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EU procedural criminal law after Lisbon

Jacob Öbergⁱ

1. Introduction

This book has so far offered a post-Lisbon analysis of the developments in EU substantive criminal law.¹ Whilst this book is primarily concerned with this area of EU policy, this chapter briefly examines an adjacent and increasingly important field of EU policy; EU Procedural Criminal Law.² A Member State's previously unquestioned competence to determine its criminal procedure and how to enforce its criminal laws is no longer a question outside the influence of EU law. Treaty amendments in Maastricht and a strong political commitment by the European Council in Tampere, Hague and Stockholm have contributed to making EU criminal procedure a central field of EU policy. This evolution culminated in the Lisbon Treaty where the Union was explicitly conferred competence to harmonise national criminal procedure,³ as well as a reinforced institutional capacity to more effectively combat transnational crime.⁴ Despite these important developments in law and policy, the field of EU procedural criminal law has not been subject to meticulous scholarly attention. There are admittedly comprehensive works on EU Judicial Cooperation,⁵ in particular the workings of mutual recognition in criminal matters,⁶ and single research contributions concerned with the field of EU Procedural Criminal Law.⁷ There exists, however, at this stage no comprehensive and critical examination of the post-Lisbon constitutional foundations for the EU's procedural criminal policy. Whilst not offering such a comprehensive enquiry, this chapter wishes to map out some direction for future research in this field.

Although this chapter primarily considers EU procedural criminal law, the development of this area is closely connected to the evolution of EU substantive criminal law. The central link is recognised in Article 82(1) TFEU which foresees that a key objective of harmonisation of EU substantive criminal law under Article 83 TFEU is to strengthen the operation of mutual recognition. The principle of mutual recognition as a basis for EU criminal policy developed under the recognition that it may be difficult to agree at the Member State level on the substance of criminal law, given its close connection to sovereignty and legal culture. It is also apparent that harmonisation of substantive criminal law (as positive integration) has been envisaged to

¹ See TFEU art 83.

² European Union Committee, *The European Union's Policy on Criminal Procedure* (HL 2010-12, 288).

³ See TFEU art 82(2).

⁴ See TFEU arts 85 and 86.

⁵ See Petter Asp and others, 'A Manifesto on European Criminal Policy' (2013) 11 *Zeitschrift für Internationale Strafrechtsdogmatik* 430; Petter Asp, *The Procedural Criminal Law Cooperation of the EU – Towards an area of freedom, security & justice – Part 2* (Jure 2016).

⁶ See Annika Suominen, *The Principle of Mutual Recognition in Cooperation in Criminal Matters* (Intersentia 2011); Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 *Common Market Law Review* 1277.

⁷ See eg Valsamis Mitsilegas, *EU Criminal Law After Lisbon – Rights, Trust and Transformation Justice in Europe* (Hart Publishing 2016) chs 3, 6 and 7.

contribute positively to the operation of mutual recognition (as negative integration). The premise would be that the effective operation of mutual recognition is based on mutual trust and that such a state of trust is premised on a certain degree of similarity as regards substantive rules on criminal behaviours (compare Article 83 TFEU).⁸

The subject-matter of this chapter is defined in broad terms. EU procedural criminal policy⁹ covers all EU legislative actions, policies/strategic directions (eg Commission Communications, JHA Council documents and strategic decisions by the European Council), along with central legislative actors (ie the European Council, the JHA Council and the Commission) relating to the criminal procedure in the judicial and prosecutorial phase on a domestic level, as well as the EU level. It covers the rules and policies that govern the apprehension, screening and trial of persons suspected of crime, as well as victims caught up in crime and the judicial institutions which are involved in the enforcement of cross-border criminal activity.¹⁰

In terms of law, it encompasses Chapter 4 of Title V of the AFSJ and the legislative competences in Articles 82, 85 and 86 TFEU, as well other instances where the EU is capable of having a normative influence on criminal procedure and the judicial cooperation between the Member States.¹¹ It is useful to distinguish between three types of powers in this regard. First, there is the competence that concerns the adoption of instruments to ensure mutual recognition of judgments, decisions and other procedural measures intended to make transnational criminal enforcement more efficient.¹² The second, more contested competence in Article 82(2) TFEU relates to harmonisation of domestic criminal procedure.¹³ This power includes mutual admissibility of evidence between Member States, the rights of individuals in criminal procedures and the rights of victims of crime, as well as other aspects of criminal procedure which are identified by unanimous Council decisions. There is a clear relationship between the competence in Article 82(2) TFEU and the competence in Article 82(1) TFEU. The linkage is that the exercise of the competence in Article 82(2) TFEU is conditional upon showing that the harmonisation measure enhances the smooth functioning of mutual recognition (or judicial

⁸ See Asp, *Procedural Criminal Law Cooperation* (n 5) 20-23; Mitsilegas, *Constitutional Implications of Mutual Recognition* (n 6) 1279-81; Commission, 'Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters' COM (2000) 495 final, 4; Jannemieke Ouwerkerk, 'The Potential of Mutual Recognition as Limit to the Exercise of EU Criminalisation Powers' [2017] *European Criminal Law Review* 5.

⁹ See Anne Weyembergh and Irene Wieczorek, 'Is There an EU Criminal Policy?' in Renaud Colson and Stewart Field (eds), *EU Criminal Justice and the Challenges of Legal Diversity* (Cambridge University Press 2016).

¹⁰ See Herbert Packer, 'Two Models of the Criminal Process' (1963) 113 *University of Pennsylvania Law Review* 1, 2; European Union Committee, *The European Union's Policy on Criminal Procedure* (n 2) 6-8; Estella Baker, 'Governing Through Crime – the Case of the European Union' (2010) 17 *European Journal of Criminology* 187, 190-192; Jörg Monar, 'Decision-Making in the Area of Freedom, Security and Justice' in Anthony Arnall and Daniel Wincott (eds), *Accountability and Legitimacy in the European Union* (Oxford University Press 2002) 67-70.

¹¹ See Christopher Harding and Joanna Banach-Gutierrez, 'The Emergent EU Criminal Policy: Identifying the Species' (2012) 37 *European Law Review* 758; Steve Peers, 'EU Criminal Law and the Treaty of Lisbon' (2008) 33 *European Law Review* 507, 508.

¹² See TFEU art 82(1).

¹³ See Peers, 'EU Criminal Law' (n 11) 513 at fn 24; European Union Committee, *The European Union's Policy on Criminal Procedure* (n 2) 14-16, 20-22 for support of this contestation.

cooperation).¹⁴ The third strand of EU competence in procedural criminal law relates to the EU's power to create and reinforce EU institutions tasked with transnational criminal enforcement. These are the competences in Article 85 TFEU relating to Eurojust and Article 86 TFEU which creates a legal basis for establishing a European Public Prosecutor's Office.¹⁵ Given their more controversial nature, the focus in the chapter lies on the second and third strands of EU procedural criminal law.

The chapter commences by accounting for the pre-Lisbon development in this area. It considers the debate on the existence of EU competence in the field of domestic criminal procedure, as well as the evolution of EU agencies involved in the fight against EU cross-border criminality (II). Thereafter, the chapter looks at how the Lisbon Treaty changed the discussion of competence in the field of EU procedural criminal law (III). The following section identifies the key questions pertaining to the constitutional basis for EU action in the field, both with reference to domestic criminal procedure and with reference to the institutional dimension of the EU's criminal procedure (IV). The conclusion summarises the findings and offers some reflections (V).

2. The slow emergence of an EU criminal procedure policy

This section encompasses a historical survey of EU procedural criminal policy which provides the proper context for the post-Lisbon discussion. Whilst there had been discussions among scholars and politicians on the future design of an EU procedural criminal policy since the early days of the Community, it was not until the establishment of the Third Pillar in the Maastricht Treaty that there was an institutional framework for the development of EU procedural criminal policy.¹⁶ The reasons for this separation of procedural criminal law from the sphere of EU influence are not difficult to discern. The question of EU competence over national criminal procedure and criminal enforcement has been a seriously contested issue, given its close relationship to state sovereignty and fundamental rights. Given the different socio-ethical legal orders in the Member States, it was excessively difficult to find a common European understanding of standards of criminal procedure. Furthermore, if powers over the enforcement of crimes were granted to supranational agencies, this would possibly compromise the respect for the state as a sovereign entity. However, the European Community's substantive competences expanded and borders were opened up after the Single European Act to ensure free movement rights, which arguably entailed a diminution of security. Novel challenges in combating crime emerged in the form of serious transnational organised crime which needed enforcement through common action. Because of these threats to the Community, the Member

¹⁴ TFEU art 82(2) reads as follows: 'To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters'.

¹⁵ See Asp, *Procedural Criminal Law Cooperation* (n 5) 18-20.

¹⁶ See Hanna G Sevenster, 'Criminal Law and EC Law' (1992) 29 *Common Market Law Review* 29, 31-38 referring to the relevant literature and discussions in the literature; Mariana Chaves, *The Evolution of European Union Criminal Law (1957-2012)* (DPhil, London School of Economics 2012) ch 1.

