THE IMPACT OF AN EXPANDING EU CRIMINAL LAW WITH A CLOSE EXAMINATION OF ITS IMPACT ON THE PRIVACY RIGHTS OF EU CITIZENS

by

Melis Atalay

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APPROVED BY:

Prof. Dr. Meltem Muftuler Bac ……

(Thesis Supervisor)

Prof. Dr. Mehmet Bac ……

Assist. Prof. Dr. Nedim Nomer ……

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Melis Atalay
European Studies, MA Thesis, 2011
Professor Meltem Muftuler Bac

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ABSTRACT:

The European Union does not have an overarching body of criminal laws that defines conduct concretely and consistently throughout all of the 27 Member States. Instead, each of the Member States retains the power over their own criminal law systems, and applies Community law only on certain occasions when the EU legislates on specific criminal matters. For example, the EU's attempt to fight terrorism and organized crime has resulted in Community legislation that requires the use Community-wide databases that gather, analyze, and share personal information on some EU citizens. The lack of an overarching penal system codifying legal definitions throughout the Community, along with the widely variant criminal law traditions of each Member State, results in the potential for EU citizens to be treated differently under Community law. This is specifically a threat in light of the use of databases, as Member States use them differently, resulting in unequal conditions and an unequal guarantee of the EU citizens' Right to Privacy as defined by the European Charter of Fundamental Rights.

AB VATANDAŞLARININ KIŞISEL YAŞAMLARI ÜZERINDEKI ETKISININ YAKINDAN İNCELENMESI ILE BERABER GENIŞLEYEN AB CEZA KANUNUNUN ETKISI

Melis Atalay, MA Tez 2011

Avrupa Çalışmaları

Anahtar kelimeler: Avrupa Birliği, Ceza Kanunu, Temel Hakları, Veritabanı

ÖZET:

Avrupa Birliğinin 27 Üye Devletlerinin hepsini somut ve sürekli bir biçimde kapsayan bir ceza kanunu yoktur. Bunun yerine, her bir üye devlet kendi ceza kanununu kullanmaktadır ve AB sadece bazı özel durumlarda Ortaklık kanununu kullanmaktadır. Örneğin, AB'nin terörizm ve organize suçlarla savaş girişimi, AB vatandaşlarının kişisel bilgilerinin toplanmasına, analize edilmesine neden olmuştur ve bu bilgilerin başkaları ile paylaşılmasında kullanılan Cemiyet-çapında veritabanları yaratmıştır. Cemiyet çapında yasal bir tanımı sistemleştiren bir ceza sisteminin bulunmaması, her bir Üye Devletlerine ait geniş çapta değişik ceza kanunu gelenekleri ile beraber, AB vatandaşlarına Cemiyet kanunu çerçevesinde değişik bir şekilde davranılma potensiyeline neden olabilir. Bu durum, özellikle Üye Devletlerin veritabanlarını değişik bir şekilde kullanımı sonucunda, AB Vatandaşlarının Avrupa Temel Hakları Şartnamesinde tanımlanan Kişisel Haklarında eşitsizliğe uğramalarına neden olabilir.

TABLE OF CONTENTS

CHAPTER I: INTRODUCTION

What is known today as the European Union started as a post-war community between six nations to pooling their industries of coal and steel production in efforts to render future wards less likely. Today, that Community has expanded to form a supranational organization that has substantial regulatory powers over many areas covering the economic, political, and legal structures of its 27 Member States. The considerable legal powers that the EU holds over its Member States today could not have been anticipated at its inception. Indeed, that unexpected quality of increasing competency is particularly true in the area of criminal law because there is no EU treaty basis for the harmonization of criminal law in the Member States.

Why, then, does the expansion of EU criminal law competence continue to grow? The EU enacts criminal legislation regulating certain criminal measures when the variation of those criminal measures in different Member States' negatively affects either the fundamental objectives of the Community, or negatively affects the functioning of the internal market. Clearly, in the context of free movement in the EU, if Country X had a more relaxed criminal law on money laundering for example than Country Y had, a criminal would likely commit the offence in Country X so as to avoid the more severe punishment. With freedoms that are the result of the abolition of internal borders and barriers is also the freedom of crime to move about. This is what some call the fifth freedom, namely, the free movement of crime. The unharmonized national legislation on money laundering consequently has the potential to negatively affect the value of the

Euro for the entirety of the Community. EU criminal competence aimed at harmonizing specific national criminal matters continues to grow in specific areas such as money laundering as necessary. While the EU lacks a normalized penal code that covers all crimes that occur within the Community, they do instead have competence to legislate over certain and specific matters over a wide area of issues.

While community-wide criminal competence often grows in response to especially detrimental variations in national criminal code, the way in which the EU has achieved the high level of competence over such matters is problematic. It is problematic that many Member States were unaware when they signed the Treaties that so much of their national legal sovereignty would be encumbered by the Community's interpretation of the Treaties' as allowing competence over increasing areas of criminal matters. As such, I characterize this growth in EU competence as unexpected, and oftentimes, unwelcome. One instance in which this growth is particularly unwelcome is the Community's recent legislation in the field of a centralized data retention system that is accessible by Member States' officials and other competence authorities. The Community has sanctioned the use of Community-wide databases to prevent transnational issues like terrorism, organized crime, and so on. However, the mechanisms of use and control are unclear because of a lack of a transparent set of definitions that a typical all-encompassing criminal law system afforded by most governments would provide for.

In fact, much of what the observer can attribute with regard to the development and current EU usage of centralized databases can be seen with the development of EU criminal competence as a whole. Both the development of EU criminal competence and

that of centralized EU databases: have made rapid and sporadic developments even though the competence to govern over certain issues was not originally expressly available in the Treaties; have developed through creative and context-driven decisions of the European Court of Justice that oftentimes lacked detailed scrutiny of the legislation by Member States before it was passed forward; have ramifications that can potentially affect the fundamental values of EU Member States' democratic societies and often raise serious constitutional questions in many states; and have either vague or completely undefined legal terms that leave massive room for legal interpretation. This last quality arguably results in the most problems for assuring rights for EU citizens, and will be the main argument of this thesis. Like EU criminal legislation in general, the legislation that pushes forward the use of EU-wide databases needs to have more clearly defined and consistent terminology, terminology that is linked with an overarching and understandable system of criminal law. The EU does not have a system of criminal law as such, and so legislation like that requiring a centralized data system in order to fight terrorism and other crimes is lacking a clear context to be situated in. A piece of criminal legislation needs to be a part of a whole system of criminal legislation in order to ensure fair and equal treatment for all EU citizens. This is because each EU Member State has a different concept of criminology, which results in each Member State using the the terminology present in the database legislation in disparate ways. The existence of an EU criminal law concept without clear and overarching definitions, and that that undefined criminal law concept requires the use of centralized databases which have the potential to affect the privacy of millions is unacceptable.

The EU is legally bound by the Charter of Fundamental Rights, and so all Member States and EU Institutions are required to respect the guaranteed rights, including the right to privacy guaranteed by Article 8 of the Charter. In order to appraise the legality of the breach of privacy that results from the use of centralized databases, it is necessary to assess whether the databases' breach is proportional to its aims to curb criminal activity. To do so, there must be clarity provided by concrete criminal law terms and definitions that are adopted on the EU-wide level. This will ensure that each Member State, even with their differing philosophies of criminal law, will use the databases equally and transparently. At present, without an EU-wide understanding of criminal law, this clarity does not exist, and the guarantee of the right to privacy cannot be guaranteed.

This thesis will take the following trajectory. First, after discussing the basics of EU law and what is to be expected from a typical government's criminal framework, I will go through a history of the EU treaties, specifically examining the content that was cited by ECJ when they creatively constructed Community competence for criminal law in certain areas. As such, landmark cases in which the ECJ did so will be detailed. Second, I will go over critically the current system of EU-wide databases, exposing the present system's faults and inappropriate breaching of EU citizen's fundamental rights, which are in part due to the vague nature and status of EU competence over criminal matters. Specifically, I will examine the suitability, necessity and proportionately of having a centralized data system that is widely accessible which are conditions that must be fulfilled in order for breaches of privacy to be legal. The last main portion of the thesis focuses on negative qualities of having a centralized EU criminal law framework in a certain number of criminal law areas, and then its positives. While an EU criminal law

competence is in fact necessary for the effective maintenance of the EU internal market, the fact that the EU lacks an overarching criminal law system that provides standards and norms of definitions means that equal treatment and the equal data protection of EU citizens is not guaranteed.

HOW IT WORKS:

EU criminal law as a complete and comprehensive system that defines all criminal offences and all rules for its Member States does not exist. The Member States do indeed retain primary control over their national criminal law systems. They only need to follow Community law, which has supremacy and primacy over national law, in areas in which the EU legislates. EU criminal law as a comprehensive system is not necessarily and specifically mentioned in any of the Treaties or international agreements, whose content makes up the "primary legislation". The only occasions that the EU does enjoy criminal law competence are those instances in which the EU has legislated secondary legislation through either binding legal instruments like regulations, directives, and decisions. As a unique combination of the Member States' criminal systems supplemented by increasing Community-implemented criminal legislation, the EU occupies a vague and inconsistent competence over criminal law, potentially resulting in the unequal treatment of EU citizens throughout the Member States.

EU criminal law works by both EU jurisprudence as well as the EU instruments. Post-Lisbon, the Community law can issue instruments that require each Member State to harmonize with certain Community legislation. These instruments are: decisions, directives, and regulations. A decision is adopted either by the Council with co-decision powers of the European Parliament or by the Commission. The Decision can require a Member State or an EU citizen to take or refrain from taking a particular action. A directive is adopted by the Council with co-decision with the EP, or by the Commission

alone. Its main purpose is to align national legislation in areas where significant gaps keep EU law from functioning effectively. A directive is binding on all Member States as to the result to be achieved and the timeframe it must be achieved, but leaves them the choice of the method they adopt to achieve the Community objectives. If a directive has not been transposed into national legislation of a Member State on time, or if it has been transposed incompletely or inappropriately, citizens can directly appeal to the directive in question before the national courts. Directives are the main instruments that the EU uses to legislate upon criminal matters. This means that Member States' largely variant approaches to criminality result in different approaches of implementing the directives. A regulation is adopted by the Council with co-decision of the EP, or by the Commission alone. It is a general measure that is binding in all of its parts. Regulations are different than the two previously explained instruments in that they are addressed to everyone. Regulations are directly applicable, which means that the law they create takes immediate effect in all the Member States in the same way as a national instruments, and without further action on the part of national authorities.

EU criminal law further works by a combination of harmonization and mutual recognition. Mutual recognition is the acceptance of judgments issued by national criminal courts in another national court automatically and without any examination of the factual basis upon which the other court's rulings were made. Mutual recognition works better if there is harmonization between Member States' legal codes. Harmonization is necessary on two levels: harmonization of offences so as to avoid double criminality; and harmonization of procedural standards governing the legal state

of affairs primarily once a judgment has been recognized and executed (Mitselgas 2009, 101).

Before we can speak of the European Union Community's jurisdiction over criminal law matters, it is important to lay out a general understanding of a typical criminal justice system. This will provide a baseline for comparison with the supranational criminal framework that the European Community currently operates with. This understanding includes the basic ideas of what a criminal justice system is, and how it should function as an agreed upon system. Linda Groning believes that this baseline understanding was so cemented in western legal discourse that it is possible to speak of a "traditional model of criminal justice system" (Groning 2011, 118). The most basic way to explain this traditional model of a criminal justice system is to explain the system as the state's legal apparatus for its use of public penal power. The state uses this mechanism to ensure order through the threat and use of punishment. Jareborg explains this as a "general preventative effect" (Jareborg 1988, 112).

For it to function properly, the system must function as an agreed upon system of norms and an organization of institutions (Groning 2011, 118). The system of norms is made up of definitions of crimes, and concrete rules of criminal procedure. Hans Kelsen posits that traditionally for this to work, there needs to be a "monistic" system of rules that is founded in only one constitutional source; this ensures coherency and consistency. It is only with this coherency and consistency that it is possible to establish clearly what is right and wrong, and for the state's citizens to act accordingly. (Groning 2011, 119) The current EU criminal law system that functions as a combination of Member States' differing constitutions supplemented with EU Acqui Communitaire lacks this monistic

quality, and therefore does not function in the way a “traditional model of criminal justice system” does. It might thus provide for confusion due to incoherencies for EU citizens. It also has the danger to result in unequal treatment of EU citizens by different Member States’ enforcing officials.

CHAPTER II: HISTORY

II.i. General Remarks and the Inchoate Formation of EU Criminal Law

The following history chapter will demonstrate the irregular way in which European Criminal law developed. It was neither fluid nor necessarily premeditated. It is in fact easily arguable that the Member States never intended to give the European Community as much competence over criminal law matters as it enjoys today. This further demonstrates that that competence is overly proportionate to what it should be. Additionally, this Chapter will show the select areas of criminal law that the EU has defined. To reemphasize, the criminal law areas that the EU has legislated upon are not backed up by an overarching system to provide clarity.

Though most of the developments in Community criminal law have occurred within the past decade, it is necessary to trace its trajectory from the 1970s. Doing so will allow the observer to perceive the formative steps for criminal law cooperation that opened up space for an inclusive Acqui Communitaire of EU criminal law. Though this section is meant to provide an overall history, I will be sure to scrutinize the status of the third pillar, especially in relation to the first pillar. Doing so will allow us to examine the nature of the intergovernmental versus supranational governance power struggle, and assess the legitimacy of transferring third pillar intergovernmental matters including criminal matters, to the first pillar supranational category.

Harmonized action over criminal matters generally occurs when there are transnational problems that are better fought with common solutions. Starting in the 1970s, EU Member States perceived the advantages of working together to fight the transnational problem of terrorism. This prompted the establishment of TREVI, which was a network established in 1976 (Vannerot 2009). It was informal in nature in that it had no specific requirements for its members, nor had it any specific infrastructure; instead it was an agreement for law administrative leaders of Justice and Interior Ministers of 12 Member States to meet when needed to discuss possible solutions and common actions for counter-terrorism issues. The incipient nature of TREVI exposes the tension of what the Community criminal law has become today: cooperation was initially spurred by efforts to brainstorm, and to discuss possible common solutions; it was not founded to enact common enforcement of national legislation that we see today. However, the discussion of possible common solutions was successful, and with increases in areas of common problems like drug and human trafficking for example, it made sense to expand dependence on TREVI further during the 1980s.

The establishment of the common EU internal market had implications that influenced EU criminal law. The lack of internal borders made it easier for illegal substances to move throughout the EU. With the successful cooperation of TREVI as encouragement, the EU forged on with minimal supranational cooperation over criminal matters with the Palma Document that was made following the Madrid European Council

in 1989. The Palma Document recognized the potential ramifications of an EU without borders, and so recommended an intensification of judicial cooperation in criminal matters. The Palma Document encourages "inter-governmental cooperation to combat terrorism, international crime, drug trafficking and trafficking of all kinds" ("Palma Document Report", 1989). To work inter-governmentally over such issues proved difficult in some situations. As the Report on the Palma Document reveals:

> In the course of the Group's discussions it was recognized that differing views Were held on their legal and political framework…and where the competence for taking decisions and action lay. It was agreed to set those differences on one side" (Section 3, Palma Report).

This shows how difficult it was for Member States' officials to come together to agree on common definitions and priorities in the criminal law arena. The differences were set aside, meaning that they are not fully resolvable on an intergovernmental stage, and would rather necessitate a supranational framework to resolve those differences in national criminal law approach.

Though the 1985 Schengen Agreement started independently of the Community framework, its integrative data sharing logic was extended to form the basis of much future EU criminal law. The Schengen Agreement was initially adopted between the Benelux countries, France and Germany. Opening borders within those countries entailed the necessity to strengthen the external borders. Hollander explains that a consequence of the abolition of checks at borders required "judicial authorities of EU member states [to intensify] the international cooperation in criminal matters" for reasons that were explained in the previous section (Hollander 2008, 54). The 1990 Schengen Implementing Convention included a wide range of provisions ensuring that stronghold, covering the areas of immigration, asylum, border controls, police cooperation and finally

a Schengen Information System. Indeed, the Schengen Acquis has since been incorporated into Community law, and has become an accepted norm guiding EU legislation. Mitsilegas asserts that this Schengen logic has set up a Community philosophy regarding criminal cooperation: "The Court has repeatedly examined criminal law in conjunction with free movement within the framework of an "area" of freedom, security and justice" (Mitselgas 2008, 8). It must be remembered that while only the initial six countries that founded the 1985 agreement agreed upon such a philosophy, it has since influenced the criminal law attitude throughout the whole community, without close scrutinizing of its content by all Member States. Moreover, the countries that today use this Schengen logic have stronger differences between them regarding criminology than did these initial six countries.

