All Roads Lead to Rome: The New AFSJ Package and the Trajectory to Europe 2020

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Article

ABSTRACT

The article reflects on the trajectory of EU criminal law and the Area of Freedom, Security and Justice (AFSJ) after the Lisbon Treaty and the Stockholm Programme, in view of the upcoming "Rome Programme" (2015–2020). Herlin-Karnell identifies eight key points for the future: strengthening the rule of law as the backbone of AFSJ; adopting a holistic approach linking criminal law to the wider acquis; building mutual trust through mutual recognition; addressing border control and migration in relation to criminal law; regulating cybercrime and safeguarding data protection; ensuring effective application of the Charter of Fundamental Rights; dealing with opt-outs and differentiated integration; and clarifying the external dimension and role of EU agencies. The article concludes that the Rome Programme should serve as an opportunity to reaffirm rule of law and human rights as guiding principles for EU criminal law.

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When the Stockholm agenda was being negotiated in 2009, the negotiators faced the uncertainty that the Lisbon Treaty would never survive its initial failure of 2007 and thereby risked the same fate as the doomed Constitutional Treaty of 2005. Such a scenario would have ended the fast track to further EU integration in criminal law as a better route to pursue than the alternative, namely the Court's case law. Five years after the successful entry into force of the Lisbon Treaty and the Stockholm Programme, and with all the legal possibilities in place to move forward with this EU project, the political climate in the EU seems all the more difficult, and it is marked by intense and heated debate on the subject. The Commission's communication, however, on "The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union" indicates that there is reason for hope.[1] Most importantly, the document demonstrates that the EU's policy in this area has been largely streamlined with other EU polices, as EU criminal law has also been affected by the financial crisis.

The EU's area of freedom, security and justice is an area that has had to respond to this question more urgently than perhaps any other EU policy area. Not only is the AFSJ still the fastest expanding field in contemporary EU integration, but it is also a very sensitive field, dealing with the most delicate legal issues such as the fight against crime, security, fundamental rights of protection, and judicial cooperation. The Stockholm Programme, which entered into force in conjunction with the Lisbon Treaty, is already coming to an end in 2014. The transnational protocol nr 10 is likewise coming to an end and some Member States like the UK have to decide on their commitment to the Union and to criminal law (The UK's semi-permanent opt-out under Protocol 36 and hence the uncertainty are also coming to an end). This would indicate the beginning of something new: a novel era for AFSJ law.

This is certainly the hope of the Commission, which has set out its view in two communications: one dealing concretely with justice and home affairs and the other indirectly so in terms of the rule of law, which is of importance for the AFSJ.[2] Thus, for the first time, the AFSJ and the new multi-annual programme has been placed in the wider context of the future of Europe. 2020 is the EU's vision when all will get well. What then would not be more suitable than including the AFSJ in this schedule?

This brief contribution will offer some reflections on the future of AFSJ law and what the author considers to be the main challenges for EU governance in this area by offering eight key points for further reference in the future.

This article will focus on criminal law but also underline the importance of a holistic understanding of the AFSJ as a whole – not isolated but related to the EU acquis in its entirety while still being characterized by the core of its sensitive subject matter of criminal law and human rights protection.

I. Background

In December 2009, the Stockholm Programme was adopted in tandem with the entry into force of the Lisbon Treaty. Hence, it was adopted at a sensitive constitutional moment for EU integration, when the famous pillar structure of the EU was abolished and when the Court of Justice gained jurisdiction in the thorny legal area of crime, security borders, and the fight against terrorism. While the founding AFSJ council Programme, Tampere concluded in 1999 was groundbreaking in the sense that it adopted mutual recognition to the AFSJ (then under the former third pillar), Stockholm was more challenging in elaborating on the new legislative powers as granted by the Lisbon Treaty. Yet perhaps Tampere has been the most important document for the development of the AFSJ law ever, as it extended the mutual recognition template, as traditionally applied within the internal market, to the criminal law cooperation area. While mutual recognition within the AFSJ has been much criticized for its overemphasis on law enforcement and little focus on procedural

safeguards, it has had a remarkable effect on the "EU" indirectly harmonizing national criminal law and criminal procedure.

According to Art. 68 TFEU, the European Council "shall define the strategic guidelines for legislative and operational planning;" part of this planning involves the drawing up of a multi-annual agenda of points to be achieved in the AFSJ. This is well underway now. The European Council in its 27–28 June 2013 conclusions mandated the future Presidencies to start discussions on new strategic guidelines in the area of freedom, security and justice with a view to its June 2014 meeting. The intention is to agree on the new Post-Stockholm Programme (2015–2020) at the European Council on 26-27 June 2014. The new programme will be formally adopted under the Italian Council Presidency (July–December 2014) and may be called the "Rome Programme."[3]

With this contextual background in mind, I will set out my main concerns and suggestions for the future AFSJ programme in the following.

