

# 1

## *Introduction*

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EU criminal law and police cooperation is one of the fastest growing areas of EU law, and the evolution of the European Union into an Area of Freedom, Security and Justice (AFSJ) has been one of the most far-reaching constitutional developments in the EU. EU legislative action in the field poses significant challenges to the legal orders of the Member States and is one of the most contested fields of EU action. There are two main reasons for this: First, the development of EU criminal law has a significant impact on the protection of fundamental rights and the relationship between the individual and the state. Second, the development of EU criminal law poses challenges to state sovereignty and the relationship between the EU and its Member States.<sup>1</sup> There is thus a necessity for further legal analysis of this rapidly evolving field,<sup>2</sup> both from a constitutional law perspective, and a more general EU law perspective.<sup>3</sup>

The same is true for European police cooperation and its regulatory framework. Transnational police cooperation in general and European police cooperation in particular pose challenges to our understanding of traditional concepts such as national sovereignty, and national security and order. Upholding national security, protecting law and order, and guaranteeing the safety and rights of its citizens are some of the core tasks of the state. Thus, the delegation of legislative powers, the development of common strategies and operational measures, and the creation of EU bodies within the field should be considered an enormous and complicated, although sometimes necessary, step to take. The increase of transnational police cooperation and the regulation thereof can be subscribed to two developments: the political decision to establish an

<sup>1</sup> V Mitsilegas, *EU Criminal Law* (Oxford, Hart Publishing, 2009).

<sup>2</sup> Important volumes include C Eckes and T Konstadinides (eds) *Crime within the Area of Freedom, Security and Justice – A New Public Order* (Cambridge, Cambridge University Press, 2011), E Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Oxford, Hart Publishing, 2012), A Klip (ed) *Substantive Criminal Law of the European Union* (Antwerpen, Maklu, 2011), V Mitsilegas, *EU Criminal Law* (Oxford, Hart Publishing, 2009) and S Peers, *EU Justice and Home Affairs Law*, 3rd edn (Oxford, Oxford University Press, 2011).

<sup>3</sup> These perspectives were also analysed by M Bergström, 'EU som lagstiftare inom straffrätten och reglerna mot penningtvätt' (2011) *Svensk Juristtidning* 357.

AFSJ within the European Union, which brings with it the erosion of internal borders, and the increase of transnational crime globally. The EU regulation of police cooperation entered a new phase subsequent to the entry into force of the Lisbon Treaty in December 2009, which will be further elaborated below.

The most recent and substantial developments leading up to the changes introduced by the Lisbon Treaty, as well as the changes themselves, can be analysed from a number of different perspectives. The focus chosen in this volume is the broader European constitutional law perspective, albeit supplemented with a more general EU law perspective. Moreover, national constitutional law aspects are important for an analysis of the overall impact of recent developments on constitutional law. Hence, this perspective is also discussed in the various chapters with examples from Sweden and the Nordic countries. Although intertwined, any legal analysis of the changes must include all three perspectives in order to explain the dynamic evolution of the policy areas studied in this volume. The EU- and national constitutional law perspectives will thereby embrace the major constitutional changes introduced by the Lisbon Treaty, where the focus is on changes in competence between the EU Institutions on the one hand, and between the EU and its Member States on the other. In order to gain a proper understanding of these changes, a brief overview of the evolution of European police and criminal law cooperation will follow.

## 1. THE EVOLUTION OF EUROPEAN POLICE AND CRIMINAL LAW COOPERATION

### 1.1 The Early Days

In 1993, the Maastricht Treaty introduced the provisions on police and judicial cooperation in criminal matters. Thus, the development of the area of Justice and Home Affairs (JHA) dates back some twenty years now, and as Hans G Nilsson points out in his foreword to this volume, this development has been sensational. Nevertheless, EU police and criminal law cooperation predates the Maastricht Treaty albeit at a more intergovernmental level outside the then existing European Community's legal framework. At that point in time focus was on the exchange of information and best practice in certain specific fields. The 1967 Naples Convention on cooperation and mutual assistance between customs administrations provided the first framework for exchanges between Member States.<sup>4</sup> Thereafter, from the mid-seventies onwards, informal arrangements for sharing and exchanging information and expertise were established dealing with immigration, asylum, and police and judicial

<sup>4</sup> Later replaced by Naples II, Council Act 98/C 24/01 of 18 December 1997 drawing up, on the basis of Article K3 of the Treaty on European Union, the Convention on mutual assistance and cooperation between customs administrations, OJ 1998, C 24/1.

cooperation.<sup>5</sup> The setting up of networks to facilitate contact between Member States was important and working parties like the TREVI Group on terrorism, radicalism, extremism and political violence were set up and their scope extended at a later stage to also cover illegal immigration and organised crime.<sup>6</sup>

With the Single European Act in 1986, the internal market and the free movement of persons demanded compensatory measures such as anti-money laundering (AML) regulations, the strengthening of external border controls and the definition of European asylum and immigration policies. However, since progress on the free movement of persons and on cooperation in the field of justice and home affairs failed to appear within the then existing Community framework, the Schengen Agreement was concluded by France, Germany and the Benelux countries in 1985, and an implementing convention was signed in 1990.<sup>7</sup> Although still outside the Community framework, the aim was to abolish internal border checks, improve control at external borders and to harmonise certain provisions on visas, asylum, and police and judicial cooperation.

