UPPSALA
UNIVERSITET

Uppsala Faculty of Law
Working Paper 2011:6a

A European Area of Freedom, Security and Justice

A Long Way Ahead?

Christina Eckes

Abstract

Article 3(2) TFEU stipulates: ‘The Union shall offer its citizens an area of freedom, security and justice [...]’. Such an Area sounds like a present anyone would want to receive. However, what precisely is the meaning of these promising terms? How much ‘freedom’, ‘security’, and ‘justice’ does the Union want to offer? What are the inherent limitations? What are the constitutional, political, and practical obstacles to establishing the Area in the way the Union envisage it?

The establishment of the area of freedom, security and justice poses huge challenges for the Union and its Member States. The identification of joint objectives is difficult and might disenchant those who were inspired by the promising terminology, but even greater constitutional, political and practical difficulties arise when European law is incorporated into national law, when specific and effective cooperation arrangements are set up (including those requiring exchange of information), when flexible and differentiated integration compartmentalises the Area to a patchwork, in the exercise of parliamentary control, in the treatment of third country nationals, and in the control of minimum standards at all levels of cooperation.

Working paper 2011:6a

A European Area of Freedom, Security and Justice: A Long Way Ahead?

Dr. Christina Eckes

Assistant Professor at the Amsterdam Centre for European Law and Governance (ACELG)

C.Eckes@uva.nl

Available at <http://uu.diva-portal.org>

Contents

1	Introduction	4
2	An Uphill Struggle: Internal Obstacles on the Way to an Area of Freedom, Security and Justice	6
2.1	A Common Vision or at Least a Common Objective?	6
2.2	Implementation: Bringing it back to the Member States	8
2.3	Effective Cooperation	12
2.4	The Legacy of the Pillars	13
2.5	A Patchwork of Constitutional Differentiation	16
2.6	Differences in Standards and Difficulties of Control	17
	2.6.1 Mutual Recognition in Criminal Law: Acceptance of Different Standards	17
	2.6.2 Mutual Recognition in European Asylum Law	18
3	External Challenges: Diversity and Rigidity	19
3.1	Counter-Terrorist Sanctions Against Individuals	20
3.2	SWIFT Agreement	21
3.3	External Human Rights Control	23
4	Conclusion	23

1 Introduction*

Article 3(2) TEU stipulates: ‘The Union shall offer its citizens an area of freedom, security and justice [...]’. Such an *area of freedom, security and justice* sounds like a present that anyone would want to receive. However, the ambitious choice of terminology also raises questions: What precisely is the meaning of ‘freedom’, ‘security’, and ‘justice’ in this context? How much ‘freedom’, ‘security’, and ‘justice’ does the European Union (EU; Union) actually want to offer? What are the inherent limitations of a European area of freedom, security and justice (area)? What are the constitutional, political, and practical obstacles to establishing this area in the way the Union envisages it?

The Union has developed an extensive and complex legal and institutional architecture for the area. In particular, threats to internal security have been a driving force behind the Europeanisation of the policy fields gathered under this label ((police and) judicial cooperation in civil and in criminal matters, visas, asylum and immigration).¹ Yet, while there is much agreement that Member States need to cooperate more closely in order to tackle these threats, the creation of the area poses great challenges for both the Union and its Member States. This paper identifies these challenges and discusses a selection in more extensive detail. These challenges

* This paper was presented at the first **Uppsala University European Law Colloquium – on Freedom, Security and Justice, Information and Data Protection: Towards more Freedom, Security or Justice?** 13-14 January 2011, organised by Maria Bergström and Anna Jonsson Cornell, Faculty of Law, Uppsala University.

This two day colloquium gathered a small selection of established scholars as well as young researchers working in the Area of Freedom, Security and Justice. While the overall aim was to address the most important changes introduced by the Lisbon Treaty in this area, its primary focus was to shed light upon specific substantive areas of European constitutional and criminal law, such as freedom of information and data protection, currently ranking high at the EU law-making agenda. The objective was to combine up-to-date presentations on main developments in the Area of Freedom, Security and Justice, with critical discussions on the impact of supranational legislation upon the freedom of information and data protection, fundamental rights in general, police cooperation, and public-private cooperation.

¹ After the attacks of 9/11, the development of a number of security related policies sped up. Examples are the adoption of Regulation 2320/2002 on aviation security, Common Position 2001/931 and Regulation 2580/ 2001 on individual sanctions, and Framework Decision 2002/475/JHA on combating terrorism. On the EU definition of terrorism see also: Eugenia Dumitriu, ‘The E.U.’s Definition of Terrorism: The Council Framework Decision on Combating Terrorism’, *German Law Journal* 5 (2004), p. 585, at 587 et seq.

will be grouped in two categories: external challenges, which originate outside the Union and internal challenges, which originate in the EU's own constitutional law.

The aim is also to create a greater understanding of the true achievement of having reached the existing shape of the area of freedom, security and justice by focusing on the diversities and difficulties that the Union has faced on the way. This includes in particular the newly conferred powers in the area of EU criminal law. Most of the challenges here identified relate to the area of freedom, security and justice as a whole or have at least broader cross-policy implications. Where any particular issue related to a specific policy only this is pointed out. While occasionally reference is made to judicial cooperation in civil matters,² the main focus of this paper is on the general development of the area of freedom, security and justice, as well as the Union's immigration, visa and asylum policies and the increasing body of EU criminal law.³

The paper is divided into two main parts. Part one sets out a range of internal challenges that the Union faces in its uphill struggle to offer its citizens an area of freedom, security and justice. It contains six subsections, each addressing one obstacle to effective cooperation. Part two addresses different external challenges and pressures. It contains three subsections of which each addresses one external obstacle. Neither of the two parts gives a comprehensive account. The discussed problems are chosen either because they are particularly illustrative and/or linked to very recent developments and events. A conclusion wraps up the discussion and makes tentative suggestions how these challenges should be approached.

² Practice under Article 81 TFEU.

³ Articles 67 to 80 and 82 to 89 TFEU.