States decided in the Maastricht Treaty to institute a general cooperation mechanism in EU criminal law by means of the Third Pillar.¹⁷

One of the main ways to combat transnational crimes was to ensure that judgments and decisions in one Member State could be accepted and enforced in other Member States. The 1999 Tampere European Council introduced the principle of mutual recognition as the main driver for EU criminal policy.¹⁸ The practical realisation of the principle, however, received its decisive impetus from external events, in particular 9/11 and the Madrid bombings. These events created serious pressure for a political response at the EU level, which resulted in the adoption of several measures intended not only to combat terrorism but aimed at strengthening cross-border criminal enforcement more generally. The most notable was the high-profile European Arrest Warrant,¹⁹ which was adopted as a counter-terrorism measure designed to ensure quick extradition between Member States for serious offences.²⁰ The Hague Programme, adopted by the European Council in 2004, reinforced the emphasis on law enforcement and stressed the importance of correct and effective implementation of the existing mutual recognition measures in the field.²¹ Simultaneously and shortly after the European Council meeting in Hague, two framework decisions on the mutual recognition of confiscation orders²² and financial penalties were adopted.²³ Mutual recognition and a focus on law enforcement in cross-border contexts (managing the flow of serious crime actors ‘without and around’²⁴) were thus the central directions of EU criminal procedural policy leading up to the Stockholm Programme.²⁵

The strict implementation of the principle of mutual recognition, however, led to controversy. The EAW and other mutual recognition measures were designed to function on the basis of quasi-automaticity and mutual trust (drawing inspiration from the way the principle operated in the internal market).²⁶ The Court of Justice held that the efficient operation of the EAW entailed that national judges would only be entitled to use the grounds explicitly listed in the EAW

¹⁷ See Sandra Lavenex and William Wallace, ‘Justice and Home Affairs – Towards a European Public Order’ in Helen Wallace, William Wallace and Mark Pollack (eds), *Policy-Making in the European Union* (Oxford University Press 2005); David Lowe, ‘Justice and Home Affairs and the Third Pillar of Union: EU Criminal Law – In Through the Back Door’ (2006) 2 *Journal of Academic Legal Studies* 30, 33; Maria Fletcher, Bill Gilmore and Robin Lööf, *EU Criminal Law and Justice* (Edward Elgar Publishing 2008) 23-27.

¹⁸ Council, ‘Presidency Conclusions, Tampere European Council, 15-16 October 1999’ (European Parliament 1999) point 33.

¹⁹ Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L190/1.

²⁰ See Mitsilegas, *Constitutional Implications of Mutual Recognition* (n 6) 1277-1288.

²¹ Council, ‘From General Secretariat to Delegations: The Hague Programme: strengthening freedom, security and justice in the European Union’ 16054/04 (2004) 2-4.

²² Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders [2006] OJ L328/59.

²³ Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties [2005] OJ L76/16.

²⁴ See Harding and Banach-Gutierrez (n 11) 759-60 for this expression.

²⁵ See European Union Committee, *The European Union's Policy on Criminal Procedure* (n 2) 60-61.

²⁶ Commission, ‘Communication from the Commission to the Council and the European Parliament, Mutual Recognition of Final Decisions in Criminal Matters’ COM (2000) 495 final, 2; Christine Janssens, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013).

Framework Decision.²⁷ A national judge would thus be required to enforce the order of a court of another Member State without a possibility to examine whether basic fundamental rights had been adhered to.²⁸ This led to strong objections among national judges (in certain Member States²⁹) and defence lawyers relating to both human rights and constitutional concerns.³⁰ Judges faced with a request for extradition were reluctant to return a defendant when they believed that his or her human rights would be violated, for example, by excessively long pre-trial detention or if the consequent trial would be unfair because of inadequate translation or inadequate legal representation.³¹

The absence of sufficient procedural safeguards and rights for defendants (subject to mutual recognition regimes) was seriously criticised by observers. This criticism led to a call for a change of policy direction (ie strong emphasis on security and effective crime enforcement) and for the slow emergence of a policy on individual defence rights and procedural standards.³² The Hague Programme had also recognised the need for mutual recognition measures to be complemented by some further legislation on common minimum standards in criminal procedure. It was argued that common minimum procedural standards on defence and victim rights could strengthen mutual trust between the authorities in Member States responsible for executing mutual recognition requests and thus the operation of mutual recognition.³³

To address the mounting criticism against the operation of mutual recognition, the Commission proposed a Framework Decision in 2004 on certain procedural rights in criminal proceedings.³⁴ The Framework Decision had a broad scope covering all criminal proceedings in the European Union.³⁵ Its main aim was to ensure that Member States effectively enforced the minimum standards of the European Convention and ensured the observance of minimum rights for the defendant (which had been subject to a European Arrest Warrant).³⁶ However, there was real

²⁷ See 'EAW Framework Decision' (n 19) arts 3 and 4.

²⁸ See Case C-303/05 *Advocaten Voor de Wereld* [2007] ECR I-03633, paras 48-61. This principle has been confirmed in subsequent post-Lisbon case law: Case C-396/11 *Radu* (29 January 2013); Case C-399/11 *Melloni* (26 February 2013). Recently the Court has, however, imposed certain limits to the operation of the EAW when it concerns cases of substantiated fundamental rights violations in the requesting state: Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Căldăraru* (5 April 2016).

²⁹ eg Poland, Germany and Cyprus, see n 31.

³⁰ See Mitsilegas, 'Constitutional Implications of Mutual Recognition' (n 6) 1280-83, 1285-88; Elspeth Guild and Sergio Carrerra, 'The European Union's Area of Freedom, Security and Justice ten years on' in Elspeth Guild, Sergio Carrerra and Alejandro Eggenchwiler (eds), *The Area of Freedom, Security and Justice Ten Years on: Successes and Future Challenges under the Stockholm Programme* (Centre for European Policy Studies 2010) 10-11.

³¹ See French Constitutional Council, Decision of 9 April 1992 No. 92- 308 DC (Maastricht I); German Constitutional Court, Judgement of 30 June 2009 2 BvE 2/08, para 113 (Lisbon); Spanish Constitutional Court, Decision of 1 July 1992 Case No. 1263/92 (Maastricht); Polish Constitutional Court, Decision P 1/05 (European Arrest Warrant).

³² See Baker (n 10) 188-196; Mitsilegas, 'EU Criminal Law After Lisbon' (n 7) ch 7.

³³ See 'Hague Programme' (n 21) point 3.3.1-3.3.2. The extent to which trust can occur and its importance is, however, contested: see Michael Schwarz, 'Let's talk about trust, baby! Theorizing trust and mutual recognition in the EU's area of freedom, security and justice' (2018) 24 *European Law Journal* 1, 13-17.

³⁴ Commission, 'Proposal for a council framework Decision on certain procedural rights in criminal proceedings throughout the European Union' COM (2004) 328 final.

³⁵ See 'Proposal for Framework Decision on Procedural Rights' (n 34) art 1.

³⁶ *ibid* recitals 7, 12, 13; 22-24.

contestation as to the existence of competence under the pre-Lisbon provision in the Treaty of European Union to adopt such rules. Notwithstanding the European Council's political support for adopting the measure,³⁷ the proposed Framework Decision was never adopted. The Commission had argued that the suggested legal basis of Article 31(1)(C) EU was sufficient as a basis for the proposed Framework Decision. It argued that such rules were 'necessary' to 'ensure compatibility' between the criminal justice systems of Member States by promoting mutual confidence across the EU.³⁸ This broad reading of EU competence was endorsed by the UK Government which contended that the Union had an almost 'open-ended' competence under Article 31(1)(C) EU to adopt measures in the field of criminal procedure if that was 'necessary' to improve mutual co-operation.³⁹ Member States, however, expressed reservations about the legality, holding that Article 31(1)(C) EU did not provide a sufficient legal basis for the proposal. It was suggested that it was, in the absence of an explicit legal basis, objectionable to confer implicit EU competence to legislate in the field of criminal procedure - an area so closely connected to national sovereignty. They also objected to the fact that the proposed Framework Decision was not restricted to cases with a cross-border dimension.⁴⁰ It was argued that the Commission's proposal would exceed the powers conferred by Article 31(1)(C) EU since minimum standards applicable to internal cases could not raise any issue of mutual recognition and were thus not 'necessary' for judicial cooperation.⁴¹ These concerns in conjunction with the unanimity requirement in the Council and the potential far-reaching implications of the proposal for the integrity of domestic criminal justice systems made an agreement on the Framework Decision impossible among the Member States.⁴²

Prior to Lisbon, there was also a debate on the EU's competence to develop and establish institutions capable of combating transnational crimes. Whilst the Union's substantive policy on rights for individuals came to birth as a necessary adjunct to the contested scope and application of the EU's existing mutual recognition regimes, the institutional dimension of the

³⁷ See 'Hague Programme' (n 21) point 3.3.1.

³⁸ See art 31(1)(C) pre-Lisbon version of the Consolidated Version of the Treaty on European Union [2002] OJ C325/5; Proposal for Framework Decision on Procedural Rights (n 34) paras 19-30, 7-9.