This intergovernmental approach led to problems of coordination where different groups deliberated separately and reported to different groups of ministers.<sup>8</sup> Hence, the Maastricht Treaty introduced provisions on police and judicial cooperation in criminal matters in Title VI of the Treaty on European Union. The areas covered were asylum policy, external border controls, immigration, combating drug addiction and international fraud, judicial cooperation in civil and criminal matters, customs and police cooperation. Three types of legal instruments were introduced which all required unanimity in the Council. The Court of Justice had only limited jurisdiction, and was only permitted to interpret legal instruments and resolve disputes between Member States when expressly provided for in the adopted instrument. The Commission's right of initiative was limited and shared with the Member States. The role of the European Parliament was limited to the right of being consulted by the Council, and thereby often informed only after the event.<sup>9</sup>

<sup>5</sup> See further, E Baker and C Harding, 'From Past Imperfect to Future Perfect? A Longitudinal Study of the Third Pillar' (2009) 34 *European Law Review* 25. One of their main arguments is that 'police and judicial cooperation in criminal matters' is in fact not a new policy area but that the cooperation between the Member States dates back several decades.

<sup>6</sup> The TREVI group set up in 1975 to counter terrorism and to coordinate policing in the EC. It was an intergovernmental network of national officials structured on three levels. See further above n 5 at 28; T Bunyan, 'Trevi, Europol and the European State' in *Statewatching the New Europe: A Handbook on the European State* (Statewatch, 1993), available at <http://www.statewatch.org/news/handbook-trevi.pdf>; and HG Nilsson, 'The Justice and Home Affairs Council' in M Westake and D Galloway (eds) *The Council of the European Union* (London, John Harper Publishing, 2004).

<sup>7</sup> The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000, L 239/19.

<sup>8</sup> Summaries of legislation, previously available <http://europa.eu.int/scadplus/leg/en/lvb/l33022.htm>.

<sup>9</sup> As Hans G Nilsson puts it in the foreword to this volume: 'The European Parliament was "consulted" and immediately forgotten.'

## 1.2 Introducing an Area of Freedom, Security and Justice

The Area of Freedom, Security and Justice (AFSJ) was introduced and defined with the Amsterdam Treaty in 1999. The measures concerning external border controls, asylum, immigration and judicial cooperation in civil matters were moved to the first pillar and thereby ‘communitarised’, whereas police and judicial cooperation still fell under the third pillar. EU measures used under the third pillar were common positions, framework decisions, decisions and conventions. Framework decisions resembled directives under the first pillar but had explicitly no direct effect.<sup>10</sup> The Schengen Agreement was included in Union cooperation through an implementing convention.<sup>11</sup> The UK, Ireland and Denmark were allowed to opt out of certain measures under the AFSJ through a protocol to the Amsterdam Treaty. However, the UK and Ireland were later allowed to participate in certain Schengen provisions according to Council Decisions in 2000 and 2001.<sup>12</sup> The Amsterdam Treaty also introduced formal rules of closer cooperation into the Treaty thus allowing certain Member States to work together more intensively within the framework of the Treaties. Thereby these Member States could make use of the institutions, procedures and mechanisms provided in the Treaties. Closer cooperation had to be established by the Council through a qualified majority vote at the request of the Member States following a Commission opinion and the transmission of the request to the European Parliament.<sup>13</sup> The conditions governing closer cooperation between police forces and judicial authorities on crime and the related procedures were derived from the relevant articles in the treaties.<sup>14</sup> The European Parliament was still only consulted and the Court of Justice only had jurisdiction if the Member States had accepted preliminary references. As pointed out by Hans G Nilsson in his foreword, 18 had done so by the end of Amsterdam.

Some smaller adjustments were made by the Nice Treaty in 2003. Eurojust and the European Judicial Network (EJN) were brought into the Treaty on European Union.<sup>15</sup> A Commission proposal for a European Public Prosecutor

<sup>10</sup> This is the only time the term ‘direct effect’ has made it into the Treaty (Article 34 Union Treaty/Treaty on European Union).

<sup>11</sup> The Schengen acquis – Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ 2000, L 239/19.

<sup>12</sup> See further M Fletcher (2009) ‘Schengen, the European Court of Justice and Flexibility Under the Lisbon Treaty: Balancing the United Kingdom’s “Ins” and “Outs”’ 5 *European Constitutional Law Review* 71.

<sup>13</sup> See further Article 11 EC Treaty/Treaty on establishing the European Community and Articles 40 and 43 Treaty on European Union.

<sup>14</sup> Article 11 of the EC Treaty/Treaty establishing the European Community, read in conjunction with Articles 40, 43, 44 and 45 of the Treaty on European Union.

