



European Institute of Public Administration
European Centre for Judges and Lawyers



Seminar 2: The pre-Lisbon instruments: Special focus on the European Arrest Warrant

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Improving Judicial Cooperation in Criminal Matters in the area of Freedom, Security and Justice. Institutional Processes and Topical Areas



The “Lisbonisation” of the pre-Lisbon criminal law instruments

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The Treaty of Lisbon – general introduction

- reorganizes the existing treaty framework
- extends co-decision procedure and QMV to criminal law (with exceptions)
- no individual Member State can initiate legislation in the field of criminal law
- emergency brake / pseudo veto / passarelle
- restrictions of the jurisdiction of the European Court of Justice are removed
- institutional issues (new institutions, modified powers)
- widens the scope of opt out rules
- general provisions of the TFEU are applicable to JHA (legitimacy, accountability, non-discrimination, powers on external relations, data protection)

Reorganization of the existing treaty framework

- **all JHA provision are under one single Title in TFEU – TFEU Part Three Title V. Area of Freedom, Security and Justice**
 - former TEU and former TEC provisions were put together
 - former 3rd pillar transferred to former 1st 'Community' pillar
 - EU replaced and succeeded the former EC, former Community legal order is replaced by union legal order
 - transitional rules
 - jurisdiction of the European Court of Justice concerning pre-existing 3rd pillar measures i.e.. measures adopted before the Lisbon Treaty
 - legal effect of pre-existing 3rd pillar measures

Decision-making – legal basis

Article 82 (ex Article 31 TEU)

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to

- a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions
- b) prevent and settle conflicts of jurisdiction between Member States
- c) support the training of the judiciary and judicial staff;
- d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Decision-making – legal basis I.

Article 82 (ex Article 31 TEU) contd.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States

They shall concern:

- a) mutual admissibility of evidence between Member States,
- b) the rights of individuals in criminal procedure,
- c) the rights of victims of crime,
- d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

Decision-making – legal basis II.

Article 83 (ex Article 31 TEU)

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

- On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

Decision-making – legal basis III.

Article 83 (ex Article 31 TEU) contd.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76

Article 84

- The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

Decision-making – power to initiate

▪ **Before the Treaty of Lisbon**

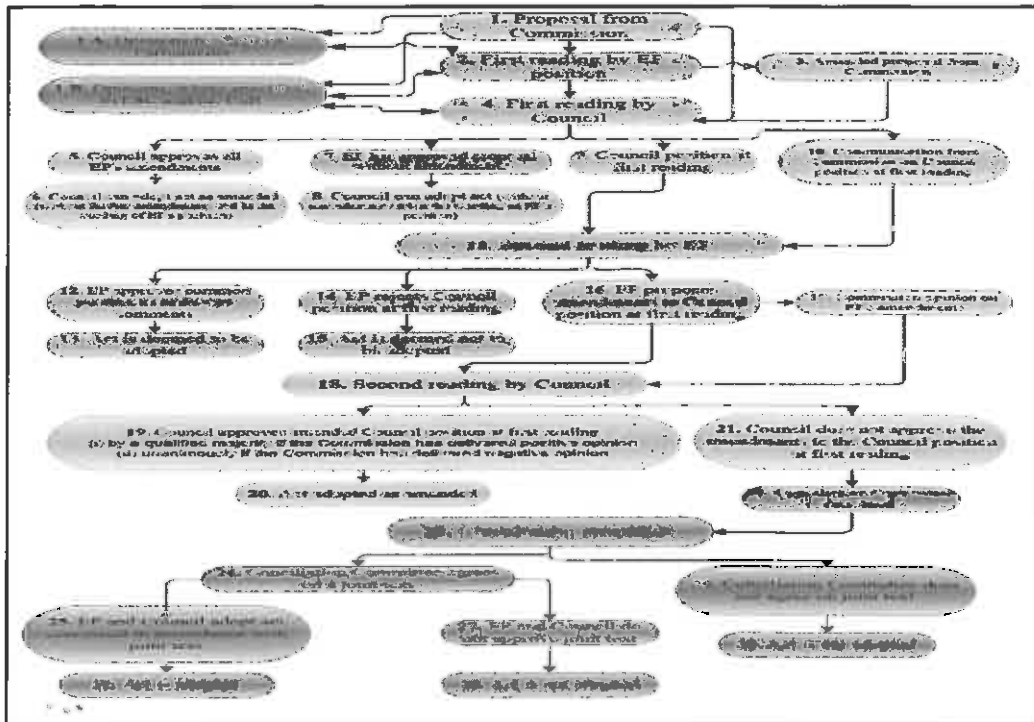
- Individual MS had the power to propose legislation in the field of policing and criminal law (former Art 34. TEU)
- practice: MSs proposed legislation in groups
 - Requirement of Impact Assessment etc made it difficult for one MS to propose
 - Building coalitions was necessary at this early stage