³⁹ This was the UK Government's position before the House of Lords' European Union Committee when the Proposed Framework Decision was subject to scrutiny; see House of Lords' European Union Committee, *Procedural Rights in Criminal Proceedings - Report with Evidence* (HL 2004-05, 28), paras 35-36, 40-41. See further Oral Evidence by Claire-Francoise Durande, European Union Committee, *The Treaty of Lisbon: an impact assessment* (HL 2007-08, 62-II) E 76 Q 338; Oral Evidence by Mr Jack Straw, European Union Committee, *The Treaty of Lisbon: an impact assessment* (HL 2007-08, 62-II) Q E 495, E 114; Oral Evidence by Mr Kevan Norris, European Union Committee, *Procedural Rights in Criminal Proceedings - Report with Evidence* (HL 2004-05, 28) E 66 Q 261-262.

⁴⁰ See 'Proposal for Framework Decision on Procedural Rights' (n 34) art 1. These concerns of 'competence creep' (see Stephen Weatherill, 'Competence creep and competence control' (2004) 23 Yearbook of European Law 1) were shared by observers such as Mitsilegas and Löff: See Mitsilegas, 'The Constitutional Implications of Mutual Recognition' (n 6) 1305-1307; Robin Löff, 'Shooting from the Hip - Proposed Minimum Rights in Criminal Proceedings' (2006) 12 European Law Journal 421, 422-429.

⁴¹ See European Union Committee, *Procedural Rights in Criminal Proceedings - Report with Evidence* (HL 2004-05, 28) 14-15.

⁴² See Samuli Miettinen, *Criminal Law and Policy in the European Union* (Routledge Publishing 2013), 215-217; European Union Committee, *The European Union's Policy on Criminal Procedure* (n 2) 7-9; European Union Committee, *Breaking the Deadlock: What Future for EU Procedural Rights?* (HL 2006-07, 20).

EU's procedural criminal policy emerged as a direct response to the 'external'⁴³ threats of organised and transnational crime.

A key tool for effectively addressing organised crime on a transnational level is obviously to strengthen pan-European cooperation between prosecutorial authorities of the Member States. The Tampere European Council in 1999 laid the foundations for the creation of the European Judicial Cooperation Unit (Eurojust) as an EU agency. Eurojust was set up formally in 2002 by a JHA Council decision with the mission of strengthening the fight against serious and organised crime by improving and coordinating cooperation in criminal matters between the competent authorities.⁴⁴ The objective of providing security to citizens and addressing external threats within the AFSJ was the key rationale for the creation of the office.⁴⁵ The key point here is, however, that the EU Treaties envisioned Eurojust as a 'co-operational' unit having chiefly a 'supportive' role for national authorities. Eurojust was thus never envisaged as a supra-national prosecutorial body with executive powers (unlike the envisaged European Public Prosecutor).⁴⁶ The question was here again a matter of constitutional mandate.

Eurojust's narrow Treaty remit was coherent with the general justification for EU action in criminal justice, which was based on a philosophy of 'cooperation' between national criminal justice systems focused on enhancing synergy (primarily by the operation of mutual recognition) without intrusive EU harmonisation.⁴⁷ It was envisaged by the Treaties that Eurojust should only be conferred powers to facilitate and develop proper coordination between Member States' national prosecuting authorities, as well as competences to support Member States' authorities in criminal investigations in cases of serious cross-border crime.⁴⁸ In the absence of more direct powers over national prosecution authorities, it was, however, questionable whether Eurojust in reality was capable of effectively contributing to the fight against serious cross-border crime.⁴⁹ Most importantly, Eurojust had no express powers to initiate by itself or to require national authorities to commence or end investigations. Whilst Eurojust could ask the national authorities to undertake a criminal prosecution on the basis of specific evidence, the latter could decide not to comply with the request.⁵⁰ It was thus readily apparent that a stronger Treaty mandate was required for Eurojust to be able to take a more active role in the prosecution of serious transnational crimes.⁵¹

⁴³ See Harding and Banach-Gutierrez (n 11) 759-762 for the use of 'external' and 'internal' threats when describing EU criminal policy.

⁴⁴ See 'Tampere Presidency Conclusions' (n 18) para 46.

⁴⁵ See art 29 of the pre-Lisbon Version of the Treaty of European Union.

⁴⁶ See TFEU art 86.

⁴⁷ See Jörg Monar, 'Eurojust and the European Public Prosecutor Perspective: From Cooperation to Integration in EU Criminal Justice?' (2013) 14 Perspectives on European Politics and Society 339, 341-43, 353-5.

⁴⁸ See arts 29 and 31(2) of the pre-Lisbon version of the Treaty of European Union.

⁴⁹ See Annika Suominen, 'The Past, Present and the Future of Eurojust' (2008) 15 Maastricht Journal of European and Comparative Law 217; Monar (n 47) 353-55.

⁵⁰ See Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime [2002] OJ L63/1, arts 7 and 8.

⁵¹ See Suominen (n 49) 226-234; Monar (n 47) 340.

The gradual emergence of a ‘proper’ supranational agency in the field of criminal law, ie the European Public Prosecutor’s Office (‘EPPO’), followed a similar path. However, the EPPO did not, as in the case of Eurojust, come as a reaction to the menace of serious cross-border crime. Instead, the rationale for creating a European Public Prosecutor sprung from legitimate concerns over extensive ‘internal’ mismanagement and misappropriation of European Union funds. The objective of protecting the EU’s budget is thus central to understanding the motivation for establishing such an office. It has been perceived that Member States’ past records in protecting EU funds are insufficient and that a European Public Prosecutor can address these shortcomings.⁵²

The fashioning of such a body was, however, a slow and contested process. The seeds for a European Public Prosecutor were considered already in the 90’s by work of the academics in the Corpus Iuris Project. This project had suggested a scheme of measures to counter the non-enforcement of offences against the EU’s budget, including suggestions of a single set of offences applicable throughout the Union, a common set of procedural rules for the investigation and prosecution of such offences and the establishment of a European Public Prosecutor.⁵³ It is, however, conventional wisdom that there was serious controversy as to whether there should be such an office with autonomous power to conduct prosecutions in relation to certain offences at all. Member States have viewed the EPPO as a further incursion on national sovereignty in a sensitive field and have expressed mutual concerns over the far-reaching implications of such an office on the functioning of national criminal justice systems.⁵⁴ More importantly, prior to Lisbon the Union did not have any Treaty mandate to create such an office. Whilst such an office was suggested by the European Convention, the failure of the Constitutional Treaty entailed that it was impossible to constitutionally defend the establishment of a European Public Prosecutor under the current Treaties. It was thus apparent that a clear Treaty mandate was needed to create such a controversial body with supranational powers to develop a more ‘integrated’ EU criminal law.⁵⁵

⁵² See Commission, ‘Commission Staff Working Document, Impact Assessment, Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office’ SWD (2013) 274, 7-8; Katalin Ligeti and Michele Simonato, ‘The European Public Prosecutor’s Office: Towards a Truly European Prosecution Service?’ (2013) 4 New Journal of European Criminal Law 7, 8-9.

⁵³ See Mireille Delmas Marty and John AE Vervaele, *The Implementation of the Corpus Iuris in the Member States – Penal Provisions for the Protection of European Finances* (Intersentia 2001). See also Commission, ‘Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor’ COM (2001) 715 final, for a preliminary discussion on the design of a European Public Prosecutor.

⁵⁴ See the recent Yellow Card issued by national parliaments against the EPPO Proposal: Commission, ‘Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No 2’ COM (2013) 851 final. See the divided opinions among the members of the Convention, Secretariat of the European Convention, ‘Draft sections of Part Three with comments’ (CONV 727/03, 27 May 2003) 33-34; Memorandum by Maria Fletcher, European Union Committee, *The Treaty of Lisbon: an impact assessment* (HL 2007-08, 62-II) E 151; Oral Evidence by Professor Jo Shaw, European Union Committee, *The Treaty of Lisbon: an impact assessment* (HL 2007-08, 62-II) Q E 47-48.

⁵⁵ See Ligeti and Simonato (n 52) 11, 21.

This section suggests that the issue prior to Lisbon in regard to developing an EU criminal procedural policy was whether the EU had competence to develop such a policy at all. As mentioned above, it was clear that the existence of such a competence to create a European Public Prosecutor and to develop Eurojust into a strong EU-wide prosecutorial unit did not exist prior to Lisbon. Notwithstanding the Commission's efforts to propose harmonisation measures, Member States strongly contested that there was a competence under the EU Treaties to develop a policy on procedural standards for defendants and victims. Due to the unanimity requirement in the Third Pillar, this contestation of competence effectively impeded the realisation of an EU criminal procedure policy on procedural standards. Concerns of competence therefore hindered the development of EU agencies capable of effectively addressing external and internal threats of serious cross-border crime.