2 An Uphill Struggle: Internal Obstacles on the Way to an Area of Freedom, Security and Justice

2.1 A Common Vision or at Least a Common Objective?

The first great challenge on the way to establishing an area of freedom, security and justice is to identify and formulate specific joint objectives. Immigration and asylum as well as criminal policies are areas where a (near) consensual agreement on ambitious objectives is very difficult between 27 different constituencies. This has resulted in considerable inherent limitations. Article 3(2) TFEU, after starting with a comprehensive promise, immediately outlines its limits: ‘The Union shall offer its citizens an area of freedom, security and justice *without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.*’⁴ The wording expresses a clear focus on free movement rights and demonstrates the inextricable link between freedom and security. This might disenchant those who were inspired by the promising terminology.

Freedom has a particular meaning in the context of the area. It does not comprise any of Europe’s philosophical heritages of the enlightenment period⁵ but is focused on, if not limited to, free movement rights. This links the area of freedom, security and justice closely with the core policies of the internal market.⁶ On the one hand, the Europeanization of free movement rights, different from the Europeanization of political and civil liberties, does not require any further justification. On the other hand, the two are

⁴ Emphasis added.

⁵ For a recent study of the philosophical origins of the modern understanding of freedom: Milan Zafirovski, *The Enlightenment and Its Effects on Modern Society* (Springer-Verlag, New York: 2010). For thinkers of the enlightenment see in particular: Thomas Hobbes (voluntary limitation of freedom), Immanuel Kant (reconciliation of freedom and political authority), Voltaire (intellectual freedom); and Mary Wollstonecraft (freedom of women).

⁶ See Part Three Title I and IV of the TFEU.

closely related. Free movement rights do not exist without protection of political and civil liberties.⁷

Scholars have discussed the ‘balance between freedom and security’ and come to the conclusion that it leans towards the latter.⁸ Equally, Union policy-makers frequently speak of a need to strike a ‘balance between freedom and security’.⁹ Indeed, it has been argued that ‘[j]ustice is to bring the balance between freedom and security.’¹⁰ All these statements display one particular perspective on how freedom and security relate. This is not at all compelling.¹¹ Freedom and security are interrelated in multiple ways and that the relationship is tension-prone. They do not relate to each other in form of an equation. More freedom does not necessarily equal less security; and more security does not necessarily equal less freedom. An illustrative example is the surveillance¹² and political exclusion of minorities¹³ that has led to alienation from the states they live in.

Additionally, the area of freedom, security and justice comprises policies which are in a particular way subject to different perceptions and understandings. Freedom and security, and what should be done to achieve them, appear to be open to very different interpretations.¹⁴ Different countries perceive threats very differently. The prime example is the perception of terrorism.¹⁵

Finally, besides the limitations imposed on the content of ‘freedom’, Member States quite consciously reined the Union in by jealously defending their state prerogative on security issues at the

⁷ This is the understanding underlying EU non-discrimination policies.

⁸ Thierry Balzacq, Sergio Carrera (eds.), *Security Versus Freedom?: A Challenge For Europe's Future* (Ashgate, 2006). In Chapter One (p. 5), Thierry Balzacq and Sergio Carrera come to the conclusion that the The Hague Programme ‘shift[s] the balance between “freedom” and “security” in a very critical way’.

⁹ There are about 2,820 hits for the term ‘balance between freedom and security’ on the web portal: www.europa.eu.

¹⁰ EULEC – The European Institute for Freedom, Security and Justice, available at: http://ec.europa.eu/home-affairs/news/consulting_public/0017/contributions/eulec.pdf.

¹¹ Laura K. Donohue, *The Cost of Counter-Terrorism*, Cambridge University Press, 2008.

¹² Tony Bunyan, ‘Just over the horizon – the surveillance society and the state in the EU’, 2010 *Race & Class* 51(3), pp. 1 et seq.

¹³ Laura K. Donohue (n 11 above).

¹⁴ ‘Civil liberties are a vital part of our country, and of our world. But the most basic liberty of all is the right to the ordinary citizen to go about their business free from fear or terror’, Tony Blair, 2001.

¹⁵ Christina Eckes, ‘The Legal Framework of the European Union’s Counter-Terrorist Policies’, in: Christina Eckes and Theodore Konstadinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, (Cambridge University Press, 2011), pp. 127-158, p. 129 et seq.

Treaty level.¹⁶ In the same vein, the German Constitutional Court (*Bundesverfassungsgericht*) declared in its Lisbon Treaty decision of June 2009 that certain elements of criminal law are central to the constitutional identity of Germany.¹⁷ It emphasized that the Member States have the police monopoly on the use of force towards the interior¹⁸ and that the requirement of democratic self-termination substantially limits what can be determined at the EU level.¹⁹ These are but examples that even though the intergovernmental arrangement has largely made way for a supranational organisation, national reservations continue to stand in the way.

Within the limited understanding of freedom and from the particular perspective that freedom and security can be and should be balanced, the Union formulates its objectives. These have been comprehensively expressed in the Stockholm programme in December 2009.²⁰ The perceived discrepancy between the high flying terminology of ‘freedom, security and justice’ and the actual specific objectives results from a combination of many things. One difficulty remains the reservations of Member States to confer to the Union a meaningful comprehensive competence to regulate not only free movement rights but also the necessary restrictions and guarantees of human rights. This should not be phrased as how to ‘balance freedom and security’ but rather argued from the understanding that a true area of freedom security and justice requires a comprehensive legal framework governing both guarantees and controlled (i.e. to some extent harmonized) restrictions of rights and liberties.

2.2 Implementation: Bringing it back to the Member States

The second great challenge presents itself at the level of implementation. Great constitutional, political and practical difficulties arise when European law is incorporated into national law. Particularly

¹⁶ See Article 4(2) TEU which declares that ‘national security remains the sole responsibility of each Member State’.

¹⁷ German Constitutional Court, *Lisbon* decision, judgment of the Second Senate of 30 June 2009 (2 BvE 2/08; 2 BvE 5/08; 2 BvR 1010/08; 2 BvR 1022/08), para 253 (these elements are criminal liability, concepts of fair and appropriate trial, and the administration of criminal law).

¹⁸ *Ibid*, para 252.

¹⁹ *Ibid*, para 358.