▪ **After the Treaty of Lisbon**

- ¼ of all MSs may propose (Art 76. TFEU)
- Issues: power to withdraw or amend, COM enjoys this right.
- Practice:
 - Right to interpretation and translation in the framework of criminal proceedings
 - European Protection Order
 - European Investigation Order

Decision making – ordinary legislative procedure

- **new legislative process applies: ordinary legislative procedure, previously consultation with the European Parliament**
- **Art 294 TFEU (former Art 251 TEC on co-decision procedure)**
- **Council and the European Parliament are both co-legislators**
- **provides joint powers for the European Parliament**
 - power to amend, power to veto
- **two readings + conciliation procedure**



Decision making – ordinary legislative procedure

▪ Assessment:

- EP has direct influence on the content of the legislative act
- democratic legitimacy increased
- EP can develop a criminal law policy agenda
- time frame of the legislative procedure became much longer approx 1 year (previously 6 months)

Voting in Council

- **general rule: qualified majority**

- **exceptional cases when unanimity is required**
 - establishing the European Public Prosecutor Art 86 (1)
 - police cooperation Art 87 (3)
 - cross border police cooperation Art 89
 - passports Art 77(3)
 - family law Art 81(3)

France	10	29	1 MS – 1 vote	
Germany	10	29		
Great Britain	10	29		
Italy	10	29		
Spain	8	27	QMV = double majority	
Poland	-	27		
Romania	-	14		
The Netherlands	5	13	Proposal of COM or HR	Any other proposal
Belgium	5	12		
Greece	5	12		
Portugal	5	12		
Czech Republic	-	12	55% of MS (min. 15 MS) who represent 65 % of the EU population	72 % of MS (min 20 MS) who represent 65 % of the EU population
Hungary	-	12		
Austria	4	10		
Sweden	4	10		
Bulgaria	-	10		
Denmark	3	7		
Finland	3	7		
Ireland	3	7		
Lithuania	-	7		
Slovakia	-	7		
Luxembourg	2	4		
Cyprus	-	4		
Estonia	-	4		
Latvia	-	4		
Slovenia	-	4		
Malta	-	3		
Total	87	345	Blocking minority: min 4 MS, and 3 if they represent 35% of EU population	
QMV	62 (71,26%)	255 (73,91 %)		
Blocking minority	26	91		

Overview of changes in decision making

5 year period following the entry into force of the Treaty of Amsterdam	After 1 May 2004	After 1 December 2009
Power to initiate		
<ul style="list-style-type: none"> COM or individual MS. 	<ul style="list-style-type: none"> COM or individual MS 	<ul style="list-style-type: none"> COM or 1/4 of MSs.
Decision-making		
<ul style="list-style-type: none"> Unanimous vote, EP is only consulted 	<ul style="list-style-type: none"> Unanimous vote, EP is only consulted 	<ul style="list-style-type: none"> General rule: Ordinary legislative procedure Operational cases : unanimous vote, EP is only consulted Exceptiond : Unanimous vote, EP consent (specific criminal law matters)
Legislative act		
<ul style="list-style-type: none"> Common position Framework decision, Decision, Convention 	<ul style="list-style-type: none"> Framework decision, Decision, Convention 	<ul style="list-style-type: none"> Emergency break Regulation, Directive, Decision,

Emergency break

- applicable to specific legal basis, can not be invoked regarding to any measure
- initiated by a MS if the draft affects 'fundamental aspects of its criminal justice system'
- involves the European Council
- suspension of the decision-making procedure
- consequence
 - agreement is reached, ordinary legislative procedure resumes
 - no agreement is reached, ordinary legislative procedure remains suspended
 - fact track decision making (enhanced cooperation), without the procedural hurdles of the ordinary legislative procedure, with fewer MS participating

Transitional provisions I.

