A Game of Chance

The Future of the AFSJ

Elena E. Popa

eucrim
European Law Forum: Prevention • Investigation • Prosecution

ABSTRACT

Abstract: The article offers a critical reflection on the ongoing debate over the "Future of Europe" scenarios envisioned in the European Commission's White Paper of 1 March 2017. Five potential scenarios are described, which enable a peek into the future, and the article explores whether the European Union's status quo should change towards a new, ambitious vision or just continue muddling through. The desirability and feasibility of the most favoured scenario ("those who want to do more do more" – a multi-speed Europe) will be tested in the Area of Freedom, Security and Justice (AFSJ). It will be argued that the clash between the three supposedly interlinked notions of freedom, security, and justice is the main obstacle hindering more coherence and uniformity in this area. This will be demonstrated by analysing the "root of the problem," i.e., prison overcrowding.

AUTHOR

Elena E. Popa

Legal Intern at T.M.C. Asser Institute
and LLM Candidate
Vrije Universiteit Amsterdam

CITE THIS ARTICLE

Popa, E. E. (2018). A Game of Chance: the Future of the AFSJ. Eucrim – The European Criminal Law Associations' Forum. https://doi.org/10.30709/eucrim-2018-002

Published in eucrim 2018, Vol. 13(1) pp 42 – 49

https://eucrim.eu

ISSN:

I. Introduction

The five scenarios formulated in the European Commission's White Paper on the Future of Europe represent a potential peek into the future, and the following paragraphs will investigate whether the European Union's status quo should shift towards a new, ambitious vision or just continue muddling through. This paper will focus on the third scenario, i.e., a multi-speed Europe, which has been endorsed by the leaders of the big four EU Member States: Germany, France, Italy, and Spain. The purpose of this article is twofold: firstly, it tries to explore the feasibility of the third scenario envisioned in the European Commission's White Paper on the Future of Europe, i.e., "those who want to do more do more," and secondly, it examines and tests this scenario in the Area of Freedom, Security and Justice (AFSJ) by looking at European detention conditions. This particular focus will exemplify whether the current challenges can somehow be tackled more efficiently in the setting of a "coalition of the willing states."[1]

In the first section (below II.), the constitutional aspects of the EU, such as sovereignty and integration, will be touched upon, since it is also important to perceive the AFSJ in the broader context of European integration. After assessing the reality and impact of having a multi-speed AFSJ, the analysis will devote particular attention to the internal challenges that this single area faces. In the second section, I will argue that this common space has been built on a paradox, i.e., a form of "territorial unity"[2] based on three supposedly interlinked notions: freedom, security, and justice. Specifically, each of these three concepts will be associated with quantifiable issues such as the mutual recognition principle (based on mutual trust), fundamental rights, public security, and EU citizenship. It will be argued that the clash between the three supposedly interlinked notions of freedom, security, and justice constitute the main obstacle in achieving more coherence and uniformity in this European space. This will be demonstrated by looking at what I believe is the "root of the problem," i.e., prison overcrowding. Therefore, the second section (III.) tests the feasibility of the third scenario by taking a closer look at European detention conditions.

The impracticability of having a "multi-speed AFSJ," due to the potential tensions it might create among the Member States and their domestic legal systems, will become readily apparent. Examples will be provided to emphasize the spillover effects that poor detention conditions have, not only for the EU citizens but also for the Member States. Overall, the concerns voiced in this paper can be viewed in light of the current tug-of-war between the domestic and supranational levels, which in turn can be translated as an issue of "fragmented institutionalism."[3] The normative value of this paper will become evident when discussing three possible outcomes for the future of the AFSJ. It should be emphasized, however, that, in the end, it is up to the EU and its Member States to make this choice. It will be interesting to see which possibility will they favour: a multi-speed AFSJ, a utopian EU criminal law policy, or just a common EU legal culture?

II. The Future of the AFSJ

The European Commission released its "White Paper on the Future of Europe". on March 2017.[4] This guiding document sets out the main challenges and opportunities for Europe in the coming decade. Firstly, the paper analyses the "driving forces" of Europe's future. Secondly, it presents five scenarios on how the EU could evolve by 2025. This depends on how the Union responds to the on-going challenges. Moreover, these scenarios aim at creating a vision for the EU after UK's Brexit. The drafters of the paper did not, however, envision concrete actions or policy prescriptions. Thus, as *Armin Cuyvers* notes, these five scenarios are not mutually exclusive, which means that, in the end, a combination of the different scenarios can also be contemplated.[5] Even though the European Council was divided on the presented vision of a multi-speed EU (third scenario),

https://doi.org/10.30709/eucrim-2018-002

the leaders of Germany, France, Italy, and Spain – the "Big Four" – endorsed it. Therefore, it will be interesting to see whether this leads to a situation where diverging perspectives (e.g., in relation to security information, criminal evidence, transfer of prisoners, etc.) of the "willing States" clash. The following paragraphs will only consider this third option and takes the AFSJ as a testing area. We will explore the potential impact in the AFSJ should the idea of a multi-speed EU become a fully-fledged political effort.