The Money Laundering Directive of 1991 was the Community's first attempt into a specific area of common criminalization. The initial proposal for the money-laundering Directive raised some important questions: did the EC Treaty contain an appropriate legal basis for the Community to define criminal offences; and likewise, could the Community appropriately define criminal sanctions? The proposal for the Directive read: "Making money laundering a criminal offence in the Member States, although it goes beyond the scope of the financial system, constitutes a necessary condition for any action to combat this phenomenon and in particular to permit cooperation between financial institutions" (OJ C106, 28 April 1990, p6, adapted from Mistelgas 2008, 66). However, because that right was not explicitly present in the Treaty, the final text read only that money laundering would be "prohibited" in Member States. This lead to a de facto criminalization of money laundering in Member States; it was not an explicitly agreed

upon common position of what that money laundering entailed, or how it should be penalized. Though the Commission attempted to justify legislating on criminal issues by citing the maintenance of a financial responsibility for the Community's internal market, forcing national criminal systems to strictly conform to supranational policies was shot down. This is in stark contrast to the Community criminal law that we see of the last decade, which often cites the maintenance of the internal market as grounds for legislating on different areas of criminal issues. Indeed, a lot has changed since this inchoate beginning for EU criminal law competence.

II.ii: The Maastricht Treaty and the Introduction of the Pillar System.

The Maastricht Treaty passed in 1992, and introduced a three-pillar structure for the European Union. The European Economic Community was renamed the European Community; it exercised supranational powers over first pillar issues, like the maintenance of the Community internal market. The European Communities of the first pillar constitute, in the words of a 1962 European Court of Justice declaration "a new legal order of international law", and as being a "self-contained legal system" (Seibert 2008, 94). The Community can legislative on issues that fall under the first pillar, but not the second and third, which were the Foreign and Security Pillar, and the Justice and Home Affairs Pillar, respectively. These pillars worked with an intergovernmental approach. Title VI of the Maastricht Treaty explains the third pillar, which is made up of provisions that relate to EU criminal law. It explains that the Union would together to cooperate on judicial affairs, customs and police management to combat terrorism, drug trafficking. It established the European Police Office (Europol) to do so.

The third pillar is additionally distinguishable from the first because the main actor is the Member State, not the Community. In the Maastricht Treaty, the exclusive competence of the national legislature in the field of criminal law was maintained (Albrecht and Braum 1999, 299). The form of international treaty law cooperation is set down in Article K3 para 2.A. the power of the Council is set as: devising common viewpoints on the initiative of the Member States (adapted from Albrecth and Braum, 298). EU institutions lacked a precise and limited role with regard to the third pillar, most notably in the area of criminal law. The European Parliament, for example, was only to be "regularly informed of discussions" regarding third pillar matters, and could only "ask questions or make recommendations" (Article K.6). Moreover, only the Member States, and not the Commission as it did in first pillar matters, were granted the rights of initiative for criminal matters.

Member States were bound to follow harmonized criminal laws only by international cooperation agreements, like Conventions. One notable Convention was the 1995 Fraud Convention. To reemphasize, Member States did not act within the Communities but rather their actions are merely part of the Police and Judicial Cooperation in Criminal Matters within the European Union. Therefore, these treaties only entered into force upon ratification by contracting parties, and so there is a maximal level of scrutiny on a case-by-case basis by each Member State, contrary to the way in which criminal law in the EU today operates and develops. Moreover, Member States may, during the implementation process, "express reservations and exempt themselves from different regulations causing lacunas again in the intended uniform protection" (Seibert 2008, 91). In this context, the Community does not enjoy any means to enforce

its implementation; the European Court of Justice has no competences either. Hence, conventions were often less effective due to negotiation and were more time-consuming. For example, this 1995 Convention was not ratified by all Member States until 2002. However, they are agreed upon in full by each Member State, so perhaps they are more legitimate and function more properly by ensuring each Member States' proper harmonization of the law.

Though the introduction of the pillar system seemed to demarcate concretely that the Community had no competence to define criminal offences or introduce criminal sanctions, the European Commission continued to fight for the ability to have competence on third pillar criminal measures, which it argued necessary for the successful functioning of first pillar Community law. A key focus of the EC was the fight against fraud relating to the Community budget. For example, the EC funded a project that came up with what they called a *Corpus Juris* that defined some criminal offences and provisions on criminal procedure (Mitselgas 2008, 67). The EC pushed to adopt this *Corpus Juris* under first pillar legal basis, though this was in the end not successful. Again, this shows how carefully the Member States negotiated to keep their sovereignty over criminal issues, wanting to self-define its own usage of it. Just one allocation of third pillar matters to the first pillar framework would mean an environment in which the Community could assert its control over a variety of issues.

The Maastricht Treaty is notable when examined in light of today's EU's competence over many areas of criminal law. The opening provision of Maastricht's Title VI referred to only "cooperation in the fields of Justice and Home Affairs", in contrast with the establishment of common policy on a number of other areas. Mitselgas makes a

key distinction: "The emphasis [during the time of Maastricht] is *not* on integration and the creation of an overarching and powerful community competence on criminal law, but on helping collaboration on 'matters of common interest'" (Mitselgas, 2008, 10). This was what was initially agreed upon by Member States, so it is remarkable that criminal law is so very different less than twenty years later.

II.iii. The Amsterdam Treaty and Major Gains for Community Criminal Law Initiatives with Framework Decisions

Negotiations aimed at making the three-pillar system more efficient resulted in the adoption of the Amsterdam Treaty in 1997. With the Amsterdam Treaty, the Maastricht third pillar areas of immigration, asylum, borders and civil law were transferred over to the first pillar. The third pillar's name changed from "provisions on cooperation in the fields of justice and home affairs" to "provisions on police and judicial cooperation in criminal matters".

The most important change is that the Treaty gives express power for the Community to develop legislation under certain areas of criminal matters that would necessarily be incorporated into Member State law. Article 29 TEU is the opening provision of Title VI, and it states that:

> Without prejudice to the powers of the European Community, the Union's objective shall be to provide citizens with a high level of safety within an areas of freedom, security and justice by developing common action among the Member States in the field of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia.
>
> That objective shall be achieved by preventing and combating crime, organized or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud through…approximation, where necessary, of rules on criminal matters in the Member States, in accordance with the provisions of Article 31 (e).

Article 31 (e) states that common action on judicial cooperation in criminal matters entails "progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the field of organized crime, terrorism, and illicit drug trafficking". This wording is broad and not specific. It is not clear, for example, whether the Community can adopt legislation in matters other than those relating to the constituent acts of offences and to penalties. Does this wording mean that the areas which the Community can legislate criminal acts and penalties cover only those named in Article 31(1)(e) – ie organized crime, terrorism and illicit drug trafficking? The vague character of these terms left wide room for the ECJ to maneuver and make creative judgments that gave more power to the Community than is explicitly expressly given in the Treaty. Moreover, because the wording was so broad, a clear and definite harmonization that might allow for equal interpretation of the legislation by Member States was not guaranteed.

To accomplish that which is set out in Article 29, the Amsterdam Treaty introduces legal instruments, including *Decisions* and *Framework decisions*. Framework Decisions are in essence the third pillar equivalent to first pillar Directives in that they bind the Member States to the results to be achieved, but leave the Member States with the discretion of how they will achieve those results. They do not need to be ratified by the national parliaments, though they do have to be transposed into national laws within a particular time frame (Hollander 2008, 59). It must be noted though that Framework Decisions do not entail direct effect, whereas Directives do. The content of the Framework Decisions comprise of definitions of criminal offences, and are often also coupled with provisions on criminal penalties. Since the penal system of each EU

Member State is so different, Framework Decisions indicate only the minimum maximum penalty that Member States are obliged to adopt. They also often include rules on jurisdiction, for example a provision for victims. The Framework Decisions on terrorism, sexual exploitation on children and trafficking in human beings all include a victims provision, that call for assistance to be granted to victims' families, etc, for example (Mitselgas 2008, 90). Technically, Framework Decisions have to be taken unanimously, (Article 34.2 EU Treaty), and without any significant involvement of the European Parliament. Every single Member State enjoys a "veto power" by which is can easily determine the pace of approximation (Seibert 2008, 107).

Framework Decisions provide a stronger legal basis for the Community to enact on criminal matters, and help provide for approximation. The Community in fact has demonstrated a large area of competence to enact legislation with Framework Decisions on criminal matters. The wording from Article 31(1)(e) that was examined above indeed was stretched out over time by the Court to include a wide area of criminal acts. Mitselgas lists the scope of that harmonization:

> "such Framework Decisions [have harmonized] criminal offences and sanctions involve issues such as terrorism, trafficking in human beings, sexual exploitation of children and children pornography, drug trafficking, corruption in the private sector, attacks against information systems, counterfeiting the Euro and non-cash means of payment" (Mitselgas 2008, 86-7).

As such, while the Member States did agree to the conditions set forth in the Amsterdam Treaty, the vague terms regarding Community competence in criminal law rendered the Community with more power than might have been initially expected.

Though with the Amsterdam Treaty decision-making still requires unanimity of the Council for third pillar law, and the Member States hold the power to enact laws, the

Treaty introduced some legal instruments, such as the use of *common position,* that increases the Union's role. A common position is formulated by the Court, and the Member States are required to abide by it within international organizations and international conferences, thus strengthening the Union's role in criminal matters regarding external action.

The Amsterdam Treaty increased the competence of some EU institutions' roles in criminal matters. Whereas before it could do so only 6 out of the 9 areas covered by the third pillar, with the introduction of Amsterdam, the Commission now has the right over initiative over all areas of Justice and Home Affairs (Hollander 2008, 57). The right of initiative was with the Member States with Maastricht. The ECJ has jurisdiction to review the legality of framework decisions on grounds of lack of competence. Moreover, the ECJ has jurisdiction to give preliminary rulings on the application of framework decisions and decisions, as well as the interpretation of conventions. By preliminary ruling, the ECJ can give an interpretation of the rules pertaining to mutual recognition as laid down in the various framework decisions. In giving its preliminary rulings, the ECJ directs the way in which the national courts apply the implementation legislation in each Member State. In this way, the ECJ potentially plays an important role in the development of the principle of mutual recognition in criminal matters. (Borgers, 100-101). If it functioned the way it was intended to, there would be perhaps more equalized interpretations by the Member States on how the EC legislated criminal rules should be transposed. There was some notable resistance by the Member States, though, to accept the jurisdiction. The UK has repeatedly called for the limits to the ECJ's preliminary ruling jurisdiction, though the Community has forged on (Mitselgas 2008, 19). The

bizarre coexistence is indicative of the tension between national courts and the ECJ; cooperation has been very limited between the two, which has blocked successful approximation of supranational criminal matters. In applying the national rules by which framework decisions are transposed, national courts are required to apply the national law as far as possible in conformity with the relevant framework decision. In that context, the competence to request the European Court of Justice to give a preliminary ruling is very important. The lack of cooperation has blocked this requesting in many instances. Consequently, less harmonization that would guarantee equal treatment of EU citizens under the legislation took place.

The contested and complex trajectory of EU criminal law has been shaped by the ECJ court decisions. The next section will examine how much these court decisions have impacted the future of EU criminal law, and given the Community large gains in competence. However, without the a properly agreed upon manner in which to equally approximate the supranational legal competences in certain areas that the ECJ created in the following cases, there is undoubtedly unequal treatment of EU citizens by the unequal interpretation by each Member State. It is exemplary of how Community criminal law has sprung forth without stringent and explicit authorization of the Member States.

II.iv. **Tensions of Central Court Jurisdiction within the Amsterdam Framework**

The Court has had to rule on cases that have been brought up due to ambiguities in the Amsterdam Treaty regarding first versus third pillar competences. Most often, there were extensive struggles regarding EU judicial protections in cases of cross-pillar initiatives. Union counter-terrorism measures are exemplary of this tension. These

measures at once have significant human rights implications, and their legal complexity transcends its ability to be housed in just one pillar. Moreover, union counter-terrorism measures are the merging of both internal and external criminal law as it involves the incorporation into Union law of international commitments. Mitselgas thus makes a distinction between two categories of situations: "instances where the Union legislator did not have any discretion in implementing UN measures; and instances where the EU legislator has some degree of discretion in implementation, by specifying individually the persons, groups and entities affected" (Mitsilegas 2008, 20). There is a gap where clear areas of effective judicial protection are defined, as well as a clear definition of how those affected can collect for damages caused by EU institutions wherein cases are cross-pillared.

The ambiguity was resolved by the court itself, as illustrated in the judgment of case of *Gestoras Pro Amnistia (*Knook 2007). When the applicant applied for damages, the court used first pillar case law to a third pillar case, stating that this right exists because "it has to be possible to make subject to review by the Court a common position which, because of its content, has a scope going beyond that assigned by the EU Treaty to that kind of act" (Para 54 Gestoras). This shows how the Court has indeed gone beyond the Treaty constraints to provide effective judicial protection to individuals affected by far-reaching restrictive measures. While in this case it did indeed grant the individual protections and as such is a positive rather than a restrictive development, this Court decision is still indicative of the Court's ability to interpret for itself, making its potential jurisdiction more far-reaching.

Indeed, the many judgments related to the third pillar that have been passed have shaped the development of the principles of EU criminal law. Central to this was the interpretation of the reach of the ECJ regarding the determination of the applicability of first pillar principles to the third pillar. When the ECJ did indeed deem those principles to cross pillars, the relationship between the first and third pillar changed, making them more entangled, and more difficult to separate. I will now go over a few first pillar principles that were considered to cross over and apply to the third.

One trend that the observer sees is the conferral from first to third pillar in light of effectiveness. The Court confirmed first pillar competence twice: in the environmental crime and ship-pollution cases. They treated criminal law in these cases not as something confined to the third pillar, but treated those crimes as if in any field of law: what Mitselgas calls "a means to an end towards the effectiveness of Community law" (Mitselgas 2008, 24). While they may indeed work well to deter such crimes, this conferral to shore up effectiveness had considerable implications later in that they defined the Court's jurisdiction to hold a broader scope. Both of these cases will be detailed in the subsequent sections.

Another ambiguity between first and third pillar law that resulted in a necessary transformation of the latter was centered on the issue of direct effect. Within the Amsterdam construction, Framework Decisions of the third pillar (that are meant to be comparable to the Directives of the first pillar) do not confer direct effect. With the exclusion of direct effect in framework decisions, there is also the exclusion of an opportunity before domestic courts for individuals to challenge their legal status and position resulting from ambiguities left by EU criminal legislation (Mitsilegas 2008, 26).

The landmark case of *Pupino* addressed this issue. It was the first case in which the Court was asked to interpret a framework decision adopted under the third pillar. The Italian Code of Criminal Procedure allowed children under 16 to testify under special procedures in contexts that were different from when the Community allowed a child under 16 to do so. The lack of approximation in this case is exemplary of the different treatment that EU citizens experience in procedure. The Court ruled that national courts under Community law are obligated to conform with third pillar Framework Decisions as well. As the court put it: "The binding character of framework decisions…places on national authorities, and particularly national courts, an obligation to interpret national law in conformity" (Para34), or something that is referred to by the Court as "loyal cooperation". It was the Court's opinion that irrespective of the degree of integration that was envisaged by the Amsterdam Treaty, it is intelligible that the writers of the Treaty would have allowed the Court to act in ways that would work towards their objectives. It ruled that framework decisions adopted on the basis of Article 34 of the EU Treaty have indirect effect and are to be interpreted harmoniously, bridging the constitutional divide between the European Community and third pillar orders (Hollander 2008, 59). This ensures similar procedural treatment of EU citizens, but still this is only guaranteed on legislation that the EU legislates. In other cases, national criminal law has to be reconciled with the approximated criminal law, and so still gaps between the experiences of EU citizens of different Member States occur.

Borgers names the *Pupino* case as one that characterized definitively the legal nature of the third pillar. He posits four effects of the *Pupino* case as: the similarity between treaty law definitions of directives and framework decisions; the useful effect of

the preliminary ruling procedure under Art 35 EU Treaty; the development of the European Union into a cohesive and solitary organization; and the expression of the principle of loyal cooperation. (Borgers, 102). Mitselgas calls this an "ahistorical approach to European integration", meaning that the Court goes beyond the original content that the Member States agreed to upon their signing the Amsterdam Treaty (Mitsilegas 2008, 27). According to Fletcher, the Court had to invoke rather inventive means to justify this ruling, since it misses any convincing textual support of the EU Treaty (Maria Fletcher 2005, 862). "This has led to the criticism that in fact he Court confers not indirect, but direct effect to the Framework Decision – in stark breach of the working of Article 34 TEU" (Mitsilegas 2008, 29). This means that the omission of direct effect for Framework Decisions at the signing of Amsterdam was completely ignored, going against the explicit wishes of the Member States. This is exemplary of the rapid gains in the competence of EU criminal competence without express mention in the Treaties.

II.v The Tampere Council and the European Arrest Warrant; the beginnings of Mutual Recognition

Major strides establishing a Community criminal system were made with the Tampere Council of October 1999. The Tampere Council cleared up some ambiguities of the Treaty of Amsterdam through further agreements (Hollander 2008, 55). During the meeting the European Council set three important new goals: to extend cooperation between judicial authorities in the field of criminal law to all kinds of judgments in

criminal cases; to eliminate all material restrictions to that cooperation; and to simplify cooperative procedures (Hollander 2008, 55-6). It was at this Council that mutual recognition as a solution was emphasized (Spencer 2011, 10). Section IV of the Presidency Conclusions stated:

> The European Council therefore endorses the principles of mutual recognition which, in its view, should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. The principle should apply to both judgments and to other decisions of judicial authorities (Section 35).

The Treaty of Nice in 2001 created Eurojust in order to intensify judicial cooperation in criminal matters. Eurojust's main task is to support and improve the coordination and investigations and prosecutions with regard to cooperation between national authorities in cases of cross border crime.