- jurisdiction of the European Court of Justice over legislative acts emanating from the former 3rd pillar of the TEU prior to the ToL
- legal effect of the legislative acts emanating from the former 3rd pillar of the TEU prior to the ToL
- possibility for the UK to opt-out legislative acts from emanating from the former 3rd pillar of the TEU prior to the ToL

Transitional provisions II.

Transitional period	After 1 december 2014
Jurisdiction of ECJ	
<ul style="list-style-type: none"> ▪ No infringement procedures concerning legislative acts that have pre-existed before ToL ▪ No preliminary reference for MS who did not accept the jurisdiction of the Court concerning legislative acts that have pre-existed before ToL 	<ul style="list-style-type: none"> ▪ Full powers of the Court ▪ Infringement procedures, preliminary references
Legal effect of acts	
<ul style="list-style-type: none"> ▪ No direct effect, no direct applicability, supremacy ▪ BUT! Until repealed, annulled or amended 	<ul style="list-style-type: none"> ▪ Direct effect, direct applicability, supremacy.

The two ways of 'Lisbonisation'

▪ Lapse of time

- According to the transitional provisions pre-Lisbon nature of the legal act is retained until the end of the transitory period (1 December 2014)
- After the end of the transitory period the pre-Lisbon nature of the act changes and post-Lisbon rules apply
- „1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.” (Protocol 36 Title VII. Article 10.)

▪ Amendment of the pre-Lisbon instrument during the transitory period

- Pre-Lisbon nature of former 3rd pillar act changes however, if the act is amended within the transitory period
- „2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.” (Protocol 36 Title VII. Article 10)
- Examples
 - **Directive on the trafficking in human beings** (Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA)
 - **Directive on child pornography** (Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA)

Legal consequences of Lisbonisation

▪ Powers of the Commission

- infringement procedure

▪ Jurisdiction of the CJEU

- preliminary reference is opened to all courts and ceases to be the choice if the MSs what courts are allowed to refer
- annulment procedures

▪ Legal effect

- supremacy
- direct effect

The EAW in a post Lisbon perspective I.

▪ Powers of the Commission- infringement procedure

- in practice: MS can be brought to Court for breaching treaty obligations, inadequate transposition of secondary law, disregarding the application of EU law
- MS – includes the courts, prosecution services
- EAW: so far only mutual evaluation rounds, no systematic EU control of implementing legislation, this will change!
- Tobin case

▪ Jurisdiction of the CJEU

- preliminary reference is opened to all courts and ceases to be the choice if the MSs what courts are allowed to refer
- in practice: EAW was already subject to preliminary reference procedures
- no substantive/quantitative change is expected

- annulment procedures
- in practice: judicial review of legal acts
- EAW: challenging the EAW is not plausible, yet the human rights aspect might receive attention



▪ Legal effect

- supremacy

- in practice: precedence over national law
- EAW: EAW and its implementing legislation supervenes national law, may raise further constitutional issues

- direct effect

- In practice: provisions of EU law can be invoked before a national law
- EAW: in case of inadequate transposition of EAW the provisions of the FD on EAW may be invoked by individuals and national court will have to apply it



Assessment

▪ legitimacy and accountability improved

- greater role for the European Parliament
- scrutiny power for national parliaments
- jurisdiction of the European Court of Justice

▪ intergovernmental nature of the former decision-making, type of legislative acts, limited CJEU jurisdiction review etc. applicable to criminal matters are abolished

▪ now one single union legal order

▪ legal consequences of Lisbonisation of pre-Lisbon instruments (e.g. EAW) either by lapse of time or by amendment



Do You Have Any Questions?

We would be happy to help.
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