1. Main Concerns

Under the proposed model of a "*coalition of the willing*", a group of countries deepen their cooperation in certain areas such as security or justice matters. The issue of having different speeds of integration within the EU means that, by advancing integration among some countries, questions regarding the cohesion of the EU will arise. The challenge may then translate into a situation in which policies of integration produce a hostile environment within the EU, especially among those states that were not included in the process. In order to understand the potential consequences of the third scenario, one needs to first become familiar with the concept of sovereignty, which can be viewed as a claimed status that is usually asserted when this status is challenged. Here, it is important to note that *Cuyvers*, while discussing the potential conflict between sovereignty and integration, has tried to emphasise that this tension should be actually exposed as a clash between two strands of sovereignty, i.e., internal (the people) and external (the state) sovereignty.[6]

This relationship is described in the sense of a confederal notion of sovereignty. By making a comparison with the US federal system, *Cuyvers* highlights the fact that confederal systems, such as the EU, incorporate extra-state and even non-state entities into the national constitutional framework for the delegation of sovereign powers. As a result, the state loses some of its sovereignty, but the people do not lose their sovereignty. He therefore argues that European integration does not conflict with sovereignty as such but only with external concepts of sovereignty. He further states that we are witnessing a relative decline of external sovereignty and a relative ascendance of internal sovereignty.[7] In the AFSJ, one could infer this from the 2017 EU Citizenship Report, which envisions that the vast majority's belief leans towards a more common EU action in order to address security threats.[8]

The external sovereignty claim has been at the core of the AFSJ since its inception.[9] This was due to its link with sensitive areas such as criminal law, security, migration, and border control, which are closely related to the nation-state. As a result, Member States were unwilling to abandon the intergovernmental structure entirely. [10] Particularly, since the drafting of the Maastricht Treaty, the Member States have tried to keep EU criminal law outside the supranational arena.[11] After the Amsterdam Treaty, the AFSJ emerged, and it was the Tampere Council conclusions in 1999 and the subsequent Hague and Stockholm programmes[12] that established the foundations for a European criminal law. The resulting institutional arrangement reflects a compromise, something that *Stephen Coutts* describes as a "halfway house between supranationalism and intergovernmentalism."[13] The Lisbon Treaty has been perceived as a step closer to constructing the AFSJ as a common space and, eventually, more as a European public order.[14] Even after its consolidation and incorporation into the supranational architecture, the AFSJ was seen by many as lacking a "*particular finalité.*"[15] Beyond abstract commitments, EU criminal law aspects are addressed in a fragmented way, and one can easily observe that there is no general broad criminal policy theme.[16]

Therefore, the main concerns for having a multi-speed Europe, in which only the willing States get to be involved, stem from the very fact that the framework in which it takes place cannot be characterized by uniformity and coherence, and it forces one to choose between either the EU or the Member States.[17] A European criminal justice system is a vital part of securing the European public interest and, as a result, it should be more than the sum of the parts its Member States have endowed it with. By viewing European

criminal law as set within a broader context that of a justice system, a clear condition that this new system requires is a quasi-constitutional setting. The current European criminal justice system can be regarded as undermining the constitutional relationship governments have with their citizens.[18] As mentioned above, this occurs because, in the AFSJ, the external sovereignty component has often clashed with the internal one, and this in turn allowed national governments to create a forum in which their one-sided criminal policy concerns dominate. Therefore, this policy area essentially remains one driven purely by political will via *ad hoc* action (e.g., unanimity requirements and emergency break provisions) and, as such, the current structure ignores the revolutionary character of EU criminal law. The next section will discuss these issues and their consequences in light of a multi-speed AFSJ.

2. AFSJ at a Crossroads Between Sovereignty & Integration

As we have seen, by applying the multi-speed scenario to the current AFSJ mechanism, one could argue that the current structure of the system will not be affected *per se*; thus, the idea of deeper cooperation will be preserved in the future. A possible outcome would be that the Member States are unreceptive to the overall concept of deeper integration, especially when asked to support certain areas of AFSJ cooperation.[19] However, it is clearly not what the current situation (i.e., EU crisis on different fronts such as immigration flows and detention, threatened EU financial interests, overcrowded prisons, etc.) demands. Ostensibly, by allowing the possibility of having too many "speeds" that go in different directions, it seems that the AFSJ will become too prone to differentiation and exceptionalism.[20]

Thus, it can be argued that the way forward is not to have a small group of countries that advance integration among themselves but to move towards a new criminal justice system in the AFSJ that takes into account not only cultural diversity (of the various national systems, both for practical and constitutional reasons)[21] but also other imperative needs such as fundamental rights and security. Consequently, rather than dealing with the traditional questions such as the division of competences between the Union and its Member States, one should pay attention to questions that are more directly related to the EU constitutional structure, e.g., the balance between fundamental rights, on the one hand, and the States' interest in public order, security, and migration control, on the other.[22]