²⁰ Stockholm Programme, O.J. 2010 C 115/1.

well-know are the challenges to the European Arrest Warrant (EAW) Framework Decision.²¹ National constitutional courts in Cyprus,²² Czech Republic,²³ Germany²⁴ and Poland²⁵ were asked to rule on the legality of the national implementation of this framework decision. Much of the criticism of the EAW was based on the argument that the surrender of a state's own nationals undermines the special relationship of citizenship between that state and its nationals.²⁶ Only the Czech Court pondered the relevance and potential of the new band of EU citizenship in this context.²⁷

In particular the *Bundesverfassungsgericht* was harshly criticized for taking an exclusive national perspective and ignoring the wider context of 'European Constitutionalism'²⁸ by not attempting to solve the conflict by interpreting the German law consistently with European law but by forcing the national legislator to take action.²⁹ The *Bundesverfassungsgericht* applied national constitutional rules to the national instrument of implementation³⁰ and came to the conclusion that the 'legislature could have chosen an implementation that shows a higher consideration in respect of the fundamental right concerned without infringing the binding objectives of the framework decision.'³¹ It defended the *full standard* of protection

²¹ Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between Member States [2002] OJ L 190/1. See further Part II Section 7 below.

²² Attorney General of the Republic of Cyprus v Konstantinou [2007] 3 CMLR 42.

²³ For an English translation see: Re Constitutionality of Framework Decision on a European Arrest Warrant (Czech Constitutional Court) [2007] 3 CMLR 24.

²⁴ *Bundesverfassungsgericht*, *EAW decision*, of 18 July 2005 (2 BvR 2236/04); for an English translation see: Re Constitutionality of German Law Implementing the Framework Decision on a European Arrest Warrant [2006] 1 CMLR 16.

²⁵ For an English translation see: Case P1/05 Re Enforcement of a European Arrest Warrant (Polish Constitutional Tribunal) [2006] 1 CMLR 36.

²⁶ The substantive issue of mutual recognition that was put into question in these constitutional challenges will be further discussed below.

²⁷ Czech Constitutional Court (n 23 above), paras 94-95.

²⁸ Jan Komárek, 'European Constitutionalism And The European Arrest Warrant: In Search Of The Limits Of 'Contrapunctual Principles'', *Common Market Law Review*, 44 (2007) (2007), 9-40.

²⁹ *Ibid*, pp. 38-39

³⁰ See for a more detailed analysis of the *Bundesverfassungsgericht*'s EAW decision: Christian Tomuschat, 'Inconsistencies – The German Federal Constitutional Court on the European Arrest Warrant', *European Constitutional Law Review*, 2 (2006), page 209–226; see also: Christian Tomuschat, 'Ungereimtes – Zum Urteil des Bundesverfassungsgerichts vom 18. Juli 2005 über den Europäischen Haftbefehl', *Europäische Zeitschrift für Grundrechte* (2005), p. 456.

³¹ *Bundesverfassungsgericht*, *EAW decision* (n 24 above), para 94; this is appears a difficult argument to make in view to the wording of Article 5(3) of the EAW Framework Deci-

provided by the German Constitution, which is different from its well-known position in the *Maastricht* decision.³² This can be explained by the fact that the *Maastricht* decision focused on the former first pillar (Community law) while the EAW Framework Decision is a third pillar instrument that was adopted under the former third pillar (intergovernmental Union law if you like). Without directly addressing the constitutionality of the framework decision, the *Bundesverfassungsgericht* discussed the possibility of national bodies breaching EU law obligations where compliance is irreconcilable with the German Constitution.³³ This implies that the Court placed national constitutional standards for the political bodies above obligations arising from the third pillar (Union law). It expressed that it would hold the political organs responsible for adopting acts which go beyond the Union's competences.

The German Constitutional Courts sent a clear warning to Luxembourg. However, it did not rule on the validity of the European framework decision. Finally, in reply to a reference from Belgium, the Court of Justice ruled that the EAW Framework Decision itself was conform to European law.³⁴ In his opinion in the EAW case, Advocate-General Colomer criticized that the *Bundesverfassungsgericht's* ruling was 'inspired by that old mistrust and is a reaction to the restrictions on judicial control in the third pillar...' However, he also agreed with the Court to the extent that '[i]t is rather paradoxical that, in an area where the Union has an increased influence on the fundamental rights of individuals, the powers of the Court have been somewhat [sic] restricted.'³⁵ The restriction of the Court's jurisdiction has disappeared with the entering into force of the Lisbon Treaty. EU criminal law has to some extent become a

sion: 'where a person who is the subject of a European arrest warrant for the purposes of prosecution [different for the execution of a custodial sentence or detention order, see Article 4(6)] is a national or resident of the executing Member State, surrender [must take place but] may be subject to the condition that the person, after being heard, is returned to the executing Member State in order to serve there the custodial sentence or detention order passed against him in the issuing Member State.'

³² *Bundesverfassungsgericht*, *Maastricht* decision of 12 October 1993, BVerfGE 89, 155; for a translation of the Maastricht decision see: *Brunner v European Union Treaty*, 57 CMLRev 1994.

³³ Judge Lbbe-Wolf critically remarked that the freedom to infringe the law could not legitimately be an endorsement of democracy in the EU [*Bundesverfassungsgericht*, EAW decision (n 24 above), para 177].

³⁴ Case C-303/05, *Advocaten voor de Wereld v Leden van de Ministerraad* [2007] ECR I-3633.

³⁵ AG Colomer in C-303/05, *Advocaten voor de Wereld*, [2007] ECR I-3633, endnote 81.

policy like any other.³⁶ The question remains whether this will change the *Bundesverfassungsgerichts* position. Will the Court take the same position as in its Solange/Maastricht case law, or will it continue to treat EU criminal law differently?