<sup>15</sup> Article 31 of the Treaty on European Union. As pointed out by Hans G Nilsson, the setting up of Eurojust was decided by the Tampere Council and the European Judicial Network was set up by a Joint Action in 1998.

did not, however, make its way into the Treaty.<sup>16</sup> Co-decision eventually became the rule for most of the subject matters that were previously brought under the first pillar by the Amsterdam Treaty.<sup>17</sup> The Nice Treaty further developed the provisions on closer cooperation.<sup>18</sup> The Council and the Commission were responsible for ensuring the coherence of actions undertaken but they were no longer required to inform the European Parliament.<sup>19</sup>

### 1.3 Political Priorities Embracing Freedom and Security

In July 1998 the European Commission published a Communication on the AFSJ setting out the basis, form and main objectives.<sup>20</sup> The main political priorities were subsequently determined at consecutive meetings of the European Council and set down in a number of different documents. In 1999, the Cologne European Council decided to draw up a Charter of Fundamental Rights of the European Union (the Charter) by December 2000. Closer instructions on how to draw up the Charter were approved at the Tampere European Council in 1999, which was devoted to the creation of an AFSJ.<sup>21</sup> Although legally binding as of the entry into force of the Lisbon Treaty in 2009, the Presidents of the European Parliament, the Council and the Commission signed and proclaimed the Charter on behalf of the three institutions already during the Nice intergovernmental meeting.<sup>22</sup> Moreover, the Tampere European Council adopted the Tampere Programme, which was the first multiannual programme to set priorities for an AFSJ.

In the post-Cold War era, the fight against non-military threats such as drug trafficking, organised crime and terrorism has become a top political priority globally. While referring to some basic connotations from international relations theory, contemporary security studies and the notion of securitisation, it can be argued that the securitisation of transnational

<sup>16</sup> According to Article 86 TFEU, there is now a possibility to establish a European Public Prosecutor's office 'from Eurojust' through a unanimous decision in the Council after the European Parliament has given its consent.

<sup>17</sup> Title IV of the EC Treaty on visas, asylum and immigration.

<sup>18</sup> Article 43 of the Treaty on European Union on enhanced cooperation consolidated all the relevant conditions, which were previously divided between Article 11 of the Treaty on establishing the European Community and the former Article 43 of the Treaty on European Union on closer cooperation.

<sup>19</sup> Compare Article 45 of the Treaty on European Union (Nice) on enhanced cooperation and former Article 45 of the Treaty on European Union (Amsterdam) on closer cooperation. See further M Bergström, 'What happened/is happening with the constitutional crisis in the EU?' in *Swedish Institute for European Policy Studies*, 2006:6.

<sup>20</sup> Communication from the Commission, Towards an Area of Freedom, Security and Justice, COM(1998) 459 final.

<sup>21</sup> Tampere European Council 15 and 16 October 1999 Presidency Conclusions, the site of the European Parliament, available at [http://www.europarl.europa.eu/summits/tam\\_en.htm](http://www.europarl.europa.eu/summits/tam_en.htm).

<sup>22</sup> The Charter of Fundamental Rights of the European Union, the Charter site of the European Parliament, available at [http://www.europarl.europa.eu/charter/default\\_en.htm](http://www.europarl.europa.eu/charter/default_en.htm).

organised crime and terrorism financing has been used to increase, or has at least led to an increase in EU competencies. This is most evident in the area of EU criminal law and police cooperation, where the handling of organised, serious crime and terrorism, arguably has been used to securitise single issues as well as entire policy areas.<sup>23</sup> Most notably, the terrorist attacks of 11th September 2001 accelerated the decision-making process in the European Union. At the extraordinary JHA Council on 20th September 2001, and the extraordinary meeting of the European Council on 21st September 2001, the Member States undertook to take decisive action against increasingly transnational organised crime and terrorism. For example, intensified AML regulations are the result of the securitisation of transnational criminality, and more recently, securitisation of terrorism as such. Both these threats demand action at the global, as well as the EU and regional levels. AML and financial freezing measures thereby exemplify the shift towards securitisation of threats to the financial sector in general.<sup>24</sup>

Subsequently, the prevalence of the security rationale was directly reflected in the nature and priorities structuring the second multiannual programme on an AFSJ – The Hague Programme adopted by the Dutch presidency in November 2004.<sup>25</sup> The Hague Programme gave preference to the security of the Union and its member states, and

understood the EU's AFSJ as primarily driven by security (urgency-led) considerations and concerns. The Hague Programme also invented the metaphor of a 'balance' between freedom and security, calling for the need to strike the right balance between law enforcement purposes and safeguarding the fundamental rights of individuals. Overall, the political elements of the EU's AFSJ agenda have been vulnerable to political demands for more 'security cooperation' within and outside Europe, perhaps without paying due consideration to the effects on and ethical implications of these very security policies for the liberal democratic principles, fundamental rights and liberties at the heart of the EU.<sup>26</sup>

The 2004 Hague Programme was the successor of the 1999 Tampere Programme and was followed by the Stockholm Programme in 2009. In contrast to its predecessor, the Stockholm Programme did not speak of a 'balance' to be struck between liberty and security. With the Stockholm Programme – An open

<sup>23</sup> M Bergström, 'The Place of Sanctions in the EU System for Combating the Financing of Terrorism' in I Cameron (ed) *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Cambridge, Intersentia, 2013).

