The Lisbon Treaty Evaluated: Impact and Consequences

London, 31 January - 1 February 2011

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UACES Lisbon Treaty conference

London 31 January

- 1 February 2011

Flexibility and loyalty in the AFSJ[1]

1 Introduction

The Area of Freedom, Security and Justice (AFSJ) has been elevated to a central constitutional place by the Treaty of Lisbon. A relatively unexplored feature of the AFSJ sphere is the flexibility provisions, most prominently the enhanced cooperation mechanisms where some Member States can go further than less integrative Member States by establishing enhanced cooperation between them. In this presentation I want to explore the impact of the principle of loyalty in this area and how it has changed after the Lisbon Treaty by looking at the flexibility provisions within the AFSJ. After all, not only does the loyalty obligation impose a general – and very well documented – duty for the Member States to be loyal towards the EU, but many of the subject matters in this area such as the fight against terrorism and organized crime have a global dimension to it and therefore touch upon the common security and foreign policy area. It will be argued that what is emerging in this area is

[1] Paper (work in progress) prepared for presentation at the UACES Lisbon Treaty evaluated conference in London 31 January – 1 February 2011. Please do not circulate. Comments welcome at e.herlinkarnell@vu.nl

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something much stronger than a loyalty obligation and more similar to a strict proportionality test.

In this presentation I will focus on particularly three issues. The first part of this presentation sets out the framework of the AFSJ and how it has changed in the Lisbon Treaty. Thereafter this presentation looks at the concept of enhanced cooperation and discusses to what extent it represents flexibility. I will also try to discuss the implications of the Court's jurisdiction in this context. Finally this presentation looks at the notion of loyalty and to what extent 'proportionality' could be said to represent the 'new' loyalty in this area.

2 The legal framework, EU criminal law after Lisbon

This section briefly sketches out the picture of EU criminal law as depicted in Lisbon. Accordingly, the former third pillar area will now form part of Title V of the TFEU.

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

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The area of criminal law is the subject of Ch 4 of title V of the TFEU. Article 82 TFEU states 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, reads that the European Parliament and the Council may establish minimum rules to the extent necessary to facilitate mutual recognition of judgments and judicial decisions as well as police and judicial cooperation in criminal matters having a cross-border dimension. Such rules shall take into account the differences between the legal traditions and systems of the Member States. The provision of Article 82 TFEU then sets out a list of areas within the EU's competence for legislation, such as the mutual admissibility of evidence between the Member States, the rights of individuals in criminal proceedings, and provisions regarding the rights of victims.

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

One of the ways of convincing the Member States to surrendering their national autonomy in criminal matter was the so-called emergency-brake provision in Article 82-83 TFEU. It is clear that such a possibility looks attractive for Member States with a strong relationship between the criminal law and the nation state and hence

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remedies the Member States' anxiousness about giving up their national sovereignty in criminal law matters.[2]

Nevertheless, if a Member State considers that a criminal law measure would be too sensitive where it would affect fundamental aspects of its criminal justice system. In that case, the ordinary legislative procedure shall be suspended and after discussion, and 'in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure'.

It is clear that such a possibility looks attractive for Member States with a strong relationship between the criminal law and the nation state and hence remedies the Member States' anxiousness about giving up their national sovereignty in criminal law matters.[3] Yet whether or not a single Member State pulls the emergency brake, the Lisbon Treaty provides nonetheless for the possibility of enhanced cooperation for the remaining Member States. '*In case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329 of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply*.'

Briefly, this means that there is no obligation as set out in Article 329 TFEU of Lisbon to address a request to the Commission, specifying the scope and objectives of the enhanced cooperation in question. Neither is there an obligation (as Article 20(2) TFEU of Lisbon

[2] Herlin-Karnell, 'The Lisbon Treaty and the Area of Criminal law and Justice' *European Policy Analysis* (Swedish Institute for European Policy Studies) available at http://www.sieps.se/sites/default/files/421-20083epa.pdf

[3] ibid

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reads) that the Council as a last resort shall adopt the decision at issue. This poses two questions. Firstly, it is possible to argue that the mere fact that the Member States do not need to show the last resort requirement as stated in Article 20(2) TFEU of Lisbon can be regarded as being in disharmony with the sensitive character of criminal law as the *ultimo ratio.* Secondly, there appears to be a risk that such cooperation could result in varying degrees and notions of freedom, security and justice.[4]

3 Flexibility and the AFSJ

The very notion of enhanced cooperation lies in the same pathway as the principle of subsidiarity, because of its character as an alternative to Union action. Indeed, it has been described as reflecting the anxiety among the Member States about the expansion of Community powers and therefore that it represents a method for states to tap on 'the brake'.[5] It could be argued that the very phenomenon of enhanced cooperation may prove to constitute a more effective solution than the 'lowest common dominator' agreements as provided for by the Treaty.