The first concrete step in the direction of mutual recognition was the establishment of the European Arrest Warrant of 2002 (Council Framework Decision June 2002 on the European Arrest Warrant and the Surrender Procedures Between Member States (2002/584/JHA), OJ L 190/1. 2002). According to the then Belgian Prime Minister Guy Verhofstadt, "The European Arrest Warrant will be for the European Justice and Home Affairs exactly as significant as the Euro will be for the economic and monetary union" (Wagner 2010). With this framework decision, an EU-wide system of extradition was introduced; under the EWA, if a certain number of conditions were met, extradition would take place automatically, within a stated set of time limits. Moreover, if the offence for which the person is wanted is one of the 32 listed in Article 2(2), the traditional "dual criminality" requirement is not needed: the requested State must hand the wanted person over, provided the offence carries at least three years' imprisonment in the requesting state (Spencer 2011, 11). This means that potentially defendants could be

surrendered to a requesting state even if that offence is not punishable under the laws of the defendants' country of nationality or residence. Again, this shows a huge area of potential unequal treatment of EU citizens. The data from the year post-EAW integration demonstrates how much change this establishment of mutual recognition brought about. Extradition was not only increased by 14%, but the average time changed too, as the average time between request and surrender was roughly a year pre-EAW, and became 43 days the year thereafter (Wagner 2010).

There was some criticism in the press, especially in the UK, for forcing courts to send their citizens to face unfair trails for offences of which they are innocent, but it was generally regarded Community-wide as a big success (Spencer 2011, 12). It thereafter provided the Community proof of the success of mutual recognition, and set the context for future cooperation on criminal matters. In 2005 a Framework Decision extended the principle of mutual recognition to "financial penalties", meaning that fines imposed by the court in one Member State are to be enforced in another (Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties OJ L 76/16 22.3.2005). . In 2006, a further Framework Decision was adopted to extend mutual recognition for confiscation orders (Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, OJ L 335/8, 11.11.2004). In 2008, two further Framework Decisions were adopted, one to enable prison sentences to be enforced in another Member State, and another to enable the same to be done with probation orders and other "alternative sanctions" (Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual

recognition to judgments in criminal matters involving deprivation of liberty (etc), OJ L 327/27, 5/.12.2008, Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions (etc), OJ L 337/102, 16.12.2008., all adapted from Spencer 2011, 13). The Community established a context of mutual recognition that invoked a symbolic environment of trust that was thrusted upon the Member States. This further was supported by the quickly burgeoning case law that encouraged Community aims to the detriment of Member States' sovereignty over criminal matters.

There are some other problems inherent in the concept of a EU mutual recognition standard. Precisely, it is problematic that there is expected a quantified standard coupled with such qualitative auspices. The Action Plan on the Implementation of the Stockholm Programme has stated that "[Mutual recognition] can only function effectively on the basis of mutual trust among judges, legal professionals, businesses and citizens. Mutual trust requires minimum standards and a reinforced understanding of the different legal traditions and methods" (Action Plan, p4). It is not clear how to attain this mutual trust; it is merely stated that it is needed. How is it possible to have entities as common and numerous as citizens from differing countries trust each other fully? Therefore, one could readily suggest, as so many commentators already have, that criminal law (unlike the creation of an integrated market for economic freedoms) demands a common set of standards of general application (Herlin-Karnell 2009, 234). This currently does not exist between all Member States. Spencer, too, comments on some tensions inherent in mutual recognition in practice in the EU:

> It was introduced, as everybody knows, as an expedient to avoid 'vertical solutions', but the view has been expressed that mutual recognition can only work

> when the laws of the countries concerned are broadly similar; and thus to make it work properly some radical and centrally-directed harmonization will be required – which is one of the things that mutual recognition was intended to avoid.

Moreover, some Member States are not buying the concept of mutual recognition. It is a common view for some Member State officials, mutual recognition works as a guise that further pushes a supranational criminal law agenda. According to these critics, the furthering of mutual recognition causes an imbalance between law enforcement and individual rights simply because it pushes further integration forward without maximal scrutiny. This has led to problems in the transposition of European measures into national law and their application in day-to-day criminal law cooperation, (Wagner 2010). Wagner further explains that: "the European Arrest Warrant was challenged in the constitutional courts of various member states. Moreover, judges have frequently refused to follow the letter of the EAW and surrender persons without any check of dual criminality" (Wagner 2010). This of course hinders the effectiveness of the principles of mutual recognition and mutual trust on a Community-wide level.

II.vi The Environmental Crime Case and the Tipping of the Scale as the Community Creates Competence to the Detriment of Member States' Sovereignties

The Environmental Crime Case is a landmark case in which the legality of the Community's ability to determine third pillar criminal law was tested. Up until this case, it was commonly understood that the Treaty establishing the European Community (TEC) conferred no power to the Community to define criminal offences or prescribe criminal sanctions on a broad scale. The Council passed a framework decision on

environmental crime; that framework decision provided that certain conduct detrimental to the environment was to be made criminal by all Member States. Its terms followed closely those of a draft directive that was previously proposed by the Commission, which was rejected by a majority of Member States on the grounds that the legal basis upon which it was founded was inappropriate because it was not appropriate for the Community to make directives about third pillar matters (House of Lords 2006, 14). In 2003, the text of the directive was transposed and made into a framework decision that was adopted by the Council under the area of the third pillar. The European Commission thereafter filed an action for annulment of the framework decision, arguing that the third pillar measure was adopted under the wrong legal basis; it should have been adopted under the first pillar and as a directive that ensured direct effect, they argued. The Commission used criminal law as an auxiliary, meaning that they argued that they Community should have competence to prescribe criminal penalties if only to protect the Community's first pillar environmental protection legislation.

The Council and most Member States, though, opposed this view. Eleven of the fifteen Member States, including the UK, intervened in support of the Council (House of Lords 2006, 15). They asserted that the Community has no right to require Member States to impose criminal penalties from the content of framework decisions. There is nothing in the Treaty, they argued, that would allow for such a conferral of competence. Moreover the Council emphasized that TEU's Part VI was devoted to judicial cooperation in criminal matters and thus was clearly delineated from Community affairs, that the Court had not previously held that the Community was competent to harmonize criminal laws, and that the legislative practice of the Council had been to detach criminal

aspects of Community proposals and put them into framework decisions further proved this point, in their view (House of Lords 2006, 15).

The Court found in favor of the Commission. The Court stated that while neither criminal law nor the rules of criminal procedure fall within Community competence in general, this does not prevent the EC legislature, "the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities [as] an essential measure for combating serious environmental offences" (Paras 47-48, adapted from Hedemann-Robinson, 283). Again, the ruling made explicit that the Member States should define the criminal penalties to apply, so long as they are effective, proportionate and dissuasive (Para 49). The Court acknowledged that, in the case in question, criminal penalties were essential for combating serious environmental offences; such penalties could therefore be adopted on the basis of Article 175 of the EC Treaty and consequently could not be adopted on the basis of the third pillar (Hendemann-Robinson, 284).

In this landmark case, the Court had to consider the relationship between Community law and the criminal law of Member States. The Court interpreted the Treaties creatively in order to establish Community competence. They focus on the effects of Articles 29 and 47 TEU, which state that third pillar action must be "without prejudice to the powers of the EC", (Mitselgas 2008, 73). Though there was historical precedence which expressly excluded the possibility of Community legislation concerning criminal law, the Court declared that "it is not possible to infer from those provisions that, for the purpose of the implementation of environmental policy, any harmonization of criminal law, even as limited as that resulting from the framework

decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law" (Judgment, para 52, adapted from Hendemann-Robinson, 288). This decision strengthened the Community pillar. "It thus sent a strong signal that third pillar action must not jeopardize Community action" (Mitselgas 2008, 73). What Mitselgas points to is that the Community objectives were placed before the objectives of retaining Member State's sovereignty over criminal affairs. What is brought to the fore in the Court's judgment is that the Community may have criminal law competence on the basis of the need to ensure effective achievement of the Community's objectives. Criminal law is only to be thought of as a means to an end to achieve a Community objective; it is not necessarily a special area of law to which special rules must apply. "Criminal law will fall within Community competence, like any other field of law, if Community objectives are at stake" (Mitselgas 2008, 73).

The question of whether the Community may declare its competence in criminal law under certain circumstances, or whether if only in cases involving environmental law remained unclear by the judgment of the case. The House of Lords noted "The fact that the Court did not expressly limit its judgment, that it described the environmental protection as 'one of the essential objectives of the Community', and that the reasoning applied by the Court to the environment would seem to be equally well capable of application to other areas of Community policy and action if they met the test of being "essential objectives" (House of Lords 2006, 18).

Even to impose a Member State to enact some sort of criminal punishment is of course a challenge to state sovereignty. There is another troubling aspect to the Court's decision. Mitselgas posits some that "it is paradoxical – and potentially incoherent – to

confer competence to define criminal offences and impose the criminalization of certain types of conduct but leave the choice of the sanctions to Member States" (Mitselgas 2008, 74). This is the type of incoherency that precludes the ability for a monistic and reasoned system that characterizes the traditional criminal legal system explained in Section 1 of this chapter. Power was given to the Community, taken away from the Member States, and because it was incoherent, it was rewritten into the following Lisbon Treaty, thus cementing the conferral of competence. The criticism of the Environmental Crime case is still relevant, for it was with that case that the initial creation of Community competence over criminal law was allowed. Perhaps if the Court found against the Commission, criminal law competence creation would look very different today.

II.vii: The Ship-Source Pollution Case

The Ship-Source Pollution case was another landmark case that affirmed the scope of Community criminal law. It was another instance in which the institutions of the Commission, the Council and the European Pillar were in disagreement as to whether particular action falls within one pillar or another. The Commission again raised objection to a Framework Decision, arguing that parts of it should be housed again under the first pillar, and thus under subject to Community control (Case-440/05, *Commission v Council* ECR [2007] I-9097). An interesting feature of this case though, is that the Framework Decision was accompanied by a companion first pillar Directive, which

defined the conduct that was criminalized by the Framework Decision. 20 Member States intervened in support of the Council (Mitselgas 2006, 82).

The Commission argued that the principles that were laid down by the Court in its Environmental Crime Judgment apply "in their entirety to other Community policies", such as transportation policies (Para 28, adapted from Europa Summary 2007). Again, they argued that the Community may enact criminal measures insofar as it helps ensure the proper functioning of Community rules. "Such action may be based only on implied Community powers which are determined by the need to guarantee compliance with Community measures, but are not confined to criminal law measures in a certain area of law or a certain nature" (Para 29).

On the opposing side, the Council argued that the common transport policy lacked the specificity and importance that the environmental protection issue had. The opposition argued that criminal law measures were not "necessary" for the Ship-source Pollution Framework as they were in the Environmental Protection case (Para 40). The Member States argued that the implied Criminal competence as was exercised in the Environmental Protection Case must be confined to measures that are absolutely "essential" for combating environmental offences, and that that competence should not extend beyond environmental protection to another common policy like transport policy (Para 41).

The Court found in favor again with the Commission. It linked Community transport policy as sharing objectives with environmental protection. The Common Transport Policy, the Court argued, is one of the foundations of the Community (Para 55). This was a reiteration of the finding in the Environmental Protection Case, namely

that when the application of criminal sanctions are effective, proportionate and dissuasive, the Community may require the Member States to establish such sanctions (Para 66). Again, criminal law is a means to an end, and in the ECJ's view, is thus justified. Additionally, we see again that Community prerogatives are perceived by the Court as more important than maintaining Member State sovereignty in those specific areas. Moreover, in both the Ship-Source Pollution Case and the Environmental Crime Case, the overwhelming majority of Member States explicitly fought against giving the Community more power, especially on the grounds that the Treaty that they agreed to did not have express conferral of such power; in both cases, the Court ignored this fact. With this case, it became clear that the Community could potentially deem nearly everything related to the internal market under the first pillar, and thus under its control. Even before the Lisbon Treaty, the pillar system completely crumbled. Their discussions are very relevant for data retention, which I introduce now to remind the reader that the emergence of data retention will be an issue examined later in this paper. Since the Data Retention Directive which will be examined later aimed at harmonizing the obligation of private data companies to retain data, and thereby at eliminating obstacles to the internal market, the legal basis could be found in Article 95 of the former EC Treaty (the former first pillar). However, the issue could have been approached from the law enforcement side, arguing that the purpose for storing the data was combating serious crime, within the framework of police and judicial cooperation in criminal matters in the former EU Treaty (the former third pillar). With the judgment of Ship-Source Pollution Case, though, it became easier for the ECJ to effectively assert their own competence to legislate on data retention to combat criminal matters affecting the internal market.

II.viii The Lisbon Treaty

The Lisbon Treaty is the amended version of what was called the "Reform Treaty", indicating the overhaul of changes brought about by the new treaty. It was amended and signed in Lisbon, by the prime ministers and foreign ministers of the 27 EU Member States on December 13, 2007. The Lisbon Treaty is the treaty that is in effect today.

With the renovation brought about by the introduction of the Lisbon Treaty, the legal framework is divided into: one, the Treaty on the European Union (TEU) (which is an amended version of the Maastricht Treaty), which contains general constitutional provisions on foreign policy; and two, the Functioning of the European Union (TFEU) (which is an amended version of the Rome Treaty), which contains provisions on EU policies. The other major change brought about by the Lisbon Treaty is the abolition if the pillar system, collapsing the third pillar intergovernmental areas into the area of first pillar supranational control. EU criminal law previously housed in the third pillar is thus now "communitarised" and under the remit of a supranational approach. This is an improvement, because the previous pillar structure regularly raised discussions about the correct legal basis of an EU instrument in case a subject matter triggered EU competence in the different pillars, as seen in the preceding sections regarding the Court's allocation of competence among different pillars. Now, the EU has the ability to legislate on criminal justice matters by the same processes, and using the same instruments, as it does for everything else. There is consequently less confusion and more transparency.

As such, the instruments previously identified with the first pillar, namely Regulations, Directives, Decisions, Recommendations and Opinions, now apply for criminal and previously demarcated second and third pillar matters. Criminal law competence is expanded. The Community can now adopt rules on criminal sanctions instead of merely requiring Member States to adopt proportionate, effective, and dissuasive penalties. Framework Decisions are no longer used, and direct effect applies for legal instruments put in place regarding criminal matters. This is of huge importance. Whereas before Framework Decisions required unanimity, which with 27 member states was often difficult to achieve, criminal law matters now may fall under directives, and so only need a qualified majority vote to be adopted.

There are other major changes brought about by the Lisbon Treaty. Firstly, the European Union now has its own international legal personality that is separate from that of its Member States; this allows for it to act as a sovereign state in the international community of states, sign treaties with other nations, etc. (TFEU Article 47). Along with this, Article 10 of Lisbon establishes EU Citizenship for all nationals of Member States.

Articles 82 and 83 TFEU comprise the main provisions that make regulate EU criminal legislation in the Lisbon Treaty. They deal with procedural and substantive criminal law, respectively. Article 82 confirms the emphasis on mutual recognition as the main rule in EU criminal law. It contains the requirement of the respect of mutual recognition of judgments, and requires the approximation of the laws and regulations of Member States to match up to Community standards. To facilitate that mutual recognition, the European Parliament and the Council are entitled to establish minimum rules (Article 82(2)). The Union may do so only to the extent that it enhances mutual

recognition of judgments and police cooperation. Such rules must take into account the differences between the legal traditions and systems of Member States, but a definite way to do this is not mentioned, and so the community criminal legislation is undoubtedly transposed in different ways in each Member State.

Article 83 TFEU stipulates that the EP and the Council have the competence to enact Directives that establish minimum rules concerning the definition of criminal law offences and sanctions in the area of particularly serious transnational crimes. A particularly serious crime is includes "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 organized crime", plus other types of crimes in the future decided upon by the Council, with the consent of the EP (Spencer 2011, 19). Moreover, Article 83 provides that there is a possibility to approximate to ensure effective implementation of a Union policy in an area which has already been subject to harmonization measures. Again, the reference of harmonizing when "necessary" is rather imprecise and so offers a degree of flexibility for the EC legislator (Herlin-Karnell, 231).

Mutual recognition is emphasized as the main theme of EU criminal law to placate Member States' concerns over their loss of sovereignty. This means that the EU maintains the position that they place superiority to mutual recognition over harmonization. However, there is no explicit listing of the Court's limits, and as seen in the *Pupino* case, the Court can deem anything necessary to facilitate mutual recognition, and the interpretation is up to their own discretion. As Herlin-Karnell explains:

> The provision of Art. 83 TFEU [stipulates] a competence where necessary…[for] harmonization. [This] constitutes an imprecise threshold when allocating

> competences. Although this provision still has to be tied to the principle of the attribution of powers and prove to be 'necessary,' there is reason to believe that the Court's interpretation of it could, in practice, prove to be far-reaching. (Herlin-Karnell, 2009, 240)

Article 84 TFEU also introduces a new area that is crime prevention. The European Parliament and the Council may co-decide to establish "measures to promote and support the action of Member States in the field of crime prevention". This excludes any harmonization of the laws and regulations of Member States.