<sup>24</sup> Ibid. See also K Svedberg Helgesson and U Mörrth (eds) *Securitization, Accountability and Risk Management – Transforming the Public Security Domain* (London, Routledge, 2012).

<sup>25</sup> Communication from the Commission to the Council and the European Parliament of 10 May 2005 – The Hague Programme: ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice COM(2005) 184 final.

<sup>26</sup> E Guild and S Carrera, 'The European Union's Area of Freedom, Security and Justice Ten Years on' in E Guild, S Carrera and A Eggenschwiler (eds), *The Area of Freedom, Security and Justice Ten Years on Successes and Future Challenges under the Stockholm Programme* (The Centre for European Policy Studies (CEPS), 2010) 10.

and secure Europe serving and protecting citizens,<sup>27</sup> focus was shifted towards the interests and needs of the citizens. According to the European Council, the challenge was to ‘ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe.’ Thus, it was ‘of paramount importance that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced’.<sup>28</sup> The Stockholm Programme was adopted in December 2009 during the Swedish Presidency and coincided with the entry into force of the Lisbon Treaty.

After briefly touching upon the historical development of EU criminal law and European police cooperation in order to place current policies in a wider historical context, the developments towards transforming EU criminal and police cooperation into a policy area of its own, will now be discussed.

## 2. THE STRUCTURE OF THE LISBON TREATY

According to Article 3(2) TEU: ‘The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.’ Article 67(3) TFEU further states 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 judgements in criminal matters and, if necessary, through the approximation of criminal laws.’ After the changes made by the Lisbon Treaty in 2009, the provisions on EU criminal law and police cooperation can be found in Part three, Title V of the TFEU, an Area of Freedom, Security and Justice. The more general provisions can be found in Chapter 1, whereas the provisions on judicial cooperation in criminal matters are found in Chapter 4, and the provisions on Police cooperation are inserted in Chapter 5. These provisions are again brought together with the provisions on policies on border checks, asylum and immigration that can now be found in Chapter 2. Finally, the provisions on judicial cooperation in civil matters have a chapter of their own under the same Title (Chapter 3). Thus interestingly, the overarching principle of mutual recognition of judgments and judicial decisions can be found both in Chapter 3 and Chapter 4 thereby emphasising its importance in both civil and criminal law matters.

<sup>27</sup> The Stockholm Programme – an open and secure Europe serving and protecting citizens, OJ 2010, C 115/1.

<sup>28</sup> *Ibid* at 4.

## 3. CHANGES AND CHALLENGES

The main changes introduced by the Lisbon Treaty relevant to EU criminal law and police cooperation concerns the introduction of a competence catalogue in Articles 2 to 6 TFEU, where Article 4(2) states that the Union shall share competence with the Member States in the Area of Freedom, Security and Justice (j). Further, the Lisbon Treaty's introduction of new legislative power within this field with reference to the ordinary legislative procedure (Article 294 TFEU) for provisions on judicial cooperation in criminal matters are of great importance thereby involving the European Parliament to its full legislative power. The Member States have lost their veto due to the introduction of qualified majority voting in the Council. The compensation available through Articles 82(3) and 83(3) TFEU for a Member State to raise an issue affecting fundamental aspects of its criminal justice system in the European Council is in contrast a mere possibility without much limiting effect. In practice this simplified procedure towards enhanced cooperation (Articles 82(3) and 83(3) TFEU) may well have a triggering effect rather than becoming a breaking mechanism. Interesting in this respect, are also the various possibilities of opting out that have so far been used with diverse effects.<sup>29</sup>

This law-making competence is still shared with the Member States and the principle of subsidiarity needs to be respected. National parliaments have a Treaty-specific competence and a duty to review EU legislative proposals and their compatibility with the principle of subsidiarity within this field, Article 5(3) TEU. According to Article 12 TEU, national parliaments are supposed to contribute actively to the good functioning of the European Union, shall be informed by the Union institutions, and draft Union legislative acts shall be forwarded to them in accordance with the Protocol on the role of national parliaments in the European Union.<sup>30</sup> The national parliaments thereby conduct a subsidiarity control.<sup>31</sup>

The national parliaments also participate in the evaluation mechanism for the implementation of the policies within the AFSJ in accordance with Articles 12 TEU and 70 TFEU. Finally, national parliaments are involved in the political monitoring of Europol and the evaluation of Eurojust's activities together with the European Parliament in accordance with Articles 88 and 85 TFEU. This is of increasing importance since these bodies have been granted more powers after Lisbon. The main purpose of Europol and Eurojust is to facilitate mutual aid and cooperation. Europol's main mission is to assist and strengthen the national police authorities of the Member States in preventing serious crime affecting

<sup>29</sup> Opt outs by the UK, Ireland and Denmark. Protocols 21 and 22.

<sup>30</sup> Protocol 1 on the Role of National Parliaments in the European Union.