3. The question of competence post-Lisbon - changing the debate from 'existence' to 'exercise' of competence

This evolution and the debate on the existence of EU competence in criminal procedure was radically altered by the Lisbon Treaty where the European Union was explicitly conferred far-reaching powers in the field of EU criminal procedural policy. The EU now shares law-making powers with the Member States in the field of criminal procedure⁵⁶ and there is, as mentioned above, now an 'explicit' competence in Article 82(2) TFEU to harmonise domestic criminal procedure.⁵⁷ Together with these powers, the Union was conferred competences in Article 85 and Article 86 TFEU providing for the further development of Eurojust and the establishment of a European Public Prosecutor to reinforce the institutional capacity to more effectively combat transnational crime.⁵⁸ The question of EU competence has thus transformed in nature: instead of discussing the 'existence' of competence, scholars now debate how EU competences should be 'exercised'.⁵⁹

On the basis of the reinforced Treaty mandate, the European Council laid the foundations for the development of an EU procedural criminal policy in the next multi-annual JHA programme, adopted in 2009: the Stockholm Programme.⁶⁰ The importance of enhancing mutual trust to enable the proper operation of mutual recognition was emphasised as one of the main challenges for the future at the Stockholm European Council. The protection of the rights of defendants was underlined as an indispensable element to build such trust between the Member States. In contrast to the situation pre-Lisbon, the new Treaty provision in Article 82 TFEU conferred on

⁵⁶ See TEU art 4(2).

⁵⁷ See Paul Craig, *The Lisbon Treaty: Law, politics and Treaty reform* (Oxford University Press 2011) 361-364, 366-67.

⁵⁸ See above s 1.

⁵⁹ The use of these terms in this context are borrowed from Jacob Öberg, *Limits to EU Powers-A Case Study of EU Regulatory Criminal Law* (Hart Publishing 2017) 1-3. See generally for this development of EU law: Robert Schütze, *From Dual to Cooperative Federalism* (Oxford University Press 2009); Loïc Azoulay, 'Introduction: the Question of Competence' in Loïc Azoulay (ed), *The Question of Competence in the European Union* (Oxford University Press 2014) 7.

⁶⁰ Council, 'The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens' (2010) OJ C115/1.

the EU legislator a clear mandate to embark on legislating on such rights.⁶¹ Furthermore, the European Council underlined the importance of finding a balance between ‘rights’ and ‘security’. Law enforcement measures⁶² and measures to safeguard individual rights should go hand in hand in the same direction and mutually reinforce each other.⁶³ The Stockholm Programme also placed victim rights at the forefront and urged the Union to develop a coordinated and integrated approach in this field. It underlined the need to give special protection, support and recognition to particularly vulnerable and exposed victims.⁶⁴

The Stockholm Programme was materialised in several concrete EU measures. The Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings⁶⁵ was adopted by the Council the same year. Following this, the Roadmap for strengthening the rights and protection of victims in criminal proceedings was adopted in 2011.⁶⁶ On the basis of these roadmaps, the EU legislator adopted seven key directives to ensure minimum standards for defendants and victims: I) Directive on Right to Translation and Interpretation in Criminal Proceedings;⁶⁷ II) Directive on the Right to Information in Criminal Proceedings;⁶⁸ III) the Victim Rights Directive;⁶⁹ IV) Directive on the Presumption of Innocence;⁷⁰ V) Directive on Access to Lawyer;⁷¹ VI) Directive on Legal Aid;⁷² and VII) Directive on Procedural Safeguards for Children.⁷³

Post-Lisbon there were also several initiatives intended to reinforce and develop the institutional dimension of the EU’s criminal procedural policy. The 2002 Eurojust Decision⁷⁴ was amended in 2008 to make it function more effectively and to describe its functions more

⁶¹ See European Union Committee, *The European Union’s Policy on Criminal Procedure* (n 2) 7-8; Weyembergh and Wiczorek (n 9) 40-41.

⁶² The Stockholm Programme did, for example, suggest a novel internal security strategy: Commission, ‘The EU Internal Security Strategy in Action: Five steps towards a more secure Europe’ COM (2010) 673 final.

⁶³ See ‘Stockholm Programme’ (n 60) paras 2.1-2.4; CEPS Policy Paper (n 30) 3-5.

⁶⁴ See ‘Stockholm Programme’ (n 61) paras 2.3.4-5, 3, 3.3.

⁶⁵ See Council, ‘Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceeding’ [2009] OJ C295/1.

⁶⁶ [2011] OJ C187/01.

⁶⁷ Council Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

⁶⁸ Council Directive 2012/13/EU of 22 May 2012 on the right to information in criminal proceedings [2012] OJ L142/1.

⁶⁹ Council Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L315/57.

⁷⁰ Council Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L65/1.

⁷¹ Council Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] OJ L294/1.

⁷² Council Directive (EU) 2016/1919 of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L297/1.

⁷³ Council Directive (EU) 2016/800 of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L132/1.

⁷⁴ See n 50.

clearly,⁷⁵ and there is now also a proposal to adopt a new Eurojust Regulation.⁷⁶ Perhaps more importantly, the Commission proposed in 2013, on the basis of Article 86 TFEU, a proposal for a European Public Prosecutor with competences to autonomously prosecute crimes against the EU's financial interests.⁷⁷ This proposal has been contested and seriously revised and negotiated in the Council leading up to the final EPPO Regulation which was adopted through enhanced cooperation.⁷⁸ All these very important developments call for a comprehensive legal and political assessment.

4. The scope and constraints of EU competence in criminal procedure

Whilst the Lisbon Treaty has settled the controversy over the existence of competence over criminal procedure, the new Treaty landscape for EU criminal procedural policy, however, provokes new, complex and sensitive questions pertaining to how these new powers should be exercised.⁷⁹ It is apparent from the Stockholm Programme, the recent Strategic Guidelines of 2014,⁸⁰ as well as legislative practice,⁸¹ that EU procedural criminal law is a central field of EU policy. This necessitates that the scope for EU action in this field is clearly identified. This section considers the EU's competence in domestic criminal procedure and the institutional dimension of the EU's powers in this field.

4.1. Competence to harmonise domestic criminal procedure

The discussion commences with Article 82(2) TFEU, which arguably entails an extension of competence in the field of criminal procedure compared to the pre-Lisbon provisions in the Third Pillar.⁸² Working Group X of the European Convention developed the thinking behind this provision and recommended 'the creation of a legal basis permitting the adoption of common rules on specific elements of criminal procedure'. This need resulted from the lack of an express provision conferring on the EU clear-cut competence to approximate criminal procedure.⁸³ Article 82(2) TFEU gives the EU competence to act in the field of domestic criminal procedure in relation to well-defined areas: I) the mutual admissibility of evidence between Member States; II) the rights of individuals in criminal procedure; III) the rights of victims of crime; and IV) any other aspects of criminal procedure which the Council has identified in advance (acting with the consent of

⁷⁵ Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust [2009] OJ L138/14.

⁷⁶ Council Doc 6643/15, 27 February 2015. Whilst increasing the powers of the national members, the Regulation will, however, not entail any substantive changes to the powers of Eurojust compared to the 2008 Eurojust Decision: See Steve Peers, *EU Justice and Home Affairs Law: Volume II: EU Criminal Law, Policing, and Civil Law* (4th edn, Oxford University Press 2016) 253-257.

⁷⁷ See Commission, 'Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office' COM (2013) 534 final.

⁷⁸ See Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office [2017] OJ L283/1 (EPPO Regulation).

⁷⁹ See European Union Committee, *The European Union's Policy on Criminal Procedure* (n 2) 14-17; Secretariat of the European Convention, 'Final report of Working Group X "Freedom, Security and Justice"' (CONV 426/02, 2 December 2002); Peers, 'EU Criminal Law' (n 11).

⁸⁰ Council, 'From General Secretariat of the Council to Delegates – European Council 26/27 June 2014 – Conclusion' (EUCO 79/14, 27 June 2014) 1-4.

⁸¹ See n 67-73 for references to this legislation.

⁸² See French Senate, *Constitution Europeenne*, 'Comparaison avec les traites en vigueur' October 2004, 242; European Union Committee, *Procedural Rights in Criminal Proceedings* (n 41) 17.

⁸³ See 'Final report of Working Group X' (n 79) 8, 9, 11.

the Parliament). There are, nevertheless, important constraints attached to the use of this power.⁸⁴ The EU legislator can only adopt measures which are ‘necessary’ to ‘facilitate mutual recognition and police and [criminal] law cooperation’. These rules must therefore have a ‘cross-border dimension’. Added to this, there is an emergency brake in Article 82(3) TFEU which can be invoked by Member States if a proposed measure under Article 82(2) TFEU affects ‘fundamental aspects’ of Member States’ criminal justice systems. These conditions are considered in turn.

The most controversial limitation would be the requirement that the proposed measure would need to have a ‘cross-border dimension’.⁸⁵ As mentioned above, this issue was contested prior to Lisbon and the debate has continued post-Lisbon. This requirement could be construed in different ways: I) that Article 82(2) TFEU is to be limited to matters which have a specific relationship (eg that victims and defendants are involved in transnational proceedings) with cross-border proceedings, such as the EU’s civil law power;⁸⁶ II) that there is no constraint in Article 82 TFEU limiting EU intervention to transnational dimensions;⁸⁷ III) that there is no need for a direct cross-border element but there would be a likelihood for such elements to occur.