A general "communitarisation" of the third pillar has brought about other institutional changes. With Lisbon, decision-making is left up to co-decision procedure between the Council's majority voting and the European Parliament. The EP has a considerable gain in responsibility. This decision-making pertains to law-making in the fields of mutual recognition and harmonization in criminal matters, framework legislation on restrictive measures regarding terrorism, crime prevention, the development of Europol and Eurojust, and police cooperation between national authorities (Article 258-260 TFEU (Mitselgas 2008, 39)). The European Parliament also is now involved in the determination and the evaluation of the activities of Eurojust. Like the Court, the new Treaty uses "effectiveness" as justification for Union competence of criminal law.

Additionally, the Court of Justice's role has been changed in that it now has full jurisdiction to rule on infringement proceedings in criminal matters. The limitations placed on third pillar matters regarding preliminary rulings are also abolished with the Lisbon Treaty. The Court also now has the jurisdiction to actions for compensation for damages and the review of legality; this reflects the general safeguards enacted due to the increased role of Community institutions in law and policy-making. Mitselgas sees this as a positive, clarifying that "Extending the Court's jurisdiction on preliminary rulings in

particular will open new avenues enabling a dialogue between national courts and the ECJ on matters of constitutional significance such as the relationship between EU criminal law and domestic constitutional law" (Mitselgas 2008, 40). This will likely mean that there will be more harmonized transposition of Community law into Member States' codes. However, this is only true for areas that the Community actually legislates on, and cannot provide for equal treatment for EU citizens.

The Lisbon Treaty also inducts the EU Charter of Fundamental Rights into Article VI of its Treaty, making it legally binding and attaining the same legal value as all EU Treaties. Before the adoption of the Lisbon Treaty, TEU article 6(2) was the provision for fundamental rights in EU law. It stated that the EU "shall respect fundamental rights…as general principles of Community law" (Fieler 2010) Those rights were to be derived from the Convention for the Protection of Human Rights and Fundamental Freedoms as well as from the constitutional traditions that were common to Member States. With the Lisbon Treaty, "The Union recognizes the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union … which shall have the same legal value as the Treaties". As such, the Charter and the guarantee of fundamental rights is part of primary EU law and all acts of secondary EU law, like Directives, have to conform to it (Feilder 2010). Not only must the EU institutions follow the Charter, but also national authorities must apply the Charter when they follow rules laid down in EU law. Judges in the Member States, under the guidance of the Court of Justice, have the power to ensure that the Charter is respected by the Member States only when they are implementing EU law. Individuals may also obtain compensation or damages if their rights under EU law are violated. Additionally, a subjective right to data protection was

included in Article 16 of the TFEU, creating a separate legal basis for EU instruments on the protection of personal data. With an eye on fundamental rights, a 2010 Commission Communication asserts that, "the Union must resist tendencies to treat security, justice, and fundamental rights in isolate from one another. They go hand in hand in a coherent approach to meet the challenges of today and they years to come" (European Commission 2011, 3). The Communication also asserts that the Union will ensure that the fundamental right to data protection is consistently applied. We will see whether this is true in the later section. This Charter appears to create the potential for new "rights", and could create considerable confusion as to interpretation of human rights in Europe. We will see later how the emphasis on fundamental rights affects the legitimacy of data retention Directives.

As can be expected from its previous relationship with the Maastricht and Amsterdam Treaties, the United Kingdom has negotiated an opt-out of the EU criminal law portions of the Lisbon Treaty.

Of course, the Lisbon Treaty's treatment of criminal law is not a complete overhaul of all intergovernmental elements previously found within the pillar system. In fact, Member States' apprehension at creating a Community that has too much control over criminal law has resulted in compromise, and below I will explore how some intergovernmental elements still do remain. It must be noted, though, that the changes of Lisbon result in huge changes for the constitutional and national courts of Member States, so these intergovernmental "elements" may be seen as superficial by some.
For example, the Lisbon Treaty repeatedly mentions respect for the diversity of national legal systems. Again, this only seems to work prime facie.

For example, there remain exceptions to the general "communitarisation" of the criminal law decision-making process. For example, unanimity is required in the Council for legislation that would expand upon criminal procedure, as well as on that which would expand the Union's competence in harmonization of substantive criminal law. (ART 82(2) TFEU and Art 83(1) TFEU). Unanimity of the Council and consultation of the EP is necessary to adopt legislation establishing operational cooperation between national competent authorities, as well as conditions under which police and judicial authorities may work in another Member State's territory (Art 87(3) TFEU and Art 89 TFEU).

The Lisbon Treaty also strongly asserts a Member State's power to decide its own internal and national security (Art 4(2) TEU). Article 276 of TFEU clearly states under Title V that the Court will have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State.

Those who cite intergovernmental qualities of the Lisbon Treaty will point to the European Council, which is made up of one person from each of the 27 Member States. The Lisbon Treaty expressly recognized the European Council as an EU institution for the first time. The Council defines "the strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice (ART 68 TFEU). As the European Council is made up of representatives from Member States, it is an intergovernmental council who determines the initiation of policy and strategy, as well as the initiation of legislation. It is important to note, though, that they share this right of initiative with the supranational Commission.

The Lisbon Treaty grants the option of a so-called "emergency break" in the adoption of Community directives in the field of criminal procedure and substantive criminal law. Member States can do so if they feel that the directive would substantially alter the fundamental characteristics of its criminal justice system. However, the only power that the Member States really do have in this procedure is to forward their disagreement to the European Council for consideration, making it more like a suggestion. Again, the Community holds the power, and not the Member States.

The Lisbon Treaty also emphasizes subsidiarity of national parliaments and court systems. There exists a special provision on national parliaments and subsidiarity in Title V TFEU (Art 69 TFEU). This, along with the European Parliament's increased role renders "the EU more accountable for its actions in the interests of the citizen and enhance the democratic legitimacy of the Union", according to a Commission Communication (Communication from the Commission to European Parliament 2010, 3). This provision places responsibility on national parliaments to ensure that legislative initiatives in criminal matters comply with the principles of subsidiarity. If the national parliament deems that it does not comply, the national parliament may exercise an "early warning mechanism". They send EU institutions their reasoned opinion; if the reasoned opinion represents at least a simple majority of the votes allocated to national parliaments, the proposal must be reviewed, and the Commission may elect to maintain the proposal upon which time the Council and the EP examine whether negotiations should go ahead (Art 7 of the Protocol). The procedure is long and it is clear that it is unlikely that a reasoned opinion of one Member State should go on to affect real change with the Commission and the EP to get past. Similar to the "emergency break procedure"

discussed earlier, this does not allow the Member State with substantial power, with the real power resting with the Community. However, there is a slight move to devolving scrutiny of EU law to a national level, which is a step in the right direction.

Exemplary of the superficiality of intergovernmental clauses of the Lisbon Treaty is the inclusion of "evaluation" of the implementation of EU criminal law by the Member States (Art 70 TFEU). However, how such evaluation should go about, and what impact it may have is unclear in the Lisbon Treaty. Article 70 refers to the evaluation by Member States with the involvement of the Commission; however, as Mitselgas points out, "the role of the latter, and the relationship between the Commission and Member States, is not clear (Mitselgas 2008, 52). It is also not clear whether all bodies of the EU, including the Fundamental Rights Agency, may be evaluated. Indeed, almost everything regarding this "evaluation" remains unclear: who will evaluate; what are the criteria for evaluation; what happens with the results of evaluation; what is the potential impact of evaluation? Mechanisms that prime facia guarantee intergovernmental qualities with reference to criminal law indeed seem more like fluff.

Dr. Garret Fitzgerld is the former Irish Prime Minister, and in the Irish Times in June 2007 he expressed similar views regarding the Lisbon Treaty:

> The most striking change [between the EU Constitution in its older and newer version] is perhaps that in order to enable some governments to reassure their electorates that the changes will have no constitutional implications, the idea of a new and simpler treaty containing all the provisions governing the Union has now been dropped in favour of a huge series of individual amendments to two existing treaties. Virtual incomprehensibility has thus replaced the simplicity as the key approach to EU reform. As for the changes now proposed to be added to the constitutional treaty, most are presentational changes that have no practical effects. (European Center for Law and Justice 2008, 1).

II.ix BEYOND

In a January 2011 Speech given in Maastricht, the Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship Viviane Reding asserted that she wanted to create more "added value for the citizens of Europe" (Reding 2011, 3). She proposed to do this by: improving procedural rights in criminal cases, setting out a strategic approach to criminal policy, and by ensuring coherence and consistency of EU criminal sanctions (Reding 2011, 3). It is only hoped that EU criminal policy will be developed with the necessity and proportionality principles in mind, especially since the trend has been, and the track she envisions, increasing centralization and supranational competence over criminal matters.

Slightly over 10 years ago, in a Euroepan Law Journal Article, Albrecht and Braum declared that "there is general agreement that, by reason of a lacking EU legislative competence, European criminal law, technically-speaking at least, does not exist as direct, binding law. In the field of criminal law, the national sovereignty of the Member States should remain inviolate. European law provisions confirm the absolute precedence of national sovereignty in the area of criminal law legislation" (Albrecht and Brau, 1999, 297-8). It is startling how wrong that assertion is today in light of what has come to pass. Most notably, the Court has taken liberties at making long-lasting decisions expanding supranational power to the expense of Member States' legislative competence, even when Treaties did not substantiate such decisions. It is reasonable to believe, then, that the EU will gain even more power in the years to come, against the wishes of Member States.

CHAPTER III: DATABASES

III.i Introduction and General Remarks

The sheer amount of personal information that centralized databases hold on EU citizens is exemplary of the shifting tide of EU criminal law; it demonstrates that the EU has attained a previously unthinkable amount of competence that has the potential to impact all EU citizens' private lives. Moreover, there are many different databases, just like there are many different provisions of EU criminal legislation; that is, there is no unified database like there is no unified EU criminal law that would facilitate clearer guidelines and expectations of how each Member State should use the databases. The increase of the EU's stronghold over databases is significant and paradigmatic of both the quantity and quality of the EU competence over dictating criminal law. By quantity, I point to the manifold and broad powers that the EU holds. By quality, I point to the significant impact on EU citizens' lives that this competence can cause. Additionally, like much of the development of EU criminal law, this right to data retention was not expressly given to the Community through Treaties, but rather developed in light of the Community's assertion of its necessity to maintain central objectives and the functioning of the internal market. All of these qualities of EU databases make their existence questionable, and indeed potentially unlawful. Very recently, calls to amend the Directives that allow for a centralized mode of data collection have been seriously considered by the Community.

The emphasis of counter-terrorism measures in the past decades has led to the development of legal and technical mechanisms that serve to facilitate the collection, exchange and analysis of personal data of EU citizens. These mechanisms fall under two categories: eliminating obstacles to data sharing between national authorities, and creating EU-wide databases. The private sector has also been involved in EU-collection matters, leading to an overall trend of privatization of the collection, analysis and transfer of personal data. Though the Court calls on these measures to ensure the effective functioning of the EU in combating terrorism, the loss of privacy has major implications for EU citizens. Because each Member State stores and uses information differently, there is disparate treatment of EU citizens' personal information. For example, in 2008 the UK had 4.2 million people's DNA on file; at that point in time, that database was 50 times greater than its French equivalent (DNA data deal 'will create Big Brother Europe' 2007). This results in an overrepresentation of UK citizens in the databases, skewing the information when used by national authorities from each of the Member States to imply something that is not correct.

EU Databases allow for a central method of collection, analysis and exchange of personal data that can be used by the EU for a variety of reasons. Some of these databases are linked with a special EU law enforcement body, like the Europol Information System, though many other databases exist as more centralized EU databases that are simply accessible by Member State officials. The major question regarding these databases is who has access to them, and just how many people have access to them. Another essential question that is asked is whether data sharing to the extent that the EU practices impinges upon rights of privacy, as guaranteed with the European Convention

of Human Rights. With widening access personal data privacy is at considerable danger. A third essential question is whether the EU is taking on a different attitude of collecting intelligence and becoming a police state. The following section will detail the history of the most significant databases used by the EU, and then will follow with why these databases pose problems for EU citizens fundamental rights and thus whether they are contradictory with the requirements of the Lisbon Treaty.

III.ii The Europol Information System

Concurrent with Maastricht negotiations were the negotiations regarding the construction of the European Police Office (Europol) into an official EU body. The Europol Convention was signed in 1995 (OJ C316, 27 November 1995). It was not ratified by all Member States until 1998, and Europol was not able to start operations in the Hague until 1999. Since the 2009 Europol Decision, it has had a legal personality (Spencer 2011, 6). The tasks of Europol are outlined in Article 3 in the Convention:

1. to facilitate the exchange of information between Member States
2. to obtain, collate and analyze information and intelligence
3. to notify competent authorities of the Member States without delay via the national units referred to in article 4 of information concerning them and of any connections identified between criminal offences
4. to aid investigations in the Member States by forwarding all relevant information to the national units
5. to maintain a computerized system of collected information containing data
6. to participate in a support capacity in joint investigation teams
7. to ask the competent authorities of the Member States concerned to conduct or coordinate investigations in special cases (Convention, pp 10-11).

Europol has intergovernmental features: its management board is composed of one representative per Member State, and each of those representatives has one vote. National authorities are sent to Europol in the Hague and there are Europol national units in each Member State. In regards to the national authorities that are sent to the Hague, the Convention states that liaison officers must be instructed by their national units "to represent the interests of the latter within Europol in accordance with the national law of the seconding Member State and in compliance with the provisions applicable to the administration of Europol" (Art 5(2), Convention, 14). This means that each national authority will work to further its own nation's philosophy of how the database and its

analysis should be used. Though it mainly has the management of the Europol Information System as its function, Europol also has some limited operational policing abilities, like the ability granted in Article 7 to make a formal request for a Member State to take action in respect of a particular case (Spencer 2011, 7).

The Europol Information System was established in 2005, but it was not until 2008 that all bilateral agreements were signed by each Member State, allowing for the interconnection of computer networks between national authorities and Europol (Mitselgas 2008, 173). The basis for the push towards a common data sharing network comes from work following a Commission backed 1999 Falcone Study that was intended to assess the use of criminal records as a means of preventing organized crime in the area of money laundering (Xanthaki and Stefanou 2008, 1). At this point it was clear that a need for centralized criminal data records had to do with maintaining the efficient study of the internal market. The study further revealed discrepancies between national criminal records in the following areas: the level of information available in the records, the types of persons with entries in national criminal records and the ground covered in these records (Stefanou 2008, 1). For example, there were very different national approaches to provisions on data erasure as similar crimes are punished by diverse levels of sanctions throughout the different national judicial systems. With this in light, the findings of the Falcone study showed a need for change in the EU-wide database systems.

The Europol Information System contains information on individuals that have either been convicted for an offence that falls under the Europol's mandate, those that are suspected of committing one of those offences, or those that have grounds to believing that they might commit one of those offences (Art 8(1) of the Europol Convention, 22).

Moreover, in opening Analysis Work Files (AWF), Europol may collect information on witnesses, victims, contacts, associates, and informers. The list of the potential collected is further expanded to include those third countries that cooperate with the Europol. The following personal data are available on the Europol information system, specifically to help complete AWFs: personal details, physical description, identification means (including forensic identification information like fingerprints, DNA results, voice profile, blood group, dental information), occupation and skills, economic and financial information, behavior data (including lifestyle, movements, places frequented, weapons, danger rating, specific risks, criminal-related traits and profiles, and drug abuse), contacts and associates, means of communication and transport, information related to criminal activities, references to other data bases (including those of public and private bodies) and information on legal persons (Art 6).

Not only the director, deputy officers, liaison officers and experts of Member States may access the Europol Information System, but invited experts of third states and third bodies may also access AWF files; for example, the Director of Europol and the USA have an Agreement on the exchange of personal data, which allows American experts to access this wide-level of personal information of EU citizens (Mitselgas 2008, 236). Mitselgas asserts that "[t]he precise rules and safeguards underlying a significant extension of access to Europol analysis files containing a wide range of personal data is left to an executive decision subject to minimal scrutiny and transparency" (as that executive decision is simply an invitation for third parties) (Mitselgas 2008, 174).

III.iii. The Schengen Information System

The Schengen Implementing Convention was incorporated into EC law with the Amsterdam Treaty, and along with it, the Schengen Information System (SIS) was too. In 1995, seven Member States worked within the SIS, and by 2001, 13 out of 15 member states did (UK and Ireland opted-out). The SIS has attained vast importance, as seen by the requirement to fit SIS parameters for the EU accession negotiations of 2004 and 2007 enlargements (Mitselgas 2008, 238).

Within the SIS framework, data is organized in the form of various alerts. Alerts may contain immigration data, or data related to police and judicial cooperation. These alerts may be made, for example: regarding third country nationals who should be denied entry into Schengen territory, on persons wanted for extradition to a Schengen state, on missing persons, on persons wanted as witnesses or for the purposes of prosecution or enforcement of sentences, on persons or vehicles to be placed under surveillance or subjected to specific checks, and on objects sought for the purpose of seizure or use in criminal proceedings (Mitselgas 2008, 237-8). From just 1994 to 2003, more than 15 million records have been created on the SIS (Statewatch Analysis 2005). Even before the enlargement, at a time when only 15 participating states were privy to the SIS, there were over 125,000 access points.

