

January 2022

Is there a future for the EU's area of freedom, security and justice?

A plan to build back trust

By Camino Mortera-Martínez

EUROPE

Is there a future for the EU's area of freedom, security and justice?

A plan to build back trust

By **Camino Mortera-Martínez**

- ★ The past 15 years have not been kind to two great icons of European integration: the common currency with its accompanying passport-free Schengen area and area of freedom, security and justice (AFSJ).
- ★ Much like the eurozone between 2008 and 2015, the EU's area of freedom, security and justice has gone through a series of shocks over the past seven years, whether they relate to migration, asylum policies, security concerns or the rule of law. But, unlike the EU's single currency area, there have been limited efforts to fix the AFSJ's multiple shortcomings
- ★ To date, the EU has dealt with each crisis separately. This was reasonable while each problem was manageable on its own and had little or no spill-over to other parts of the EU project. But this is no longer a sustainable strategy. All the AFSJ crises are related and they all need fixing quickly. The EU should find inspiration in how it dealt with the twin financial and eurozone crises.
- ★ So far, Schengen and the AFSJ have weathered a migration crisis, several terrorist attacks, and a pandemic because EU countries have mostly been happy to co-operate with each other and trusted each other's systems.
- ★ But it is becoming clear that countries have very different ideas about who should be allowed in and how; what an independent judiciary is; and what should be the relationship between EU law and national constitutions.
- ★ The EU does not need to come up with flashy new plans to reform Schengen every two or three years. Instead, EU leaders should focus on the underlying problem: the waning trust between member-states and the impact that this lack of trust on co-operation.
- ★ The most important consequence of the bloc's gradual loss of mutual trust may be the gradual exclusion of some EU countries from the Union's common legal space. That space includes not only police and judicial co-operation, but also the single market.
- ★ The EU will not solve its trust problem through new laws or court rulings, because the problem stems from political, rather than legal, differences. Instead, the EU should focus on rethinking the way the AFSJ works and clarifying the compromises it involves. One way forward could be to draw inspiration from the European Semester and the EU's post-pandemic recovery fund.
- ★ The EU should come up with a 'European Justice Semester', which would help to rebuild trust in three ways. First, it would establish a permanent and clearer link between policies related to Schengen, like the free movement of people, and policies related to the wider area of AFSJ like the independence of

the judiciary. Second, it would make it harder for countries to backslide. And third, it would allow the EU to anticipate, prepare and deal with issues of mutual trust faster and better.

- ★ The European Council could hold a special summit on the future of Schengen and the AFSJ. The result could be a baseline plan which includes a monitoring mechanism based on the eurozone's European Semester and the post-pandemic recovery fund.
- ★ Such plan would include a set of pre-agreed standards that all member-states should abide by. These standards should be drawn up by the Council of Ministers and the European Commission, approved by the European Parliament and endorsed by the European Council.
- ★ The Commission could use these standards to monitor trends, for example of judicial reforms, and issue clear guidelines. Member-states would need to present national plans roughly every two years explaining how they would comply with those guidelines.
- ★ National AFSJ plans should be approved by the Council of Ministers. The Commission would then review those plans and come up with country recommendations, which should be approved by the Council of Ministers. Member-states should commit to follow those recommendations.
- ★ EU governments and the European Commission could set up dedicated teams to ensure regular communication between Brussels and EU capitals; and an early warning mechanism to spot problems before they become unmanageable, similar to the six-month review devised for the disbursement of the recovery fund.
- ★ EU member-states should agree on a warning procedure that would apply to countries which have been found to repeatedly deviate from the standards. Such a procedure could end with a suspension of EU funds or with a temporary 'freezing' of the recalcitrant country's participation in certain EU laws, like the European Arrest Warrant.
- ★ To work, a European Justice Semester cannot be a purely procedural plan, driven solely by the EU institutions. Such a plan would need the highest-level political backing and broad public support every step of the way. A European Justice Semester should focus on performance, solidarity and accountability.

September 11th 2001 was an awful day for the world, but it gave impetus to international co-operation against crime and terrorism. The attacks on the World Trade Center and the Pentagon persuaded the US that no country could fight international terrorism on its own. It also convinced Europeans that they needed to speed up their plans to protect their citizens. The EU would spend the next ten years building a borderless legal area where Europeans could freely move, safe in the assumption that that suspects and criminals would be promptly apprehended, put on trial and extradited if needs be. The EU's area of freedom, security and justice (AFSJ) became Schengen's inseparable companion.

During the first decade of the 21st century, the prospects for European integration looked bright. This was particularly true for two of the icons of integration: the common currency, and the passport-free Schengen area. The 2010s were not kind to either; so far, the 2020s have not been kind to anything at all. As a result of the COVID-19 pandemic, countries have put borders back up. The politics of migration remain toxic and EU countries have not been able to agree on common policies. Despite a number of shocking terrorist attacks, the likelihood of falling victim to terrorism in Europe is extremely small.

Even so, terrorism and crime are amongst the top ten concerns of European citizens, according to the European Commission, and feature regularly in electoral campaigns across the EU.¹ Meanwhile, the EU's reliance on a common legal space, in which shared rules are interpreted predictably by independent courts, has been challenged by assaults on the independence of the judiciary in several member-states. Furthermore, the Union's post-pandemic recovery fund may be susceptible to corruption and, if the money is misspent, anti-EU forces will profit.

¹: European Commission, 'Standard Eurobarometer 95 – Spring 2021', September 2021.