The above mentioned decision on the Lisbon Treaty could serve as an indication that will consider criminal law a particularly sensitive area that deserves greater scrutiny than other areas of law. In the Lisbon Treaty decision, the *Bundesverfassungsgericht* seized the opportunity to address fundamental issues of the relationship between European and German law.³⁷ The theme of this ruling even though it is phrased in a ‘so long as’ terminology,³⁸ would be better described as: ‘so far and no further’. The *Bundesverfassungsgericht* listed five particularly sensitive policy areas where European competence must be exceptionally well-justified.³⁹ The list included as the first point substantive and formal criminal law.⁴⁰

The problems related to implementation are not only teething problems. They are related to the fact that the Union adopts measures in area of freedom, security and justice – particularly in the area of EU criminal law – that impose significant limitations on civil liberties. The Member States’ struggles to accept mutual recognition in the field of EU criminal law can be starkly contrasted with their willingness to hide behind mutual recognition of fundamental rights protection in the area of asylum.

An exponential increase of preliminary rulings can be witnessed in the different policy fields now falling within the area of freedom,

³⁶ See for more detail the section on ‘the legacy of the pillars’ below.

³⁷ *Bundesverfassungsgericht*, Lisbon Treaty decision (n 17 above); see on this decision the ‘Special Section: The Federal Constitutional Court’s *Lisbon* Case’, German Law Journal Vol 10.8 (2009), pp 1201-1308.

³⁸ The *Bundesverfassungsgericht* used the ‘so long as’ terminology citing its own Maastricht decision (*Bundesverfassungsgericht*, Lisbon Treaty decision (n 17 above), para 262), but also to draw new lines to indicate to what level of integration ‘democracy’ in the Union has to reach a level analogous to a state (para 272), to what extent decision-making through conventions is acceptable (para 308), at what point European citizenship could start to threaten ‘the existence’ of the German people (para 350).

³⁹ *Bundesverfassungsgericht*, Lisbon Treaty decision (n 17 above), paras 248-260: (1) substantive and formal criminal law; (2) the disposition of the police monopoly on the use of force towards the interior and of the military monopoly on the use of force towards the exterior; (3) the fundamental fiscal decisions on public revenue and public expenditure; (4) the shaping of circumstances of life in a social state; and (5) culture, for instance as regards family law, the school and education system and dealing with religious communities.

⁴⁰ *Bundesverfassungsgericht*, Lisbon Treaty decision (n 17 above).

security and justice.⁴¹ This will help to ensure uniform interpretation but it also reflects the amount of litigation before national courts.

2.3 Effective Cooperation

A third challenge is the need to set up specific and effective cooperation arrangements, including those requiring exchange of information.

The EU has created a network of agencies operating in the area of freedom, security and justice. It consists of Europol, Eurojust, Frontex and the Situation Centre (SitCen). The SitCen has now become part of the European External Action Service (EEAS). The link is not as surprising as it may seem. The SitCen has also in the past been focusing on external security. However, there is a growing understanding that internal and external security issues are so closely interlinked that they must be dealt with jointly. SitCen's mandate and activities remain largely secret. It predominantly offers assessment of intelligence from the Member States and public sources. Hence, Europe is in the process of establishing an internal intelligence apparatus to collect information about (all) Europeans.

Europol, Eurojust, Frontex support and strengthen action by the competent authorities of the Member States. Europol strengthens mutual cooperation in preventing and combating organized crime, terrorism and other forms of serious crime affecting two or more Member States.⁴² Eurojust stimulates and improves the coordination of investigations and prosecutions in the Member States.⁴³ Frontex enables and facilitates the exchange of operational information between the border guards of the Member States and assists them in pooling technical and human assets.⁴⁴

Europol and Eurojust cooperate closely. Since 2008, they have established a secure communication link and exchange information

⁴¹ Steve Peers, 'Mission Accomplished? EU Justice and Home Affairs Law After the Treaty of Lisbon', *Common Market Law Review* 48 (2011), pp. 681-685.

⁴² See Article 5 of Council Decision of 6 April 2009 establishing the European Police Office (Europol), 2009/371/JHA, OJ L 121 of 15.5.2009; see also the Europol convention of 26 July 1995 (OJ C 316 of 27.11.1995).

⁴³ See Article 3 of Council Decision of 28 February 2002 establishing Eurojust, OJ L L 63/1 of 6.3.2002.

⁴⁴ See e.g. Article 4.2 of Regulation 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams (RABIT regulation), OJ L 199/30 of 31.7.2007.

above the level of ‘restricted’.⁴⁵ Europol and Frontex exchange restricted information on the basis of a cooperation agreement.⁴⁶ Frontex and Eurojust are currently preparing a cooperation agreement.

As we will see throughout this paper, the recent conclusion of the SWIFT agreement with the United States of America is an illustrative example, not only of internal challenges relating to the protection of data and the exercise of parliamentary control in the area of freedom, security and justice, but also of the external pressures to which the Union has to face up. It will therefore be discussed both in this section and in Section 3.2 below.

Besides all concerns relating to the protection of the rule of law and data protection, Member States face considerable technical difficulties.⁴⁷ The disparate systems of the Member States do either have to be compatible with each other, or the EU has to introduce a centralized EU systems. In the well-discussed case of Personal Name Record (PNR) systems the Union has opted to ensure compliance of separate national systems.⁴⁸

2.4 The Legacy of the Pillars

The fourth challenge is the historical legacy of the pillar structure. Despite the Court of Justice’s attempts to establish jurisdiction and a certain level of uniform interpretation throughout the European legal order,⁴⁹ the Union’s pillars remained pre-Lisbon very different as regards decision-making,⁵⁰ jurisdiction,⁵¹ and legal effect.⁵² Some

⁴⁵ The EU uses four different levels of classification: EU restricted; EU confidential; EU secret; and EU top secret.

⁴⁶ Agreed in 2008; available at: <http://www.europol.europa.eu/legal/agreementsAgreements/Strategic%20cooperation%20agreement%20Frontex.pdf>.

⁴⁷ Conference on Law Enforcement Information Exchange and Modern Technologies (COPE 09).

⁴⁸ See e.g. the Commission proposal on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, of 15.04.2011, Interinstitutional File 2011/0023 (COD).

⁴⁹ Case C-105/03, Pupino [2005] ECR I-5285; Case C-355/04 P, Segi v Council [2007] ECR I-1657.

⁵⁰ Unanimity remained the voting requirement in the Council even after the Treaty of Nice for family law and legal migration. The European Parliament was only consulted on these two policies and on visa lists and visa formats.