Peers is the main proponent of the latter of these interpretations (III) and suggests that the Union’s specific criminal procedure powers would be rendered meaningless if they could only be applied in cross-border proceedings. It would also be very difficult to foresee and establish the existence of cross-border elements in proceedings, whether it concerns mutual admissibility of evidence or defence rights and victim rights. Attempts to constrain the competence to cases with a cross-border dimension would also create inequalities, with distinct categories of defendants being treated differently. He thus suggests that the test should be whether it is likely that the rules in question would have a particular impact on cross-border proceedings. Such likelihood would exist where the measure contained a clause providing that Member States could not refuse to recognise mutual recognition requests on grounds falling within the scope of a measure adopted pursuant to Article 82(2) TFEU.⁸⁸

However, the first and more stringent interpretation (I) seems to be advanced by the Treaty framers. It is clear that Working Group X in the pre-Lisbon discussion of Article 82 TFEU insisted that the Union should be able to legislate only in matters where this was justified by a cross-border dimension or procedures with ‘transnational implications’.⁸⁹ The House of Lords’ European Union Scrutiny Committee and the^{French Government} underlined that the express^{limitation, that}

⁸⁴ See ‘Draft sections of Part Three with comments’ (n 54) 32-33; Craig (n 57) 366.

⁸⁵ See discussion in Jacob Öberg, ‘Subsidiarity and EU Procedural Criminal Law’ (2015) 5 *European Criminal Law Review* 19, 22-28.

⁸⁶ In TFEU art 81(3) the wording of ‘cross-border implication’ is used however.

⁸⁷ See Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law* (3rd edn, Cambridge University Press 2014) 661-662.

⁸⁸ See Peers, ‘EU Justice and Home Affairs Law’ (n 76) 670-671; European Union Committee, *Procedural Rights in Criminal Proceedings* (n 41) 14-16. This proposal draws inspiration from the test advanced by the Court in Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising)* [2000] ECR I-08419.

⁸⁹ ‘Draft sections of Part Three with comments’ (n 54) 32-33; ‘Final report of Working Group X’ (n 79) 11.

the proceedings should have a cross-border dimension, must be taken seriously. Too broad a reading of ‘cross-border’ dimension would also make it impossible to ensure that the measures were ‘necessary’ for improving judicial co-operation and could lead to illegitimate ‘competence creep’. If any case can have a cross-border dimension because of a very remote possibility of having to enforce a judicial order in another Member State, then these words are illusory.⁹⁰

A way of policing this condition would be to require the EU legislator to substantiate that a certain instrument addressed cross-border problems. A methodology for this task is to examine the design of a Directive and consider the scope of the Directive (ie whether it covers only cross-border proceedings or also internal situations). In addition to this, it is appropriate to examine the explanatory memorandum and impact assessment to assess whether the alleged cross-border link is sufficiently articulated. A brief example of the Victim Rights Directive illustrates the point. This Directive was justified on the basis that victimisation typically features cross-border aspects and that victims are often in a cross-border situation where they need additional protection.⁹¹ This point was not compelling when the justifications were analysed in more detail. It was apparent that the Directive had not been limited to rights for victims in cross-border proceedings.⁹² Neither was there any compelling evidence that ‘victimisation’ as such was regularly a cross-border problem. The evidence indicated rather that victimisation, as a rule, takes place in a purely national context without transnational dimensions or implications.⁹³ Given this, it is natural to contest the EU’s competence to regulate victim rights in internal situations (ie situations where the victim is victimised in their own Member State and where the judicial proceedings take place in that Member State). This short analysis of the Victim Rights Directive may be indicative of a broader trend of employing Article 82(2) TFEU to establish via EU secondary law self-standing human rights standards with a very feeble link to the cross-border dimension of the action.⁹⁴

Another contested limitation in Article 82(2) TFEU is the requirement that harmonisation of procedural standards and rules on admissibility of evidence must ‘facilitate mutual recognition’ of judgments or decisions or ‘judicial cooperation’. EU competence to legislate on procedural rights is not self-standing but conditional upon the need to demonstrate that such rights are

⁹⁰ See European Union Committee, *Procedural Rights in Criminal Proceedings* (n 41)14-17; French Senate (n 82).

⁹¹ Commission, ‘Commission Staff Working Paper, Impact Assessment, Accompanying the document; Communication from the Commission to the European Parliament, the Council, the European economic and social Committee and the Committee of the Regions; Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, Proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters’ SEC (2011) 580 final, 18-20.

⁹² See ‘Victims Directive’ (n 69) arts 1 and 2.

⁹³ See SEC (2011) 580 (n 91) 18.

⁹⁴ See Öberg, ‘Subsidiarity and EU Procedural Criminal Law’ (n 85) 36-45; Valsamis Mitsilegas, ‘The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice’ (2015) 6 *New Journal of European Criminal Law* 460, 475-477; Rianne Letschert, Conny Rijken, ‘Rights of Victims of Crime: Tensions between an Integrated Approach and a Limited Legal Basis for Harmonisation’ (2013) 4 *New Journal of European Criminal Law* 226.

necessary to facilitate the operation of mutual recognition.⁹⁵ Working Group X of the Convention (referring to evidence of practitioners) sustained that some approximation of certain elements of criminal procedure may prove necessary in order to facilitate mutual recognition. Such harmonisation would arguably facilitate the collaboration between law-enforcement agencies of the Member States and the application of the principle of mutual recognition by strengthening mutual confidence.⁹⁶ The Commission has also in the past justified harmonised EU rules on procedural rights as being necessary to the enhancement of mutual trust, which arguably would lead to the improvement of judicial cooperation. However, it seems that key EU directives in the field, such as the Presumption of Innocence Directive and the Victim Rights Directive, do not provide a clear link between the rights proposed and their necessity for the operation of mutual recognition.⁹⁷ The justifications have also been based on a concept of mutual trust which is too imprecise and too subjective to be amenable to judicial review. This would, however, run counter to the Court's case law on legal basis which suggests that the choice of legal basis for a measure must be based on objective factors which are capable of being reviewed by the Court. There is also a risk here for 'competence creep'. If the adoption of minimum standards for persons in criminal proceedings could be justified as 'theoretically' having a positive impact on 'mutual trust', which arguably would 'facilitate' the operation of mutual recognition, then practically all rules of criminal procedure would be candidates for EU harmonisations.⁹⁸ Given all this, there is a need for a more comprehensive analysis of these substantive constraints (the 'cross-border' criterion and the 'mutual recognition/mutual trust' criterion) to the exercise of EU competence under Article 82(2) TFEU.

Furthermore, there are several under-explored and central questions pertaining to the legal and political dimension of the emergency brake in Article 82(3) TFEU. Pursuant to this provision, the Member State can refer a Directive to the European Council if it 'affects fundamental aspects of its criminal justice system'. The political implications of the emergency brake are potentially significant. A referral to the European Council makes reaching agreement on a measure very cumbersome. The European Council decides by unanimity and it would need the Head of Government to agree to an EU measure, which his or her own government has argued affects fundamental aspects of the national criminal justice system.⁹⁹ The emergency brake is thus an anomaly in the envisaged 'Communitarisation' of the AFSJ. If Member States are willing to use the emergency brake or threat to use it, some of the very problems that the introduction of qualified majority voting sought to avoid, ie delays in decision-making and the watering down of proposals, would be replicated.¹⁰⁰ Whilst Member States would generally lose political capital by pulling the emergency brake, they would still be entitled, and perhaps

⁹⁵ See Peers, 'EU Criminal Law' (n 11) 512-513; European Union Committee, *Procedural Rights in Criminal Proceedings* (n 41) 14-15.

⁹⁶ See 'Final report of Working Group X' (n 79) 8.

⁹⁷ See n 94.

⁹⁸ See Mitsilegas, *Mutual Recognition in Criminal Matters* (n 6) 1307-08; Öberg, 'Subsidiarity and Procedural Criminal Law' (n 85) 25-27.

⁹⁹ See Judgment of German Federal Constitutional Court of 30 June 2009, *Lisbon Judgment*, Case 2 BvE 2/08, BvE 5/08, 2 BvR 1010/08, BvR 1022/08, BvR 1259/08, BvR 182/09 (2009) para 365; Chalmers and Davies (n 87) 635-636.

¹⁰⁰ See Memorandum by JUSTICE, European Union Committee, *The Treaty of Lisbon: an impact assessment* (HL 2007-08, 62-II) E 156.

feel compelled (by pressure from domestic politics) to use it. More importantly, the mere existence of the brake may compromise and seriously hinder effective EU action in the field of criminal procedure. The threat of its use would be sufficient to strengthen a Member State's negotiating hand, given the consensus approach in the Council. There is also some tentative evidence from certain UK Government officials and experts suggesting that Member States are willing to use it.¹⁰¹ It would, however, be useful to consider further both with qualitative and quantitative indicators (eg the number of legislative acts which have been adopted by unanimity) to what extent the existence of the emergency brake influences negotiations in the Council.