Much like the eurozone between 2008 and 2015, the EU's area of freedom, security and justice has gone through a series of shocks over the past seven years, whether they relate to migration, asylum policies, security concerns or the rule of law. But, unlike the EU's single currency area, there have been limited efforts to fix the AFSJ's multiple shortcomings. Instead, both EU governments and the EU institutions have chosen to follow a piecemeal strategy, treating each blow to the Union's AFSJ as an isolated incident. This has made sense until now, as it is an easier sell to voters to separate migration issues from, say, the rule of law. But it is not a sustainable strategy anymore.

“EU leaders can no longer pretend that the EU's common borderless legal area is doing well.”

All of the AFSJ's crises are related. The reason why EU countries have close police and judicial co-operation links and, at least on paper, a common set of rules governing asylum and migration, is that they need to reduce the risks that would otherwise arise in a Union without internal border checks. Schengen and the AFSJ form the bloc's common borderless legal area. A shock to Schengen has an immediate ripple effect on the AFSJ.

The EU's decade of unrest and relaxation

EU justice and home affairs (JHA) comprises a set of policies intended to help EU countries manage the side-effects of closer economic integration and the abolition of border controls. As member-states gradually lifted checks on people, goods, capital and services, both law-abiding Europeans and criminals became more mobile. The free movement of capital made laundering money easier. The development of the internal market also meant that more people from different nationalities were getting married, divorced, having children, signing or ending contracts, buying and selling property and, in general, entering into legal transactions in other countries. Meanwhile, both asylum-seekers and other sorts of migrants were arriving in Europe in growing numbers, and looking to settle.²

The 1999 Amsterdam treaty responded to these developments by saying that one of the EU's main objectives should be “to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.”³

2: Sophia Besch, Ian Bond and Camino Mortera-Martinez, 'Plugging in the British: Completing the circuit', CER policy brief, June 22nd 2018.

EU leaders and the EU institutions can no longer pretend that the EU's common borderless legal area is doing well. The EU needs a new plan to make it more resilient. This plan must include regular performance checks and a set of rights and obligations that finally simplifies the link between Schengen and the AFSJ. Such a plan would need a serious commitment from both EU governments and the Brussels institutions, but would not require changing the treaties.

This policy brief looks back at the AFSJ's difficult decade. It argues that the EU needs to clarify the relationship between Schengen and the bloc's common legal space, and draws lessons from the eurozone crisis, calling for the EU to set up a 'European Justice Semester' to protect the AFSJ.

This is the last paper of a series on the future of EU justice and home affairs. It examines some ideas that have been discussed at meetings of the Amato group, a reflection group of experts on justice and home affairs policies, run by the Centre for European Reform, chaired by former Italian Prime Minister Giuliano Amato and supported by the Open Society European Policy Institute (OSEPI). It has been meeting since 2014. This paper tries to capture the main take-aways of the group's work over the past seven years.

Spurred by a general optimism about European integration and the pressing need to improve police and judicial co-operation in Europe following terrorist attacks in Madrid and London in 2004 and 2005, the Lisbon treaty, which entered into force in December 2009, gave new powers to the EU institutions. The Commission was given the power to propose laws on a wide range of topics such as migration, asylum, criminal law and police co-operation. The Council of Ministers and the European Parliament could each amend, reject or approve those proposals, which, once accepted, would become EU laws and fall under the supervision of the European Court of Justice (ECJ).

From 1999 to the mid-2010s, JHA remained a relatively obscure part of EU policy which accordingly attracted very little public interest. In hindsight, it all began to turn sour in 2014.

Faced with increasing arrivals of leaky boats overcrowded with people fleeing bloody conflicts in Syria and Libya, the Italian government of then-prime minister Enrico Letta launched 'Mare Nostrum', a search and rescue

3: Article 2 Treaty on European Union, 1997. The Amsterdam treaty was signed in 1997 but only entered into force in 1999.

operation, in 2013. Other EU countries then accused Italy of encouraging people to risk their lives crossing to Europe by sea in unsafe ships operated by people smugglers, and the EU convinced Letta to replace 'Mare Nostrum' with the much smaller 'Operation Triton' in 2014. Triton had no mandate to search for and rescue distressed boats proactively. In April 2015, around 700 people died in a shipwreck off the coast of the Italian island of Lampedusa. In September of that year, the image of three-year-old Syrian boy Alan Kurdi lying lifeless on a Turkish beach made headlines around the world. Public attention turned to Europe's perceived inability to deal with migrants and asylum-seekers, who were often conflated.

“The migrant shipwreck tragedy in Lampedusa was a turning point for the future of the EU project.”

The tragedy in Lampedusa was a turning point for the EU: the Union has been at the centre of a heated political debate about borders, human rights and Europe's economy ever since. National politicians began to frame migration debates as a zero-sum choice between open borders for all and 'fortress Europe'. EU governments and the Brussels institutions eventually fell into the trap of adopting this dichotomy, creating the most serious border crisis in the EU's history.

In 2015 and early 2016, over a million people crossed into Europe as the conflict in Syria intensified and Libya's failed state became a safe haven for smugglers. Quickly, it became apparent that member-states did not see eye-to-eye. Some felt they were bearing a disproportionate burden in protecting Schengen's external borders; some felt they were taking in more than their fair share of asylum-seekers; and some did not want to accept would-be refugees at all. The bitter political debates that ensued deepened the fault lines between front-line and destination member-states. The disagreements about quotas, solidarity and shared responsibility also entrenched another dividing line that had been developing for a while, this time between Central and Western Europe over respect for the rule of law and fundamental rights.