II. The New AFSJ Multi-Annual Programme

The underlying tone of the Commission's communication on the EU Justice and Home affairs Agenda for 2020 is that, in the 15 years that have passed since the Treaty of Maastricht and the complex pillar structure that previously marked EU criminal law, this area is finally on track as being intensively related to other EU policies. It has just taken a bit longer. A very recent Eurobarometer survey, "Justice in the EU" (November 2013), offers an interesting foray into the empirical reality of AFSJ culture in EU legal practice. The basic message of this survey is that the construction of the AFSJ has come a long way but is still far from its completion and, although fairly positive towards the EU enterprise, that there is still room for improvement when it comes to the efficiency of the judiciary.[4] Whilst the evaluation seems to confirm the common stereotypes – that Southern European countries distrust their judiciaries while the Nordic countries, Germany, the Netherlands, the UK, and Belgium are more positive towards their judicial systems – the results could, of course, also reflect the national cultures as to how the questionnaires were filled in.

In the following, I will set out eight key points that, in my view, are of crucial importance for the development of the AFSJ in the future Rome programme (if that is to be the name). Therefore, this reflection should be seen as a plea for the EU legislator and the judiciary to focus on certain central aspects.

III. Eight Key Points of Reference for the Future Regarding Criminal Law and the Drafting of a New Multi-Annual Programme

1. The rule of law and the AFSJ

It seems to be a tactical move on the part of the Commission to issue a communication on the rule of law in conjunction with its Europe 2020 communication for the AFSJ.[5] As rightly observed by the Commission, the rule of law is the backbone of any democracy and all Union activity. The Commission points out that where Member State mechanisms to secure the rule of law cease to operate effectively this endangers the functioning of the EU's need to protect this principle as a common value of the Union. It could be said that the rule of law encompassing the broader notion of "justice" is the basic constitutional principle on which other EU principles are based. The rule of law really is, therefore, the backbone upon which to base AFSJ cooperation. In addition, the rule of law is connected to the principle of legality in criminal law and to the principle of

conferred powers in EU law. The EU needs to be firm on its commitment thereto, as it is so closely related to the protection of human rights and the kind of criminal law that will emerge in 2020.

2. Holistic view: How different is the AFSJ from the rest of the EU *acquis*?

There is a constant need at the EU level to reconcile the complexity of EU constitutional law in general with the peculiarities of criminal law. As the Commission stipulates in its communication mentioned above,[6] there are no rights without effective remedies, and it is important to highlight the role of Art. 47 Charter on Fundamental Rights, which codifies these rights in the Treaty together with Art. 19 TFEU. To achieve a smooth operation of the enforcement system, the Commission proposes a holistic view of the consumer law acquis as a fundamental part of the AFSJ, which integrates civil law cooperation, criminal law cooperation, security and border control. In particular, the digital market and E-justice directives are of importance here, touching as they do on financial crime legislation and the question of trust in the market. Hence, the realization of an enforcement system of the Charter and effective judicial protection should constitute the starting point for any successful cooperation in the AFSJ. As Peers points out in his recent analysis of the new multi-annual programme, while there are frequent references to the Charter and human rights protection, there is not much discussion as to its enforcement.[7] This is an important point, as the enforcement of the Charter and the boundaries of Art. 51 clearly have important implications for the scope of fundamental rights protection vis-à-vis Member State autonomy in this area.

The point is that the AFSJ is not to be seen in isolation from the rest of the EU acquis but should be viewed holistically as a whole in the EU without denying the special features of AFSJ law. Criminal law, in particular, offers a delicate test case, dealing as it does with very sensitive issues of human rights protection and the deprivation of freedom as well as security and moral-philosophical issues.

3. Mutual recognition: Mutual trust is the bedrock upon which EU justice policy should be built[8]

The creation of trust is long-term fundamental construction work for the EU. Much of the judicial cooperation in this area is based on the principle of mutual recognition. The difficulty in this area is that the notion of trust has been a difficult parameter to monitor and initially was pushed in favor of justifying increased EU action and the adoption of instruments like the European Arrest Warrant in early cases such as Advocaten voor de Wereld.[9] In this case, the Court of Justice insisted that the EU judicial area for criminal law cooperation had sufficient mutual trust in order to justify the application of mutual recognition in this area. But a lot of water has passed under the bridge since then. In its recent communication, the Commission states that people are increasingly crossing borders and that they are increasingly frustrated with the cumbersome procedures. Interestingly, the Commission links this to the economic crisis and points out that, as a result, border crossing has affected the efficiency and capacity of some national legal systems and that this undermines trust. More trust is needed.

