

# COMMON MARKET LAW REVIEW

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### **Aims**

The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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### Establishment and Aims

The Common Market Law Review was established in 1963 in cooperation with the British Institute of International and Comparative Law and the Europa Instituut of the University of Leyden. The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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Valsamis Mitsilegas, *EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*. Oxford and Portland, Oregon: Hart Publishing, 2016. 295 pages. ISBN: 978 1 84946 648 6. GBP 50.

With the Treaty of Lisbon, EU criminal law has become more firmly embedded in the constitutional and institutional framework of the EU. The Treaty of Lisbon has profound consequences for the scope of legislative competences of the EU, regarding substantive as well as procedural criminal law, the type of legislative instruments used (directives substituting framework decisions) and the way they are brought about (through the co-decision procedure), the applicability of general principles of EU law, and the applicability of the Charter of Fundamental Rights. Mitsilegas analyses the consequences of these developments from two perspectives: from the perspective of the Member States, when he looks at State sovereignty and national legal diversity; and from the perspective of the individual and his/her relationship with the State, when he looks at fundamental rights protection and respect for the rule of law. Mitsilegas' normative evaluation is based on the premise that in the pre-Lisbon era, European criminal law was characterized by "uncritical securitization" (pp. 2–3). The question is whether and to what extent the Lisbon Treaty has been able to address the consequences of this securitization. The analysis is thus mainly retrospective, although the author also reflects upon what Lisbon might bring for the future.

The book promises a discussion of many central topics in the field. After a short introduction and a chapter on the process of constitutionalization of EU criminal law (Ch. 2), Mitsilegas discusses the debates on EU competence in the field of substantive criminal law (Ch. 3), co-ordination and centralization of prosecution, including Eurojust and the proposed establishment of a European Public Prosecutor's Office (Ch. 4), mutual recognition and mutual trust (Ch. 5), legislation on the protection of human rights of the defendant (Ch. 6), the place of the victim in EU criminal law (Ch. 7), the relationship between EU criminal law and EU

citizenship (Ch. 8), and the emergence of “preventive justice” at the EU level (Ch. 9). The threads are drawn together in the conclusion (Ch. 10).

Mitsilegas’ main evaluative conclusion of the Lisbon Treaty is that it has had “mixed results” in dealing with the consequences of securitization (pp. 1–3). The book aims to show on the one hand that the post-Lisbon era is still frequently marked by uncritical deference to Member States’ policy choices (at times privileging security over the protection of fundamental rights), as well as by “uncritical acceptance of the existence and importance of mutual trust” (p. 3). On the other hand, the Lisbon Treaty has also helped to strengthen the protection of fundamental rights of the individual. Mitsilegas argues that the Treaty even offers a “promise of rights”: by shifting the focus from the State to the individual, and from security to the protection of fundamental rights, the Treaty lays the foundation for a fundamental change or even a paradigm shift in European criminal justice.

This review focuses on Chapters 5 and 6, as they are apt to illustrate this main thesis. In Chapter 5, Mitsilegas criticizes the automaticity in the application of the principle of mutual recognition. This automaticity is based on the presumption of States’ mutual trust in each other’s criminal justice systems and the adequate protection of fundamental rights therein. However, Mitsilegas explains how experience with the European Arrest Warrant shows that exactly this automaticity led to fundamental rights concerns. In the book’s conclusion he states that after Lisbon, mutual recognition is still prominent, still upheld consistently by the ECJ, still based on a strong presumption of mutual trust, and still often characterized by a prioritization of national justice demands of the issuing State over justice demands in the executing State (p. 264). Mitsilegas sees several ways to address the fundamental rights concerns this entails. He strongly proposes a fundamental rights review in the executing State. At the time of writing (the book’s cut-off date is September 2015), the ECJ had consistently opposed this, which is criticized by Mitsilegas as the Court thereby deviates from its own case law in the field of asylum law and from the Strasbourg case law. One may expect the judgment (April 2016) in *Aranyosi & Căldăraru* (Joined Cases C-404 & 659/15 PPU) to have been received by Mitsilegas as a step in the right direction, as it allows for an – albeit limited – fundamental rights review in the executing State. A fundamental rights review is not enough for Mitsilegas, however: he also advocates several measures that should ensure that mutual trust need no longer be presumed, but is truly *earned*. The most important development in this regard, which is already in the process of materializing, is the adoption of a legislative framework harmonizing the rights of the defendant throughout the European Union.

This legislative framework is discussed in Chapter 6. The harmonization of criminal procedural law related to the rights of individuals in criminal proceedings is regarded as a seminal step towards a new model of criminal justice in the EU. As Mitsilegas points out, the formal attribution of legislative power in Article 82(2) TFEU constituted a breakthrough in this regard, as the directives adopted on this legal basis undoubtedly impact domestic criminal justice systems and the protection of fundamental rights therein – in the system as a whole, that is, as the scope of these instruments is not limited to EU-related cases. Through the autonomous interpretation of the broad and undefined concepts used therein, according to the author, “the Court of Justice will create a European legal culture of rights which Member States will be under a duty to accommodate” (p. 180). The development of a legislative framework on defence rights is warmly welcomed by the author. However, the justification given in the different directives is regarded as problematic, as they are adopted on the premise that they will enhance mutual trust. Mitsilegas encourages harmonization of procedural rights not because it will make mutual recognition easier, but because it will address the adverse effects of mutual recognition on the individual (pp. 156–158). In other words, harmonization of defence rights should take the perspective of the individual, not that of the State.

Mitsilegas exposes how many pre-Lisbon problems and challenges persist. At the same time, he draws attention to how the institutional “normalization” of EU criminal law, the growing importance of the Charter of Fundamental Rights, and the new legislative powers point in the direction of a transformation of justice in the EU, which is described in the conclusion (pp. 263–271). Apart from mutual recognition being complemented by harmonization as just

mentioned, an important development from the perspective of Member States that Mitsilegas points out is that different areas of EU law become increasingly interdependent. This leads to a new conception of compliance which is no longer focused on individual provisions, but on the EU system and its objectives as a whole. Also, the greater coherence that this interdependence brings about, makes the variable geometry of EU criminal law increasingly unsustainable. The transformation of justice might even be more important for the individual, who is becoming more and more central to European criminal law as growing heed is being taken to the rule of law and the protection of fundamental rights. If I understand Mitsilegas correctly, these developments are seen to already form the roots of the potential transformation of justice, whilst the “promise of rights” implies that there is more in store for the future.

This book presents a rich, detailed, comprehensive, yet at the same time coherent and manageable analysis. The book is characterized by a lucid and analytical writing style, and has many valuable references to the academic literature. Its critical engagement with the literature make it useful not only for established scholars in the field, but also for (graduate) students looking for inspiration for research projects. It is a highly valuable contribution to the study of European criminal law.

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