While Hungary's Viktor Orbán had been toying with the idea of "illiberal democracy" since 2014, the EU's rule of law stand-off began in earnest four years ago.⁴ In December 2017, the Commission launched a disciplinary proceeding against Poland under Article 7 of the Lisbon treaty, for breaching EU values. Article 7 proceedings can end with the suspension of the offending state's voting rights in the Council of Ministers. In October 2018, the European Parliament initiated proceedings against Hungary for the same reason.⁵ But neither of the two disciplinary actions has got very far: they require unanimous agreement in the Council, minus the offending state. Even if 25 states agreed to sanction Poland or Hungary, one of that pair would still be able to block action against the other. Meanwhile, both the European Commission and the European Parliament have become worried about democratic backsliding in other countries, too: in Slovenia, the government of Orbán's ally, Janez Janša, has been clamping down on media freedom and NGOs. In Romania and Bulgaria, fears over corruption and respect for fundamental rights are piling up.

Twenty twenty-one may have been the bumpiest year yet for the rule of law in Europe. In December 2020, the EU passed a law (the 'conditionality mechanism', in EU jargon) that would stop payments from the EU's budget and recovery fund to countries that do not respect the rule of law. The Commission has not yet triggered this mechanism because, to overcome Warsaw and Budapest's threat to veto the bloc's recovery fund, EU governments promised them that the law would not be used until the ECJ had had the time to review it. But, to put pressure on Poland and Hungary, the Commission has instead delayed the release of recovery fund money (which is separate from the general EU budget) to both countries, over concerns about widespread corruption and a captured judiciary. Over the past 12 months, the ECJ has ruled repeatedly that the Polish government has breached EU law with its judicial reforms – and Warsaw has, also repeatedly, refused to comply with the Luxembourg court's rulings.⁶ The stand-off came to a head in October when the Polish Constitutional Tribunal ruled that parts of the EU treaties were incompatible with the Polish constitution, sparking fears of a 'Polexit'.

4: Viktor Orbán, Speech at the 25th Bálványos Free Summer University, July 26th 2014.

5: Both the Commission and the European Parliament can trigger Article 7 when they consider that there is a clear risk that a member-state may breach one or more of the EU's founding values. These are listed in Article 2 of the Lisbon Treaty and are: respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities among others. Once the proceeding is launched, it is up to the Council of Ministers to impose sanctions.

6: After coming to power in 2015, Law and Justice and its coalition partners launched a major overhaul of Poland's judiciary. First, the government packed the Constitutional Court with friendly judges; second, the government revamped the judiciary's governing body, the National Judiciary Council, and changed how both ordinary courts and the Supreme Court functioned. The reform also lowered the retirement age of judges, which allowed the government to force out magistrates seen as hostile to it and replace them with younger, pro-government judges. Further reforms introduced disciplinary procedures that could be used against judges who wanted to apply certain EU laws, or submit preliminary questions to the European Court of Justice – an important feature of the EU's legal system.

The Polish Constitutional Tribunal tried to piggyback on a relatively new trend: the rise of the eurosceptic courts. The Romanian and German constitutional courts, the Danish Supreme Court and the French *Conseil d'État* have in recent years all questioned the validity of EU law or the legitimacy of ECJ rulings.⁷ Spain's otherwise reliably pro-EU judiciary has been debating the usefulness of the European Arrest Warrant (EAW) since a judge in Germany refused the extradition of the fugitive Catalan independence movement leader Carles Puigdemont.⁸ And Slovenia only nominated its required two delegated prosecutors to the European Public Prosecutor's Office (EPPO, a body with powers to prosecute crimes related to the EU budget) in November 2021, six months after the office started operations. Ljubljana's two nominees are not even confirmed yet – with Janša clarifying that they are just “temporary appointments”⁹

“EU justice and home affairs, once the preserve of academics and officials, has become a political battleground.”

COVID-19 has further complicated matters. While most headlines rightly focus on the human and economic costs of the pandemic, the spread of the virus has created much collateral damage – including to Schengen and the EU's single market. At the beginning of the pandemic, member-states restored, or extended, passport checks;¹⁰ and the EU imposed an entry ban on non-EU citizens. Both were not entirely unreasonable measures but were decided and applied in a hurry and rather incoherently across the EU.¹¹ As a result, member-states grew wary of each other – questioning the ability of other European governments to deal with the crisis. More worryingly, many EU countries introduced serious and uncoordinated restrictions on the free movement of European citizens – or banned it altogether. While the EU has to some extent managed to harmonise member-states' criteria for when EU citizens are allowed to travel (notably through the introduction of an EU-wide COVID-19 vaccination passport), many restrictions on movement

remain in place. At the time of writing, in January 2022, several member-states have re-instated lockdowns and/or other restrictions on movement within and across their borders. Border controls persist in many EU countries.

EU justice and home affairs, once the preserve of a handful of lawyers, academics and officials, has become a political battleground. Migration, security (including health security) and EU values are amongst the most contentious issues of EU policy – and ones which can win or lose elections at home. Collectively, they have created new rifts within the EU or aggravated pre-existing fault lines. The EU and its member-states tolerated Orbán's antics until the 2015-2016 migration crisis exposed a new and important rift between Eastern and Western member-states.¹² The crisis also mirrored the divisions that became apparent during the eurozone crisis between 2010 and 2012: frugal, more economically conservative member-states like Germany, Sweden and the Netherlands are also the EU's biggest recipients of both labour migrants and asylum-seekers, while their southern, more indebted and fiscally dovish counterparts like Italy, Greece and Spain are the countries where migrants and asylum-seekers first arrive.