⁵¹ References for a preliminary ruling from final courts only, see ex-Article 35 TEU and ex-Article 68(1) EC.

⁵² See ex-Article 34(2)(b) TEU.

of the historical heritage of the pillars has survived over time, including after the entering into force the Treaty of Lisbon. The area has grown out of the originally rather weak cooperation between national activities, first within TREVI and later within the Union's Third pillar. It does not have the strong supranational Community roots. This has remained the approach: a political preference prevails for cooperation between national systems rather than forcing harmonization through. Leaving national systems unchanged.

As is well known, the third pillar was introduced by the Treaty of Maastricht and originally contained all the policy areas that are now part of the area of freedom, security and justice: cooperation in civil and in criminal matters, visas, asylum and immigration. They were subject to what is commonly called the intergovernmental method (unanimity, right of initiative shared between the Commission and the Member States). With the Treaty of Amsterdam, parts of the third pillar (visas, asylum, immigration and civil law) moved into the EC Treaty and became subject to a hybrid form of decision-making with some elements of the Community method but also with some particularities that were rather intergovernmental. The Treaty of Nice introduced the Commission's monopoly of initiative and co-decision for a number of policies. Finally, the Lisbon Treaty brought all the policies together again under Title V of the TFEU. However, this does not mean that the entire area of freedom, security and justice has become subject to uniform rules mirroring the old Community method. Indeed, even though the ordinary legislative procedure has been introduced for most policy areas,⁵³ special procedures requiring unanimity apply to significant number of exceptions.⁵⁴ Furthermore, the area of freedom, security and justice is the subject of numerous protocols attached to the European Treaties.⁵⁵ Most importantly, these protocols contain transitional provisions and geographical limitations.

⁵³ Visa lists and formats (Article 77 TFEU); Article 79, 82 83 84 85 87 and 88 TFEU.

⁵⁴ Creation of a European Public Prosecutor (Article 86(1) TFEU); operational police cooperation (Articles 77(3), 81(3), 87(3) and 89 TFEU).

⁵⁵ Protocol 19 on the Schengen Acquis Integrated into the Framework of the European Union; Protocol 21 on the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice; Protocol 22 on the Position of Denmark; Protocol 23 on External Relations of the Member States with Regard to the Crossing of External Borders; Protocol 36 on transitional Provisions; in a more limited: Protocol 20 on the Application of Certain Aspects of Article 26 of the Treaty on the Functioning of the European Union to the United Kingdom and to Ireland; Protocol 24 on Asylum for Nationals of Member States of the European Union.

The Protocol on Transitional Provisions provides for special interim rules applicable to the pre-Lisbon instruments.⁵⁶ In particular, the Court will only acquire full jurisdiction over pre-Lisbon instruments on 1 December 2014, except where these instruments are amended. This keeps the legacy of the third pillar alive for an additional five years.

The most important shadow of the intergovernmental nature of old third pillar is the fact that the area of freedom security and justice does not correspond to the territory of the Union. The UK, Ireland and Denmark do not only continue to enjoy their pre-Lisbon opt-outs for the areas of immigration, visa and asylum (and civil law), but extends it to cooperation in police and criminal matters and for the UK and Ireland to amendments of pre-Lisbon instruments by which they are already bound. Hence, the position of the UK, Ireland and Denmark could be summarized as a default opt-out from the area of freedom security and justice with an opt-in possibility (in the case of Denmark limited to visa lists and formats).⁵⁷ This geographical differentiation leads to greater complexity⁵⁸ and questions of whether old obligations remain in place when new instruments are adopted without the opt-out countries. It might also make it more difficult for EU citizens to feel that they are living in a European area of freedom, security and justice when it does not apply to the entire territory to which their free movement rights apply.

In sum, EU criminal law has become in many ways like any other policy field. At the same time, the pillar structure lives on in form of special decision-making rules in some areas, in form of limited jurisdiction of the Court for pre-Lisbon instruments and in form of the differentiated geography.

⁵⁶ Article 9 and 10 of Protocol 36. See for a detailed account of the state of affairs on existing pre-Lisbon instruments: Steve Peers, 'Mission accomplished?' (n 42 above), pp. 685-690.

⁵⁷ The UK and Ireland (Protocol 21), as well as Denmark (Protocol 22), are in an opt-out default position with an opt-in possibility, with slightly different rules. See also the following section on differences.

⁵⁸ Which also leads to litigation before the Court of Justice: •Case C 77/05, *UK v Council* (*Frontex decision*), [2007] ECR I-11459; C-137/05, *UK v Council*, [2007] ECR I-11593; and C-482/08, *UK v Council*, Judgment of 26 October 2010.

2.5 A Patchwork of Constitutional Differentiation

A fifth challenge worth mentioning, lies deep inside the constitutional structure of the Union. Flexible and differentiated integration compartmentalizes the *area* to a patchwork. On the one hand, Europeanisation is fueled by the desire to advance and the need to address internal security issues. On the other, the area of freedom, security and justice is characterized by deeply ingrained differences of national preferences and security cultures.

No other policy field within the European Treaties is subject to the same extensive geographical differentiations, flexibility arrangements, and opt-outs as the area of freedom, security and justice.⁵⁹ The UK, Ireland, and Denmark have an opt-out default with opt-in possibility.

Beyond this, the European Treaties foresee the possibility of enhanced cooperation (Article 20 TEU), the emergency break (Article 82(3) TFEU), law and order clauses (Article 72 TFEU) and the national security exception (Article 73 TFEU). There appears to be a greater willingness to use the rules on enhanced cooperation,⁶⁰ not only in the area of freedom, security and justice but also more broadly. This might actually lead to greater discrepancies of application also in other policy areas.

Geographical differences impact on policy making when a Member State that is not part of the Schengen area takes over the rotating presidency. The Treaty of Lisbon has mitigated this effect to some extent with regard to external actions through the introduction of the President of the European Council and the High Representative. However, differentiation not only exists but aggravates as the area of freedom, security and justice progresses – both where those Member States that have a special position want this and where they would like to participate. The UK for instance was not allowed to participate in the new Visa Information System⁶¹ or Frontex.⁶² Both legal instruments adopted by the Council were found to further develop the existing Schengen Acquis in which the UK is not participating.