Therefore, in its communication the Commission sets out to focus on three key words: consolidate, codify, and complement. With this approach, the Commission means that it will focus on the need to uphold fundamental rights, meaning ensuring effective remedies and improving judicial training. Specifically, it emphasizes the need for digitalization as that facilitates access to justice. With codification, the Commission means that the need to bring the legislation enacted so far with regard to due process rights into one instrument would make it more accessible. Finally and of utmost interest, with “complement” the

Commission means that the EU should develop a common sense of justice linked to the broader question of values.

This neatly brings us to the fourth key point of this paper, Europe's justice deficit, namely that of border control and the new role of the criminal law. Accordingly, this is an area in which the question of values is put to the test.

4. Border crisis and relationship with criminal law and effectiveness

While this analysis is confined to the impact of the AFSJ developments in criminal law, it should not be denied that many of the key future challenges concern not only criminal law but also asylum issues, security, and border control. The migration crisis has hardly escaped anyone. At present it seems a little unclear how there can be a common European solidarity here when not more is being done at the political level. Moreover, from the perspective of criminal law, migration law is an interesting example of the application of criminal law in the new area. Increasingly often, the EU is now invoking criminal law sanctions as a preventive measure.

For example, in the *El Dridi* judgment,[10] the principle of effectiveness (as developed in EU criminal law) was relied upon by the European Court of Justice to define the competence and margin of discretion Member States have concerning the coercive measures that could be implemented in the context of the procedure for the return of illegally staying third-country nationals.[11] Here, the effectiveness principle was employed as a way of restricting competences in the sense that the Member State may not prevent the achievement of the objectives of the Returns Directive,[12] specifically as regards the implementation of an efficient policy of removal and repatriation of illegally staying third-country nationals.[13] Thus, there are good reasons to believe that the effectiveness principle will continue to play an important role in this area and help shape the constitutional contours of an AFSJ.[14]

5. EU regulation of cybercrime and data protection

Needless to say, this area is set to offer challenges in the future. The recent spying scandals and the transatlantic dimension of EU law in this area confirm the close relationship between the development of EU policies and politics. An example of a delicate measure in this area is the "European terrorist finance tracking system."[15] The proposal specifically concerns EU-US cooperation and the collection of data in the fight against terrorism and its financing. It illustrates the difficulties that the EU faces with regard to the adequate protection of data in the security context. Although cybercrime is the latest security buzzword, the need to fight it has been around since the advent of the Internet, and counter-action has been taking shape over the past ten years. During this period, the EU has been making significant efforts to develop a framework for dealing with cybersecurity in the EU area.[16] It has therefore drawn up a proposal for a directive to tackle this threat; this proposal is closely linked to the EU's fight against organized crime[17] and is based on Art. 83(1) TFEU, which covers computer crime in the broad sense.[18] The recently agreed upon Cyber Crime Directive is a legal guinea pig in this respect as regards how to reconcile an adequately high level of fundamental rights protection with the EU's insistence on and objective of achieving internal security.[19] In any case, perhaps the recent judgment in *Digital rights*, confirms a change of attitude by the Court of Justice as regards how far EU law can go in the name of 'effectiveness'. [20] The Directive under scrutiny authorized the gathering of data and far reaching surveillance mechanisms in order to ensure the effective fight against crime. The Court annulled the Directive on the grounds of breach of proportionality as it held that the Directive had a too sweeping generality and therefore breached, inter alia, the basic right of data protection as set out in the Charter of Fundamental Rights Article 8.

6. Fundamental rights and the Charter

The importance of the Charter for the future of EU criminal law cannot be underestimated and hence it has been touched upon throughout this brief reflection. As Peers points out in his recent analysis of the post-Stockholm agenda, any reference to ensuring the correct implementation of EU legislation and rhetorical commitments to the Charter mean nothing without the Commission committing itself to bringing about more infringement actions in such cases. In respect of due process rights, Art. 49 of the Charter provides a requirement of legality and proportionality in a more extensive way than the ECHR. Also, Art. 47 of the Charter guarantees the right to an effective remedy, as noted above, while Arts. 48-49 stipulate the presumption of innocence and the right of defense.[21] The latter provision also makes clear that the severity of penalties may not be disproportionate to the criminal offence. It is therefore likely that the binding status of the Charter will both be of significant symbolic importance and have a substantive impact on criminal law. The future will show how far-reaching the Charter is in light of the limitations set by Art. 51 Charter and it insistence on an implementation measure to trigger its application in the Member States.[22] In any case, it always applies to the EU institutions in all their activities and that is very important. Several important instruments have recently been adopted in this area such as the Directive on the Right of Access to Lawyer.[23]