The row over the rule of law has intensified the split between the original EU-15 and countries which joined the EU after 2004. While security remains less divisive, as most EU countries agree that they should co-operate to combat crime and terrorism, the topic has become entangled in broader discussions over the EU's borders, Europe's values and political posturing over the place of religion in Europe. The European Commission even has a dedicated Commissioner for ‘promoting our European way of life’ whose portfolio includes security.

To date, the EU has dealt with each of these crises separately. This was reasonable while each problem was manageable on its own and had little or no spill-over to other parts of the EU project. But there are clear links between the EU's migration, security and rule of law woes.

7: In December 2016, the Danish Supreme Court ruled that EU principles deriving from ECJ rulings should not be applicable in Denmark, as they do not derive from the EU treaties. In May 2020, the German Constitutional Court ruled that the ECJ had overstepped its power when it ruled that the European Central Bank's public sector purchase programme (PSPP) was legal. In April 2021, the French *Conseil d'État* (France's highest administrative court) ruled that French intelligence services could breach EU laws protecting privacy because the EU does not have equivalent laws protecting citizens' safety. In June 2021, the Romanian Constitutional Court said that the Romanian constitution should always have primacy over EU law; and that an ECJ ruling saying that Romania's recent judicial reform was against EU law was not enforceable in Romania.

8: Camino Mortera-Martínez, ‘Catch me if you can: The European Arrest Warrant and the end of mutual trust’, CER insight, April 1st 2019.

9: Wester van Gaal: ‘Slovenia finally appoints ‘temporary’ EPPO prosecutors’, EU Observer, November 19th 2021.

10: Some member-states, like Sweden, introduced border controls in 2015 following the EU's migration crisis and have not lifted them since.

11: Camino Mortera-Martínez: ‘Will the coronavirus pandemic deliver a coup de grâce to Schengen?’, CER bulletin article, September 20th 2020.

12: Hugo Brady, ‘Openness versus helplessness: Europe's 2015-2017 border crisis’, Groupe d'études géopolitiques, June 28th 2021.

All roads lead to Schengen

There is a reason why all of the AFSJ's crises seem to be happening at the same time, or in very close succession: they are connected. It is naïve to think that sizeable migration flows will not affect the way that Europeans think about security; and it is plain wrong to believe that migration, border and security issues will not spill over into other parts of EU policy-making, such as the recovery fund and the rule of law. The only reason why the EU has an area of freedom, security and justice in the first place is because of Schengen. In the words of a senior EU official, "without Schengen, laws governing criminal and civil co-operation in Europe, as well as police and intelligence collaboration, would be nice-to-have, not a must-have."

“There is a reason why all AFSJ's crises are happening at the same time: they are connected.”

To date, Schengen has managed to weather a migration crisis, several terrorist attacks and a pandemic because of two things: it involves the sharing of benefits and burdens; and it presupposes a high degree of mutual trust between its members.¹³ But that trust has eroded in recent years. And both the EU institutions and the member-states seem to have forgotten, or outright ignored, the compromises that are required to make Schengen work.

To benefit from the abolition of border controls between member-states, governments had to introduce so-called compensatory measures, like boosting controls on the EU's external borders, exchanging law enforcement information through common databases and improving police and judicial co-operation between themselves.¹⁴

All these measures are based on the assumption that, by following common rules and standards, EU countries' border, police and judicial systems will eventually become so similar that further checks will become unnecessary. This is the starting point of the AFSJ, which is based on the same principles as the original Schengen treaty (an inter-governmental treaty signed in 1985 and later expanded and transformed into EU law), but goes beyond it by including mechanisms for judicial co-operation in several areas of law, like criminal, civil and commercial law. These mechanisms include the EAW, which makes it easier to extradite criminals across the EU, and the European Investigation Order (EIO), which allows one country to carry out criminal investigations on behalf of another. Mutual recognition (in this case of each other's goods and services) is also the *modus operandi* of the EU's single market. Not coincidentally, both Schengen and the single market grew in parallel in the 1990s.

Neither Schengen nor the EU's single market can work without trust. While the single market seems unscathed for now (with the exception of Brexit and a continuing row over lower quality products making their way eastwards), things are not looking up for the AFSJ. It is becoming clear that – despite the AFSJ's large body of common standards – countries have very different ideas about who should be allowed in and how; what an independent judiciary is; and what the relationship between EU law and national constitutions should be.

The EU does not need to come up with flashy new plans to reform Schengen every two or three years, as it has since the migration crisis. Instead, EU leaders should focus on the underlying problem: the waning trust between member-states and the impact this lack of trust has on the area of freedom, security and justice.