<sup>31</sup> This new mechanism has been used eg by the Swedish Parliament, Riksdagen. See further, CF Bergström, 'Subsidiaritetstprövningen: Riksdagen hittar en ny roll i EU:s lagstiftningsprocess' (2010) *ERT* s 423, and A Jonsson, 'EU:s lagstiftningsprocess och subsidiaritetstprövningen: Nya möjligheter för nationellt inflytande?' (2011) 4 *SvJT* 413–429.



two or more Member States, terrorism, and crime which affects a common interest covered by a Union policy (Article 88 TFEU). Europol can, for example, participate in joint criminal investigations, collect data and provide analysis on transnational crime, and request national law enforcement agencies to open a criminal investigation.<sup>32</sup> The task of Eurojust is to support and reinforce coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on a common platform, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol (Article 85 TFEU).<sup>33</sup> The role of national parliaments as well as the European Parliament is thereby of utmost importance, although due to the limited space, not analysed further in this volume.

It was only with the entry into force of the Lisbon Treaty on 1 December 2009, that it was possible to speak about EU Criminal Law and EU police cooperation as a policy area of its own. For the first time, the EU was provided with a criminal law competence to legislate, not only as a form of compensation when other policy areas were being developed which is a typical feature of EU law exemplified by Maria Bergström in this volume, but as a policy area in its own right. The EU has now been granted some, although still limited, competence to decide on definitions of criminal offences and sanctions in the area of particularly serious crime with a cross-border dimension (Article 83(1) TFEU). The EU may further adopt directives with minimum rules with regard to the definition of criminal offences and sanctions if deemed essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonising measures (Article 83(2) TFEU).

The fact that the CJEU has almost full jurisdiction within this field further strengthens the notion of a policy field of its own. There is no limit concerning preliminary references. Instead, the CJEU shall act with the minimum of delay when a preliminary reference is raised in a case concerning a person in custody (Article 267(4) TFEU).<sup>34</sup> Only a few narrow limits remain concerning the CJEU's jurisdiction, which is in stark contrast to the pre-Lisbon situation. In relation to the AFSJ and more specifically Chapters 4 and 5 on judicial cooperation in criminal matters and police cooperation, the court has no jurisdiction to review the validity or proportionality of operations carried out by the police and other law enforcement services of a Member State, or the exercise of the responsibilities incumbent upon Member States with regard

<sup>32</sup> The European Parliament and the Council may now adopt regulations determining Europol's tasks, including collecting, storing, processing, analysing and exchanging information (Article 88 TFEU).

<sup>33</sup> The European Parliament and the Council may now adopt regulations determining Eurojust's tasks, including initiating criminal investigations and proposing the initiation of prosecutions by national authorities (Article 85 TFEU).

<sup>34</sup> See also the rules on expedited and urgent preliminary ruling procedure, Title III, Chapter 2 and 3 respectively of the Rules of Procedure of the European Court of Justice, OJ 2012, L 265/1.

to the maintenance of law and order and the safeguarding of internal security (Article 276 TFEU). Anna Jonsson Cornell will further elaborate on these aspects in her contribution to this volume. These very specific limitations in the CJEU's jurisdiction are to some degree compensated for by the Commission's general possibility to use its infringement procedure within the entire area, at least as from 1 December 2014 when all remaining Framework Decisions will be given full legal effect and the Commission and the CJEU will have full powers of enforcement.<sup>35</sup>

The area of police cooperation in the EU has been constitutionalized in the sense that important questions of inter alia competences, legal basis and legislative processes are dealt with in for example Title V, Chapter five TEU. Historically, international regulations on transnational police cooperation have focused on facilitating cooperation as well as the sharing of information. This was also the case in the EU pre-Lisbon, which both the Treaties and secondary legislation such as the Framework Decision on Joint Investigation Teams are testimony to. However, ambitions are now more far-reaching and include legislative measures adopted through both the ordinary and special legislative procedure (depending on whether the measure is non-operational or operational) concerning, for example, the collection, storing, analysis and sharing of data, training and exchange of personnel and techniques, and finally the creation of common investigative techniques. This, together with the existence of EU agencies such as Europol and Eurojust, changes the preconditions for police cooperation in the EU. Moreover, from a strategy point of view it will be interesting to see what changes COSI can bring with it and the impact EU strategies will have on national strategies. This issue will be further discussed by Anna Jonsson Cornell in Chapter 8. Several of the chapters in this book deal with important aspects of this overall development. As will be shown, there are still several challenges that have to be met. Some of these are subscribed to the continuing fragmentation of the regulative framework, large discrepancies between national legislation, differences in how law enforcement bodies are organized nationally, and finally the will and ability of national law enforcement bodies to play a constructive part in EU police cooperation.