The legal dimension of Article 82(3) TFEU concerns two basic questions: What is the meaning of 'fundamental aspects' (I) and is it possible for the Court of Justice to adjudicate on Member States' decision to trigger the emergency brake concerns (II)?¹⁰² The meaning of 'fundamental aspects' will naturally be individual for each Member State. However, it is conceivable that the case for arguing that an EU measure affects 'fundamental aspects' is stronger if the measure would infringe on rules belonging to the constitution of the Member State.¹⁰³ Thus, if an EU measure would be of such a profound character that it has implications for the Member States' fundamental structures, political and constitutional,¹⁰⁴ there is a compelling case for triggering the emergency brake. Whilst Member States may be ready to argue that the whole sphere of criminal law belongs to the Member States' constitutional identity (as it anchors its social and moral values and affects in an especially sensitive manner democratic self-determination¹⁰⁵), such an argument is unlikely to stand up before other Member States and the Court of Justice. If such an argument would be accepted, the move to qualified majority in Article 82 and Article 83 TFEU would seem practically meaningless.¹⁰⁶ With regard to judicial review of the use of the emergency brake, the issue is sensitive. The subjective language of the Treaty suggests that it may be difficult for the Court to overrule the trigger of the emergency brake.¹⁰⁷ There are, however, observers suggesting that the triggering of the emergency brake is an issue of interpreting EU Treaties, which the Court ultimately has the sole power to adjudicate upon. The situations where the Court would feel compelled to exercise this power would arguably be of a more extreme character.¹⁰⁸

4.2. The institutional foundations of the Union's criminal procedural policy

¹⁰¹ See European Scrutiny Committee, *European Scrutiny* (HC 2004-05) paras 110-120; European Union Committee, *The Treaty of Lisbon: an impact assessment* (HL 2007-08, 62-II) paras 6.47-6.55; Oral Evidence by Jo Shaw (n 54) E 8-9, Q 38-41; Oral Evidence by Mr Jack Straw, (n 39) QQ E 502-506.

¹⁰² Oral Evidence by Mr Jack Straw (n 39) QQ E 502-506; Memorandum by Professor Damian Chalmers, European Union Committee, *The Treaty of Lisbon: an impact assessment* (HL 2007-08, 62-II) E 127.

¹⁰³ See Petter Asp, *The Substantive Criminal Law Competence of the EU—Towards an Area of Freedom, Security & Justice – Part 1* (Jure 2013) 140; Peers, 'EU Justice and Home Affairs Law' (n 76) 37.

¹⁰⁴ See TEU art 4(2). See further Leonard Besselink, 'National and constitutional identity before and after Lisbon' (2010) 6 *Utrecht Law Review* 36.

¹⁰⁵ See 'Lisbon judgment' (n 99) paras 251, 355, 356, 358.

¹⁰⁶ See Besselink (n 104) 47-49.

¹⁰⁷ See Oral Evidence by Claire-Francoise Durande (n 39) E 76, Q 351-355; Peers, *EU Justice and Home Affairs Law* (n 76) 35-38.

¹⁰⁸ See Asp, *Substantive Criminal Law Competence* (n 103) 139-140.

The second dimension of the Union's criminal procedural policy is the institutional basis for such a policy. Whilst there are several institutions belonging to this field,¹⁰⁹ there are two high-profile institutions in particular that deserve further scrutiny from a constitutional perspective; Eurojust and the EPPO.

The new provision on Eurojust in Article 85 TFEU provokes very pertinent questions concerning the limits to the Union institutions' operational capacity in the field of criminal law.¹¹⁰ This provision clearly increases Eurojust's power in comparison to the Pre-Lisbon provisions of Article 29 and Article 31(2) EU.¹¹¹ The provision gives the EU legislator competence to adopt regulations through the ordinary decision-making procedure to determine Eurojust's 'structure, operation, field of action and tasks'.¹¹² Eurojust's tasks include, for example, the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union (I), the coordination of investigations and prosecutions (II), the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network (III).¹¹³ A notable extension of powers is that Eurojust after Lisbon can be given powers to 'initiate criminal investigations'.¹¹⁴ The vague wording gives space for contestation and possible 'competence creep' by the EU legislator. It is reasonable to assume that the Commission may be interested in proposing to give Eurojust powers to adopt decisions that are binding for Member States' judicial authorities, given the broad design of Article 85 TFEU.¹¹⁵

The wording of Article 85(2) TFEU, however, constrains this power significantly as Eurojust cannot adopt 'formal acts of judicial procedure'. This limitation was particularly underlined by several Convention members endeavouring to circumscribe the right to initiate criminal

¹⁰⁹ Europol and art 88 TFEU need further scrutiny but this falls outside the field of 'Judicial Cooperation in Criminal Matters' to which the provisions on Eurojust and EPPO belong. Instead, those provisions are placed in Chapter 4 of the AFSJ with the separate title of 'Police Cooperation'. This chapter observes the Anglo-Saxon distinction between the investigation of crime by the police and law enforcement authorities and the prosecution and trial process before the courts (although in many countries, eg Sweden, investigations form part of the judicial process). This distinction may seem artificial but there is a more substantive rationale for excluding Europol. This is the fact that there are less contestations relating to the new competences in art 87 and 88 TFEU compared to art 85 and 86 TFEU: See European Union Committee, *The European Union's Policy on Criminal Procedure* (n 2) paras 6.219-6.225; 'Final Report Working Group X' (n 79) 10-12, 18; Peers, *EU Justice and Home Affairs Law* (n 76) 261, 269-270, 300-388.

¹¹⁰ See Antoine Mégie, 'Eurojust in Action: An Institutionalisation of European Legal Culture?' in Renaud Colson and Stewart Field (eds), *EU Criminal Justice and the Challenges of Legal Diversity* (Cambridge University Press 2016); Suominen (n 49); Anne Weyembergh, 'The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU' (2011) 2 *New Journal of European Criminal Law* 75, 86-88.

¹¹¹ It seems clear from Working Group X (n 79) 18-20 that this is an extension of powers. See also Memorandum by Dr Valsamis Mitsilegas, European Union Committee, *The Treaty of Lisbon: an impact assessment* (HL 2007-08, 62-II) E 167-168.

¹¹² As discussed above, the original 2002 Eurojust Decision (n 74) has been amended by a Council Decision in 2009 (n 75). The following departs from the consolidated version of the Decision as it appears in Council, 'From: General Secretariat of the Council to Delegations, Subject: Council Decision on the strengthening of Eurojust and amending Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime' (5347/3/09, 15 July 2009).

¹¹³ See TFEU art 85.

¹¹⁴ See Craig (n 57) 368; Fletcher and Gilmore (n 17) 66-74.

¹¹⁵ See Monar (n 47) 347-350; Weyembergh (n 110) 90-98.

proceedings.¹¹⁶ What is controversial here is whether the new wording of Article 85 TFEU opens up a possibility to ‘require’ national authorities to commence proceedings.¹¹⁷ Eurojust can already, as matters stand now, ask the national authorities to undertake a criminal prosecution based on specific evidence. The latter may, however, decide not to comply with the request.¹¹⁸ Peers has rejected that Article 85 TFEU provides Eurojust with powers to ‘require’ national authorities to bring proceedings, as such requests would amount to ‘formal acts of judicial procedure’. The fact that Eurojust cannot adopt ‘formal acts of judicial procedure’ also constrains, according to Peers, Eurojust’s power to resolve conflicts of jurisdiction (ie the power to require one Member State not to prosecute in favour over another). If charges had already been brought, such a compulsion may amount to a ‘formal act of judicial procedure’. However, Eurojust would arguably be entitled to compel a national authority to refrain from bringing proceedings which technically would not be a ‘formal act of judicial procedure’.¹¹⁹ It seems apparent that this issue and other questions relating to the scope of Eurojust’s powers deserve more careful scrutiny.

Article 86 TFEU and the establishment of a European Public Prosecutor presents several intriguing questions. It was mentioned above that, due to concerns for national sovereignty in a sensitive field of policy, there has been a ‘rocky’ road¹²⁰ to create a supranational ‘European prosecutor’ with direct powers to prosecute crimes against the EU’s financial interests in national courts.¹²¹ Nevertheless, the prospects of creating a European Public Prosecutor obtained real impetus from the successful negotiation of the new Article 86 TFEU, which was enshrined in the Lisbon Treaty. This provision provides the Council with a competence to ‘establish a European Public Prosecutor’s Office from Eurojust (...) in order to combat crimes affecting the financial interests of the Union’ by a unanimous decision after having obtained the consent from the European Parliament. The EPPO shall ‘be responsible for investigating, prosecuting and bringing to judgment (...) the perpetrators of, and accomplices in, offences against the Union’s financial interests’. It shall also ‘exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.’¹²² Whilst Article 86 TFEU does not in itself establish the EPPO, it provides the foundation for its subsequent establishment. Consequently, it constitutes the legal basis for the Commission’s widely contested proposal to establish the EPPO,¹²³ which could be viewed as one of the most important reforms ever in the history of EU criminal law.¹²⁴

The key constitutional questions with regard to Article 86 TFEU and the EPPO Proposal concern the remit of this office. First, does the EPPO’s mandate also contain a right to prosecute

¹¹⁶ See TFEU art 85(2); ‘Draft sections of Part Three with comments’ (n 54) 33.