Why waning trust is a problem

Every EU crisis over the past ten years has been to some degree the result of diminishing trust between its member-states. Each of those crises has in turn fed suspicions and made countries more wary of each other. Not all the crises originate in the EU's deficient AFSJ arrangements. But all of them have had an impact on the bloc's area of freedom, security and justice. Take the eurozone crisis. Greece's near-exit from the euro in 2015 unexpectedly shaped Europe's initial response to the refugee crisis.¹⁵ In 2016, with Athens seemingly unable to control the massive flows of people trying to cross to Europe by sea, talk of a mini-Schengen, which would not include Greece, grew louder in the corridors of Brussels. Having once been accused of almost pushing Greece out

of the single currency, then German Chancellor Angela Merkel was "determined not to let Greece fall again" in the words of one of her senior aides. To end the crisis without having to push Greece out of Schengen, Merkel struck a surprise deal with Turkey to return rejected asylum-seekers from Greece.

Beyond the obvious blow to the European project, the most important consequence of the bloc's gradual loss of mutual trust is that, eventually, it may lead to the exclusion of some EU countries from the Union's common legal space. That space includes police and judicial co-operation but also the single market: goods, people and, to an extent, services and capital move freely in the EU

13: Raoul Ueberecken, 'Schengen reloaded', CER policy brief, November 11th 2019.

14: Ueberecken, 'Schengen reloaded'.

15: Agata Gostyńska-Jakubowska and Camino Mortera-Martínez:

'Thomas Cromwell or the executioner's axe? Options for a Grexit', CER insight, July 10th 2015.

because citizens and companies alike rely on EU-wide standards, including court rulings. If the judiciary gets captured in a member-state, both civil and criminal law co-operation will become more difficult; businesses will be wary of setting up shop in a country where they may be subject to arbitrary laws; and people's personal decisions, on issues such as buying a house, having kids or changing jobs, will be affected too.

“The EU will not restore trust by laws or court rulings alone, because this is a political problem.”

Currently, there is no formal mechanism in place to expel a country from the AFSJ. But there are two ways this can happen. The first is through a de facto exclusion of a member-state from EU judicial co-operation schemes. This is already happening when, for example, national courts stop the transfer of asylum-seekers from Germany and elsewhere back to Greece or Italy because of abysmal reception conditions. Another example is when courts in several EU countries refuse to extradite wanted people to a member-state where the courts are not perceived as independent, or where the government is distrusted by other member-states. After the UK triggered Article 50 of the Lisbon treaty to start its exit from the EU, several judges across the Union refused to extradite people there, as it was unclear whether EU law would apply to those suspected or convicted of crimes during and after Brexit. As the situation of the judiciary in Poland, Hungary and Romania has deteriorated, various European courts have refused extradition requests, as they considered that suspects' fundamental rights might not be respected in those countries. While the ECJ has, for now, stopped blanket prohibitions on extradition (as opposed to decisions in individual cases) because of declining judicial standards, this may change in the future, especially if Poland continues openly to defy ECJ rulings.¹⁶ In any case, the Luxembourg court already allows member-states to suspend extradition if they have evidence that the rights of the suspect may not be respected – something which should not be too difficult to argue in view of the ECJ's latest rulings on the independence of the Polish judiciary and the Commission's own assessment of the situation in Poland, Hungary and Romania.

The second way to suspend an EU country's membership of the bloc's single legal area is more tricky, but not impossible. In a recent paper for the Centre for European Political Studies (CEPS), a think-tank, respected

Hungarian EU law professor Petra Bárd and former Polish Ombudsman Adam Bodnar argue that the Polish Constitutional Tribunal's October ruling should trigger a formal suspension of all AFSJ laws based on mutual recognition in Poland.¹⁷ The authors suggest that this could be done either by the EU institutions or by the ECJ. There is no article in the treaties allowing for such a suspension. But there is no article in the treaties which explicitly rules it out, either – in fact, the European Parliament has suggested that the three EU institutions (Commission, Parliament and Council) could take such a decision, if they found 'systemic deficiencies' in a given country after conducting regular joint reviews of the state of the rule of law in each EU member-state.¹⁸ The ECJ could, on paper, issue a ruling after concluding one of the many cases it is now examining, declaring the suspension of one or more of these laws in certain member-states. But recent case law on the suspension of European Arrest Warrants in Poland indicates that this is unlikely to happen.

The ECJ's main problem is that, if it ruled that one or more EU laws were not applicable to an EU country because its courts lacked independence, this would make it very difficult for that country's judges to seek the ECJ's help when dealing with matters of EU law. All national courts are allowed to submit questions to the ECJ if they think there may be a contradiction between EU and national rules; or if they are looking to clarify obscure points of EU law. A ruling to exclude a country from mutual recognition laws would automatically imply that national judges would not be allowed to continue business as usual, including asking for preliminary rulings.¹⁹ This would have a ripple effect on the bloc: because the ECJ would not be able to interpret questions of EU law in one country, it would not be able to ensure the uniform application of EU law across all member-states.

Suspending parts of the EU acquis would be difficult and may have unintended effects. For example, suspending membership of Schengen if a country cannot guarantee that its judiciary is fully independent would be a more effective stick than the Article 7 procedure and would ensure that Schengen rights and obligations are clear to all members. But such a move, even if temporary, would be tricky: one of the benefits of Schengen is that it makes it easier for European citizens to move around the Union, in turn boosting support for the EU project.

The EU will not solve its trust problem by laws or court rulings alone, because this is a problem that stems from political, rather than legal, differences. Rebuilding trust

16: See, for example, the following ECJ cases: joined Cases C-404/15 and C-659/15, Aranyosi and Căldăraru; case C-216/18, LM; and joined cases C-354/20 and C-412/20, L and P. The Dutch government is pushing for a blanket ban on extradition to Poland in an ongoing case before the ECJ - C-562/21 Openbaar Ministerie.