When a constitutional law perspective is adopted it usually leads to **the** emphases of state power per se, the distribution and control thereof, and the protection of the individuals and their fundamental rights. Constitutional safeguards, including the protection of fundamental rights, take a central role in the analysis of the legislative framework and the challenges that the implementation of the AFSJ is likely to bring. However, the constitutional law perspective needs to be put in relation to other principles guiding the exercise of state power, be it by the Member States at large, the EU or individual Member States. In contrast to the constitutional law perspective which is focusing on limiting competences, ensuring control, upholding safeguards and requirements

<sup>35</sup> Protocol 36 on Transitional Provisions, Article 10.

of due process; an EU integrationist perspective is introduced. The development within the AFSJ is subsequently analysed also from an EU integrationist perspective emphasising notions such as effectiveness, integration, legal effect and harmonisation. By highlighting both the constitutional law and the EU integrationist perspective more nuanced conclusions embracing the EU law development of constitutional principles and rights protected by the ECHR and the Charter including due process rights and the wider reference to the rule of law can be reached.

#### 4. OUTLINE

Against the background of the most important changes introduced by the Lisbon Treaty in the area of criminal law and police cooperation, this volume is divided into four main sections. Each section analyses some specific challenges.

The *first section* includes a critical analysis of the boundaries of the new criminal law competencies, as well as some more general challenges for EU criminal law. Specific focus is set on the lawmaking process. In Chapter 2, Ester Herlin-Karnell charts recent case law by the CJEU in the field of European criminal law and the AFSJ more broadly. This chapter addresses the question of the extent to which this case law has changed the EU's course of navigation in EU criminal law – or if the compass is still the same – and the legal impact of the entry into force of the Lisbon Treaty in this area. Herlin-Karnell further investigates some recent legislative initiatives introduced by the EU institutions, particularly with regard to the EU's security agenda. In doing so, this chapter considers which EU institutions, if any, are the main drivers in EU criminal law. Moreover, the chapter considers to what extent the Member States are themselves responsible for reinforcing integration in the AFSJ. The chapter concludes by offering a general outlook of the prospect of EU criminal law.

In Chapter 3, Anna Wetter reviews the legislative procedure that led to the adoption of Directive 2009/52/EC that provides for minimum standards on sanctions and measures against employers of illegally staying third-country nationals. The Directive was adopted before the Lisbon Treaty entered into force and provided the EU with an explicit legal basis to adopt criminal sanctions. Prior to the adoption of the Lisbon Treaty it was still uncertain whether the EU could adopt criminal sanctions under the then Community pillar, and some Member States disputed the legal basis that was chosen for the Directive which makes it a particularly interesting case study. A broader purpose of the chapter is to shed light on how general EU law principles and guidelines were taken into account during the legislative procedure. The chapter also looks beyond the Lisbon Treaty and discusses whether the new provisions suffice to encounter the argued democratic deficit that permeated the former Treaty in the area of criminal law.

In Chapter 4, Petter Asp focuses on the explicit criminal law competences the EU was provided with through the Lisbon Treaty. Article 82 TFEU (on mutual

recognition and criminal procedural harmonisation), Article 83 TFEU (on harmonisation of substantive criminal law), Article 86 (on the European Public Prosecutor) and Article 325 (on the protection of the financial interests of the union) are particularly important. According to Asp, these new competences – as well as the transformation of criminal law cooperation from a ‘third pillar issue’ to one area of cooperation among others – show that we are heading towards something that can be described as EU criminal law. This chapter focuses on the challenges that we are facing in this process.

The *second section* deals with EU criminal law and fundamental rights, in particular the protection of personal data and individual privacy. In this section, focus is on the implementation of EU law into national legal orders and the challenges that this process brings with it. This section embraces Chapters 5, 6 and 7 which each provide an analysis of a specific issue and the general challenge of combining EU criminal law development with a high level of fundamental rights protection. In particular the harmonisation of data retention in the European Union through the Data Retention Directive (2006/24/EC) has been controversial. Chapter 5 by Theodore Konstantinides delves into the constitutional and human rights implications arising out of the retention of traffic data for the purpose of law enforcement. First, the chapter provides a critical account of the main challenges met by Member States during the transposition of the Data Retention Directive, which is of particular interest in Sweden due to the difficulties met when transposing the directive. Second, the chapter discusses the basis of justification of EU data retention legislation vis-à-vis the interference by a public authority with a person’s right to privacy under the ECHR and the Charter. The analysis conducted leads to the conclusion that blanket harmonisation of the length of time that telecom operators and internet providers must retain data has proven to be superfluous for the investigation and prosecution of serious crime. It is argued that both the Directive’s uneven implementation in the Member States as well as the Commission’s delayed evaluation report fail to prove that the strict criteria for justifying non-consensual, blanket and indiscriminate retention and therefore interference with a person’s right to privacy have been met. Equally, this chapter concludes that the smooth functioning of the internal market and maintenance of internal security should not compromise the fundamental right to privacy and the rule of law – ie the values on which the EU is founded.