Since its inception, the SIS has been ever expanding. In 2004, the Council adopted a first-pillar regulation and a third-pillar decision to introduce new functions for the SIS to fight terrorism (Reg 871/2004, [2004] OJ L162, 30 April 2004 and Decision

2005/211/JHA [2005] OJ L68, 15 March 2005, adapted from Mitselgas, 239). This move extended the access of SIS data to national judicial authorities and access to immigration data to people responsible for issuing visas and residence permits. The increase in the amount of national authorities that have access to the database increases the chance that information of the databases will be used unequally throughout the EU.

More recently, there has been a move to establish SIS II, which is composed of a central EU system (Central SIS II) and a national system (N. SIS II). This will help to organize SIS, which currently covers both immigration and criminal law data. However, whereas before the SIS worked as a hit/no hit search function, SIS II will work more as a broader intelligence database. The SIS II provisions allow for the inclusion of biometrics, in the form of photographs and fingerprints (Art 20(3)(e) and (f) of the provision, adapted from Statewatch Analysis 2005). Whereas in SIS it was used only to confirm someone's identity, in the future, biometrics will also be used for "one-to-many" searches, where biometric data of one person will be compared with the whole SIS database (Mitselgas 2008, 240). This interlinking is a great departure of the initial hit/no hit search option. This is because the person is no longer assessed on the basis of data relating to him/her, but also regarding the basis of that person's associations (Mitselgas 2008, 241). More generally, as the European Commission acknowledged, the functions of the SIS will be transformed " *from a reporting system to a reporting and investigation system*" (my emphasis added, House of Lords European Union Committee, 2007). Like Community criminal provisions in general, the ever-expanding power and scope of SIS is a constant feature of data retention systems.

III.iv The Customs Information System

In November 1995, a Convention was drawn up on the basis of Article K.3 of the TEU, on the use of information technology for customs purposes establishing the Customs Information System (CIS) (OJ C316, 27 November 1995). In 1997, a first pillar gegulation was set up to use CIS for mutual assistance in respect to customs and agricultural matters (Council Regulation (EC) No 515/97, OJ L82, 22 March 1997). After the ratification of all Member States, the CIS was itself launched in 2003 (Council doc 16245/07 Brussels, 9 January 2004, all adapted from Mitselgas 2008, 242).

According to the CIS Convention, the CIS aims to "assist in preventing, investigating, and prosecuting serious contraventions of national laws by increasing, through the rapid dissemination of information, the effectiveness of the cooperation and control purposes of the customs administrations of Member States" (Art 2(2)). Both the Commission and a Committee consisting of representatives from the Customs Administrations manage the CIS. The CIS includes personal data, as well as if there are real indications that the person has committed, is in the process of committing, or will commit any serious contraventions of national laws (Art 5, all adapted from europa.eu, 2006). This condition is overly broad, and so a large amount of innocent people may potentially be included in the CIS. The central database is available to all Member States – "it is noteworthy that these may include authorities other than customs administrations" (Mitselgas 2008, 244). This makes the assurance of equal and fair treatment of all EU citizens even more difficult to attain.

III.v. Interoperability

There are certain recently established legal bases to help with the interoperability between different EU databases an/or EU agencies. For example, Europol has been granted access to the SIS. This trend is easily visible with regard to a 2004 European Council Declaration on combating terrorism issued shortly after the Madrid bombings, which linked the "war on terror" with the movement of people when it asserted that "improved border controls and document security play an important role in combating terrorism" (Pt 6, p7). To "combat terrorism", the European Council stressed that "in order to exploit [information systems'] added value within their respective legal and technical frameworks in the prevention and fight against terrorism" there needed to be interoperability (pt 5, p7, "Declaration on Combating Terrorism, 2004). Again, we see expanding access to who has control of which data systems.

The Hague Programme that was adopted by the European Council in 2004 also maintained the link between movement, migration, and terrorism. They stated that

> the management of migration flows, including the fight against illegal immigration should be strengthened by establishing a continuum of security measures that effectively links visa application procedures and entry and exit procedures at external border crossings. Such measures are also of importance for the prevention and control of crime, in particular terrorism. In order to achieve this, a coherent approach and harmonized solutions in the EU on biometric identifiers and data are necessary (Para 1.7.2).

The Commission was thereafter called upon to research and present its findings in a Communication detailing the ways in which synergy between data systems could benefit the combating of terrorism. The Communication was presented in 2005, and was entitled "the Communication on improved effectiveness, enhanced interoperability and synergies

among European databases in the area of justice and home affairs" (COM 2005). It is in this Communication that interoperability is defined as: "the ability of IT systems and of business processes they support to exchange data and to enhance the sharing of information and knowledge" (ibid, pg3). Through this definition, interoperability is a technical, rather than legal concept. Mitselgas emphasizes that "the attempt to treat interoperability as a merely technical concept, while at the same time using the concept to enable maximum access to databases containing a wide range of personal data (which become even more sensitive with the sustained emphasis on biometrics) is striking" (Mitselgas 2008, 246). Indeed, to do so is to depoliticize an issue that can disturb the protection of fundamental rights as well as civil liberties. These databases were established for different purposes, as explored above, and so to blur the boundaries of each database and equivocate by doing so via interoperability is problematic.

The development of the Visa Information System (VIS) is a clear example of the inappropriate blurring of police and immigration databases. At once, the purpose of the system is to "contribute towards improving the administration of the common visa policy and towards internal security and combating terrorism" (Doc 5831/04). At that time, it called for VIS to be used by border guards as well as national authorities authorized by the Member States as diverse as "police departments, immigration departments and services responsible for internal security" (ibid). Many people that are not perhaps adequately trained in the reasons and philosophy of having such databases could thus misconstrue and misuse them. In 2005, the Justice and Home Affairs Council called for access to VIS to be given to national authorities responsible for "internal security" when exercising their powers in investigating, preventing and detecting criminal offences,

including terrorist acts and threats (Mitselgas 2008, 247). The Commission presented a separate third pillar proposal to this end, and the two texts were later linked and negotiated in parallel, which ended in a 2007 Council doc (Council Doc 10267/07 Presse 125, adapted from Mitselgas 2008, 247). Moreover, there are bridging clauses that allow Europol to access VIS within the limits of its mandate (Art 3(1)).

VIS, though developed for immigration purposes, now contains information on people that engage in lawful activity, like applying for a visa or for asylum, and which holds information that can be accessed by a wide range of police authorities. This runs counter to proportionality principles that must be guaranteed that will be examined in detail later. Mitselgas notes an aspect more troubling of this development: "They signify the elimination of the distinction between innocent and suspect activity under a maximum securitization approach, whereby the quest for security justifies the maximum collection and exchange of personal data, regardless of their nature" (Mitselgas 2008, 249). This trend is not ending, but instead is burgeoning, which is troubling indeed to the necessary scrutiny when passing measures to expand the retention and sharing of personal data throughout the EU.

What is additionally alarming is preference for timely data over mutual assistance. The Commission affirmed it acceptable to bypass mutual legal assistance practices by allowing national authorities direct and automatic access to information. The Council Decision of 2005 on the exchange of information and cooperation concerning terrorist offences required the appointment of a specialist law enforcement unit in each Member State. This unit was to coordinate the *automatic* transfer of data on terrorist-related

prosecutions and convictions to Europol, Eurojust and other Member States via the specially appointed contact point in Eurojust (Xanthaki and Stefanou 2008, 13).]

III.vi Exchange of Data Between National Authorities & The Principles of Availability

The proliferation of the exchange of data between national authorities occurs most often in the field of police cooperation, mutual legal assistance, and legal cooperation. This is pushed forward by the principle of availability, which will be explained below. However, a major problem with this international cooperation exists: police authorities from different Member States make up different niches in each nation's constitutional makeup; while some nations' police forces are expected to make up a huge portion of that nation's maintenance of legality, other nations' police forces are less expected to do so. This results in the potential unequal treatment and coverage by the EU law for EU citizens coming from different Member States.

> The Principle of Availability was laid out in the Hague Programme. It states that
>
> Throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement for ongoing investigations in that State (Point 2.1, pg 27, the Hague Programme, 2005).

In effect, this gives national law enforcement agencies within the EU full access to all data in all national and European databases. The principle is based on a maximal version of mutual recognition. This recognition of the impact of the principle of availability is

essential. There are very few grounds for refusal, and the exchange of information is almost automatic. The Programme says that the information is to be handed made automatically available to "equivalent" authorities of other Member States (Art 14, 2005). But how is it possible to determine equivalent authorities when each nation has a different conception of police authority? Mitselgas points out that the proposal "does not require a level of equivalence between such authorities, but equivalence is to be defined by a comitology procedure, thus evading full parliamentary scrutiny" (Mitselgas 2008, 258). This is a problem of all EU-wide databases; different nations' perceptions of data usage are different, so supposing that availability will work without deeper examination of who should make up "equivalents" from each Member State, etc., will result in the incorrect and unequal usage of the database information.

As the European data protection authorities put it in their statement from their meeting in Cyprus in May 2007:

> In view of the increasing use of availability of information as a concept for improving the fight against serious crime and the use of this concept both on a national level and between Member States, the lack of a harmonized and high level of data protection regime in the Union creates a situation in which the fundamental right of protection of personal data is not sufficiently guaranteed anymore (http://www.cnpd.pt/bin/relacoes/declaration.pdf).

Before handing over data, evidence, or suspects, the police and judiciary of one state used to be required to believe firmly that the police and judiciary of the requesting state would respect the rights of its nationals. Now, with the principle of availability, there is less scrutiny as to whether the requesting state will treat the personal data with the same consideration and protection that is afforded in the requested state. By transferring such data, the police and judiciary of one state potentially put their citizens at risk of being investigated, tried and imprisoned in another state. This requires a great deal of

confidence in the fairness of the requesting state's criminal justice system (Bignami 2007, 237).

The proposal for this sort of data exchange was tabled in 2005, but the move towards the principle of availability remained on some Member States' minds, which led to an agreement on enhancing police cooperation outside the EU framework. Namely, seven EU Member States (Belgium, Spain, France, Luxembourg, Germany, Austria, and the Netherlands) signed the Prum Convention in 2007 (Council Document 10900/05, Brussels, 7 July 2005). The Prum Convention proposes among other things the establishment of national DNA analysis files and the automated search and comparison of DNA profiles and fingerprinting data (Mitselgas 2008, 259).

In 2007, the Justice and Home Affairs Council agreed to integrate major parts of the Prum Convention into the EU legal framework, asserting that:

> the special value of the Treaty lies in the substantially improved and efficiently organized procedures for the exchange of information. The states involved may now give one another automatic access to specific national databases. This amounts to a quantum leap in the cross-border sharing of information (Justice and Home Affairs Council 2007, 7).

The content of Prum was formalized by Decision 2008/615/JHA "on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime", OJ L210, 6 August 2008. The proposal, like Prum, requires Member States to establish national DNA analysis files for the investigation of criminal offences (Art2 (1)). Automated searching and comparison of both fingerprint data and vehicle registration is also allowed (Art 9 and 12). This is significant because each Member State is required to establish such databases without any domestic debate or real domestic scrutiny. Mitselgas

points out another huge drawback regarding differing approaches of different Member States:

> "the proposal does not specify what kind of data could be included in DNA or fingerprint databases. This may lead to substantial discrepancies in national approaches, with some Member States including data only of persons convicted of serious crimes, and others including data on a wide range of individuals, including suspects or persons subject to disqualifications" (Mitselgas 2008, 261).

For example, even as recent as 2008, the UK had 4.2 million people's DNA on file (7% of their population, and surprisingly enough 750,000 of which are taken from under 16s); at that point in time, that database was 50 times greater than its French equivalent (DNA data deal 'will create Big Brother Europe' 2007). . This is likely because, as the aforecited article asserts, "Britain gives its police greater freedom to obtain, use and store genetic information than other countries, who remove the profiles if the person is acquitted or not charged". It is thus problematic, as then UK Liberal Democrat spokesman David Heath explained, "to be sharing information about innocent citizens" with countries that do not normally record their own nationals' as such; it distorts the information at hand for Member States that do not normally retain such a huge level of information.

One source of data that has been recently shared between police forces of Member States is criminal records. The Commission's proposal for a Council Decision came in October 2004 with a call for urgent measures justified by reference to the terrorist attacks in New York and Madrid, and the Belgian pedophilia cases (Proposal …2004, 664). This first gained legality with the 2005 third pillar Decision "on the exchange of information extracted from the criminal record" (Council Decision 2005). Through this Decision, a central authority was designated in each Member State that was to inform other Member States' central authorities of criminal convictions of their

nationals, and answer any questions posed by other Member States, including supplying criminal record data (Art 1-3).

The Swedish government initially spurred the exchange of information between police authorities. The Swedish government stated:

> that a national competence to detect, prevent or investigate a crime or criminal activity attributed to a national authority by national law should be recognized by other Member States and constitute a right to request and obtain information and intelligence available in other Member States *without any other formal requirements than those laid down in the Framework Decision* (my emphasis added, Explanatory Memorandum 2004.).

A framework decision facilitating the exchange of information and intelligence between authorities in Member States was passed in 2006 (Council Framework Decision 2006). Article I of this Decision declares its purpose to "establish the rules under which Member States' law enforcement authorities may exchange existing information and intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations" (Article1.1). This objective is broad; what is meant by information and intelligence, who are the law enforcement authorities, and what constitutes criminal investigations? The vagueness in these terms will obviously have the result of having each Member State construe those terms differently. Though it is not clearly defined and quite broad, there are some caveats. The Member States are not required to gather and store information solely for the purpose of providing it to other Member States, for example (Art1 (3)).

In general, requests along with the details to substantiate the request are made from one Member State to another (art 5). There is also a safeguard of the principle of equivalence with the exchange of information: the requesting Member State authority must ensure that conditions are not stricter than those applicable at national level for

providing and requesting information to these authorities (Art 3(3)). In order to acquire requested data, the offence to which the request refers must be considered a criminal offence in both Member States. However, substantive criminal provisions are notoriously different to juxtapose, especially when the offences that are not purely criminal, like administrative offences that may lead to criminal prosecution in one state, but not in another (Xanthaki and Stefanou 2008, 8). The requested information can be refused on grounds of endangering national security interests of the requested country (Art 10 (1)-(3)).

As has been previously noted, the sharing of criminal records is problematic since all Member States have different systems of drafting criminal records. In Austria, Ireland, Sweden and the UK, police authorities keep criminal record archives, whereas in Denmark, Finland, France, Germany, Greece and Spain criminal records are placed with the Ministry of Justice (Xanthaki and Stefanou 2008, 28). Additionally, some Member States include certain information, for example, while others do not include that information Another area in which there are differences between Member States is wherein if a Member State's police force is not allowed to get some information in their own Member State, can it not just get the information from authorities in other member states? Moreover, this system allows for national authorities to circumvent limitations in their domestic law by obtaining information by authorities in other Member States where the law does not provide for equivalent safeguards of coercive measures for investigations, for example. Also, what happens to the persona data once it has been transmitted to another authority? These questions are essential to ask because the fundamental right of privacy is involved, and the answers to these questions might be in

part the answer to ensuring equal treatment under the database system for all EU citizens. Each of these issues is affected further still by the involvement of the private sector in collecting EU citizens' private data at the request of the Community. In the next Chapter, I will survey the ramifications of having the private sector as a definitive actor in the collection of private data.

CHAPTER IV: THE PRIVATE SECTOR AND DATABASES

Private companies have been called upon to cooperate with state authorities to help them fight crime. Specifically, data retention in this field refers to the obligation put on providers of public communications networks to retain traffic and location data as well as related data necessary to identify the subscriber. The private sector may get involved by reporting information to authorities if they suspect suspicious activity, retaining data that has already been collected, or extending information collected for business purposes to public authorities. I will explore and give an example of each of these mechanisms. All instances reconfigure the relationship between the private and the public. All areas of information that are transmitted from the private sector to the EU State involve everyday activities that are very legitimate, such as air traveling, making credit card payments, etc. Regarding the information transmitted from the private sphere, the emphasis is on prevention and suspicion, and indeed, profiling, which turns the EU into somewhat of an intelligence-seeking potential police state. Commissioner Hammarberg has reported that troublingly,

> These systems no longer just watch: companies and governments have developed, or are developing, software that supposedly identifies "suspicious behaviour" and even whether a person has "hostile intent". Surveillance computers don't just survey : they direct the attention of police and other authorities to specific " targets" (Hammarberg 2008, 2).

This means that there is very little active consideration to determine whether a person should be "targeted", and this may lead to distortions that unjustly will lead to the privacy of an individual being wholly invaded. Additionally the private sector from different Member States have different cultures regarding data protection and criminology in

general, so they may report varying amounts of information to the public sector. Whereas the Member State government authorities might have some, even if minimal, training on how an EU-wide database system should work, the private sector is expected to have even less of this training, which results in even more unequal treatment of EU citizens' private information under the database system.

The following will detail some of the most important areas in which the private sector is required to give information to the public sector.

IV.i Financial Intelligence Units

An instance in which the private sector reports suspicious activities to public authorities is in the case of financial intelligence units reporting suspicious banking transactions (FIUs). As stated earlier, anti-money-laundering initiatives have been a priority of the EU's criminal legislation. There has since been legislation obliging banks, the financial sector, and other professionals for many duties to assist the fight against money laundering. Some of these duties are: customer identification and record keeping duties, and the reporting of suspicious transactions (Mitselgas 2008, 263). It should be noted that this poses a problem for lawyers who are obliged to report suspicions of money-laundering that runs counter to the assurance of client-attorney confidentiality agreements.

