the Internet for terrorist purposes;\textsuperscript{70} all of which have, however, been criticised from a human rights perspective.\textsuperscript{71} For this reason, the Commission points out that the relationship between the many interacting instruments and the mechanism for information exchange needs to be evaluated. The argument is centred on effectiveness concerns coupled with the need to prevent, pursue and protect. Admittedly, there are also good aspects of this Communication, such as the explicit recognition of the need to respect fundamental rights; and it is also highlighted that it is a priority to ensure that any measure complies with the Charter of Fundamental Rights. Yet in the light of the EU history on the fight against terrorism since 9/11, it is easy to have the impression that such reassurance appears fluffy and vague.\textsuperscript{72} At least it remains to be seen in practice.

Thus, it is cautiously submitted that these measure are not driven by safeguarding the individual but by security and efficiency concerns to enable speedy justice in Europe. This might sound paradoxical when considering the increased focus on the citizen’s rights with regard to the EU’s future agenda in criminal law as proclaimed in the Stockholm programme.

6 Conclusion

This paper had three aims. First, I tried to paint the background picture and concluded that the Lisbon Treaty provides for a whole new framework for the development of EU criminal law which makes it justified to speak about a ‘relocation’ of the notion of EU criminal law.

Thereafter, I investigated recent case law and tried to discuss the implications of citizenship in this area. I concluded that the development of citizenship rights (although already applicable to the former – and still existing in terms of the transitional protocol –

\textsuperscript{72} See e.g, C Eckes, EU Counter-Terrorist Policies and Fundamental Rights The Case of Individual Sanctions (Oxford: Oxford University Press, 2009).
third pillar) constitute extremely important change in this area. Subsequently this paper discussed the recent Stockholm programme and pointed out that although the Commission is trying its best to create a genuine EU law agenda in criminal law this programme is far too open-ended and general to be taken adequately seriously. There is still a lack of appropriate framework for legal safeguards of the individual, but the legal web is constantly improving. Thirdly, this paper looked at the area of data protection and European investigation orders as examples where there may be long-lasting clashes regarding the efficiency of criminal law cooperation and protection of the individual.

Perhaps the greatest difficulty will be to decide the exact content of the emerging regime of EU criminal law. There are various roadmaps produced by the EU and they all aim to drive citizenship rights, but it remains to be asked to what extent the individual – including the defendant – fully benefits from the complex web of EU criminal law as it currently stands. So although the criminal law has been relocated in terms of Treaty changes, it is too still to early to talk about an autonomous interpretation of it that fully respects fundamental rights. This area will remain work-in-progress for the EU for some time.