⁵⁹ The Euro-zone (European Monetary Union) is of course not identical with the territory of the entire Union.

⁶⁰ Examples of attempts to use enhanced cooperation before the entering into force of the Treaty of Lisbon at: Steve Peers, *EU Justice and Home Affairs Law* (Oxford University Press, 2011), p. 93.

⁶¹ Case C-482/08, *UK v Council*, Judgment of 26 October 2010.

⁶² Case C-77/05, *UK v Council (Frontex decision)*, [2007] ECR I-11459.

2.6 Differences in Standards and Difficulties of Control

Another difficulty lies in the combination of mutual recognition and the difficulty of controlling minimum standards at all levels of cooperation. Infringement procedures by the Commission are of course possible. However, for instance in the Dublin II case no procedures were initiated even though a large number of cases was pending before the ECtHR and numerous newspapers had reported the difficult conditions in Greece.

2.6.1 Mutual Recognition in Criminal Law: Acceptance of Different Standards

Under the EAW Framework Decision, which contains a list of 32 serious offences,⁶³ Member States are required to surrender anyone sought for prosecution or detention where this is requested by another Member State. The EAW is built on mutual recognition.⁶⁴ In principle mutual recognition works in two directions: it should entail recognition of decisions that incriminate but also recognition of decisions that exculpate. In practice, the former is much more prominent than the latter.

Sweden's request to surrender Julian Paul Assange, editor in-chief of WikiLeaks, is probably the case concerning a European Arrest Warrant that stirred up most attention.⁶⁵ As is well-known, Mr. Assange was accused of having committed several sexual of-

⁶³ Participation in a criminal organisation, terrorism, trafficking in human beings, sexual exploitation of children and child pornography, illicit trafficking in arms, ammunition and explosives, corruption, fraud including fraud pertaining to the financial interest of the European Union, recycling the benefits of crime, and counterfeiting of money including the Euro.

⁶⁴ European Commission, *Mutual Recognition of Final Decisions in Criminal Matters*, COM(2000)495; see also: Theodore Konstadinides, 'The Europeanisation of extradition: how many light years away to mutual confidence?', in: Christina Eckes and Theodore Konstadinides (eds.), *Crime within the Area of Freedom, Security and Justice: A European Public Order*, (Cambridge University Press, 2011), pp. 192-223.

⁶⁵ At the time of writing Julian Assange is under house arrest awaiting the extradition appeal hearing on 12 July 2011 (The Guardian, 6 April 2011, available at: <http://www.guardian.co.uk/media/2011/apr/06/julian-assange-extradition-appeal-date>). See for the extradition decision: City of Westminster Magistrates' Courts, Findings of facts and reasons in the case of the judicial authority in Sweden v Julian Paul Assange, of 24 February 2011, available at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Judgments/jud-aut-sweden-v-assange-judgment.pdf>.

fences.⁶⁶ Sweden issued an EAW at the preliminary investigation.⁶⁷ This was criticized arguing that ‘Mutual Legal Assistance was a more proportionate response than issuing an EAW’.⁶⁸ The case of Assange could at least be seen as raising questions on the use of the EAW for highly politicized cases.

A closely related issue is the fact that criminal law and criminal procedural law are not harmonized. Similar problems arise with regard to cooperation in civil matters.⁶⁹ The only guarantee that Member States comply with minimum standards is up to this point the ECtHR which recently ruled on the practice of preventive detention (Sicherheitsverwahrung).⁷⁰

2.6.2 Mutual Recognition in European Asylum Law

European asylum law is based in all but name on mutual recognition. The main objective of the so-called Dublin II-Regulation⁷¹ is to determine which Member State is responsible for examining an asylum application lodged by a third country national on the territory of one of the Member States. In principle, each application is reviewed by one Member States only. It so aims to prevent ‘asylum shopping’ and multiplication of work. However, this assumes that all Member States at the very least offer asylum in compliance with the requirements of the ECHR.

In January 2011, the ECtHR gave a blow to the Common European Asylum System by finding Belgium to be in violation of Article 3 ECHR for sending an asylum seeker back to Greece.⁷² This is an internal difficulty that became fully visible under external pressure. The particular relevance of the accession of the Union to the ECHR for the area of freedom, security and justice will be dis-

⁶⁶ Three sexual assault allegations and one rape allegation in August 2010 (The Guardian, 6 April 2011, available at: <http://www.guardian.co.uk/media/2011/apr/06/julian-assange-extradition-appeal-date>).

⁶⁷ City of Westminster Magistrates’ Courts (n 44 above), summary of facts on p. 9.

⁶⁸ Ibid, referring to the live evidence of Brita Sundberg-Weitman and Mr Alhem.

⁶⁹ C-491/10 PPU, *Aguirre Zarraga*, Judgment of 22 December 2010.

⁷⁰ ECtHR, *M v Germany*, application no. 19359/04, judgment of 17 December 2009. See for the internal problems that this ruling caused: German Constitutional Court, ruling of 4 May 2011 (2 BvR 2365/09; 2 BvR 740/10; 2 BvR 2333/08; 2 BvR 1152/10; 2 BvR 571/10); the English press release is available at: <http://www.bverfg.de/en/press/bvg11-031en.html>.

⁷¹ Council Regulation 343/2003 of 18 February 2003, OJ 2003 L 50/1–10.

⁷² ECtHR, *M.S.S. v. Belgium and Greece*, application no. 30696/09, judgment of 21 January 2011.

cussed Section 3.3 below. The ECtHR provides an external control of minimum standards.⁷³ Yet, this control comes into play with considerable delay. The EU must develop its own instruments and mechanisms to ensure certain standards.