17: Petra Bárd and Adam Bodnar: 'The end of an era: The Polish Constitutional Court's judgment on the primacy of EU law and its effects on mutual trust', CEPS, October 25th 2021.

18: Committee on civil liberties, justice and home affairs: 'Report on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights', European Parliament, 2020/2072(INL), September 29th 2020.

19: Lukas Märtin: 'Das Damoklesschwert über der europäischen Rechtsordnung: Vom europäischen Haftbefehl und der Gefahr der Verrechtlichung politischer Konflikte', Verfassungsblog, December 1st 2021.

will require a higher level of accountability over how AFSJ policies are enacted at a national level. The problem is not necessarily the result of bad faith. There is, more simply, a general lack of understanding of the provisions of the Union's AFSJ and a lack of ambition to clarify them. Eventually, this could become a very big problem. If Europeans do not find a way to restore a shared understanding of the rules, trust that they will be enacted proportionately and that violations will be penalised, the EU's fault lines will deepen and governments will further

question the logic of open borders and security co-operation. Citizens may start to wonder what the point of the EU is, after all.

In the future, the EU should focus on rethinking the way the AFSJ works and clarifying the compromises it involves. This is no easy task. But EU leaders and the EU institutions could find inspiration in one of the ways the Union dealt with the twin financial and eurozone crises in the first part of the last decade.

Finding hope in a strange place: How the eurozone crisis could help fix the EU's area of freedom, security and justice

In 2008, the world economy experienced a steep downturn when parts of the American and European financial sectors collapsed. In the EU, some member-states fared worse than others. In Greece, Portugal, Italy and Spain, the crisis exacerbated long-standing structural problems and added sky-rocketing public debt to create a perfect storm. Investors lost confidence in the creditworthiness of several of the EU's member-states.²⁰ As a result, many people lost trust in the eurozone altogether: the EU's ambitious common currency came close to collapsing.

“The EU institutions should to do ‘whatever it takes’ to keep the AFSJ afloat.”

In an attempt to lower public debt and to regain the confidence of financial markets, member-states imposed large cuts in public spending, which took a heavy economic toll on Southern European countries. The crisis forced leaders to confront the trade-offs inherent in the single currency – between shared rules, costs and benefits – and eventually, with a lot of help from the European Central Bank, they managed to stabilise the currency.

There are parallels between Schengen, and its accompanying AFSJ, and the eurozone. Both are extremely ambitious projects in the absence of an overarching federal state. Both feature consistently amongst the most popular aspects of the EU (a single currency and passport-free travel). And both have proved to be unprepared to absorb shocks (be it a global economic crisis, a pandemic or a sudden surge in migration); and are plagued by repeated failures of member-states to abide by the rules (on deficit and debt limits, border controls, or judicial independence). But while the euro crisis instilled a sense of doom in Europe's political elites and forced them into action, this sense of urgency has so far been missing from the EU's AFSJ.

It is now time for the EU institutions to do ‘whatever it takes’ to keep the AFSJ afloat. A good starting point would be to set up a European Justice Semester for the EU's area of freedom, security and justice.

The financial and sovereign debt crises exposed the failures of the EU's monetary and macroeconomic policies. To fix them, the Union changed fiscal rules and passed new laws governing the co-ordination of fiscal and macroeconomic policies. The EU also set up more stringent oversight mechanisms, for example the common supervision of Europe's largest banks. To streamline the regular co-ordination of Europe's economic policy, the EU created the European Semester.

Starting in November each year, the European Commission, together with the Council of Ministers, scrutinise economic trends and individual member-states' policies, and recommend areas for reform. EU countries then submit national plans to Brussels, explaining how they are going to follow the Commission's recommendations. The recommendations cover a wide range of policies, from employment to childcare and civil justice. The Commission assesses the national plans, and issues specific recommendations to each of the EU-27 – and additional recommendations for eurozone members. The Council of Ministers then discusses the recommendations, which have to be endorsed by EU leaders before their adoption. In case of non-compliance, the EU can require additional monitoring, impose fines and even freeze EU funding to the offending country – though that has not yet happened. A decision to fine a country is deemed to be approved unless a qualified majority of member-states disagrees with it (a procedure known as reverse qualified majority voting). Countries which have signed the so-called Fiscal Compact, a treaty on fiscal stability, have also agreed that other decisions, such as deeming that one country has breached the rules, can also be taken by reverse qualified majority voting.

²⁰ Marcin Szczepanski, 'A decade on from the crisis: Main responses and remaining challenges', European Parliamentary Research Service, October 17th 2019.

The European Semester also has a role in the disbursement of the post-pandemic recovery fund to EU countries. To qualify for recovery money, EU countries need to send their national spending plans to the European Commission, which scrutinises them and decides whether or not to grant funding. To perform this analysis, the Commission looks at many indicators, including the European Semester's country recommendations. If the national plans do not comply with the rules of the recovery fund, European Semester recommendations, and the rule of law provisions of the conditionality mechanism, the Commission may delay the release of funds or stop it altogether – as is currently the case with Hungary and Poland.

“A review mechanism called ‘European Justice Semester’ could combine elements of the European Semester and the recovery fund.”