In Chapter 6, Alexandros Ioannis Kargopoulos describes and analyses the *ne bis in idem* principle established in EU law. This chapter contains a short introduction of the *ne bis in idem* principle including a presentation of the main legal texts where it is enshrined. The introduction is followed by the *ratio legis* of the European *ne bis in idem*, with due consideration of the principle of mutual recognition with which *ne bis in idem* has been associated by the CJEU. Next, focus is shifted to the actual interpretation and implementation of the principle in the case law of the CJEU: the scope of the application of the principle is analysed, followed by a thorough analysis of the ‘*idem*’ element and subsequently the ‘*bis*’ element. Thereafter, focus is again shifted to the application of the *ne*

bis in idem in cases of concurring crimes arising out of the same material acts where only one or some have been assessed by the first court, the *lis pedens* etc. The most important of these is the issue touched upon in recent judgements (C-489/10 *Bonda*, C-617/10 *Åkerberg Fransson*) that concern the application of the *ne bis in idem* in other than criminal proceedings. The chapter further considers the case law of the ECtHR in the light of the ‘conformity’ clause, Article 52(3) of the Charter, which obliges the CJEU to interpret any corresponding rights in line with Strasbourg jurisprudence. Finally, the chapter concludes with a short epilogue on the function of the *ne bis in idem* in the integration process.

In Chapter 7, Per Ole Tråskman analyses the European Arrest Warrant (EAW) and its implementation in three of the Nordic countries in the light of the Nordic Arrest Warrant (NAW) that was introduced through a Convention in 2005. Tråskman analyses the new legislation that has been passed in Denmark, Finland and Sweden as result of the EAW and the NAW. The intention of this chapter is to follow up the development of both the EAW and the NAW in order to establish their impact in the Nordic countries. Tråskman notes, *inter alia*, that the EAW has quickly become an important and frequently used measure, which the authorities hail as a significant part of a modern and efficient European crime prevention scheme. Tråskman also concludes that there is no Nordic cooperation and coordination as the implementation of the EAW into national law and that this potentially is detrimental to the longstanding history of Nordic cooperation within criminal law. Viewed from the legal rights perspective, the implementation of the EAW can be seen as just one more sign of the ongoing shift in the EU towards a new paradigmatic model for adjudication and criminal proceedings.

The *third section* maps out specific challenges in EU police cooperation, in particular, the important issue of the sharing of information between law enforcement agencies and its potential impact on the protection of fundamental rights. In Chapter 8, Anna Jonsson Cornell provides a constitutional analysis of the development of EU police cooperation after the entry into force of the Lisbon Treaty. She describes the Lisbon provisions on police cooperation with their focus on competence issues, the legislative process, different types of control of police cooperation, and definitions which focus on operative and non-operative police cooperation. She also provides an analysis of different challenges concerning the sharing of police information, in particular in relation to the problems with defining operational and non-operational police cooperation, as well as the unclear boundaries between police cooperation on the one hand and criminal law cooperation on the other.

The particular issues concerning the sharing of police data are followed up in Chapter 9 by Iain Cameron, who outlines the European legislative framework regulating the collecting and sharing of information. He argues that the need for effective police cooperation between EU states requires a degree of EU regulation of these national systems with regard to the storing and sharing of intelligence. The existing, and future, EU regulations involve both an application of the

mutual recognition principle as well as a degree of harmonization. This takes into account and builds on the variety of ‘soft’ standards of data protection produced within the Council of Europe, particularly the standards emerging as a result of the case law of the European Court of Human Rights (ECtHR). This Chapter aims to give an overview of these standards. Previously, the transfer of police data was for a given purpose; a specific criminal investigation, a specific intelligence gathering exercise etc. However, at least in the future, the transfer of data between police forces in Member States is expected to be much more extensive and more ‘routine’, even automated. When players act together in a network, securing accountability for the individual actions of each player can become much more difficult. Cameron analyses this particular issue from the perspective of ECtHR case law.

In the *fourth and final section*, focus is shifted toward networks, horizontal agency and multi-level cooperation within the AFSJ. The specific challenges arising when players act together in networks is further analysed in Chapter 10 by Bo Wennström who thus widens the perspective towards multi-agency cooperation. As a starting point, he notes that fighting crime is a concern for several players at different levels – from the local to the international level, while nation states are still modelled around vertical thinking. This ‘new order’ has been caused by an internal diffusion of power due to privatisation and deregulation, and by globalisation. The need for multi-agency cooperation is evident and the call for horizontal cooperation has become a co-occurring phenomenon in every debate on government, governance and public service. Especially in the field of security and fighting crime, the call for horizontal cooperation is now ever-present. Wennström argues that a kind of naïve ‘horizontal ideology’ exists, which presupposes that what is done in the name of horizontal collaboration is always good in itself, because it is done with a good purpose in mind: to increase safety and reduce violence. But multi-agency cooperation creates complex hierarchies in which the players tend to demonstrate a high degree of independence. The aim of this chapter is to offer a broader understanding of horizontal agency cooperation in the field of crime and security. A special focus will be on the shift from cooperation to coordination in the AFSJ in EU.

Finally, Chapter 11, by Maria Bergström connects some of the themes in this volume by contrasting and emphasising a two-dimensional analysis of the multi-level cooperation previously discussed. First, drawing on the constitutional analysis presented in this introductory chapter including the main changes introduced by the Lisbon Treaty and their broader constitutional implications that holds together several of the issues discussed in the previous chapters. Second, the EU law perspective is eventually added, where focus is on the development of EU criminal law in context, including both a broader historical and integration perspective. As a result she will be able to draw some general conclusions about the constitutional developments of EU law in general and EU criminal law in particular.