¹¹⁷ See ‘Final report of Working Group X’ (n 79) 10, 19.

¹¹⁸ See ‘Amended Eurojust Decision of 2009’ (n 112) art 8.

¹¹⁹ See Peers, *EU Justice and Home Affairs Law* (n 76) 218-219.

¹²⁰ See Mitsilegas, *EU Criminal Law After Lisbon* (n 7) ch 4 for this expression.

¹²¹ See n 54 for references to this contestation.

¹²² See TFEU art 86 (1)-(2); ‘Final report of Working Group X’ (n 79) 19-20 for the thinking behind the provision.

¹²³ See ‘EPPO Proposal’ (n 77) 2, 4.

¹²⁴ For a small selection of recent literature: Petter Asp (ed), *The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives* (Jure 2015); Katalin Ligeti, *Toward a Prosecutor for the European Union Volume 1* (Hart Publishing 2012); Leendert H Erkelens, Arjen WH Meij and Marta Pawlik (eds), *The European Public Prosecutor’s Office: An extended arm or a Two-Headed dragon?* (Springer 2014); Ligeti and Simonato (n 52).

not only offences against the financial interests of the Union but also ‘ancillary offences’?¹²⁵ Secondly, does the EPPO have ‘exclusive jurisdiction’ to prosecute offences¹²⁶ against the financial interests of the Union? Both these issues were widely contested when the EPPO Proposal was negotiated in the Council and when the national parliaments issued a ‘Yellow Card’ against this proposal.¹²⁷

National parliaments were particularly critical of the proposal to give EPPO jurisdiction over ancillary offences,¹²⁸ suggesting that criminal law is primarily a national competence. The criminal enforcement of offences against the financial interests of the EU should thus be a power of national authorities. Furthermore, as fraud is committed at a national level, fighting appropriately against such offences depends mainly on taking a firm line at this level.¹²⁹ The Commission defended the scope of the Regulation by underlining the link between crimes affecting the financial interests of the Union and ancillary offences to such crimes. Without joint prosecution there would be a risk for parallel enforcement concerning ancillary offences (potentially breaching the principle of *ne bis in idem*) undermining the efficiency of anti-fraud activities.¹³⁰ Although there is a pragmatic thrust behind the Commission’s argument, one may question whether it could be squared with the wording of Article 86 TFEU and the idea of

¹²⁵ See Adán Nieto Martín and Marta Muñoz de Morales Romero, ‘The Office of the European Public Prosecutor and Related Offences: Deconstructing the Problem’ in Petter Asp (ed), *The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives* (Jure 2015).

¹²⁶ See Petter Asp, ‘Jeopardy on European Level: What is the Question to which the Answers is the EPPO?’ in Petter Asp (ed), *The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives* (Jure 2015) 60-67; Kai M Lohse, ‘The European Public Prosecutor: Issues of Conferral of Subsidiarity and Proportionality’ in Leendert H Erkelens, Arjen WH Meij and Marta Pawlik (eds), *The European Public Prosecutor’s Office: An extended arm or a Two-Headed dragon?* (Springer 2014).

¹²⁷ See discussion Irene Wieczorek, ‘The EPPO draft regulation passes the first subsidiarity test: an analysis and interpretation of the Commission’s hasty approach to National Parliaments’ subsidiarity arguments’ (2015) 16 German Law Journal 1247; Öberg, ‘Limits to EU Powers’ (n 59) 167-182.

¹²⁸ See ‘EPPO Proposal’ (n 77) art 13 providing that ‘Where the offences referred to in Article 12 are inextricably linked with criminal offences other than those referred to in Article 12 and their joint investigation and prosecution are in the interest of a good administration of justice the European Public Prosecutor’s Office shall also be competent for those other criminal offences (...)’.

¹²⁹ See Chamber of Deputies (Romania), ‘Reasoned opinion finding the lack of conformity of the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with the principle of subsidiarity’ COM(2013)534 (courtesy translation); Dutch Senate of the States General, ‘Reasoned opinion (breach of subsidiarity) on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office (DOC(2013)534)’, 17 October 2013, 153768.01; Joint Committee on Justice, Defence and Equality (Ireland), ‘Reasoned Opinion of Joint Committee on Justice, Defence and Equality, COM(2013)534 Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office’, October 2013; Seimas of the Republic of Lithuania, Committee on European Affairs, ‘Opinion on the European Commission Proposal for a Council Regulation on the Establishment of the European Public Prosecutor’s Office’, 16 July 2014, No V-2014-4174L; House of Representatives of the Republic of Cyprus, ‘Reasoned Opinion submitted by the House of Representatives of the Republic of Cyprus with regard to the Commission’s proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office [COM(2013)534]’ (executive summary in English); Senate of the Republic of Poland, ‘Opinion of the European Union Affairs Committee of the Senate of the Republic of Poland on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office’ COM(2013)534, adopted at the meeting of 9 October 2013 (courtesy translation); Statement by the Committee on Justice, ‘Reasoned Opinion of Swedish Parliament- ‘Subsidiarity check on the proposal on the establishment of the European Public Prosecutor’s Office’, 2013/14: JuU13; Hungarian National Assembly, ‘Summary of the reasoned opinion adopted by the Hungarian National Assembly on 21 October 2013 concerning the Proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office [COM(2013)534] 2013/0255(APP).

¹³⁰ See COM (2013) 851 final (n 54) 4-12.

transnational interests and supranational legal assets.¹³¹ The theories suggest that the legitimacy of an offence depends on the protection of a relevant interest from the constitutional point of view. The financial interests of the EU would be a prime candidate of a genuine supranational interest as the budget is central for the existence of the Union.¹³² The problem with the Commission's argument is that ancillary offences do not concern genuine transnational interests. Criminalising ancillary offences is arguably not vital for the functioning of EU policies or the existence of the Union.¹³³ It is therefore striking that the ultimate version of the EPPO Regulation contains a competence for the EPPO to prosecute 'ancillary offences'.¹³⁴

National parliaments also contested the Commission's claim that Article 86 TFEU conferred the EU competence to establish a European Public Prosecutor with 'exclusive competence' in relation to offences affecting the EU's financial interests.¹³⁵ The exclusivity of the EPPO was also challenged in subsequent negotiations in the Council. It was, for example, proposed by the Greek presidency that it should be exchanged for a concurrent competence, which means that both the EPPO and national prosecution authorities are competent to enforce crimes against the EU budget.¹³⁶ The final version of the adopted EPPO Regulation has, however, maintained the 'exclusivity' of the jurisdiction of the EPPO.¹³⁷ The issue here is whether exclusive competence could be construed or 'implied' according to the Court's case law under Article 86 TFEU. The argument for implied exclusive competence would be that such powers are essential to achieve the objectives of the Treaties or the furtherance of competences listed in the Treaties. It is, however, questionable to what extent the interpretation of Article 86 TFEU could be stretched in this way. Ultimately, this becomes a question of determining whether 'exclusivity' is necessary for the EPPO to function in an appropriate way and to fight efficiently against the EU's financial interests.¹³⁸ Given all this, there is a pressing need to make a rigorous constitutional analysis of the EPPO's remit and the recently adopted EPPO Regulation.

5. Conclusions

This chapter has endeavoured to outline a potential research agenda for legal scholars in the field of EU procedural criminal law. Taking a step back and considering the evolution of this

¹³¹ The latter theory suggests that EU action is justified primarily to address specified cross-border problems arising from diverse national regulations in an integrated legal space: Alexander Somek, 'The Argument From Transnational Effects I: Representing Outsiders Through Freedom of Movement' (2010) 16 *European Law Journal* 315; Martín and Morales Romero (n 125) 130-134.

¹³² See Martín and Morales Romero (n 125) 132-133.

¹³³ See TFEU art 83(2).

¹³⁴ See 'EPPO Regulation' (n 78) art 22(3) and art 25(1). The rules for exercising the competence are, however, complicated, art 25(3).

¹³⁵ See Lithuanian Opinion (n 129); Opinion of Hungarian National Assembly (n 129); Irish Opinion (n 129); Romanian Opinion (n 129); Dutch Senate Opinion (n 129).

¹³⁶ Council, 'From Presidency to the Council, Proposal for a Regulation on the establishment of the European Public Prosecutor's Office' (Draft Regulation) 5766/17, 31 January 2017, arts 17 and 20. See Mitsilegas, 'EU Criminal Law After Lisbon' (n 7) 103-113 for a discussion of the recent Council proposals.

¹³⁷ See 'EPPO Regulation' (n 78) art 25(1).