Of course, neither the EU's economy nor the eurozone are perfect, nor have the new rules magically fixed all their problems. But, over time, EU leaders and the EU institutions realised that they could not rely on trust and outdated laws alone to keep the economy and the single currency going – they needed a renewed push to make all countries accountable for their actions. The European Semester is a small building block in the eurozone's efforts to stabilise the currency. The EU's post-pandemic recovery fund is taking accountability a step further by putting proper money behind a reform monitoring system. Countries are required to show how they are using the recovery money to reach the targets and milestones set by the Commission every six months. They are also required to prove that the money is properly audited and that they have made all the necessary reforms for the money to have a meaningful impact on society and the economy. In stark contrast with previous funds, if a country fails this test, the Commission and the Council of Ministers are allowed to stop payments until the errant member-state complies with the rules.

A review mechanism, combining elements of the European Semester and the recovery fund, – a ‘European Justice Semester’ – could serve as a useful tool for the EU's area of freedom, security and justice, for three reasons.

First, it would help to establish a permanent and clearer link between policies related to Schengen – like the free movement of people or the sharing of police and intelligence information (which most countries like); and policies related to the wider area of freedom, security and justice – like the independence of the judiciary or common asylum and migration rules (which some countries do not like very much). Second, it would help solve what can be called the ‘Copenhagen paradox’, whereby democratic backsliding in some member-states means that, were they to apply to join the EU now, they

would not meet the so-called Copenhagen criteria for accession on human rights and the rule of law. A regular overview of justice and home affairs policies would make it harder for countries to backslide. And third, it would allow the EU to anticipate, prepare and deal with issues of mutual trust better, before they become a Poland-sized problem and without having to resort to the ineffective Article 7 procedure for suspending voting rights in the Council.

The legal basis for a European Justice Semester for the EU's area of freedom, security and justice would be Article 70 of the Lisbon treaty. Article 70 allows the Commission and member-states to conduct a review of policies related to the area of freedom, security and justice, “in particular in order to facilitate full application of the principle of mutual recognition.” The treaty also says that both the European and national parliaments should be kept abreast of the reviews.

A European Justice Semester for the EU's AFSJ should follow at least seven steps:

1. The EU should begin by defining the key elements of the area of freedom, security and justice and, more crucially, the rights and obligations attached to it. Member-states would need to revise the 1999 concept of the AFSJ to bring it line with current realities. This could include, for example, making it clear that Schengen is an integral part of the AFSJ and cannot be detached from other elements, like compliance with ECJ rulings or agreements on migration policies. The hard reality is that countries cannot have the benefits of passport-free travel without recognising the authority of the ECJ or applying migration laws that they themselves have approved in Brussels.

EU leaders used to come up with multi-annual plans (‘programmes’) to set out the direction EU justice and home affairs should take. Over time, EU governments found these plans too onerous, so they quietly dropped them. Over the past seven years, there have been no policy guidelines on EU JHA beyond two Commission plans heavily focused on internal security matters (the 2015 European Security Agenda and the 2019 European Security Union). A renewed effort to make the AFSJ work, now and in the future, should come from EU leaders, not the European Commission. The European Council could hold a special summit on the future of JHA, as it did twice in the ten years after the birth of the AFSJ.

At the summit, EU countries could debate, and decide, what they want to do with police and judicial co-operation, the Schengen area and the Union's migration policies. This should be a frank and open conversation that could be informed by the conclusions of the Conference on the Future of Europe – an EU-wide public consultation process that is due to conclude in the spring of 2022. The result should be a baseline plan for the Union's area of freedom, security and justice which

should include a monitoring mechanism based on the eurozone's European Semester and the post-pandemic recovery fund. This plan would need to be agreed by all EU member-states by consensus. If a broad agreement cannot be found, and some countries decide not to take part, the European Council may want to resort to an inter-governmental agreement, as it has done in the past on eurozone issues. This would be unideal, though – EU governments and the EU institutions, in particular the European Council, should try to get all member-states on board. Once the plan is in place, decisions should be taken either by qualified majority voting or by reverse qualified majority voting.

“JHA policies should reflect the experience of the economic side, where setting down too-specific targets became a headache.”

2. Building on the European Council guidelines, the Council of Ministers, together with the European Commission, could set up a broad system of standards that all members of the club should abide by, with a clear warning that these standards are linked, and that failure to abide by some could lead to a range of penalties. Both the new concept and the list of standards should be approved by the European Parliament and endorsed by the European Council, to ensure broad political support and citizen engagement and to diminish the risk of non-compliance.

3. On the basis of the list of standards, the European Commission could propose a review process similar to the European Semester. The Commission could monitor trends, for example on judicial reforms, and set clear guidelines every, say, 18 or 24 months. The Commission could use these guidelines to flag issues that it considers to be in violation of EU rules (for example, the Polish reform of the judiciary that discriminates between male and female judges) and to suggest ways to fix them. Once the Commission issues its guidelines, member-states would need to present their plans on a range of JHA policies (civil justice, criminal justice, the state of the judiciary, intelligence gathering, police practices and the status of asylum reception facilities, for example), which would then be discussed by the Council of Ministers and approved by the Commission. This is the type of peer review that Article 70 refers to.

4. The Commission would then review the national plans and come up with country recommendations, broken up by chapters (civil justice, criminal justice, border controls, fundamental rights and so on). The recommendations would need to be approved by the Council of Ministers by qualified majority voting (without the vote of the country in question).

5. Member-states would commit to implementing the recommendations during the rest of the policy cycle. This

step would be different from the European Semester in two ways: first, unlike with the Semester, EU countries would have to explicitly say that they would follow the recommendations each time; second, JHA policies are not budgets requiring annual approval, so a European Justice Semester experiment could run for longer periods, of, say, 18-24 months.