Mutual recognition causes problems. Asylum policy mainly concerns people who do not have a voice – neither in European nor in national politics. The great emphasis that Union law attaches to equal treatment of EU citizens has if not a downside so at least a flipside to it: it takes away attention from third country nationals. Criminal law by contrast concerns EU citizens albeit only a small proportion of the over-all population. And, the small number who is affected is unable to avoid it. This is why the unpredictable consequences of being surrendered to another country have raised so many concerns. This can also be contrasted with the (lack of public) discussion in policy areas where large parts of the population are affected and many resources are allocated, such as health or education. While national constitutional courts required Member States to reconsider the leap of faith they made to agree on EU criminal law based on mutual recognition, for most a ruling of the ECtHR was necessary to do the same for asylum law.

Effective internal EU control of certain minimum standards would make it easier for Member States to ‘trust’ each other. It would protect the EU from further challenges in Strasbourg. And, finally, it would stop Member States from using EU law to conveniently free themselves from unpopular ‘problems’ such as asylum seekers.

3 External Challenges: Diversity and Rigidity

Speaking about globalization has already gone out of fashion. Yet, the observation that international law has changed significantly both in quantity and in quality has been repeated so often that it has become a platitude. More and more detailed regulation is adopted at the global or regional level. International solutions to global challenges are agreed in a large range of policy fields. Countries become more and more interdependent, economically and

⁷³ See most recently: ECtHR, *M.S.S v Belgium & Greece* (application no. 30696/09), judgment of 21 January 2011.

financially. This section will address questions such as: What are the specific difficulties that the EU encounters in this field when it takes external actions; *i.e.* concludes international agreements? Does the establishment of the area require certain external actions?

3.1 Counter-Terrorist Sanctions Against Individuals

The Treaty of Lisbon has introduced two legal bases for counter-terrorist sanctions (restrictive measures): Article 75 TFEU and Article 215(2) TFEU. Counter-terrorist sanctions are in essence the freezing of all financial assets of private individuals that are suspected to support terrorism.⁷⁴ One of the two legal bases, Article 75 TFEU, is part of the area of freedom, security and justice. The author has argued elsewhere⁷⁵ that the two legal bases correspond to the two United Nations (UN) sanctions regimes. European counter-terrorist sanctions giving effect to the UN lists of terrorist suspects (UN Security Council Resolution 1267) should be adopted under Article 215(2) TFEU. Autonomous European counter-terrorist sanctions giving effect to the general call to freeze the assets of terrorist suspects under UN Security Council Resolution 1373 by contrast should be adopted under Article 75 TFEU.⁷⁶ However, the pending challenge against EU Regulation 1286/2009 giving effect to the 1267 regime demonstrates that the use of the two new legal bases is not uncontroversial.⁷⁷ In this action, the European Parliament invoked primarily the choice of the wrong legal basis. It argued that the regulation should have been adopted on the basis of Article 75 TFEU instead of Article 215(2) TFEU. Article 75 TFEU authorizes the Union to create a framework for the adoption of administrative measures freezing the financial assets of terrorist suspects. It is specifically aimed at preventing terrorism and related activities and it does not make a link to the in-

⁷⁴ For a comprehensive analysis of EU counter-terrorist sanctions see: Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (Oxford University Press, 2009).

⁷⁵ Christina Eckes, 'Sanctions against Individuals: Fighting Terrorism within the European Legal Order', *European Constitutional Law Review* (2008), 205–24 (pp. 220 *et seq.*).

⁷⁶ For a recent report on counter-terrorist sanctions see: European Center for Constitutional and Human Rights (ECCHR), 'Blacklisted: Targeted Sanctions, preemptive security and fundamental rights', December 2009, available at: http://www.ecchr.eu/news_details/items/neuer-ecchr-bericht---blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.html.

⁷⁷ Case C-130/10, *European Parliament v Council*, action brought on 11 March 2010.

ternational fight against terrorism. So far the Union has not made use of this new legal basis.

The legality of the pre-Lisbon framework for adoption autonomous European sanctions has been confirmed by the General Court.⁷⁸ However, as we have seen in a long line of challenges (including challenges of measures adopted after the reform) this does not necessarily mean that the individual listing (application in practice of the legal rules) conforms to fundamental rights.⁷⁹ Counter-terrorist sanctions, not only where they give effect to UN lists of terrorist suspects, but also where they are autonomous measures imposed in an internal sanctioning mechanism giving effect to UN Security Council Resolution 1373 have been a dark chapter in the EU's record of respect for fundamental rights. They have certainly heightened the awareness of external influences on the internal protection of fundamental rights.

3.2 SWIFT Agreement

The SWIFT agreement allows US authorities to access, subject to the approval of Europol,⁸⁰ large volumes of transaction information from the Society for Worldwide Interbank Financial Telecommunication (SWIFT). SWIFT is an inter-service banking company which is used in roughly 80 percent of all international transactions.

In 2010 the European Parliament has shown its newly established (supranational) teeth under Article 218(5) TFEU and voted the agreement down the first time,⁸¹ to then agree to an amended version. It reached in particular the elimination of 'bulk' data transfer, the mentioned empowerment of Europol, the right of redress for European citizens before US courts, and deletion of data after

⁷⁸ Most recently General Court, Case T-348/07, *Stichting Al Aqsa v Council*, 9 September 2010.

⁷⁹ Case T-228/02, *Organisation des Modjahedines du peuple d'Iran (OMPI I)*; Case T-47/03, *Jose Maria Sison*; Case T-327/03, *Stichting Al-Aqsa v Council*; Case T-253/04, *KONGRA-GEL*; Case T-229/02, *Osman Ocalan, on behalf of the Kurdistan Workers' Party (PKK) v Council*; T-256/07, *People's Mojahedin Organization of Iran (OMPI II)*; Case T-284/08, *People's Mojahedin Organization of Iran*; Case T-341/07, *Jose Maria Sison*; Case T-348/07, *Stichting Al-Aqsa*.

⁸⁰ Vetting by Europol was introduced only after the EP had once voted the agreement down.