## 5. CONCLUSIONS

The most recent and substantial developments leading up to the changes introduced by the Lisbon Treaty as well as the changes themselves, can be analysed from a number of different perspectives. The focus chosen in this volume is a broader European constitutional law perspective that is supplemented by a more general EU law perspective,<sup>36</sup> as well as some national constitutional law aspects with particular examples from Sweden and the Nordic countries. Although intertwined, any legal analysis of the changes must include all three perspectives, at least to some extent, in order to explain the dynamic evolution of the policy area.

So far, mainly a broader European constitutional law perspective, and some national constitutional law aspects have been discussed in the various chapters. The European constitutional law perspective embraces the major constitutional changes introduced by the Lisbon Treaty, where focus is on changes in competence between the EU Institutions, and between the EU and its Member States. The role of national parliaments as well as the European Parliament is of utmost importance. However, due to the limited space, this is not subject to further analysis in this volume. Since a constitutional law perspective emphasises state power, and the distribution and control of such power, the protection of individuals and fundamental rights are also of utmost importance. Constitutional safeguards, the protection of fundamental rights and due process take a central role. But also other principles, under which the state power must act, be it the Member States at large, the EU, individual Member States or agents for these interests, have been discussed and analysed further.

In stark contrast to such a restraining perspective where focus is on limiting competence, ensuring control, upholding safeguards and requirements of due process; an EU integrationist perspective is introduced as a contradistinction and further challenge. Underlying and reinforcing these differences, which of course do not exist to this exaggerated extent, the development is viewed wearing EU integrationist spectacles emphasising notions such as effectiveness, integration, legal effect and harmonisation. Well aware of the artificial separation such a constructed division entails, the idea is to emphasise these differences to form a common base for the analysis as well as some more nuanced conclusions embracing also the EU law development of constitutional principles and rights protected by the ECHR and the Charter of Fundamental Rights of the European Union including due process rights and the rule of law. The contributions to this volume show in a multifaceted way the challenges that the EU and its Member States are facing when it comes to defining and implementing policies of relevance for establishing an Area of Freedom, Security and Justice.

<sup>36</sup> These perspectives were also analysed in M Bergström, 'EU som lagstiftare inom straffrätten och reglerna mot penningtvätt' (2011) 4 *SvJT* 357.

The range of questions dealt with is wide; starting with the widened competence for the EU within the area of criminal law and police cooperation, dealing with issues of accountability, control, rights and efficiency, and ending with a discussion on new ways of cooperation and the challenges that they pose. It has become clear that the developments within this particular area, from the EU's point of view, increasingly are considered a harmonization project. Herlin-Karnell interprets this development as an attempt to create a 'common European sense of fairness' when it comes to recent developments within the area of procedural law, especially procedural rights of suspects and accused. This in combination with the development of substantive law of relevance for the protection of victims' rights is symptomatic for the overall trend within the EU to also include the protection of individual rights. Thus, the EU has moved from focusing solely on cooperation between law enforcement agencies and judicial bodies in order to convict criminals and fight serious crime and terrorism, to also include procedural and substantive rights of both criminals and victims. As a result of both developments, the degree of harmonization between Member States is likely to increase, a development which arises high emotions and provokes critical analyses of the competence and role to be played by the EU within the area of criminal law and police cooperation.

A common feature of almost all contributions to this book is that they highlight the role of the nation state as the holder of the exclusive right to use violence and force against individuals within its jurisdiction. Certainly, the very fact that the EU does have regulatory powers of direct relevance for national criminal policy and law, and the powers and modus operandi of national law enforcement agencies, does challenge our perceptions of sovereignty, democratic accountability and control, legitimacy, popular rule and representativity. Moreover, new actors such as private organizations and companies have entered the area of criminal law and police cooperation. These actors also have access to the decision making process at the EU level and hence can steer the development in directions that benefit their interests. This adds to the important question of how accountability can be exercised in systems of multilevel governance. Who is, and can be held responsible in complex systems? Or to put it bluntly, who can actually be found, charged and punished, for what and by whom at what level? Nevertheless, the development embraces so much more. Besides harmonisation and implementation, cooperation and mutual assistance are still key concept.

To sum up, EU criminal law and police cooperation is one of the fastest growing areas of EU law, and the evolution of the Union into an Area of Freedom, Security and Justice arguable has been one of the most far-reaching constitutional developments in the Union. Above all, this volume has sought to identify and address some of the Union's main challenges in this respect, where a balance has to be found between state power, Union competence, meaningful cooperation, and the common values that the cooperation builds upon, including the protection of individuals and fundamental rights. Thus, hoping to improve the dynamic evolution of EU criminal law and police cooperation, some of these



underlying challenges have been identified, discussed and analysed at the current stage of this process. Accordingly, the aim of this contribution is to take part also in this wider challenge.