

THE LISBON TREATY AND THE AREA OF FREEDOM, SECURITY AND JUSTICE AS AN AREA OF LEGAL INTEGRATION

Stephen David Coutts*

Summary: This paper considers the Area of Freedom, Security and Justice (AFSJ) in the broader context of European integration and links it to two trends in the development of the European Union: firstly, the expanding scope of European law and secondly the increasingly fragmented nature of the integration process. The paper provides a historic and thematic description of the AFSJ and argues that it represents, amongst other things, a movement of the EU into areas of 'high politics' and the development of a nascent 'European public order', linking territory, the state and citizens. In a parallel development, European integration has developed into a system of organising difference and accommodating national preferences. This is epitomised in the AFSJ where the system of integration, analysed under various parameters, appears to emphasise national autonomy and to facilitate variation.

Introduction

European law can be described as a law of integration.¹ The achievement of an Area of Freedom, Security and Justice (AFSJ) is one of the objectives of the European Union.² Can the AFSJ be conceived as an area of legal integration? Given the significant changes that took place in the AFSJ in the Treaty of Lisbon and the publication of the latest multi-annual policy programme,³ it would be timely to take stock of the AFSJ and to place it in the broader context of European legal integration.

In its half century of existence, both the object of European integration and the form of that integration have changed significantly. While originally concerned with the construction of a common market, economic integration and related 'flanking measures', in recent decades the range of matters covered by the law of the European Union has expanded to include more overtly political areas such as internal security, immigra-

* PhD researcher, Department of Law, European University Institute, Florence.

¹ P Pescatore, *Le Droit de l'intégration* (reprint, Bruylant 2005), remains a classic in this regard.

² Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union [2010] OJ C-83/1 article 3 (2) Treaty on European Union (hereinafter TEU).

³ In particular, the latest multi-annual programme for the development of the AFSJ, the Stockholm Programme, Council Document 17024/09 adopted by the European Council on 10/11 December 2009.

tion and asylum, police and judicial cooperation, citizenship and fundamental rights. In this context, the construction of the AFSJ marks a new stage in the development of the European Union.

However parallel to the expansion of the subject matter of European integration, the form of integration has also substantially changed, so much so that some are of the opinion that the law of the EU has come full circle and these voices have called for a theory of 'disintegration'.⁴ From a period when legal integration focused primarily on the creation of norms developed centrally and applied uniformly, in recent decades EU law has known increased fragmentation.⁵ As evidence of this trend, authors have cited on the one hand the non-uniform participation by Member States in certain EU policies, and on the other hand certain characteristics of EU legal instruments that emphasise increased divergence in its application.⁶

The AFSJ can be seen as continuing these trends in the process of European integration: the expanding reach of integration and its increasingly differentiated form. The creation of the AFSJ and its institutional maturity in light of the Treaty of Lisbon in the European Union represents a significant expansion in the subject matter of European integration and the construction of a European polity. In particular, it marks a move from the creation of a European economic space to a 'European public order', a trend complemented by the increasing importance of citizenship and fundamental rights in the Union. On the other hand, the type of integration, with a notable emphasis on a multi-speed integration process and differentiated integration, is consistent with the broader trend towards an emphasis on horizontal forms of integration.

This paper will place the AFSJ, in the light of the Treaty of Lisbon, in the broader context of European integration. After a brief overview of the changing nature of integration in the EU it will provide a short historical introduction to the AFSJ and will assess what is being integrated in the AFSJ. The final section will assess the form of integration taking place in the AFSJ in the light of the Treaty of Lisbon. Integration in the AFSJ follows the trend of recent developments of integration in the EU and is marked by increased differentiation with an emphasis on horizontal methods and fragmented norms. Integration in the AFSJ is designed to manage rather than eliminate legal differences. Where appropriate, refe-

⁴ See J Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16(2) OJLS 231-253.

⁵ See generally G de Burca & J Scott, *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing 2000).

⁶ Such as the use of options in Directives, derogations, and increasing reference to national law terms. See S Weatherill, *Law and Integration in the European Union* (Clarendon Press 1995) ch 5.

rence will be made to policy and legislative developments since the entry into force of the Lisbon Treaty.