In the broader EU context, the question of conferral of powers is much more than the mere consideration of whether a law was enacted legitimately.[23] This is mostly due to the existence of EU law that builds and relies extensively on the willingness of its Member States to accept the supranational character of the Union. Consistency, however, stems directly from the principle of conferral, and a lack of consistency in the EU, especially in the AFSJ, might result in legal uncertainty, which in the context of the Court of Justice of the European Union (CJEU) case law, would have an adverse effect on, for example, the rights of EU citizens and effective judicial protection.[24]

Therefore, as noted by *Neil Walker*, one cannot think of the AFSJ as forming a "natural unity" especially in terms of a clearly defined project.[25] As such, the AFSJ is sometimes seen as a *fictio iuris*, which reflects this ambiguous idea that, irrespective of the new EU competences in this area, they "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security" (Article 72 TFEU).[26] However, configuring the AFSJ to what *Massimo Fichera* calls "a space in which imperialistic and functional elements are disguised under a thin veil of normativity"[27] may be difficult to achieve, especially if one disregards the balance between the three "common constitutional commitments" of freedom, security and justice.[28]

III. "A European Public Order:" Moving Towards an EU Criminal Law Policy?

Despite the above-mentioned hurdles, the AFSJ has constantly evolved into a complex set of institutions, agencies, legislative initiatives, and principles. This, however, is in sharp contrast with the loss of legitimacy and appeal that the EU is currently experiencing.[29] The following paragraphs will offer a visionary approach by focusing on the more sensitive area of criminal law. It will be argued that there is an immediate need to construct an EU criminal law policy so as to avoid the "legislative chaos" inherent in the "patchwork structure" of the AFSJ.[30] In order to understand this argument, it is important to first look at the clash between three supposedly interlinked notions of freedom, security, and justice. By doing so, I will show why this conflict constitutes the main obstacle in achieving more coherence and uniformity in this European space.

I will demonstrate the impracticability of having a multi-speed AFSJ by testing and applying this hypothesis to the issue of detention conditions. The feasibility of applying the third scenario to the current AFSJ structure will be assessed by looking at prison overcrowding which I consider the "root of the problem". Potential tensions might be created among the Member States and their domestic legal systems. The normative value of this assessment will become evident when discussing three (possible) future outcomes. Thus, the following will consider alternative options to the multi-speed scenario in order to avoid a fragmented system subject to the principle of attributed powers.[31]

1. The Challenge of Balancing Freedom, Security & Justice

The AFSJ is a unique concept that has the goal of creating and strengthening the European judicial area by combining two different elements: sovereignty and integration.[32] However, in order to have an efficient, coherent, and fair system of police and judicial cooperation there is a need for a more coordinated approach. A successful policy that leads to such an outcome requires a strong foundation of mutual trust,[33] which in turn requires a certain degree of approximation in order to be achieved.[34] Even though the AFSJ is characterised as an important step in the process of EU constitutionalisation, it seems that its supposedly interconnected notions of freedom, security and justice have yet to acquire an autonomous meaning and weight in this process.[35] Striking a balance between these values is an important step towards constructing the AFSJ as a "legal and political, but mainly as a moral space,", as *Fichera* puts it.[36] This is a difficult task for both the EU and the Member States, since one can clearly observe the EU's insistence on adopting a dominant security approach.[37] Many scholars have argued that the keystones of EU integration (such as EU citizenship, the four freedoms, the uniform and effective implementation of EU law, etc.) are "exposed to the expansion of the security discourse."[38] The prevalent idea that the other two values, freedom and justice, need to be seen "through the lens of security"[39] has to be considered in order to understand how this will affect the multi-speed AFSJ.

If one considers the leading academic perspective, i.e., that the AFSJ is permeated by a security discourse,[40] one can observe that the security dimension becomes the precondition for the exercise of free movement (the "freedom" aspect of the AFSJ).[41] However, while free movement rights can only be enjoyed if they are not threatened or undermined by criminality, these rights also need to be secured, i.e., free from measures that arbitrarily constrain individual liberty. One can immediately observe how narrowly the concept of freedom has been constructed in the AFSJ. This is also the case for the notion of justice, which has been perceived mostly in procedural terms, and it has been frequently seen to form "a core part of the rule of

law."[42] Unsurprisingly, the rule of law is considered an EU constitutional principle and is listed in the Treaty as one of the foundational notions on which the EU has been built.[43] It is also closely connected to the constitutional question concerning the objectives the EU should safeguard and the limits set by the Treaty.[44] Yet, the substantive legitimacy of a political community is premised not only upon the establishment of the rule of law but also upon subjecting it to popular self-determination, i.e., a people's freedom to determine one's own constitutional form.[45] Therefore, the AFSJ should be seen in the context of EU constitutionalisation as "a way of dealing with Europe's complexity and multilevel realities."[46] The following section will elaborate on the "root of the problem," i.e., having a multi-speed AFSJ and, as a result, some alternatives will be suggested.