⁸¹ Jörg Monar, 'The Rejection of the EU-US SWIFT Interim Agreement by the European Parliament: A Historic Vote and its Implications', *European Foreign Affairs Review* 15/2, 2010, pp. 143-151.

five years.⁸² The discussion on the Passenger Name Record (PNR) scheme with the US goes along similar lines.⁸³

In the context of the debate on *WikiLeaks*, the issue of data protection has never been more topical.⁸⁴ It is an area where more controversies are likely to come up. The *Bundesverfassungsgericht* found the national law implementing European Data Retention Directive⁸⁵ unconstitutional⁸⁶ but held at the same time that neither the lawfulness nor the supremacy of the directive itself was relevant,⁸⁷ since it gave the national legislator a large margin of discretion and could have been implemented in accordance with the German constitution. Just as in the case of the EAW, the problem was found to lie at the level of implementation, which did not create any problems at the European law level. However, it is not excluded that national constitutional courts will one day find it impossible to give effect to a European law instrument under national law without breaching the national constitution.

In this context, not only the implementation of the EU's internal decisions but also the consequences of its cooperation with third countries on internal security issues⁸⁸ could become the subject of challenges in national courts. The SWIFT agreement is here but one example. Another example would be the agreements which Europol, Eurojust and Frontex⁸⁹ conclude with third countries and which mainly concern information exchange. Lower data-protection standards and the difficulty to assess data-protection in practice remain a problem.

⁸² See for more detail: Contemporary Practice of the United States, 2010 *The American Journal of International Law* 104, pp. 659-661.

⁸³ See: <http://euobserver.com/9/30428/?rk=1>.

⁸⁴ <http://euobserver.com/22/31614>: US asked for information connected to WikiLeaks from the online short-message service Twitter.

⁸⁵ Directive 2006/24/EC, O.J. 2006 L105/54.

⁸⁶ German Constitutional Court, Data Retention decision of 2 March 2010, 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08; see also the ruling of the Romanian Constitutional Court, Decision No. 1258 of 8 October 2009 (translation: www.statewatch.org/news/2009/nov/romania-court-data-ret.pdf; commentary: Cian Murphy, National courts - Romanian Constitutional Court, Decision No. 1258 of 8 October 2009, *Common Market Law Review* 47: 933-941, 2010. See also two interim decisions on the Euro stability measures: 2 BvR 1099/10, decision of 9 June 2010; 2 BvR 987/10, decision of 7 May 2010.

⁸⁷ German Constitutional Court, Data Retention decision (n 19 above), para 183.

⁸⁸ Jörg Monar, 'The EU's Externalisation of International Security Objectives: Perspectives after Lisbon and Stockholm', 2010 *The International Spectator*, 45:2, 23-39.

⁸⁹ See above for their functions.

3.3 External Human Rights Control

The Union's accession to the ECHR⁹⁰ will strengthen the protection of human rights in the European legal order by submitting the Union itself to independent external control. It will give EU citizens the same protection vis-à-vis acts of the Union as they presently enjoy from their Member States. Particularly in the area of freedom, security and justice that is concerned with EU criminal law and with EU asylum law the ECtHR's case law will be of great importance. Not only because these are areas of law in which civil liberties are submitted to far reaching restrictions but also because the Court of Justice has not yet built up a large body of case law.⁹¹ Even before accession the M.S.S. ruling of the ECtHR⁹² has demonstrated the need and importance of this external control.

4 Conclusion

Many obstacles exist on the way to a coherent and comprehensive area of freedom, security and justice. The area comprises a diverse set of policy fields: immigration and asylum, cooperation in civil matters, cooperation in criminal matters, and police cooperation. This is but one of the reasons why it is neither supranational nor intergovernmental. It is neither possible nor desired to harmonize the whole civil and criminal law enforcement mechanism. On the one hand, this creates problems. On the other hand, this has constituted a fertile ground for flexible forms of governance.⁹³ Furthermore, the current state of affairs should be seen as a great achievement because of the particular difficulties in the area.

Furthermore, five tentative suggestions will follow of how the external and internal challenges to the establishment of an area of freedom, security and justice could be addressed. First, the Union should develop its own more ambitious vision. It should not only develop a security agenda but also focus on 'freedom' in the true

⁹⁰ Foreseen in Article 6(2) TEU and Article 218(8) TFEU. See also Article 17 of Protocol 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms that entered into force on 1 June 2010.

⁹¹ See for the limited jurisdiction of the Court of Justice above the section on the Legacy of the Pillars.

⁹² ECtHR, *M.S.S.* (n 72 above).

⁹³ Jörg Monar, 'Experimentalist Governance in Justice and Home Affairs', in: Charles F. Sabel and Jonathan Zeitlin, *Experimentalist Governance in the European Union*, Oxford University Press, 2010, pp. 237 et seq, at 238.

sense of the word as a value in the autonomous European legal order. Freedom should include but not exhaust itself in the freedom to move and reside freely in another Member State. Second, pre-Lisbon third pillar measures should be revised and amended under the new post-Lisbon procedures. This ensures full judicial protection; the authority of the Commission to control compliance with EU standards and the involvement of the European Parliament. Third, true mutual recognition should be fostered through the acceptance that the different Member States do not have the same standards but that they all comply with enforceable EU minimum standards. National courts should make active use of the preliminary ruling procedure in the area of freedom, security and justice. Fourth, the external dimension of the supremacy of EU law should be defended.⁹⁴ Five, conscious efforts should be made to establish a European public order, not only in minimum standards of protection but also through the promotion of the EU's successes. The belief in the functioning of the European legal order is a necessary precondition for the establishment of an area of freedom, security and justice.

The discussion on the development of a European public order opens the door to questions along the lines of: which came first, the chicken or the egg? Is the emergence of the European public order a consequence of the developing EU criminal law? Or, is the developing EU criminal law the consequence of an emerging European public order? The two are intricately related. The development of a European public order would be necessary not only for the EU to take up certain policy decisions, in particular those that restrict fundamental rights, but also for the EU to formulate more specific joint objectives. Much diversity has led to rather vague formulations in the area of European criminal law. This requires Member States to broaden their definitions of crimes and ultimately threatens the principles of legality and legal certainty.

The European public order is not only about mutual recognition and the introduction of minimum standards of procedural protection but requires a deeper belief in the European legal order. This emphasizes the need for the EU to promote its own successes.

⁹⁴ Compare also: Christina Eckes, 'Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?', *European Law Journal* 2011, *forthcoming*.

Anything else makes introducing restrictive criminal law measures at the EU level a dangerous enterprise.