7. Differentiation: the way forward?

Perhaps the most complex issue for the future, not dealt with by the Commission in its communication on Europe 2020 and the AFSJ, is that of the flexibility provisions.[24] As is well known, the UK, Ireland, and Denmark have negotiated a unique approach to the AFSJ project. This poses challenges not only for those trying to analyze the current state of play but also for national courts as well as the Court of Justice when applying EU constitutional principles. These Member States have the opportunity to opt out of criminal law cooperation provisions as provided for by the Lisbon Treaty and Protocols Number 21 and 22.[25] They can later opt in under the conditions set out in the protocol. In addition, Transitional Protocol No 36 contains specific rules that apply only to the UK and in which the UK must decide by 2014 whether it wishes to participate in remaining third pillar measures at all and whether it accepts the jurisdiction of the Court in this area.[26] The consequence of any opt-out (not participating in a measure) is that the Court of Justice will not have jurisdiction to monitor it and, furthermore (obviously), that the Member State is question is not participating. An opt-out also applies to any international agreement concluded by the Union in relation to the cooperation in question. In other words, an opt-out has serious consequences for the EU in general. Moreover, according to Protocol nr 22, Denmark has opted out from the AFSJ venture and participates in Schengen-related measures and pre-Lisbon third pillar instruments on the basis of international law as before; they continue to be binding and applicable to Denmark as previously, even if these acts are amended. It could be the case, however, that Denmark notifies the other Member States that it wishes to join the EU criminal law "project."

Clearly, this is bound to be a political decision and will be the cause of further complexity in the legal discussion on the AFSJ. Future case law must clarify what this tells us with regard to the scope of the Charter. The opt-out area and the concept of a multi-speed Europe is a testing ground for the AFSJ and the scope and function of the traditional EU constitutional principles.

8. External dimension of the AFSJ and growing importance of agencies

While the AFSJ sphere is becoming increasingly securitized, with an increasing mixing and mingling of the internal and external agenda, the number of actors in the AFSJ scene is increasing. The Commission has issued yet another communication "An open and secure Europe: making it happen," which follows the path set by the Stockholm programme and stresses the increasing importance of the EU's internal agenda.[27] As the Commission puts it: "steps taken to ensure freedom, security and justice in Europe are also influenced by

events and developments outside the EU." In other words, the external agenda shapes the internal agenda here.

In the context of Europe 2020, the global impact of the AFSJ has mostly been linked to consumer concerns and the digital agenda. As noted above, however, the digital agenda touches upon difficult issues of the balance between "fundamental rights" and the growing international surveillance trend. The external dimension to AFSJ law and EU criminal law is, however, of growing importance and closely linked to the transatlantic endeavours to fight terrorism and cybercrime. The growing role of agencies such as Eurojust and Europol are increasingly important agents in the AFSJ machinery, and their role raises issues of accountability, e.g., how to hold these agencies accountable in the absence of any concrete guidelines. The letter issued by the Director General of Justice and Home Affairs Council of the European Union is an interesting read in this regard.[28] Importantly, the letter stresses the potential of these agencies in contributing to the creation of a common culture in AFSJ law.[29]

IV. Within which parameters should the AFSJ navigate? Final remarks

The future Rome programme (if that will be the name) is by no means an end to the complexities faced by the EU in the AFSJ but instead the beginning of an even more perplexing era. It is still a safe bet that the future of EU criminal law and AFSJ law more broadly depends on the EU's ability to uphold and strengthen the rule of law. Instead of going in circles, the justice agenda should now lead the way towards the creation of a genuine justice area in criminal law (and other areas). Therefore, there is no need to cross the Rubicon (to borrow an expression in the AFSJ context from the House of Lords in the Dabas[30] case) as was done a long time ago and, most recently, in Rome 1957. The Rome programme should therefore be embraced as an opportunity to navigate back to basics through different means: a strong commitment to the rule of law and human rights protection as the guiding dictum in all AFSJ law. The future of EU criminal law, therefore, will largely depend not only on the politics within the EU's institutions but also on the level of sophistication among all those who practice or research the area as well as their capacity to influence the debate on how to shape the face of criminal law in 2020.