2. The Challenge of Prison Overcrowding as a Testing Ground

In April 2001, the European Court of Human Rights (ECtHR) took a major turn in direction in its case law. In response to *Peers v. Greece*,[47] the Court declared that unsatisfactory detention conditions (e.g., overcrowding resulting in poor living space, inadequate ventilation, and lack of hygiene) could constitute a breach of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[48] This judgment made clear that the Member States of the Council of Europe may run the risk of being convicted in case they fail to tackle the problem of overcrowding. Moreover, at the EU level, the prison overcrowding relates to mutual recognition of judgments, with the CJEU having to deal with this issue on several occasions.[49] It has done so by balancing fundamental rights against the mutual recognition principle. In the criminal justice area, this can become problematic, since it fails to appreciate that security interests need to present a necessary and proportionate deviation from a fundamental right, as becomes clear from Article 52(1) of the Charter.[50] It will be argued that, despite the case law on the matter, overcrowding still represents a key challenge in many European prisons.[51] As a result, the following paragraphs will also take into account the debate on whether detention conditions may be considered an aspect of criminal procedure and therefore something that falls within the scope of EU competence to approximate.[52]

In order to understand the widespread problem,[53] attention should be given to the harmful effects, both in quantitative and qualitative terms. Quantitatively, prison overcrowding is often seen as "the mismatch between prison capacity and the number of prisoners to be accommodated."[54] Qualitatively, the impact of overcrowding on the prisoner can be described as "a subjective feeling of insecurity and insufficient living space" and with respect to the staff as "a sense of overload and uncontrollable situations."[55] Thus, the harmful effects affect not only the prison administration but also the prisoners, staff, and society as a whole. As noted in Recommendation Rec (99)22 concerning prison overcrowding of the Council of Europe, these issues "represent a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions." It is important to reiterate the urgency of remedying this problem, since there are various risks pertaining to both fundamental rights and internal security of the EU. For example, in July 2017, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has publicly stressed the serious consequences of overcrowding for prisoners and staff due to the Belgian authorities' failure to comply with existing prison capacity standards.[56]

It is now necessary to examine this issue in light of the mutual recognition principle and fundamental rights. Accordingly, the application of the mutual recognition principle in the AFSJ implies a certain degree of automaticity, in the sense that judicial decisions taken in one Member State should be accepted in another Member State. In the criminal law area, the CJEU interpreted this principle as meaning that "Member States are in principle obliged to give effect to a European Arrest Warrant."[57] These definitions are closely related to

the goals of free movement and the integration method of home state control, which means that, once the requirements of the home state are fulfilled, the (judicial) product or person moves freely.[58] In the context of surrender procedures, one needs to stress the Court's recent shift in approach,[59] whereby mutual recognition can be limited when there is a risk of a human rights violation (e.g., in case a person needs to be surrendered to a Member State that has serious overcrowding issues). However, this limitation has been constructed as an additional non-execution ground based on fundamental rights in the Framework Decision on the European Arrest Warrant. This may become a problematic situation that has direct effect on EU measures and judicial cooperation, since, according to the mutual trust principle (the corollary of mutual recognition), there is a presumption of compliance with international obligations (including fundamental rights).[60]

In terms of fundamental rights, the issue of overcrowding is considered a significant source of inhuman and degrading treatment.[61] This has also been reiterated by the ECtHR.[62] For example, if there is a risk that the requested person (under a EAW) will be subject to such treatment, the executing authorities need to postpone the warrant until the issuing authority has provided assurances that eliminate the risk.[63] Such a mechanism is controversial for two reasons. First, by relying on assurances, one involuntarily creates two classes of EU citizens, i.e., those that are detained in adequate conditions and those that remain in inadequate conditions because they were not arrested abroad.[64] Second, by requesting assurances (i.e., by consulting ECtHR case law and UNHCR reports), the competent national authorities are encouraged to act as "delegates for the application of European fundamental rights law."[65] Thus, by attributing judicial review powers to cases of potential human rights violations, it allows national authorities to transgress into their counterparts' legal system. This in turn might become a source of great tension among the Member States, which, until recently, were used to adhering to mutual recognition based on trust.

IV. Conclusions

In the early 90s, at the inception of the AFSJ, few would have imagined that this area would go so far in terms of both material scope and legislation, especially in such a short time.[66] As such, the AFSJ can be broadly conceptualized as the realization of the internal market principle of free movement, along with associated concerns as to individual rights.[67] Beyond the bare AFSJ label, however, there is not much coherence immediately apparent, in the sense of an attempt to construct a new policy out of the Member States' diverse parts.[68] In the context of a multi-speed scenario, it has been seen that the Member States may be unreceptive to the overall concept of deeper integration, especially when asked to support other areas of AFSJ cooperation. This is because such cooperation can be perceived and presented as what *Eleanor Sharpston* calls "an enlightened defence of their national sovereignty," rather than "the undesirable pooling of national sovereignty within a post-nation state universe."[69]