In 2000, the Member States adopted a third pillar decision on the cooperation between financial intelligence units (OJ L271, 24 October 2000). It was enacted in order to address the differing national models of domestic anti-money-laundering frameworks.

This decision required each Member State to set up a financial intelligence unit that would receive and process reported suspicions of money-laundering, and included provisions that would enable these FIUs to exchange information with ease.

Thereafter, in 2005 the EU adopted a money-laundering directive (Directive 2005/60/EC 2005). This is a first pillar directive has provision that detail the FIUs, with maximum powers of access to national databases; Member States are obligated to ensure that the FIUs have access to the financial, administrative and law enforcement information that they require to properly fulfill their tasks (Art 21(3)). This has the potential to transform the FIUs from filtering bodies to investigative bodies.

IV.ii TELECOMMUNICATIONS

Telecommunication is another area with which the private sector assists the EU State to find information for the purpose of combating international crime. A 2002 first pillar directive was passed regarding the erasure of communications data (Directive 2002/58/EC, OJ L201, 2002 p37). However, Community authorities attempting to prevent organized crime vied for the public sector to retain some electronic communications (Conclusion December 2002). Following the 2004 Madrid bombings, the European Council instructed the Council to examine proposals for obliging data providers to retain some telecommunications and the 2002 first pillar directive on erasure became irrelevant.

Thereafter, a framework decision on data retention was co-opted between France, Sweden, the UK and Ireland (council doc. 8958/04 Brussels, 28 April 2004). As there was difficulty to get agreement by unanimity off the ground, the proposal was relaunched as a directive that was formally adopted under an Article 95 EC (internal market) legal basis in 2006 (Directive 2004/24/EC 2006). While the grounds of this measure are indeed given by the necessity of internal market protection, the text and this purpose make it clear that it is meant to combat criminal behavior on a large scale. It should not have been passed under the guise of first pillar, but should have remained under third pillar, which would have of course required the unanimity of all Member States for it to get approved.

With this directive, a move was made to harmonize Member States' data retention provisions "in order to ensure that the data are available for the purpose of investigation, detection and prosecution of serious crime, as defined by each Member State in its national law" (Art 1(1)). That is any serious crime, not just crimes related to money laundering, organized crime, or terrorism. The qualification for "serious crime" is left up to the interpretation of each Member State, again leaving room for unequal treatment of data throughout the EU. Telecommunication providers must retain data for periods "no less than six months and not more than two years from the date of the communication" (Art 6). This includes personal everyday data. Though the directive asserts that only competent authorities may access the telecommunications data, it is not specified just who may be a part of that group of competent authorities (Art 4). That such a wide area of data should be accessible by an undefined and potentially large group of people brings fundamental rights, especially the right to privacy, into issue. Again like most directives, the Data Retention Directive contained no further rules on the conditions under which

competent national authorities can access the retained data. This is left to the discretion of the Member States and falls outside the scope of the directive.

Thereafter, the European Union formally adopted Directive 2006/24/EC on "the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of communications networks and amending Directive 2002/58/EC". Similar to the 2002 Directive, Member States must require their communications providers to retain certain telecommunications information for a period of 6 months to 2 years. The following data must be retained: the source of the communication; the destinations of the communication; the date, time and duration of a communication; the type of communication; the communication device; the location of mobile communication equipment. This directive covers: fixed telephony, mobile telephony, Internet access; Internet email; and Internet telephony. Essentially, law enforcement authorities have access to everything a customer would see on a typical phone bill statement, like the time and duration of the call, the customer name, and numbers called. Also, in the case of Internet data retention, the law enforcement could request a superficial image of an email account's inbox and sent folder (excluding the contents of the emails). Member States also have the freedom under Article 15(1) to legislate official access to the retained data for purposes other than those provided in the Directive. For example, Germany has made data admissible in certain civil copyright cases.

It is essential to realize just how much personal information is passed through telecommunications networks in today's information-oriented society. Patients consult doctors via telephone, troubled victims consult crisis lines, clients consult attorneys.

Moreover, in the case of mobile phones, a person's movement via geographic location tracking can be followed (Breyer 2005, 1). In the 2008-2009 year alone, two million data access requests were made (Ozimek 2011). Breyer names the emerging trend to track telecommunications information as the employment of "blanket traffic data retention" (Breyer 2005, 1). Alarmingly, he posits that "data retention does not only apply in specific cases. Instead, society is being preemptively engineered to enable blanket recording of the population's behavior, when using telecommunications networks" (Breyer 2005, 1).

Sweden has not yet implemented Directive 2006/24/EC. The European Commission has since filed a complaint against Sweden for not implementing the Directive within the required 18-month timeframe Ricknas 2009*)*. Additionally, in March of last year, Germany's 2007 implementation of the directive was repealed after it was successfully challenged in the Federal Constitutional Court as unconstitutional (Kartheuser 2010). German carriers were thereafter asked to delete data they have collected as the nation now determines how to re-implement the law with amendments. Germany's *Arbeitskreis Vorratsdatenspeicherung* (Working group on data retention) had argued that wholesale data collection infringed on the "secrecy of telecommunications and the right to informational self-determination", and that data could be used to create personality profiles and track people's movements. It is a hugely controversial directive, and so support by all Member States is definitely not all there. Today, the following countries have implemented, in part or fully, the Directive: UK, France, Finland, Denmark, Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Italy, Malta, Netherlands, Liechtenstein (non-EU), Poland, Portugal, Romania, Slovenia, Spain,

Switzerland (non-EU). The following countries have not yet implemented the Directive: Germany, Sweden, Austria, Belgium, Greece, Ireland, Luxembourg, Norway (Non-EU). (Tung 2010).

IV.iii Passenger Name Record Database

The EU also has gained the competency to access passenger name record (PNR) data related to travel from the private sector. This data spans to include credit card details, dietary requirements, seating, no show, and anything other information that an airline may know about passengers. Airlines are required to transfer all PNR to the US Department of Homeland Security for all flights to or via the US since 9/11. This initial involvement of EU-based airlines spurred the EU to make agreements with the US that safeguarded adequate data protection for its EU citizens.

In a 2004 Directive, the EU established a system requiring airlines to transmit passenger data from airlines to Member States' border authorities (Council Directive 2004/82/EC 2004). This initial directive regarding passenger data collection was more limited than the form we see today: it required a transfer of limited categories that are mostly found in one's own travel documents.

Thereafter, the Commission tabled a proposal for a framework decision of transmission of PNR data for flights going into the EU (Proposal for a Council Framework Decision 2007). The Annex of the proposal contains the categories of data that are to be transferred, and include a list that is very similar to that of the latest EU-US PNR Agreement that includes a wide range of data including payment method, time of

payment, dietary restrictions, and other "general remarks". So what is the jump from the 2004 directive regarding passenger data and the proposed 2007 framework decision? Whereas the 2004 directive requires the transmittal of only official information that one may find on a passport and therefore other state data systems, the 2007 framework decision allows for information that potentially includes a larger scope of personal information; it focuses more on profiling with details that say something about a passenger's habits. The Commission's move to adopt this framework decision takes the logic of "an intelligence-led model of border controls very similar to the "border security" models in the US and the UK" (Mitselgas 2008, 270). Indeed, the purposes of the PNR were explained as not just for border controls and immigration but also for the purposes of counter-terrorism and security purposes.

The data is to be retained for a maximum of no less than 3 years (Art 9). Data is transmitted to Passenger Information Units (PIUs) 24 hours before departure (Art 5(3)). The passenger data is kept to help identify persons who are, or may be, involved in terrorism and organized crime offences as well as their associates, to create and update risk indicators for the assessment of such persons, to provide intelligence on travel patterns and other trends relating to terrorist offences and organized crime, and to use data in criminal investigations and prosecutions (Art 3(5)). From there, data is organized and sent to "competent authorities"; as has been noted time and time again, this nomination of "competent authorities" is broad, and can include a very large group of people at the Member States' discretion (Art 4(2)). Similar to the case of money laundering, the PIUs are established by Member States and there are no detailed rules for their establishment.

Currently, there are EU PNR agreements with the USA, Canada and Australia, which are provisionally acceptable. In May 2010, the European Parliament, under the new Treaty rules, postponed its vote for consent for formal conclusion of the EU-US and EU-Australia PNR agreements (europa.eu 2010).

A UK House of Lords Analysis finds that sharing passenger information is not proportional to its pursued results. Statewatch asserts that

> "The imbalance between the obligations imposed upon the passengers and the invasion of privacy rights of the individual on the one hand, and the objective of migration control on the other hand, is massive, particularly because this aspect of the proposal appears to apply regardless of nationality since most of the passengers affected are EU citizens, who cannot be considered illegal immigrants" (Statewatch 8).

Moreover, the report asserts that this application in the context of a borderless Schengen area would "in effect re-introduce border checks through the back door. It would also run counter to the main thrust of EU border control in recent years, which has concentrated effort on strengthening the external borders of the Union" (Report 2004, 9). The House of Lords also finds that "there is no evidence to support the view that the directive is necessary to combat organized crime and threats to national security" (Report 2004, 13). Rather, the EU government is "focused on creating risk profiles on individuals", similar to its aims for collecting telecommunications records (Report 2004, 13). Proportionality as a requisite for the breach of privacy guaranteed by Article 8 ECHR will be discussed in full below.

CHAPTER V: DATABASES AND THEIR COMPATIBILITY WITH FUNDMENTAL RIGHTS

V.i General Laws Pertaining to Data Protection

In the 1990s, the European Union's influence in data protection laws had to do with market-creating organization and the prevention of abuses by market actors. Since the terrorist attacks in New York, and Madrid, cooperation in criminal law enforcement has accelerated. Today, the focus of data protection laws is now to protect the privacy of its citizens.

Pre-Lisbon, there was no horizontal instrument that obligated the protection of privacy of data in the third pillar. As such, there was fragmentation of data protection arrangements, one for each body, and database. With the Lisbon Treaty, Article 16.1 TFEU establishes a specific provision on a right to data protection. Referring to the European Parliament and the Council, this provision reads:

> [that those two bodies must] lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices or agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data (Lisbon Treaty 2007).

In general, the abolition of the pillars with the Lisbon Treaty streamlines the data protection process. However, this does not negate the fact that a wide and ever-growing area of personal data can be accessed by the EU State, and that the actuality of personal

data protection remains precarious. As mentioned before, the lack of a EU-wide criminal law system and a lack of a common understanding of databases mean that there is less control over the data protection mechanisms.

Member States have a positive obligation to protect the lives of their citizens as per a European Court of Human Rights ruling (Osman v United Kingdom 1998). They are obliged to do all that could be reasonably expected of them to avoid a real and immediate risk to the lives of EU citizens of which they have or ought to have knowledge. In this sense, the right to security has long been " codified" as a human right in the European Court of Human Rights (ECHR) case-law. In *Osman* the Court also stressed "the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice , including the guarantees contained in Articles 5 and 8 of the Convention". (ECHR Article 8 stipulates the right to respect for private and family life. States thus have the difficult job of balancing competing human rights interests with international criminal acts. On the one hand, they must protect their population against terrorist threats, and on the other, they must safeguard the fundamental rights of individuals, including persons suspected or convicted of terrorist activities.

Perhaps the most important development under Lisbon is the incorporation of the Charter of Fundamental Rights of the EU, which is based on the European Convention on Human Rights. Among the rights guaranteed by the Charter are: one for the respect for private and family life, and the other on personal data protection (Art 7, Art 8). The latter contains provisions of purpose limitation, fair processing and the rights of access and rectification. Article 8 of the Charter of Fundamental Rights reads:

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right to access to the data which has been collected concerning him and her and the right to have it rectified.

Article 8 ECHR further stipulates that any breaches of the rights it guarantees must be justified "in accordance with the law" (Article 8(2)). Paragraph 2 of Article 8 provides that:

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, or the protection of health or morals, or for the protection of the rights and freedoms of others.

This justification requires that the breach must have some basis in domestic law. A vague and broad general statutory basis is not sufficient. As such, the exchange of information between Member States must serve one of the specific interests mentioned, and at the same time must not interfere with the rights and freedoms of others. Moreover, interference with private life must be proportional. In essence, proportionality requires a

balancing exercise. “It is between the nature and extent of the interference and the reasons for interfering” (Xanthaki and Stefanou 2008, 84). Proportionality is comprised of two elements: search for alternative, less rights-burdensome government means of accomplishing the public purpose and an assessment of the importance of the right as compared to the public purpose. If this right is sufficiently important in comparison to the public interest, and there are alternative means of accomplishing the public purpose, proportionality is breached. It must be noted that law enforcement is not an interest or a right in itself. If it were, the state would be able to erode human rights on the basis that laws are to be enforced. The same applies to other abstract aims, like “criminal justice” or the “defense of innocent suspects” (Breyer 2005, 369). Instead, Article 8(2) ECHR recognizes the “prevention of…crime” as a legitimate aim.

The following broad standards can also be derived from judgment of the European Court of Human Rights, and are reflected in the case law of the European Court of Justice:

1. the nature of information and intelligence coming from private companies like airlines and banks must have additional safeguards in order to ensure the accuracy of the information. This is because the data is collected for commercial purposes, so it needs safeguards to adapt the information appropriately for use in a legal sphere.
2. “The collection of data on individuals solely on the basis that they have a particular racial origin, particular religious convictions, sexual behavior or political opinions or belong to particular movements or organizations which are not proscribed by law should be prohibited. The collection of data

concerning these factors may only be carried out if absolutely necessary for the purposes of a particular inquiry." (Principle 2.4 of Recommendation R(87)15)

3. EC Directive 95/46/EC stipulates, for the First Pillar, that if a person is subjected to a fully-automated decision like that of the retaining of data and passing it along to other Member States upon request, the individual should at the very least have the right to know the logic involved in this decision, and measures of interest that could safeguard the individual's interest in retaining his privacy. The scope and application of this principle is still rather unclear, even in the First Pillar. However, the underlying principle - that it would violate human identity, dignity or personality to treat anyone on that basis without stringent safeguards - must surely also be applied in the Third Pillar. This clearly has implications for the kind of "profiling" of terrorist suspects, discussed earlier. (The above provisions were adapted from Commissioner for Human Rights Hammarberg 2008)
4. Breyer explains that some have interpreted the jurisprudence of the Court of Human Rights as outlawing any exploratory or general surveillance that is not conducted on a case-by-case basis in the event of reasonable suspicion (Breyer 2005, 368). In its decision on the German G10 Act, the Court of Human Rights noted that the Act did not permit "so-called exploratory or general surveillance", (Court of Human Rights, Class et al. v Germany (1978), Publications A28 Section 51: "Consequently, so-called exploratory or general surveillance is not permitted by the contested legislation").

5. Additionally, there needs to be a requirement that the quality of law in question should be accessible by any person. This is so that a concerned individual may be enabled to foresee the consequences of the law and adapt their conduct accordingly (Breyer 2005, 367). Forseeability implies that the law must be distinct and clear in its terms to given individuals an adequate indication as to the circumstances that authorities are empowered to act. In Malone v United Kingdom, the European Court of Human Rights asserted that no right in the Convention can be restricted, unless the citizen knows the basis for such interference through domestic law (Xanthanki and Stefanou 2008, 80).

All of these conditions must be met to maintain a high level of data protection that is guaranteed as a fundamental right. Its enshrinement into the Lisbon Treaty makes it of significant importance.

V.ii The CONS of HAVING a CENTRALIZED DATABASE

V.ii.a. DATA COLLECTION AND RETENTION AS INAPPROPRIATE and DISPROPORTIONATE

The European Data Protection Supervisor is a recent body that was created in 2001 to oversee the use of personal data by European Community institutions. It does not

have any jurisdiction per se, but it instead provides opinions to be received and respected by the European Commission. Their recent opinion on the 2006 Data Retention Directive, including their opinion of the usage of database systems, is relevant (EDPS 2011). What the EDP emphasized most is the proportionality issue. To answer whether the use of database systems would be proportional, a condition that must be met for the breach of the right to privacy, the following questions were addressed: Is there evidence that government action can achieve the stated purpose? Is the government action necessary for accomplishing the stated purpose or would alternate means accomplish the same purpose with a lesser burden on the privacy rights (EDPS, 2011). All data collected must be "adequate" and "relevant" to accomplishing the government purpose (Convention 108, Art 5, c), and the amount of data processed and the time during which it is stored should be no more than what is necessary to accomplish this purpose (Art 5, e). The EDP found that on a number of levels, the protections of private information by the Data Retention Directive was not enough to provide said proportionality.

Can data retention, or even the threat thereof, prevent crimes from taking place? The likely answer is no. Firstly, it is easy for terrorists to avoid having their communications recorded. They could use peer-to-peer technologies, internet cafes, or anonymous proxies, etc. to avoid the communications monitoring. Heinz Kiefer is the president of Eurocop (European Confederation of Police), and in a press statement, he admitted:

> "It remains easy for criminals to avoid detection through fairly simple means, for example mobile phone cards can be purchased from foreign providers and frequently switched. The result would be that a vast effort is made with little effect on criminals and terrorists than to slightly irritate them. Activities like these are unlikely to boost citizens' confidence in the EU's ability to deliver solutions to their demand for protection against serious crime and terrorism" (Breyer 2005).