I. The changing nature of legal integration in the EU

Conceived of as an agent of integration, one of the original (and perhaps principal) purposes of law in the context of the EU was to ensure that variations between differing legal systems did not hinder cross-border activities and cooperation. In order to achieve this goal, integration entailed the gradual removal of differentiated treatment as part of a 'process leading... to an increase in the exchanges between the various societies concerned and to a more centralized form of government'.⁷ Very often, such legal integration was to take the form of 'a replacement or an overlay of national norms by European ones'.⁸ This traditional vision of legal integration, dominant in the 1980s, fitted with the vision of EU integration as the construction of a relatively classic hierarchical federal legal system. Indeed, there was an explicit federalist theme to the famous 'Integration through Law' project, conducted in the EUI, Florence, in the 1980s.⁹ Later, Dehousse and Weiler outlined various 'parameters of integration' according to which a legal system can be assessed as representing lesser or greater integration. Amongst the factors to be considered in assessing the system of integration is the binding nature of the 'central law', the decision-making process, the role of the 'centralised institutions, the existence of a 'hierarchy of norms' and of a centralised adjudicative body.¹⁰

However, since the early 1990s the picture of the EU legal order as a formally structured, hierarchical system has been replaced with a more nuanced vision of the EU, accepting a plurality of autonomous legal orders conceived of in more or less heterarchical structures. And while much academic focus has been on the more general questions of sovereignty and constitutional pluralism,¹¹ it is submitted that there is a related trend in the role and techniques of legal integration. The vision of integration as the progressive establishment of a set of uniform rules superimposed on and/or replacing the relevant national rules through a system of centralised rule-making bodies has become outdated. Since the mid 1990s, greater emphasis has been placed on 'differentiated' or 'flexible integration' through the increased use of minimum harmonisation

⁷ RD Dehousse & JHH Weiler, 'The Legal Dimension' in WW Wallace (ed), *The Dynamics of European Integration* (Pinter 1990) 246.

⁸ *ibid.*

⁹ M Cappelletti, M Secombe & JHH Weiler (eds), *Integration Through Law* (de Gruyter 1985).

¹⁰ Dehousse & Weiler (n 7).

¹¹ M Abeij, 'Questioning EU Constitutionalisms' (2008) 9(1) *German Law Journal* 1.

and enhanced cooperation.¹² The focus of EU legal action appears to have changed from eliminating difference to 'organising difference'.¹³

The shift in the role of EU law towards organising rather than eliminating differences between the legal systems of Member States can perhaps be related to the changing scope of EU law. The construction of a common market necessarily involved the creation of a 'level playing field', and to some extent homogenous economic conditions were a necessary consequence of the creation of the internal market. Additionally, matters of economic regulation, being for the most part technical, presented variation in terms of national preferences that could be managed by technical regulation.¹⁴ Obstacles to uniform harmonisation based on diverse political values or choices, while certainly not absent, were less frequent compared to other areas of policy. However, as the role of the EU became increasingly diversified, EU regulation saw an increasing tendency to employ legislative techniques that allowed for the accommodation of varying national preferences. An example was the use of minimum harmonisation in the internal market as a means to manage variations in national preferences in environmental, social and employment policies.¹⁵

As the latest, and perhaps most 'political', stage in the development of the EU, the system of integration in AFSJ continues and institutionalises this trend of facilitating variation. Given the relationship between the AFSJ and certain core state functions and sovereignty, it is to be expected that the system of integration implemented in the AFSJ would take particular care to respect the role and autonomy of national legal orders.¹⁶ As the role of the EU expands to more overtly political areas, the system of integration adapts in order to manage, rather than eliminate, difference and variation.

The rest of this article will focus on describing the AFSJ and its system of integration in the light of the Treaty of Lisbon. It will offer a historical account of the development of the AFSJ and will attempt to

¹² See de Burca & Scott (n 5); Shaw (n 4); B de Witte, D Hanf & E Vos (eds), *The Many Faces of Differentiation in EU Law* (Intersentia 2001); F Tuytschaever, *Differentiation in European Union Law* (Hart 1999).

¹³ CVD Curtin, 'Emerging Institutional Parameters and Organised Difference in the EU' in de Witte, Hanf & Vos (n 12).

¹⁴ The notion that micro-economic matters of regulation could be managed by a technocratic supranational institution forms the basis of what Majone has termed the 'regulatory state'. See G Majone, 'The European Community as a Regulatory State' (1994) 5(1) *European Community Law*, *Collected Courses of the Academy of European Law* 321.

¹⁵ M Dougan 'Minimum Harmonisation and the Internal Market' (2000) 37 *CML Rev* 852.

¹⁶ This is perhaps related to the increasingly acknowledged multi-level conceptions of the EU legal order, particularly in the AFSJ. See L Hooghe & G Marks, *Multi-Level Governance and European Integration* (Rowman & Littlefield 2001); for the related concept of multi-level constitutionalism, see I Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 27(5) *EL Rev* 511.

identify what it signifies in the development of the European Union. It will be seen that the AFSJ represents political functions that lie at the heart of the modern state (Section II). As a result, the system established in the AFSJ under Lisbon is careful to stress the continued importance of national legal systems and to accommodate variation and differentiated preferences (Section III).