Therefore there is a link between subsidiarity and flexibility as it allows for action outside the EU programme of harmonization.[6] The argument of the present paper however is that such flexibility is ambiguous in the criminal law area. The point is that the emergency brake is too

[4] Herlin-Karnell, 'Enhanced cooperation and conflicting values - are new forms of governance the same as good governance?' forthcoming chapter in M Trybus & L Rubini (eds) *After Lisbon: The Impact of the New Treaty on European Union and the Treaty on the Functioning of the European Union (forthcoming Edwar Elgar 2011) see also* S Carrero & F Geyer, The Reform Treaty and Justice and Home Affairs (17 August 2007), available at http://www.libertysecurity.org/IMG/pdf_The_Reform_Treaty_Justice_and_Home_Affairs.pdf

[5] Ibid.

[6] S Weatherill, 'If I'd wanted you to understand I would have explained it better': What is the Purpose of the provisions on closer co-operation introduced by the Treaty of Amsterdam? In D O'Keeffe and P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart publishing, Oxford 1999), 21

Ester Herlin-Karnell, VU University Amsterdam

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much of a political smooth solution, used as a way of convincing the Member States to give up their sovereignty in this area. The problem is that the mere inclusion of an emergency brake is not a blessing per se and may result in conflicting values and rationalities in the tension between moving forward and respecting fundamental principles of criminal law and the adequate protection of human rights.[7]

Accordingly, the concept of enhanced cooperation is a form of flexibility as it accepts that there is room for action outside the 'traditional' EU model. Therefore, as expressed by one Advocate General, the notion of enhanced cooperation is a legal expression of the balancing exercise between making the Union wider and making it deeper'.[8] Prior to the entry into force of the Lisbon Treaty, the concept of 'enhanced cooperation' had never been used. The first ever approval of resort to it was recorded in July 2010: Dec 2010/405 OJ 2010 L189/12 regarding the law applicable to divorce and legal separation.[9] So enhanced cooperation in the criminal law area (except for examples such as the Prüm Treaty and Schengen outside the Treaty framework[10]) has never been used. In spite of this, it seems as if fighting crime and terrorism are extremely high priorities for the EU and the Member States so there is strong reason to believe that it will now become a legal reality.

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[7] Developed in Herlin-Karnell, 'Enhanced cooperation and conflicting values - are new forms of governance the same as good governance?' forthcoming chapter in M Trybus & L Rubini (eds) *After Lisbon: The Impact of the New Treaty on European Union and the Treaty on the Functioning of the European Union (forthcoming Edward Elgar 2011)*

[8] Case C-77/05 *United Kingdom* v. *Council*, Judgment of 18 December 2007 and § 83 of the Opinion of AG Tristenjak delivered on 10 July 2007.

[9] See S Peers, 'Divorce, European Style: The First Authorization of Enhanced Cooperation', European Const Law review, (2010) 339

[10] See generally, European Committee 18th Report of 2006/07, *Prüm: an effective weapon against terrorism?,* http://www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/90/90.pdf

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4. The Court of Justice and enhanced cooperation

It seems clear that the Court will face a number of difficulties in this area. One of the novelties of the Lisbon Treaty is obviously the reformation of the Court's jurisdiction in this area and constitutes a major development in the sense that it gives the Court full jurisdiction. This was previously not the case as the Court was only granted jurisdiction under limited circumstances as set out in Article 35 EU (if the Member States had opted for such jurisdiction).[11] However, as a result of the transitional protocol as attached to the Lisbon Treaty there will be mixed jurisdiction over different measures concerning the same subject matter, and the most feasible regime (and favourable from the perspective of the individual) should then be preferred. The crucial question seems to concern the definition of when an act is 'amended.' It has been suggested that, in the absence of any *de minimis* rule or any indication that acts are in any way severable as regards the Court's jurisdiction, any amendment − no matter how minor − would suffice. But there will obviously be less clear cases.[12]

In any case, it seems clear that the Court will face the problem of justicability in this area. [13] Moreover, it seems likely that the Court's new jurisdiction will cover also the exercise of enhanced cooperation (as long as the cooperation in question is Treaty based).[14] This will not only be the case as regards the initial decision to establish enhanced cooperation but also with regard to the observance of the conditions to the admission of an existing enhanced cooperation regime. One could perhaps speculate that the Court will consider such a ruling

[11] This means also that it will be possible for the Commission to bring infringement procedures in this area and that the previous limitations in all but the transitional protocol which contains a five year transitional protocol before former third pillar law will be treated in the same way as TFEU instruments[11], have been abandoned. According to this Transitional protocol Articles 9-10 the previous third pillar regime continue to apply for another five years. It also means that the complex inter-pillar structure that has characterized European criminal law will remain for some time.