Secondly, though data retention is seen as necessary by government officials mainly to combat terrorism, data retention cannot realistically stop an attack from happening. At best, it is possible for that data to assist the police in finding the culprits and their accomplices after the attack has taken place. As such, the cost of the loss of privacy from millions of people is not proportionate to the gains in stopping terrorist attacks. It is understandable for a few exceptional people should have their data stored and shared between competent EU Member State authorities; but a blanket data retention on all EU citizens presents huge costs for individual privacy with apparently smaller gains for fighting crime.

There is an even more troubling aspect of centralized data retention. These technologies are used more and more frequently, but should not be depended upon. Commissioner Hammarberg explains that these technologies that result in "profiling" may only work up until a point, but still have a huge and inevitable margin of error that will cost the privacy of innocent people unjustly. Hammarberg writes:

> Attempts to identify very rare incidents or targets from a very large data set are mathematically certain to result in either an unacceptably high numbers of "false positives" (identifying innocent people as suspects) or an unacceptably low number of "false negatives" (not identifying real criminals or terrorists). As a very recent, authoritative study by the US' National Research Council (the US National Academies) concluded:
> Automated identification of terrorists through data mining (or any other known methodology) is neither feasible as an objective nor desirable as a goal of technology development efforts (Hammarberg 2008, 3).

In January, 2011, a private rights group in Germany called AK Vorrat was also concerned for the security of the privacy rights of German citizens after several EU Directives regarding data retention were incorporated into German national law. They conducted their own analysis, which suggested the loss of data retention will make little

practical difference to police. The study found that while data retention was in operation, more serious criminal acts (2009: 1,422,968) were reported to police than before (2007: 1,359,102) but a smaller proportion were resolved. In 2009 76.3 per cent of serious crime were cleared up compared to 77.6 per cent in 2007, before the introduction of the blanket retention of communications data rules in 2008 (Leyden 2011). Similarly, after the additional retention of internet traffic data began in 2009, the number of recorded internet offences increased from 167,451 in 2008 to 206,909 in 2009. The clear-up rate for internet crime fell from 79.8 per cent in 2008 down to 75.7 per cent in 2009 (Leyden 2011). As such, data retention is not necessary, especially when considering the costs of fundamental rights to EU citizens. Ak Vorrat also believes that the blanket retention has caused criminals to use other means, which results in targeted investigation techniques that were normally used in the past can no longer be used today. "This avoidance behavior can not only render retained data meaningless but also frustrate more targeted investigation techniques…Overall, blanket data retention can thus be counterproductive to criminal investigations" (Leyden 2011). Of course, this is only true for Germany, and so this non-correlation cannot be assumed for all countries in the EU, though it is highly likely there are similar trends throughout the EU Member States. If data retention is indeed ineffective, and might even aggravate usual investigative techniques, the scales are tipped even further into the direction of unproportionality. Blanket data retention is inadequate in the test of proportionality.

The Opinion on the Data Retention Directive also maintains that the necessity of data retention as provided for it the Data Retention Directive has not sufficiently been demonstrated. Under Article 8(2) of the Convention of Human Rights, breaches of

privacy are allowed when the measure is necessary for achieving the legitimate aim. It is arguable if data retention is really necessary, as a proposal for the Directive claims "to meet the generally recognized objectives of preventing and combating crime and terrorism" (COM 2005, 3.). There has been no evidence, though, that data retention has proved to be a necessary investigative tool. In fact, according to the EDPS, the Directive has regulated data retention "in a way which goes beyond what is necessary" (COM 2005, 11).

Another requirement under Article 8(2) is the necessity of foreseeability. It has also been underlined by the Court of Justice in its *Österreichischer Rundfunk* ruling that the law should be formulated with sufficient precision to enable the citizens to adjust their conduct accordingly (edps.europa.eu 2011). However, because the way in which the directive will be implemented in each Member State lies primarily with how the authorities in each Member define "serious crime", and because Member States have differing legal traditions and practices in general, there is no foreseeability in the case of data retention.

The Data Retention Directive as it is written also has some notable weaknesses. The ICO points out specifically that some measures aimed at providing transparency through better notification are ineffective. One such example is the ineffectiveness of fulfilling the Directive's Article 10 and 11, which obligate the provision of information to the data subject. Such privacy policies are provided so that the data subject to aware that his data is being collected, and can check and verify the information. The ICO asserts, though, that these mechanisms fall short of actually helping the affected people understand their rights.

> The evidence suggests that their use is predominantly targeted to meet any applicable legal transparency requirement, rather than serving a real transparency benefit towards the consumer. Privacy policies are written by lawyers, for lawyers, and appear to serve little useful purpose for the data subject due to their length, complexity and extensive use of legal terminology… The end result is that privacy policies are not read. Companies have evidence indicating that few consumers access privacy policies (Robinson 2009, 29-30).

The provisions set up fall short of the requirements needed in order to legitimate a breach of privacy as established in Article 8.2.

V.ii.b A GROWING GOVERNMENT CULTURE OF INTELLEGENCE GATHERING

The increase in ways for a centralized mechanism to collect data has undoubtedly changed the culture of policing and political policy in the EU. With abilities akin to surveillance powers afforded to centralized powers, and "partly incited by the media, an undercurrent of insecurity and fear has established itself" (Breyer 2005, 2). This is problematic because this undercurrent does not actually correlate with an increase of crime rates. With the proliferation a culture used to surveillance, it is undoubted that this undercurrent will not reverse.

The EU continues to attempt to amass huge amounts of personal data, making its functionality in this way similar to a police state; however, recent court decisions have shown that this action goes against rights provided by the European Convention of Human Rights. Specifically, in a December 2008 case, two British men who were never convicted of a crime came to the European Court of Human Rights, claiming that their DNA and fingerprints should not be retained by UK police as per Article 8 of the

European Convention on Human Rights (bbc.co.uk 2008). The Court found in favor of the two plaintiffs, citing breaches of the right to a private life. The ECHR said it was "struck by the blanket and indiscriminate nature of the power of retention in England and Wales"; the article relates that of about 4.5 million people from which personal data is placed into a database, about one in five of them does not have a current criminal record. Though this is just one case, there are doubtful hundreds if not thousands more that are having their privacy breached inappropriately given the culture of data retention by European police forces that is practiced and spreading.

Another issue that pertains to the growing intelligentsia behaviors of the state police forces is the possibility that data retention may be abused by the police to monitor activities of any group that may come into conflict with the state, even those who are engaged in legal protests. The UK police have been found to have used anti-terrorism powers against groups opposed to the war in Iraq, for example (bbc.co.uk 2003). It is not necessarily the collection of each piece of data, but rather how each piece could potentially be used by the law enforcement. As Germany's Arbeitskreis Virratsdatenspeicherung states, "Even though the storage does not extend to the contents of the communications, these data may be used to draw content-related conclusions that extend into the users' private sphere" (Federal Constitutional Court 2010. In other words, the EU could create files based solely on circumstantial evidence; by permitting detailed information to be obtained on social or political affiliations and on personal preferences etc, there is a presupposed and inappropriate equivocation while making on file on someone. Of course, given the differing cultures regarding criminology in each Member State, personal data could further be used in a wide variety of ways that do not

necessarily correlate with their intended purpose. An overarching system of criminal law would only provide enough clarity on how the data should legitimately be used.

This problem is demonstrated by the perceptions noted above in the February 2008 Eurobarometer study: 64% of data subjects question whether organizations that held their personal data handled this data appropriately, and 84% of data controllers were in favor of more harmonized rules on security measures to improve and simplify implementation of the legal framework on data protection, with only 5% of data controllers believing that existing legislation was fit to handle the increasing amount of personal information being exchanged (Robinson 2009, 39). Clearly, there is some question as to the effectiveness of existing rules that are in place to adequately protect private data of EU citizens.

V.ii.c THE CONFUSIONS INCITED WHEN DEALING WITH A MYRIAD OF DATABASES

Though the 2000 Mutual Legal Assistance Convention and its 2001 Protocol are mechanisms that aid in implementing a precise procedure and guidelines to be followed by Member States when sending and servicing mutual legal assistance, it has not been signed by a considerable amount of Member States (Convention of 29 May 2000 on mutual assistance in criminal matters between the member states, OJ C 197, 12 July 2000, p1, and OJ C 326, 21 November 2001, adapted from Xanthaki and Stefanou 2008, 4). The 2000 MLA Convention has not been ratified by Greece, Ireland, Italy, Latvia, and

Luxembourg. The Protocol has not been ratified by Estonia, Greece, Ireland, Italy, Luxembourg, Malta and Portugal (Xanthaki and Stefanou 2008, 9-10). This has consequences: in 2005 alone, 155 requests for mutual legal assistance were not addressed by the procedures found in the 2000 MLA Convention and its Protocol because the requesting Member States have omitted to ratify those two instruments (Xanthaki and Stefanou 2008, 10). There is thus relative weakness in the reality of mutual legal assistance and equal treatment of the databases within the EU Member States.

At the international level, all Member States are signatories to the European Convention of 20 April 1959 on Mutual Assistance in Criminal Matters, the Additional Protocol of 17 March 1978 to the European Convention on Mutual Assistance on Criminal Matters, the Convention of 19 June 1990 implementing the Schengen Agreement of 1985 on the Gradual Abolition of Checks at Common Borders, and the 2001 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (Xanthaki and Stefanou 2008, 5). Moreover, there are Benelux Conventions and Nordic Conventions on legal assistance. The myriad of international agreements often causes confusion and difficulty for mutual legal assistance. It is especially different when one takes into account that the information requested is needed rather urgently. For example, though the 1959 Convention excludes fiscal military and political offences, these are covered by the 1972 Protocol and the Schengen Convention (Xanthaki and Stefanou 2008, 6). The authorities can less appropriately use data from the myriad of databases still, making the breach on individual fundamental rights even more unsuitable.

It should be kept in mind that personal data centrally collected is additionally

sometimes transferred to countries outside the EU. This can raise a number of questions because the level of protection of personal data outside the EU can sometimes be lower. The Commission maintains a list of third countries where the level of protection of personal data is considered to be in line with EU rules on data protection, to where personal data may be transferred without additional safeguards into countries with even more disparate views on databases. Transfers of personal data to all other countries may only take place if the EU exporter provides for the adequate protections of rights, in particular through special contracts between the EU exporter and the foreign importer which will receive and process the data in compliance with EU rules (Commission Staff Working Document, 2010, 16).

V.iv The PROS of HAVING a CENTRALIZED DATABASE

An independent international research team led by RAND Europe called the Information Commissioner's Office (ICO) has listed the strengths of the current Data Retention Directive as: serving as a reference model for good practice; harmonizing data protection principles and to a certain extent enabling an internal market for personal data; having flexibility; being technology neutral; improving awareness of data protection concerns (Robinson 2009).

Personal data can be used to benefit society as a whole in select instances. The ICO also reports that the public sector increasingly uses personal information in databases to improve public services such as tax administration and social security

provision that better the lives of EU citizens. A good example of the way in which governments are looking to tailor services to the citizen include the UK's Transformational Government Initiative. Personal data is also being increasingly used in healthcare (particularly research and large-scale epidemiological studies) and socio-economic research. (Robinson 2009, 12) However, this does not account for the breaches on privacy by any means, especially when balancing these positives in relation to the negatives and weighing out proportionality. The EU's use of databases is an egregious breach of fundamental rights, and so it should be amended or repealed.

CHAPTER VI: Overall Assessment and Conclusion

With the inappropriate access to data retention systems aside, it is necessary to assess the EU's hold of the several areas of criminal competence in general. The following chapter is meant to provide a clear summary of the both the main negative and positive consequences of having a EU criminal law program. Though quantity and quality of criminal matters that the EU currently has competence over is problematic, as well as the disconnected nature of those competences, I believe that the EU should enjoy some criminal law competence to combat transnational crimes that aversely affect the Euro and EU's internal market, as well as help produce a general feeling of symbolic Community.

VI.i Negative Consequences

Though those in favor of developing criminal legislation further often argue that criminal competence is a means to an end, critics of developing criminal harmonization further argue that criminal law must always be treated as a special case; it needs definite and distinct scrutinizing since criminal law is often what defines a nation's culture. It needs to be commonly understood by all those that are subject to it; this is not the case for EU criminal competence. Some critics' specific arguments take the following logic. They argue that criminal law is inextricably linked with state sovereignty and deals with sensitive areas such as the relationship between the individual and the state. Also,

criminal law development in the EU has generally led to more regressive rather than progressive environments for their citizens. They also argue that any conferral of competence in criminal matters by Member States to the Community should be express in the Treaties, and not subject simply to creative rulings of the ECJ. Finally, they argue that intervention in criminal matters does not sit well with the character of the Community as a primarily economic space.

It is useful to consider some theory when reading the contestations for community criminal law competence. Groning asks the question of what kind of criminal system does a society ideally want. She asserts in theoretical terms that the "legitimacy of criminal law should be measured in relation to the basic normative principles of the democratic *Rechtsstaat,* centered on the idea of individual autonomy, and the state is but a means to uphold that principle" (Groning 2011, 125). In order to achieve this, a criminal law system should take the constitutional framework of the principles of *ultimo ratio* seriously, be minimalistic, and promote practices in favor of the autonomy of the individual (Groning 2011, 125).

The right to punish is the essence of state power, so to alter the way in which the state punishes its people is to change the essence of its power. As Linda Groning puts it: "The ordering of the exercise of public penal power in precisely a (national) criminal justice system is considered necessary in order to secure the basic values of the democratic *Rechsstaa*t *(Rechsstaat* being the constitutional paradigm of western states that combines democratic majority rule with constitutional protection of individual rights) (Groning 2011, 115-6). And in this reading, it is not possible to say that the EU practices necessary to promote individual autonomy since it is not minimilastic, and often

impinges on the autonomy of the individual. It will not be possible to promote autonomy of the individual, though, if there is a not a strict and widespread understood notion of what the criminal law competence of the EU subjects the individual to.

VI.i.a Sharp Differences between the legal traditions of Member States

Firstly, the differences between the Member States' legislation on penalties are still quite sharp, indicating not just that successful harmonization is unlikely, but probably unwanted. There are historical, cultural and legal reasons for the differences in their legal systems which have evolved over time. Each Member State's treatment of criminal law is an expression of the way in which Member States have faced and answered fundamental questions about criminal law, choices that were shaped by each Member State's own historical trajectory. These systems have their own internal coherence, and amending individual rules without regard to the overall picture would risk generating distortions and creating unequal treatment under Community law for EU citizens.

The problem of asymmetry addresses the fact that each Member State has a different system of national criminal law that is not easily reconcilable to form one system. The combination of a centralized legislator and decentralized negotiation and administration of that punishment is not compatible with the idea that the citizens should be equally protected under the criminal justice system. For example, there is the risk that the courts of different Member States will interpret common rules in different ways.

There is both unequal treatment of those who are charged with EU crimes, and a risk on the horizontal level, of unequal protection of the EU citizens against crime. Member States determine a lot of their own general rules and principles and so there are substantial normative gaps. In May 2011, UK Justice Secretary Ken Clarke, too, has commented on the how unrealistic having a "one size fits all" approach to criminal law is. He says that

> "A preoccupation with imposing a single, inflexible, codified data protection regime on the whole of the European Union, regardless of the different cultures and different legal systems, carries with it serious risks…Let us keep the broad principles of the existing Directive and better understand the 27 laws we all in our nation states have, rather than setting out to create in detail an additional 28th radically different, and artificial new set of laws" (theregister.co.uk 2011).

Combating racism and xenophobia is one particular field of EU criminal harmonization that has been contested and resulted in long debates; this is exemplary of the disparate philosophies on criminal law that each Member State has, and just why it is so difficult to reach a harmonized approach. As previously mentioned, Article 29 TEU has "preventing and combating racism and xenophobia" as one of the mechanisms to allow for a "high level of safety". However, different Member States disagree to the extent to which such conduct should be criminalized (Mitselgas 2008, 98). With the Community under the Maastricht Treaty, the Member States adopted a Joint Action "concerning action to combat racism and xenophobia" in 1996 (96/443/JHA, OJ L185, 24 July 1996, p5.) The joint action defined racism as and xenophobia as:

(a) public incitement to discrimination, violence or racial hatred in respect of a group of persons or a member of such a group defined by reference to coulor, race, religion, or national or ethnic origin;
(b) public condoning, for racist or xenophobic purposes, of crimes against humanity and human rights violations;
(c) public denial of the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 April

1945 insofar as its includes behavior which is contemptuous of, or degrading to, a group of persons defined by reference to color, race, religion, or national or ethnic origin;

(d) public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia;

(e) participation in the activities of groups, organizations or associations, which involve discrimination, violence, or racial, ethnic or religious hatred. (Title I, (a, adapted from Mistelgas 2008, 98).

Instead of criminalizing racism as defined in the joint action, there was introduced the obligation for Member States to ensure "effective judicial cooperation", by either criminalizing the behavior or by derogating from the principle of dual criminality (Title 1a). Obviously this leaves a lot of room for Member States to act; the obligations of the text are vague and thus relatively weak. Member States inserted their own declarations and qualifications where it saw fit. The UK, for example, stated that it would only apply the obligations "where the relevant behavior is threatening, abusive, or insulting and is carried out with the intention of stirring up racial hatred or is likely to do so" (Annex, Declaration 3, adapted from Mitselgas 2008, 99). Other Member States interpreted the joint action differently.