Some argue that, in order to remedy the current challenges, the EU needs to shape an EU criminal law policy. Some scholars argue that, by having a common criminal policy, the EU will be able to guide legislative development and, as a result, reflect on the goals of criminal law, also in light of social and political consideration.[70] Others[71] advocate a purely legalistic approach. However, as we have seen there are a number of challenges (i.e., the principle of conferral, the balancing of the three notions "freedom, security and justice", and the issue of coping with diversity) that the development of an EU criminal law policy faces in light of the specific EU context. Thus, the main point is that the constitutional fencing of asymmetry stemming from differentiation has to be counterbalanced against EU's political nature and its irregular justifiability.[72]

Given the multiple actors involved, the challenge of uniform implementation, while ensuring respect for diversity, is pressing and urgent. For this reason, I propose that the European Council should take up the task of drafting a single European criminal law policy. According to the Treaty and in particular Article 68 TFEU,[73] the European Council would be the most evident choice for drafting a global approach in relation to an EU criminal policy, since it could make the required political choices after a multidisciplinary consultation of all stakeholders involved, including practitioners. On the other hand, one can infer from the strategic guidelines of June 2014[74] that the European Council has radically changed its approach by choosing not to focus on an ambitious project for the AFSJ. While the Stockholm Programme emphasized the need for harmonisation of EU substantive criminal law, the European Council Conclusion contained minimal – if any – references to criminal law harmonisation. This new, limited approach may pose problems for a more active European Council in the field of EU criminal policy. This discussion is still in its early stages, and it is still not known whether the Member States will perceive this as an intrusive option that challenges respect for diversity. However, a less intrusive approach would be to develop a common EU legal culture among criminal justice practitioners with the help of the European Judicial Training Network,[75] whereby mutual trust would be strengthened across all levels of the national criminal justice system. Therefore, it remains to be seen which choice the EU and its Member States will favour: will it be a multi-speed AFSJ, a utopian EU criminal law policy or just a common EU legal culture?

---

1. T. Wahl, "News Report on the European Union" in: *eucrim* 1/2017, p. 3 (ID=1701002).↩
2. M. Fletcher, E. Herlin-Karnell, and C. Matera (eds.), *The European Union as an Area of Freedom, Security and Justice*, 2017, pp. 39–40.↩
3. *Ibid*; Fragmentation in the AFSJ is understood, more broadly, as three things: Firstly, this EU concept contains a number of distinct policies. Secondly, fragmentation results from the pillar structure of the Amsterdam and Lisbon treaties. Thirdly, fragmentation results from a variable geometry, as not all Member States participate in all the fields falling within the AFSJ; See further B. Martenczuk, "Variable Geometry and the External Relations of the EU: The Experience of Justice and Home Affairs", in: B. Martenczuk and S. van Thiel (eds.), *Justice, Liberty, Security: New Challenges for EU External Relations*, 2008, pp. 493–523.↩
4. Available at: https://ec.europa.eu/commission/publications/white-paper-future-europe_en (last accessed on August 3, 2017).↩
5. Available at: http://leidenlawblog.nl/articles/five-scenarios-for-europe-understanding-the-eu-commissions (last accessed on August 3, 2017).↩
6. A. Cuyvers, The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU, 2013, pp. 312 et seq.↩
7. Ibid.↩
8. T. Wahl, *op. cit.* (n. 1).↩
9. For more information on the development from the intergovernmental AFSJ to today's AFSJ, see S.D. Coutts, "The Lisbon Treaty and The Area of Freedom, Security and Justice as an Area of Legal Integration", *Advanced Issues of European Law*, 2011, p. 93; see also J. Monar, "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation" (1998) 23(4) *EL Rev,* 320; H.J. Laski, *The Foundations of Sovereignty and Other Essays,* 1921), 314; N. Walker (ed.), *Sovereignty in Transition,* 2006, pp. 229 et seq.↩
10. A.R. Glencross, "Federalism, Confederalism and Sovereignty Claims: Understanding the Democracy Game in the European Union", in: R. Adler-Nissen, T. Gammeltoft-Hansen (eds.), *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond*, 2008, p. 3; See also Werner and de Wilde, 'The Endurance of Sovereignty' *European Journal of International Relations*, 2001.↩
11. E. Herlin-Karnell, 'The Integrity of European Criminal Law Co-operation: The Nation State, The Individual and The Area of Freedom, Security and Justice' in: F. Amtenbrink, P.A.J. van den Berg (eds.), *The Constitutional Integrity of the European Union*, 2010, p. 237.↩
12. *Ibid*, p. 239; See also Tampere Conclusions, paras. 33 and 53 ('Tampere European Council: Presidency Conclusion') 15 and 16 October 1999, The Hague Programme, paras. 33–32 ('The Hague Programme: Strengthening freedom, security and justice in the European Union', O.J. C 53, 3.3.2005, 1–14; Stockholm Programme, paras. 3.1.1. and 3.3.1. ('The Stockholm Programme: An open secure Europe serving and protecting citizens', O.J. C 115, 4.4.2010, 1–38↩
13. S.D. Coutts, The Lisbon Treaty and The Area of Freedom, Security and Justice as an Area of Legal Integration, *Advanced Issues of European Law*, 9th Session Dept. of Law, EUI Dubrovnik, April 2011, p. 92.↩
14. *Ibid*; The AFSJ has been often seen as a "European Public Order." For more details, see Kaunert, 'The Area of Freedom, Security and Justice: The Construction of a "European Public Order"' (2005) 14(4) *European Security,* 459; See also H. Lindahl, 'Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity' (2004) 29(4) *EL Rev,* 461.↩
15. N. Walker 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in N Walker (ed.), *Europe's Area of Freedom, Security, and Justice,* 2004, 5; See also S.D. Coutts, The Lisbon Treaty and The Area of Freedom, Security and Justice as an Area of Legal Integration, *Advanced Issues of European Law*, 9th Session Dept. of Law, EUI Dubrovnik, April 2011.↩
16. A. Weyembergh, and I. Wieczorek, 'Is there an EU Criminal Policy?' In R. Colson and S. Field (eds.), *EU Criminal Justice and The Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice*, 2016, p. 44 et seq.↩
17. A. Cuyvers (2013), *op cit.*(n. 6) p. 450.↩
18. M.L. Wade, 'Why some old dogs must learn new tricks' in: R. Colson, and S. Field (eds.), EU Criminal Justice and The Challenges of Diversity: Legal Cultures in the Area of Freedom, Security and Justice, 2016, p. 81.↩