¹³⁸ See Opinion 1/76 *Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741; Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention* [2006] ECR I-01145 for examples of 'implied' exclusive competence.

field, it appears that the initial rationale for conferring EU competences in the field of domestic criminal procedure came as a response to the perceived ‘moral distance inherent’¹³⁹ in the application of the EU’s mutual recognition regimes. The creation of the EAW and other mutual recognition instruments led to calls for procedural protection and defence rights for individuals subjected to the operation of mutual recognition. The institutional dimension of the EU’s criminal procedural policy evolved, however, on a slightly different path. The underlying motivation for the creation and development of EU-wide crime-fighting agencies/institutions and their incremental extension of competence was primarily to ensure that the Union could in a more efficient way address both the ‘internal’ and ‘external’ threats deriving from criminal activity in the EU. Eurojust thus developed as a ‘coordination’ unit to address the external threat of serious cross-border criminality by cooperation between prosecutorial authorities in the Member States. The European Public Prosecutor on the other hand has been designed as a supranational prosecutor with direct powers to address internal mismanagement and misappropriation of EU funds.¹⁴⁰

The current powers of the EU conferred by the Lisbon Treaty in the field of EU criminal procedural policy, however, give rise to a number of complex questions pertaining to how these competences should be exercised. There are several issues standing out in relation to Article 82(2) TFEU, in particular whether ‘mutual recognition’ and the reference to ‘cross-border dimension’ could work as constraints to the exercise of EU competences. Whilst there has been no comprehensive enquiry examining the EU legislator’s practice, there are indications in the scholarship¹⁴¹ that the limits in Article 82 TFEU have not yet been taken seriously by the legislator. It is therefore pertinent to consider the political and legal dimension of the emergency brake in Article 82(3) TFEU (and Article 83(3) TFEU), which has not yet been subject to a comprehensive analysis. What also seems to be absent in current scholarship is a meticulous analysis of the constitutional basis under the Treaties to establish and reinforce EU-wide institutions in the field of criminal law. Therefore, serious attention should be paid to the EU’s competence to establish a European Public Prosecutor in Article 86 TFEU (particularly in light of the recent proposals to establish this office) and to the competence in Article 85 TFEU to further develop Eurojust’s mandate to engage in operational cooperation.¹⁴²

As a concluding note, this chapter endeavours to link together this contribution with the theme of the book, which is the post-Lisbon development of EU substantive criminal law, in particular with reference to the use of evidence in law-making. EU procedural criminal law shares several features with the evolution of EU substantive criminal law. First, there has been a discussion, both as regards EU substantive criminal law and EU procedural criminal law, about the competence of the EU to adopt measures in this field. The Commission proposed prior to Lisbon to adopt several harmonisation measures in both these fields, although it was seriously contested

¹³⁹ See Mitsilegas, ‘The Symbiotic Relationship’ (n 94) 476 for this expression.

¹⁴⁰ See above s 2.

¹⁴¹ Seen n 94 for reference to the relevant scholarship.

¹⁴² See above s 3.

whether the EU had competence in them.¹⁴³ After Lisbon, it is apparent that the EU enjoys competence (albeit a limited one) in both substantive criminal law and procedural criminal law. The key question, which has been outlined in this chapter, is how the competences should be exercised. Furthermore, similar to EU substantive criminal law, procedural criminal law is emerging as a mature discipline of EU policy, having countenanced intense legislative activity in recent years. This raises the question as to what kind of EU procedural criminal policy should be developed.¹⁴⁴ To address this question, scholars may need to engage in wider research exercises cutting across different disciplines. Pertaining to this, the EU legislator must ask questions as to the role evidence and science have when developing EU criminal policy. This question has been discussed in this book with reference to substantive criminal law¹⁴⁵ but there is a lot of work needed on understanding the use of evidence when legislating on criminal procedure. It is appropriate to illustrate this point with some examples.

One of the central issues in EU criminal procedure is how legislators appreciate issues such as mutual trust and mutual recognition.¹⁴⁶ Mutual trust is built upon different premises (eg that human rights are protected in acceptable ways in the Member States etc) and this suggests that the acceptance of the principle of mutual recognition is conditional on whether these assumptions are met. However, ascertaining to what extent these assumptions are fulfilled may require broader empirical work by criminologists and sociologists which considers the different causes for problems of mutual recognition apart from differences between national law systems.¹⁴⁷ It may, for example, be relevant to establish empirically to what extent other factors such as the existence of language barriers, different irrational biases, shortage of resources and adequately trained personnel may be factors behind why mutual recognition becomes ineffective.¹⁴⁸ This is simply a hypothesis, but it brings home the point that legal concepts such as ‘mutual recognition’ and ‘mutual trust’ cannot be easily grasped or discussed without some wider sociological and philosophical enquiries. Such multidisciplinary research may give us not all the answers or incomplete answers, but it gives us a broader factual framework to enable us to make informed political decisions and to develop a theory of how ‘mutual recognition’ should be appreciated as a constraint to the exercise of EU competence under Article 82 TFEU.

The question here is also, as in substantive EU criminal law, what needs to be demonstrated with evidence and what type and quantity of evidence is required as a basis for legislative interventions? We can use mutual recognition again as an example of what an evidence-based approach in EU procedural criminal law may offer. The conventional harmonisation argument often suggests that harmonisation of procedural standards automatically leads to mutual trust

¹⁴³ See Öberg, *Limits to EU Powers* (n 59) ch 1 and ch 4; Michael Dougan, ‘From the Velvet Glove to the Iron Fist: Criminal Sanctions for the Enforcement of Union Law’ in Marise Cremona (ed), *Compliance and the Enforcement of EU Law* (Oxford University Press 2012) 90-107.

¹⁴⁴ See Weyembergh and Wiczorek (n 9).

¹⁴⁵ See Ouwerkerk’s, Persak’s and Harding/ Banach-Gutierrez’ contribution in this volume.

¹⁴⁶ See Schwarz (n 33).

¹⁴⁷ See Asp, *Procedural Criminal Law Cooperation* (n 5) 191.

¹⁴⁸ See Fletcher and Gilmore (n 17) 128-129, 202; Löff (n 40) 426-428; Gert Vermeulen, ‘Where do we currently stand with harmonisation in Europe?’ in André Klip and Harmen van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Science 2002) 71-73.

and more efficient application of mutual recognition. Looking at the concrete instance of harmonisation of victim rights, such harmonisation has been advanced by the Commission on the basis that it is necessary to build mutual trust which, in turn, will lead to more efficient judicial cooperation. The foundation for the argument is the assumption that the treatment of victims would be a strong indicator of the quality of justice systems in general. Thus, by deduction it follows that harmonisation of victim rights would promote mutual trust and, in the end, mutual recognition.¹⁴⁹

The Commission may be right in their premise that minimum victim rights promote mutual trust among Member States' judicial authorities. The point here is, however, that this premise underlying EU legislative intervention is not substantiated with compelling evidence. A strict evidence-based approach to EU criminal procedural policy would suggest that the EU legislator must substantiate some degree of likelihood that a specific harmonisation measure would lead to positive consequences for the principle of mutual recognition.¹⁵⁰ The EU legislator should consequently make it 'likely' or at 'least reasonable' that the general absence in certain Member States of eg victim rights (or other defence rights) is what makes judges refuse the execution of mutual recognition instruments.¹⁵¹ Such an evidence-based approach could require that the evidence substantiating the nature of the mutual recognition concerns is of a certain quality, eg statistical studies on courts, questionnaires from individuals and Member States, policy studies and academic articles.¹⁵²

Perhaps it is incompatible with a reasonable interpretation of the constitutional constraints in Article 82(2) TFEU to require that the linkage between harmonisation of procedural standards, mutual trust and mutual recognition are substantiated with persuasive evidence. It may even be excessive to require that these premises are made 'likely' with empirical data. But the argument here is that it must be openly discussed to what extent these premises need substantiation with evidence and, if they do, what kind of evidence would be sufficiently reliable to prove the Commission's assumptions relating to the alleged causal links between harmonisation and the efficient operation of mutual recognition.¹⁵³ It is thus the author's aspiration that these complex issues and other questions relating to evidence in law-making in EU criminal procedure are subject to broader cross-disciplinary debates along the lines proposed in this book.¹⁵⁴

¹⁴⁹ See SEC (2011) 580 (n 91) 5-6, 18-20.

¹⁵⁰ See *Tobacco Advertising* (n 88) para 86.

¹⁵¹ See Öberg, 'Subsidiarity and EU Procedural Criminal Law' (n 85) 29, 32-33.

¹⁵² See eg SEC (2011) 580 (n 91) Annex 11 for such quantitative indicators.

¹⁵³ See Öberg, 'Subsidiarity and EU Procedural Criminal Law' (n 85) 32-33, 35, 39-41.

¹⁵⁴ There are, however, compelling examples from political science analysing the nature of the developments of EU criminal procedural policy: see in particular Sandra Lavenex, 'Mutual recognition and the monopoly of force: limits of the single market analogy' (2007) 14 *Journal of European Public Policy* 762; Monar (n 47). See furthermore for such wider interdisciplinary enquiries in the field of criminal justice: Nina Persak (ed), *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes* (Routledge 2016); Renaud Colson and Stewart Field (eds), *EU Criminal Justice and the Challenges of Legal Diversity* (Cambridge University Press 2016).

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