6. National governments and the European Commission could set up dedicated teams to ensure regular communication between the EU institutions and EU capitals. An early warning mechanism to spot problems before they become unmanageable could also be part of the plan. The mechanism could be similar to the six-month review devised for the disbursement of the recovery fund.

7. The most difficult part of the exercise would be to agree on, and enforce, sanctions. JHA policies should reflect the experience of the economic side, where setting down too-specific targets has become a major headache for policy-makers. The current debate over the suspended Stability and Growth Pact (SGP) is a case in point: the SGP fixes targets for government deficits and debt. But the rules have proven to be unhelpful in recessions. EU countries froze the Pact when the COVID-19 pandemic hit and are starting to consider reforms to the fiscal rules and when to reactivate them. JHA policy-makers should avoid such hard targets, which would do little to mend wounds or make the AFSJ more resilient to crises.

As a first step, EU member-states should agree on a warning procedure that would apply to countries which have been found to deviate from the standards repeatedly. The Commission and the Council of Ministers, acting by reverse qualified majority voting, could, for example, decide to apply the procedure to a country which had failed to address recommendations twice in a row (that would be two cycles of 18-24 months). The country could respond by amending its actions or face the suspension of EU funds, also agreed by the Council by reverse qualified majority voting.

Ultimately, EU countries will have to decide whether they want to impose more serious consequences on countries which repeatedly fail to abide by the rules. Radical solutions, like suspending parts of EU law for recalcitrant members, may be tempting but will be difficult to apply in practice and might backfire.

A more workable idea would be to ‘freeze’ the application of specific laws, like the EAW or EIO. To be effective in discouraging governments from behaving badly, such a freeze should be swiftly agreed upon by reverse qualified majority voting if a country persists in breaching EU rules for a long time; or if the behaviour is serious enough to put the whole AFSJ at risk. To target unruly governments without punishing citizens, any suspension of certain parts of the *acquis* should never amount to a total exclusion of one member-state from the EU's common

legal area: all national courts should be able to resort to the ECJ when they need to; and no EU citizen should lose the right of effective judicial protection at the EU level as a result of their government's actions.

This roadmap would build on existing EU initiatives like the rule of law mechanism (a dialogue between the EU institutions, national governments and civil society about the state of the rule of law in the member-states) and the Schengen evaluation process (a peer review of the way countries apply Schengen laws in their territory, which the Commission has recently proposed to expand). It could scrap existing but inefficient initiatives like the justice scoreboard, by streamlining the oversight of the judiciary across member-states while still taking into account different legal traditions.²¹ It would also include more recent developments like rule of law conditionality.

“If countries do not accept that membership of Schengen brings both rights and obligations, the project may fail.”

To work, a European Justice Semester cannot be a purely procedural plan, driven solely by the EU institutions. Such a plan would need the highest political backing every step of the way, and this will not be easy. The one

lesson Europe has learnt from the SGP problems is that no-one can resolve an ambitious political challenge, like the euro, with a non-political solution. Any plan to build back trust in the EU's area of freedom, security and justice should ideally include all member-states. It would only be a distant second best if it was restricted to a handful of member-states. Although once up and running a European Justice Semester could bypass blocking minorities, its basis would need a general consensus on the direction that the EU wants to take when it comes to its area of freedom, security and justice.

A European Justice Semester would need broad public support. The EU's response to the eurozone crisis may have ultimately helped to avert the demise of the single currency, but it was deeply unpopular in many member-states on account of the pain caused by austerity and economic dogmatism. While some EU leaders remain stubbornly fond of fiscal measures, the pandemic has made their case weaker: the recovery fund has opened the door for a new way to help troubled countries while making them accountable for their actions – by making the fund performance-based. As a result, both Southern and Northern governments (and their voters) have been – touch wood – fairly cheerful about it, as it has something for every-one. A European Justice Semester would need to focus on performance, solidarity and accountability if it is to enjoy broad support across the EU.

Conclusion

Some EU governments complain that the EU they joined was about passport-free travel, a budding common currency and the world's largest single market. The contract they signed said nothing about same-sex marriages, judicial reform or women's rights. This argument may be illiberal but is not entirely untrue: Europe has changed drastically over the past 20 years. The problem with this line of thought is that it fails to grasp that governments and institutions must and will adapt to a changing society.

So far, the EU's area of freedom, security and justice has failed to keep pace with a changing world: for the most part, the AFSJ remains stuck at the beginning of the century, when all EU countries seemed to be happy to increase police and judicial co-operation and did not

contemplate border closures or democratic backsliding. This, in turn, has increasingly made the AFSJ unable to deal with a succession of crises, each of which has made EU countries less trusting of each other. EU leaders must understand that if countries do not accept that being part of Schengen brings both rights and obligations, the project may fail – or, at the very least, become smaller.

Camino Mortera-Martinez

Senior research fellow, CER
January 2022

This paper is the final of a series on the future of EU justice and home affairs supported by the Open Society European Policy Institute.

²¹: The justice scoreboard is a Commission-led review of the performance of national judiciaries. To do this, the Commission decides on a set of indicators, often not comparable, across member states and assesses them against a set of pre-decided criteria. Member-states are often reluctant to provide information to the Commission and regularly argue that the scoreboard does not take into account different legal traditions across the EU.