19. C. Gomez-Jara Diez, *European Federal Criminal Law: The Federal Dimension of EU Criminal Law* (Cambridge-Antwerp-Portland: Intersentia, 2015), p. 229. The author reiterates here that "the best evidence of the need for change is that the existing mechanisms have not provided adequate protection in the past."↩
20. S. Blockmans, *Differentiated integration in the EU from the inside looking out* (The Centre for European Policy Studies, Brussels, 2014) p. 107; See also S. Carrera and G. Florian, 'The Reform Treaty & Justice and Home Affairs. Implications for the Common Area of Freedom, Security & Justice', CEPS Policy Brief No. 141, *Centre for European Policy Studies*, Brussels, 2007, p. 8.↩
21. A. Weyembergh et al. (2016), *op. cit.* (n. 16) p. 36.↩
22. S. Blockmans (2014), *op. cit.* (n. 20), p. 92.↩
23. E. Herlin-Karnell, 'Europe's Area of Freedom, Security and Justice Through the Prism of Constitutionalism: Why the EU Needs a Grammar of Justice to Improve Its Legitimacy', *WZB Berlin Social Science Center*, 2014, p. 11↩
24. S. Blockmans (2014), *op. cit.* (n. 20) p. 33; See also Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Commission, Council and United Kingdom v. Yassin Abdullah Kadi*, 19 March 2013; Advocate General Bot opined that the principle of judicial review laid down by the CJEU in *Kadi I* requires further clarification.↩
25. N. Walker (ed.), *Sovereignty in Transition* (Hart Publishing 2006), pp. 229 et seq.↩
26. R.A. Wessel, L. Marin, C. Matera, 'The External Dimension of the EU's Area of Freedom, Security and Justice' in C. Eckes and T. Konstadinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, 2011, p. 274.↩
27. M. Fichera, 'Sketches of a theory of Europe as an Area of Freedom, Security and Justice' in M. Fletcher, E. Herlin-Karnell and C. Matera, *The European Union as an Area of Freedom, Security and Justice*, 2017, p. 44.↩
28. *Ibid*, See also A.H. Gibbs, Constitutional Life and Europe's Area of Freedom, Security and Justice (Ashgate Publishing, Ltd., 2011).↩
29. For further details, see Communication from the Commission, The EU Justice Agenda for 2020: Strengthening Trust, Mobility and Growth within the Union, Strasbourg, 11 March 2014, COM (2014) 144 final, para.2: "Since the entry into force of Lisbon Treaty […] substantial progress has been made towards a better functioning of the common area of justice" and para. 5: "by 2020, justice and citizens' rights should know no borders in the EU."↩
30. M. Delmas-Marty, 'Introduction: Objectifs et méthods', in M. Delmas-Marty, U. Sieber and M. Pieth (eds.), *Les Chemins de l'harmonisation pénale-Harmonising Criminal Law*, 2008, pp. 19–31, see in particular p. 21.↩
31. A. Weyembergh et. al. (2016), *op. cit*. (n. 16), p.37.↩
32. F. Spiezia, 'The Coordination of Investigations at International Level: Towards a World Public Prosecutor?', in: S.Muller, S. Zouridis, M. Frishman and L. Kistemaker (eds.), *The Law of the Future and the Future of Law*, 2011, p. 654.↩