[12] S Peers, Finally 'Fit for Purpose"? The Treaty of Lisbon and the End of the Third Pillar Legal Order' (2008) YEL.47

[13] F Amtenbrink and D Kochenov, 'Towards a more flexible approach to enhanced cooperation', in A Ott and E Vos (eds) 50 years of European Integration: Foundations and Perspectives, (TMC Asser 2009).

[14] Compare C Lyons, 'Closer Co-operation and the Court of Justice', in G de Búrca and J Scott (eds.) *Constitutional Change in the EU*, *From Uniformity to flexibility?*, (Hart publishing, Oxford, 2000) 95.

too political and therefore choose not to intervene in much the same fashion as that concerning the sensitive question of whether the Court should strike down on subsidiarity.

In short, the complexity of the opt-out/opt-in system and how it will work in future poses big difficulties and exceeds the scope of this presentation.[15] Nevertheless, it seems obvious that it remains somewhat unclear how, for example, the operation of mutual recognition in criminal law will function in this regard. After all, Article 82 TFEU stipulates that as regards the very concept of mutual recognition there is no possibility for the Member States to pull an emergency brake. There is however such a possibility as regards the enactment of legislation to the extent necessary to facilitate mutual recognition in criminal law cooperation matters having a cross border dimension such as the rights of individuals in criminal law procedure. It seems unlikely that the very notion of mutual recognition could function adequately here without all Member States participation. These are important issues and throw open many questions for the development and credibility of the project of EU criminal law more broadly.

5 Proportionality is the new loyalty?

In fact, the establishment of enhanced cooperation and particularly under the regime provided by Lisbon appears to be highly ambiguous if we consider the general principle of loyalty, which has become universally codified with the Treaty of Lisbon, Article 4 TEU (and therefore explicitly applicable in the former third pillar field as well beyond the so-called *Pupino* case law). As stated, the 'last resort' solution requirement as set out in Article 20(2) TEU of Lisbon does not need to be complied with in criminal law if a Member State has pulled the emergency brake. At issue here is the fact that it may not always be in the EU's interest to move forward and in this regard the possible disharmony with subsidiarity comes

[15] E Fahey, Swimming in a Sea of Law: Reflections on Water Borders, Irish (- British -) Euro Relations and Opting Out and Opting- In After the Lisbon Treaty' CML Rev (2010) p 673.

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to the fore as well as the criminal law principle that any criminalization must constitute the last resort as means of control.[16]

The Member States of the EU are under an obligation to be loyal to not only the EU's institutions but also to the Treaty as a whole as stipulated in Article 4 (3) TEU. Such a loyalty obligation could even mean that they are under an obligation to refrain from international obligation if it would jeopardize the full effectiveness of EU law. It seems indeed as if the loyalty obligation is the driving principle in many fields of EU law and in the field of external relations in particular. It is well known that ever since the ERTA[17] case in the 1970s the principle of loyalty has played a crucial importance for the whole development of the external dimension to EC competences. This is the starting point not only for loyalty as an important even necessary component for the external dimension of EU external relations, but also for the development of the implied competences of the Union. So imagine the following scenario: nine Member States wish to go further by establishing enhanced cooperation despite the fact that the emergency brake has been pulled. If the proposed legislation concerns the fight against terrorism it seems to be a clear demarcation problem on how to demarcate internal and external security. More specifically, the question arises as to the relationship between loyalty obligations and non-affect clause as stipulated in Article 40 TEU. We know from Art 1 TFEU and TEU respectively that the Treaties are to be treated equally. The point is that this is important because the European Court of Justice is largely excluded from jurisdiction over the external sphere of the Union's activities but will be asked to monitor its own jurisdiction. It

[16] Ester Herlin-Karnell ' Subsidiarity in the Area of EU Justice and Home Affairs – A Lost Cause ?' (2009) 15 ELJ 351

[17] Case C-22/70 *Commission* v. *Council* [1971] ECR 263

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appears likely that what will emerge in this area is something much stronger than a loyalty obligation and more similar to a strict proportionality test, a balancing act between the Member States and the EU.

6 Conclusion

This presentation has tried to point at the main challenges with the establishment of enhanced cooperation in the specific context of criminal law. There is a risk that the notion of loyalty in this area will mean the opposite, namely that the Member State that pulled the emergency brake will be under an obligation to comply with loyalty and 'move forward'. This could lead to a dangerous trend where loyalty will point in the direction of more criminal law. A balanced approach, in terms of proportionality, would arguably offer a more attractive solution and framework as compared to the more difficult parameter of loyalty, without denying the difficulty of finding out just what proportionality means.