Thereafter, Commission tabled a proposal for a framework decision to replace the 1996 Joint Action (Mitselgas 2008, 99). It aimed at making the same racist and xenophobic conduct punishable in all Member States under a common criminal law approach. This list of offences was expanded, and common definitions and penalties were introduced. Member States were concerned, and rightly so, that this would not be easily successful and effective given the diversity of Member States' approaches to racism and xenophobia. The UK, for example, were opposed to their having to change their domestic law to be amended to include the criminalization of incitement to religious hatred, which is an issue that was quite controversial there for much of its history as an independent

country (Mitselgas 2008, 99). In general, Member States reacted negatively to being required to change the criminal law, which would essentially require a change in their legal traditions and legal philosophies regarding racism. Finally, in 2007, a "general approach" on the text of the framework decision was accepted (Doc. 8665/07). There are exceptions that address national sensitivities. With regard to criminalization at a national level, a UK-inspired exception states that Member States:

> May choose to punish only conduct which is either carried out in a manner likely to disturb public order or which is threatening, abusing or insulting, as well as that the reference to religion is intended to cover at least 'conduct which is a pretext for direction acts against a group of persons or a member of such a group defined by reference to race, coulour, descent, or national or ethnic origin'. (Arts 1a and 1b respectively, adapted from Mistilegas 2008, 99).

This ensured that the UK would not have to change domestic criminal law. However, "from a harmonization point of view…this may not lead to optimal solutions, in particular for those hoping that the Framework Decision would create a level of legal certainty and common understanding" (Mitselgas 2008, 100). It is clear that there is always at play a fine balance between Community criminal legislation effectiveness and state sovereignty.

This discussion on the Member States' efforts to harmonize anti-racism and anti-xenophobia measures is intended to show how different Member States' philosophies regarding their own legal traditions are. Not only does this make it very difficult to harmonize criminal law on a community-wide level, but it also begs the question as to whether such harmonization and loss of culture is wanted. There are numerous other examples of similar difficulties in successful harmonization that would ensure equal treatment under the law; for example, different Member States define "organized crime" differently.

VI.i.B Increasing Power without the Express Rights in the Treaties

The manner in which Community criminal competence sprung forth is also an area of concern for some critics. What must be noted is the fact that there is no historical precedent of building a supranational criminal law system that is supplemental to those nation's own criminal law programs. It sprang forth purely from the Community's creative judgments and self-allotted powers. This was the focus of the earlier section examining how ambiguities between the first and third pillar resulted in the ECJ's landmark judgments that allowed for the Community to have competence over previously housed third pillar issues.

Critics also point to the erratic nature of the European Council's legislative and policy programmes that are enacted in light of current events. The 1999 Tampere European Council Conclusions, followed by the 2004 Hague Programme's content is heavily influenced by external world environment. The EU of the 2000s was threatened by terrorism, which led the European Council react swiftly in response. Mitselgas notes that the "terrorism rationale has justified and led to the adoption of measures…disparate…." (Mitselgas 2008, 33). The blurring of pillars resulted in important ramifications regarding accountability and judicial control; their swift action is troubling in terms of European Council transparency and a lack of debate and discussion as well as a lack of guarantee for labored and detailed analysis of possible consequences of action that is especially necessary when trying to harmonize the law between such differing countries.

Another troubling quality that is cited by opponents is the fact that EU Criminal law is not based on harmonization, but rather on mutual recognition. This means that national criminal justice systems potentially have to change substantially to fit the model of Community criminal law. Instead of deliberated and well-organized development, EU criminal law is enacted when and to what extent it is needed by the maximal, not minimal player. This causes huge discrepancies within the system from one Member State to another.

VI.i.c **Community Criminal Law as Repressive, and not Rights-Giving**

Oftentimes, the Community will claim their criminal law initiatives are pushed forward in order to benefit citizens; in other words, that these initiatives will necessarily give rights rather than take them away. However, when examining some initiatives, it is difficult to say whether this is actually so. For example, two measures based on the principle of mutual recognition in particular that claim to benefit the defendant expose some aims of the supranationalization forces. The two cases are the enforcement order and the probation order; both have the claim of securing enhanced prospects of the sentenced person's being integrated into society, thus being a benefit to the defendant (Recital 9 of the Enforcement order and Recital 8 of the Probation order.) The enforcement order was initiated to facilitate the serving of sentences in East European Member States that would have otherwise been served in West European Member States. Given the inferior and often inhumane conditions in several East European prisons, the argument that this measure is to benefit the prisoner is unlikely. Furthermore, the

enforcement order circumscribes the requirement of prisoner's consent, which is supposed to be guaranteed in the 1983 Council of European Convention on the transfer of sentenced persons (Wagner 2010, 12). This is problematic for the outlook of the future of mutual recognition in criminal law cooperation. The push to attain "mutual recognition" has hampered the balance between law enforcement and individual rights that has been explicitly desired by Member States. As Wagner further states:

> European criminal law cooperation has privileged law enforcement over individual rights because the adoption of repressive measures has been eased by the principle of mutual recognition whereas the introduction of common standards of defendants' rights has been hampered by unanimity in the Council (Wagner 2010, 13).

As mentioned above, this leads critics of some Member States to become weary, and less likely to advance the principle of mutual trust that is needed in order to ensure the principle of mutual recognition. It is contradictory in its expectations. Common standards are thus even more difficult to attain.

Another area of criticism is that EU criminal law development has led to overall repression, rather than right gaining for EU citizens. Takis Tridimas zeros-in on a quality of the development of EU criminal law that is at odds with the classic integration model. He explains that "traditionally, Community law has led to the erosion of national sovereignty through *granting rights* to citizens. Integration through law has always been rights-focused. This paradigm appears to be reversed in the field of criminal law where emphasis lies firmly in facilitating the exercise of the state powers rather than in bestowing rights" (my emphasis added, foreward to Mitselgas text book, v). For example, the Charter of Fundamental Rights was established to safeguard the rights of EU citizens ensuring the protection of rights. The development of Criminal Law in the EU, by contrast, has allowed the Community powers to withhold rights that were previously

granted in a Member State setting. The most potent examples are the correlated rights of data protection and privacy.

Though it is somewhat of a simplification, the following figure shows how much framework decisions have influenced the legislation of the following Nordic Countries' national criminal programs. Introduced framework decisions that aimed at approximation of substantial criminal law have often led to either criminalizing nationally more acts (called new-criminalization) or to an upward adjustment of penalties and penalty scales (up-criminalization). This is indicative of a very problematic feature of EU criminal law: it often requires more constriction and repression, instead of allowing for more rights, protections, etc. Elholm states that "I have found no examples of de-or down-criminalization in the Nordic countries of framework decisions" (Elholm, 212). In the following figure, a * represents "new-criminalization", and a + represents "up-criminalization". (Adapted from Elholm 2009, 194-203).

FRAMEWORK DECISIONS OVERVIEW:

Framework Decisions Related Legislation	**Denmark**	**Finland**	**Sweden**
Counterfeiting	*	*	*/+
Non-Cash Means of Payment		*	
Money Laundering	*	*/+	
Terrorism	+	*/+	*/+
Trafficking in	+	*/+	*/+

Human Beings			
Unathorised Entry	***/+**	***/+**	***/+**
Corruption		*****	
Sexual Exploitation of Children	***/+**	***/+**	**+**
Drug Trafficking	**+**	*****	*****
Information	***/+**	**+**	*****
Ship Shource Pollution	**+**	**+**	**+**
Enviornment		*****	
Organized Crime			*****
Racism		***/+**	

Elholm makes an interesting finding regarding the consequences of framework decision approximation in national legislation is that of "over-criminalization". By this he means Member States often up- or new-criminalize without necessarily having to according to the framework decisions (Elholm 2009, 213). This is mostly due to a national policy and ideology that is difficult to harmonize with the result requirements from the EU acts. For example, there is over-criminalization because of legal-technical reasons; it may be necessary to rewrite the constituent elements of the framework decision so that the wording complies with the national legislation technique and language. There is a risk

that more things are criminalized than is necessary by the EU Framework Decisions (Elholm 2009, 213).

Moreover, there is an imbalance between the horizontal and vertical aspect of EU criminal law. There is more focus on efficient crime control than on the control of public penal power. For example, the push to develop of European prosecutor's office has had no equivalent for a common defense structure, like a "Eurodefender" or something in that logic.

VI.i.d PRIVACY LOSS

EU individuals' privacy loss is not proportional to the gains of combating criminal law. It is therefore the number one problem of the data retention trends that result from pooling together criminal law competence to the EU. Indeed, in the most recent 2011 Evaluation report from the Commission to the Council and the EP in the Data Retention Directive, section I.2.6 reads: "the Retention of telecommunications data clearly constitutes an interference with the right to privacy of the persons concerned as laid down by Article 8 of the European Convention of Human Rights and Article 7 of the EU Charter of Fundamental Rights (edsp.europa.eu 2011). The EDSP has deemed this opinion regarding the Directive as "the moment of truth for the Data Retention Directive" (I.2.11).

In general terms, there are direct and indirect forms of damage due to privacy loss that may have consequences on individuals. Van der Hoeven proposes a classification of three types of harm that may arise as a result of the compromise of privacy protections (adapted from Robinson 2009):

1. **Information based harm –** there are increased instances of identity theft, but this category can include any type of harm that is possible following the acquisition of private and personal data, even including negative feelings of mistrust of the government, etc. According to the Home Office the cost of identity theft to the United Kingdom economy was £1.7bn6.
2. **Information injustice** – information that is presented in one text is used inappropriately in another. This is expected, and indeed often occurs, with the sharing of information between different Member States which have differing philosophies of criminality, where information presented in one context is used in another. Other examples include the mistaken detention on the basis of erroneous or inaccurate personal information, as occurred with the US lawyer Brandon Mayfield who was imprisoned for two weeks by the US Federal Bureau of Investigation (FBI) in June 2004 following a match between his fingerprints with those found in the Madrid terrorist bombing.
3. **Restriction of moral autonomy** – people fear the omnipresence and pervasiveness of having their personal data taken, and analyzed by the government. This may lead to people feeling restricted or limited in expressing their opinions or their ability to self-represent own identity to the public.

VI.ii: Positive Consequences of Having a Centralized Community Criminal Framework

Article 29 TEU expresses the vision of EU cooperation as the creation of an area of freedom, security and justice. The attainment of this area will allow for an internal market to thrive. To achieve this, the Community says, is necessary a mutual approximation of rules on criminal matters in each and all of the Member States. The community deems the creation of various framework decisions to be appropriate to prevent and combat international crimes by the provision of three arguments. First, the Community holds that there should be no gaps or loopholes in the EU in which criminal acts are unpunished or punished lightly. It is in these gaps or loopholes that crime will spread to the rest of the EU via the open inner borders. This is why harmonization in certain criminal matters is a must. This is the argument of prevention of crimes in the Community.

A second argument explains that Community criminal legislation is necessary because it is not possible for police, prosecution authorities, and courts of justice to stick to national procedures of the court while EU criminals and criminality move at a larger scale. This is because differences in substantive criminal law are potential obstacles to effective investigation and prosecution across borders. An example of such an obstacle is a requirement of double criminality, which blocks legal cross-country assistance. Another is a potential low level of penalty in one country because lack of coercive measures like extradition of confiscation that are present in another Member State. There are dozens of other examples of potential obstacles. In addition, an approximation of the substantive

criminal law will increase mutual trust among the countries, making it more likely to work together efficiently, according to the Commission. This is the argument of preventing problems of differences in prosecution within the Community.

Aside from these baseline arguments, the most important consideration that pushed forward the communitarization of criminal law is that the maintenance of the economy must be put first. The criminal sanctions imposed on the economy, such as money-laundering and insider-trading, relate mostly to the maintenance of trust in a functioning capital market. Not only is this essential for fair competition within the EU, but also ensures that foreign investors trust in a functioning environment in which they can properly invest. Albrecht agrees with the stance that criminal law has been furthered in the EU primarily as a way to protect the economy. She states:

> Criminal law serves as a means for the bureaucratic organization of economic interests and is designed to suit the needs of the capital markets. Its legitimation, therefore, results from its effectiveness in serving economic goals…Integration through criminal law amounts to no more than the administrative attempt to make the movement of capital manageable (Albrecht 1999, 305).

In the above quote, she stresses the bureaucratic elements of Community criminal law. Basically, the European Commission asserts its responsibility over the EU economy by defining its role in criminal law. Criminal law is one element in the political administrative organization of a single market.

EU criminal law legislation also helps ensure there will not be jurisdictional conflicts regarding the principle of *ne bis in idem*. This principle represents the idea that no one shall be liable to be tried or punished twice for an offence for which he or she has already been finally acquitted or convicted in accordance with the law. This is incredibly important, and has sometimes even been incorporated into the Constitution of a nation; it

is indeed included in the US constitution in the 5th Amendment as a constitutional right, for example. Especially within the EU, transnational crime has been growing as a consequence of the internal market, among other factors. In cases where more than one state may enforce jurisdiction, conflicts of jurisdiction are likely to emerge and these can have significant consequences for the states and the individual involved. Different legal traditions may understand this concept *of ne bis in idem* differently, though. Different types of legal action and different types of offences are possible when comparing the actual meaning of *ne bis in idem.*

Several provisions have thus been established that refer to the issue in order to prevent fragmentation of viewpoints on *ne bis in idem*. One such provision of *ne bis in idem* is offered by articles 54 to 58 on the Convention implementing the Schengen Agreement, which was incorporated into EU third pillar law after the Treaty of Amsterdam. These articles introduce a transnational version of the principle, meaning that each of the contracting parties have agreed to recognize the principle in the same way. Additionally, the principle has been included in the Charter of Fundamental Rights and in the Framework Decision on the European Arrest Warrant (Hollander 2008, 65). This is a positive for the proper functioning of the law and equal treatment of EU citizens; it would be even better if such a commitment to understanding harmonized requirements were in place for more issues pertaining to criminal law competences of the EU.

A community criminal law agenda works to positively enforce an explicit code of symbols and signals that ensures effectiveness in the eyes of EU citizens. It is the EU's wish to appear as an international organization with a "nation state character" in order to

appear strong on the world political stage. Criminal law can oftentimes be considered as the foundation stone in the sovereignty of an independent nation, and the regulation of punishment is therefore connected with a certain symbolic value. For example, in the Commission Communication of the Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the EU, the introductory portion sets up a symbolic objective. The Commission explains that "by defining common [offences and] penalties in relation to certain kinds of crime, the Union would be putting out a symbolic message" which will among other things "help give the general public a shared sense of justice" and to express that "certain forms of conduct are unacceptable" (p9). The Commission sets out to establish that the regulation will create a future shared sense of justice by explicitly stating that it should be acceptable by all those in the Community that certain offences are abhorrent to the Community (all the above adapted from Elholm 2009, 224). It creates a sense of unity for these Community members. Moreover, it helps rationalize the need further commitments in the areas of economics, politics, external action, etc; to cooperate on criminal matters is exemplary of an independent nation speaking with one voice.

Elholm also explains how the enactment of Community criminal laws can help elicit a unifying implicit sense of symbols and signals which speak to the political wishes of European Union. For example, it is the Community's wish to be active and efficient. An example of EU criminal legislation with this more implicit message is the Framework Decision on Unauthorized Entry. This Framework Decision was passed after a tragic and horrible incident at Dover in which over 50 Chinese refugees were found suffocated in a container after an attempt to enter Great Britain illegally (Elhorn 2009, 225). In response,

the Community sounded the attack against smuggling people and demanded extended penalties for this type of crime all over the EU.

On the other side of the balance from the necessity to protect individual rights is the necessity to protect the common good. This is what has pushed forward the harmonization of criminal legislation in the European Union. Simply put, the world climate produces common problems that necessitate cooperation.

VI.iii CONCLUSION

In conclusion, the necessity to preserve the EU's internal market makes cooperation on criminal matters self-evident. However, the extent that that cooperation allows for far-reaching Community competence is questionable. To improve the quality of the EU criminal legislation, there unquestionably needs to be more of a common understand of the terms and conditions that make up the legislation. This is necessary to help ensure that the Community laws are interpreted similarly to ameliorate the equal treatment of EU citizens under that law.

The most questionable of the competences is the legality of the Data Retention Directive, and the overall use of centralized databases in the general. This has become the general attitude of the EU Member States in the past year or two. Germany, especially, has taken a strong stance against the allowance of EU Data Retention requirements. This can be seen with Germany's Federal Constitutional Court (*Bundesverfassungsgericht*) 2010 overturning the Data Retention Directive because they deemed it unconstitutional. Additionally, the latest June 2011 statistics published by German police have shown that

telecommunications data protection has had no positive impact on the number of cases solved (Baker 2011). This and similar publications, along with a shifting attitude towards the world climate and the fight on terrorism in general, will either cause the 2006 Data Retention Directive to be either amended or repealed completely. It is unlikely, unwanted, and unlawful for the EU to continue to amass and share the personal data of potentially any and all of its 500 million citizens without concrete evidence that its positives for public good and the prevention of crime outweigh its negatives of encroaching fundamental rights. At this point, there is no evidence to prove that.

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