33. Mutual trust is the corollary of mutual recognition. See, for example, V. Mitsilegas, '*EU Criminal Law after Lisbon: Rights, Trust and the Transformation of Justice in Europe*', 2016, p. 126; V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual', 31 *Yearbook of European Law*, 2012, p. 319; H. Battj, E. Brouwer, P. de Morree and J. Ouwerkerk, *The principle of Mutual Trust in European Asylum, Migration and Criminal Law Reconciling Trust and Fundamental Rights*, Meijers Committee (Utrecht, the Netherlands, FORUM, Institute for Multicultural affairs, December 2011), pp. 40–41.↩
34. F. Spiezia (2011), *op. cit.* (n. 32) p. 661.↩
35. M. Fichera (2017), *op. cit.* (n. 27) p. 36.↩
36. *Ibid*, p. 35.↩
37. *Ibid,* See also M. Fichera (2017), *op. cit.* (n. 27) p. 35 et seq.↩
38. *Ibid*; See also D. Kostakopoulou, "The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue" in C. Barnard (ed.), *The Fundamentals of EU Law Revisited*, 2007, p.174.↩
39. For example, the Vienna Action Plan [1999] O.J. C 19/1, 23 January 1999, para. 6: "which considers that freedom includes the 'freedom to live in a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power […] to combat and contain those who seek to deny or abuse that freedom"; On the expansive nature of security, see further M. Fichera, 'Security issues as an existential threat to the community, in: M. Fichera and J. Kremer (eds.), *Law and Security in Europe: Reconsidering the Security Constitution*, 2013, p. 85.↩
40. For more information about the security discourse and how the concept has been defined, see B. Hudson, S. Ugelvik (eds.), *Justice and Security in the 21st Century: Risks, Rights and the Rule of Law*, 2012, pp. 200 et seq.; See also M. Trybus and N.D. White, 'Conclusions on the Current State of European Security Law' in M. Trybus and N.D. White (eds.), *European Security Law*, 2007, p. 354.↩
41. M. Fichera (2017), *op. cit.* (n. 27) p. 38.↩
42. S.E.M. Herlin Karnell, 'Two Conceptions of Justice in EU Constitutionalism: The shaping of security law in Europe', Inaugural lecture delivered on the 29 October 2014, Vrije Universiteit Amsterdam, p. 11; See also A. J. Williams, *The Ethos of Europe: Values, Law and Justice* , 2011.↩
43. S. D. Scott, Law *After Modernity*, 2013.↩
44. Consolidated Version of the Treaty on European Union, 2010 O.J. C 83/01, Article 2.↩
45. M. Fichera (2017), *op. cit.* (n. 27) p. 38; See also M. Fichera, 'Criminal law beyond the state: The European model' (2013) 19 *European Law Journal* 174, p. 193.↩
46. Ibid.↩
47. ECtHR, 19 April 2001, *Peers v. Greece*, Appl. No. 28524/95.↩
48. See, e.g., ECtHR 8 January 2013, *Torreggiani and others v. Italy*, No. 43517/09; ECtHR 16 July 2009, *Sulejmanovic v. Italy*, No. 22635/03; ECtHR 22 October 2010, *Orchowski v. Poland*, No. 17885/04; ECtHR 20 January 2009, *Slawomir Musial v. Poland*, No. 28300/06; ECtHR 14 September 2010, *Affaire Florea v. Romania*, No. 37186/03; ECtHR 8 November 2012, *ZH v. Hungary*, No. 28973/11; and ECtHR 19 April 2001, *Peers v. Greece*, No. 28524/95↩
49. ECJ, 5 April 2016, joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu;* ECJ, 15 March 2017, case C-528/15 *Al Chodor and Others*; ECJ, 21 December 2011, joined Cases C-411/10 and C-493/10, *N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform.*↩