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1. COM (2014) 144 final, The EU Justice Agenda for 2020 – Strengthening Trust, Mobility and Growth within the Union↩
2. Ibid; see for an excellent analysis S. Peers, 'The next multi-year EU Justice and Home Affairs programme. Views of the Commission and the Member States', available at statewatch.org↩
3. For an analysis, see S. Peers, op. cit. (n. 2). See also letters from Commissioners C. Malmström and V. Reading available at http://www.statewatch.org/news/2014/mar/eu-com-post-stockholm.pdf↩
4. http://ec.europa.eu/public_opinion/flash/fl_385_en.pdf↩
5. COM (2014) 158 final, A new EU framework to strengthen the Rule of Law↩
6. COM (2014) 144 final↩
7. S. Peers, op. cit. (n. 2)↩
8. COM (2014) 144 final↩
9. *Advocaten voor de Wereld* [2007] ECR I-3633↩
10. Case-C-61/11, *El Dridi*, judgment of 28 April 2011 n.y.r. See also Case C-430/11 *Sagor*, judgment of 6 December 2012↩
11. On the interpretation of this Directive, see D. Acosta Arcarazo, 'The Returns Directive: Possible Limits and Interpretation' in K. Zwaan (ed.) *The Returns Directive: Central Themes, Problem Issues, and Implementation in Selected Member States* (Wolf Legal Publishers: Nijmegen), pp. 7-24; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. L 348, 24.12.2008↩
12. Directive 2008/115/EC, O.J. L 348, 24.12.2008, p.98↩
13. Case C-61/11, *El Dridi* judgment of 28 April 2011, n.y.r., para 41-43↩
14. On the role of effectiveness in criminal law, see E. Herlin-Karnell, *The Constitutional Dimension of European Criminal Law* (Hart 2012)↩
15. COM (2011) 429 final, A European Terrorist Finance Tracking System: available options↩
16. L. Buono, 'Gearing up the Fight against Cyber Crime in the EU: A New Set of Rules and the Establishment of the European Cyber Crime Centre' (2012), *NJECL*↩

17. Proposal for a directive on attacks against information systems, COM (210) 517↩
18. Proposal for a directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA↩
19. Directive 2013/40/EU, L 218/8 directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA. See also COM(2010) 517, Proposal for a Cybercrime Directive on attacks against information systems and repealing Council Framework Decision 2005/222/JHA↩
20. See case note E. Herlin-Karnell (2009), C-301/06, CML Rev and Joined Cases C-293/12 and C-594/12, Digital Rights Ireland, Judgment of 8 April 2014↩
21. In her recent opinion delivered on 18 October in Radu C-396/11 (para. 103), AG Sharpston, discusses the boundaries of Art. 49 of the Charter by stipulating that it would be interesting to explore the boundaries of these provisions within the context of Art. 3 ECHR, where the ECtHR has held that a grossly disproportionate sentence could amount to ill-treatment contrary to Art. 3 ECHR. The Court did not elaborate on this issue↩
22. See Case C-617/10 *Åkerberg Fransson,* Judgment of 26 February 2013, n.y.r., for a liberal interpretation of the scope of the Charter↩
23. Directive 2013/48/EU↩
24. See E. Herlin-Karnell, 'Constitutional Principles in the Area of Freedom, Security and Justice', in D. Acosta and C. Murphy, (eds.), Europe's Area of Freedom, Security and Justice (Hart Publishing 2014)↩
25. See, e.g., S. Peers, *EU Justice and Home Affairs* (Oxford, Oxford University Press, 2011); A. Hinarejos, J. Spencer and S. Peers, Opting out of criminal law: What is actually involved? Centre for European law Cambridge working paper 2012/1↩
26. See J. Piris, *The Lisbon Treaty, A Legal and Political Analysis* (Cambridge, Cambridge University Press, 2010) 199-200; P. Craig 'The Lisbon Treaty, Law, Politics and Treaty Reform' (Oxford, Oxford University Press, 2010) 341, E. Herlin-Karnell, op. cit. (n. 24)↩
27. COM (2014) 154 final, An open and secure Europe: making it happen↩
28. http://www.statewatch.org/news/2014/mar/eu-council-jha-agencies-post-stockholm-7313-14.pdf↩
29. Ibid↩
30. House of Lords in *Dabas (Appellant) v High Court of Justice, Madrid (Respondent)* (Criminal Appeal from Her Majesty's High Court of Justice) [2007] UKHL 6, 28 February 2007↩

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