50. Wouter van Ballegooij, The Nature of Mutual Recognition in European Law: Re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area, 2015, pp.160–161.↩
51. See the study 'Prison Overcrowding and Alternatives to Detention', carried out by the University of Ferrara et al. (<http://www.prisonovercrowding.eu/en/about-the-project>) and the Council of Europe's Annual Penal Statistics, also known as the 'SPACE programme' (http://wp.unil.ch/space/), which collects data on imprisonment and penal institutions throughout the Council of Europe Member States.↩
52. A. Weyembergh, I. Armada and C. Briere, European Added Value Assessment The EU Arrest Warrant: Critical Assessment of the Existing European Arrest Warrant Framework Decision (Available at: http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/510979/IPOL-JOIN_ET(2013)510979(ANN01)_EN.pdf) Annex I, Research Paper, p. 63.↩
53. For an extensive analysis of prison overcrowding and how to remedy this situation, see the study by H. de Vos, E. Gilbert, I. Aertsen, *Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level*, Leuven Institute of Criminology, p. 9; See also http://www.prisonovercrowding.eu/en (last accessed on August 14, 2017).↩
54. Prison overcrowding and prison population inflation, recommendation N°R (99) 2230 September 1999 and the report prepared with the assistance of A. Kuhn, p. Tournier and R. Walmsley, coll. Legal Issues.↩
55. K. Beyens, S. Snacken and C. Eliaerts, Barstende muren. Overbevolkte gevangenissen: omvang, oorzaken en mogelijke oplossingen, 1999.↩
56. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), Public Statement concerning Belgium, Strasbourg, 13 July 2017, pp. 2 et seq.↩
57. Van Ballegooij (2015), *op. cit.* (n.50), p. 332; See also M. Maduro, 'So Close and Yet so Far: the Paradoxes of Mutual Recognition', 14(5) *Journal of European Public Policy* 814, 2007, p. 820.↩
58. W.van Ballegooji and p. Bard, 'Mutual Recognition and Individual Rights: Did the Court get it Right?' 7(4) *New Journal of European Criminal Law* (2016), p. 453.↩
59. ECJ, 5 April 2016, joined cases C-404/15 and C-659/15 PPU *Pal Aranyosi and Robert Caldararu;* This judgment has been praised for its individualistic approach, since the Court has been strongly committed in its previous case law to an effective surrender regime based on mutual recognition and mutual trust. For more information on the previous approach, see: Case C-303/05 *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, EU:C:2007:261; Case C-123/08 *Dominic Wolzenburg*, EU:C:2009:616; *Opinion 2/13*.↩
60. Van Ballegooij (2015), *op. cit.* (n.50) p. 455.↩
61. CPT was the first to consider it in light of fundamental rights; See further H. de Vos, E. Gilbert, I.Aertsen, *Reducing prison population: Overview of the legal and policy framework on alternatives to imprisonment at European level*, Leuven Institute of Criminology, p. 9.↩
62. ECtHR, 6 March 2001, *Dougoz v. Greece* (App. No. 40907/98); 15 July 2002, *Kalashnikov v. Russia* (App. No. 47095/99); 16 July 2009, *Sulejmanovic v. Italy* (App. No. 22635/03).↩
63. Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, paras. 88–89.↩
64. Van Ballegooij (2015), *op. cit.* (n.50) p. 456.↩
65. Joined Cases C-404/15 and C-659/15 PPU *Pál Aranyosi and Robert Căldăraru*, para. 89; See also I. Canor, 'My Brother's Keeper? Horizontal Solange: An ever closer Distrust among the People of Europe', *Common Market Law Review* 50, p. 413.↩
66. This area of EU law was initially called 'Justice and Home Affairs' in the Treaty of Maastricht, 29 July 1992, O.J. C 191/1.↩
67. G. Conway, 'The Future of a European Public Prosecutor in the AFSJ' in M. Fletcher, E. Herlin-Karnell and C. Matera, *The European Union as an Area of Freedom, Security and Justice* 2017, p. 194↩
68. N. Walker, 'In search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice*, 2004.↩
69. E. Sharpston, 'The Future of the Area of Freedom, Security and Justice' in M. Dougan, S. Currie (eds.), *50 years of the European treaties: looking back and thinking forward,* 2009, p. 220.↩
70. A. Weyembergh, et.al(2016), *op. cit.* (n. 16), p. 37; See also C. Roxin, Kriminalpolitik und Strafrechtssystem, 1970.↩
71. F. von Listz, *Der Zweckgedanke in Strafrecht* (1882), translated into Italian by A.A. Calvi, *La teoria dello scopo nel dirrito penale*, 1962.↩
72. F. Amtenbrink and D. Kochenov, 'Towards a more flexible approach to enhanced cooperation', in A. Ott and E. Vos (eds.), *50 years of European Integration: Foundations and Perspectives*, 2009.↩
73. According to this provision, "The European Council shall define the strategic guidelines for legislative and operational planning within the AFSJ."↩
74. Conclusions of the European Council of 26 and 27 June 2014, EUCO 79/14, 27 June 2014.↩
75. For more details on how judges and legal practitioners can be trained (e.g., in human rights education) so as to strengthen trust among national authorities, see European Parliament In-Depth Analysis on '*The Training of Judges and Legal Practitioners: Legal and Parliamentary Affairs Justice, Freedom and Security*', DG for Internal Policies of the Union, Policy Department for Citizens' Rights and Constitutional Affairs, PE 583.134, March 2017.↩

ABOUT EUCRIM
eucrim is the leading journal serving as a European forum for insight and debate on criminal and "criministrative" law. For over 20 years, it has brought together practitioners, academics, and policymakers to exchange ideas and shape the future of European justice. From its inception, eucrim has placed focus on the protection of the EU's financial interests – a key driver of European integration in "criministrative" justice policy.
Editorially reviewed articles published in English, French, or German, are complemented by timely news and analysis of legal and policy developments across Europe.
All content is freely accessible at https://eucrim.eu, with four online and print issues published annually.

Stay informed by emailing to eucrim-subscribe@csl.mpg.de to receive alerts for new releases.
The project is co-financed by the Union Anti-Fraud Programme (UAFP), managed by the European Anti-Fraud Office (OLAF).

Co-funded by
the European Union