II. The history of the Area of Freedom, Security and Justice and the construction of a European public order

This section places the AFSJ in the context of the first trend in European integration mentioned in the introduction, that of the expanding range of policies subject to integration measures and the activities of the European Union. In a sense, this is obvious. The movement of the EU into policy areas previously considered the exclusive purview of the nation-state, in particular security issues, is in itself important and forms part of the general extension of the European Union's powers and range of activities beyond the traditional economic core of the internal market.¹⁷

In terms of *policy* areas, most of the AFSJ predated the entry into force of the Treaty of Lisbon.¹⁸ However, the Treaty of Lisbon has seen a significant widening of powers within those policy areas.¹⁹ This is not to say, however, that the treatment of the AFSJ in the Treaty of Lisbon and recent policy developments, in particular the Stockholm Programme, have had no impact on the wider story of European integration. The creation and development of the AFSJ marks a significant shift in the focus of European integration and in the construction of a European polity. The AFSJ is part of a wider story of the European Union, appropriating various state-like attributes to itself: the provision of security, the appropriation of a territory, the development of various public values and the gradual creation of a citizenry.²⁰ This development has been incremental and the Treaty of Lisbon is the latest step in this process.

The first instances of cooperation in the areas that were to become the AFSJ took place outside what was then the EEC. The establishment of the Trevi working groups in 1975 and the Schengen system were forms of inter-governmental cooperation characterised by a highly technical subject matter and specialist technical committees. The creation of the

¹⁷ See A von Bogdandy, 'The European Union as a Supranational Federation: A Conceptual Attempt in the Light of the Amsterdam Treaty' (2000) 6 *Columbia Journal of European Law* 27.

¹⁸ That is to say that prior to the Treaty of Lisbon the EU had competence of some kind in most areas now covered by the AFSJ: immigration, asylum, criminal law, judicial cooperation, etc.

¹⁹ See as an example article 83(2) TFEU on criminal offences.

²⁰ See von Bogdandy (n 17).

European Union with the Treaty of Maastricht marked a new stage in the development of internal security cooperation in Europe. Occupying the third pillar of the three pillar structure of the European Union, Justice and Home Affairs cooperation retained much of its inter-governmental characteristics with a special decision-making process dominated by national governments and the requirements of unanimity. It also employed weaker legislative instruments compared to the more developed Community pillar. Nonetheless, the creation of the third pillar marked a shifting dynamic in the governance of security in Europe, turning the EU into a site where public interest in matters of justice and home affairs was to be represented, and involving the EU in the provision of these public goods.²¹

Concerns regarding both judicial and democratic oversight in the context of Justice and Home Affairs and the efficiency of the institutional systems in the third pillar led to calls for reform in negotiations leading to the adoption of the Treaty of Amsterdam. At the same time, given the sensitivity of the subject matters and the fact that they represented areas close to the 'core' of state sovereignty, Member States were unwilling to abandon entirely the inter-governmental structures in the area. The resulting compromise partially communitarised the third pillar, moving matters relating to immigration, asylum and visas²² into the new Title IV of the EC Treaty, while internal security matters, criminal law and police and judicial cooperation remained in the 'rump' third pillar.²³ The resulting institutional arrangements also reflected a halfway house between supranationalism and inter-governmentalism, with the 'Community' elements being marked by certain inter-governmental characteristics and some supranational elements being introduced in the third pillar. It is worth noting that the Treaty of Amsterdam also saw the incorporation of the Schengen system into the European Union structure. The Schengen acquis was split between the two elements of the AFSJ depending on whether it related to the free movement of persons or broader questions of security. In order to provide a link between the two institutional frameworks that now contained the policy of the Union in Justice and Home Affairs, the Treaty of Amsterdam saw the creation of the Area of Freedom, Security and Justice.

Given the broad subject matter, the use of the term 'area' incorporated the 'material heterogeneity' of the AFSJ and was employed by the

²¹ AH Gibbs, 'Reasoned "Balance" in Europe's Area of Freedom, Security and Justice' (2011) 17(1) *European Law Journal* 121.

²² Broadly, and perhaps somewhat confusingly, entitled 'policies relating to the free movement of persons'.

²³ J Monar, 'Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation' (1998) 23(4) *EL Rev* 320.

Commission as a means to present a coherent domain of action while spreading it across different legal bases in the Treaty of Amsterdam.²⁴ It is clear that anyone approaching the topic faces some 'basic design problems' and a not insignificant difficulty in identifying an element of 'coherence' in the AFSJ, ie 'a defining feature or features of the Area of Freedom, Security and Justice itself'.²⁵ Walker identifies *policy* coherence as one potential type of 'coherence' that could be imposed on the AFSJ and it is true that the various policies that fall within the ambit of the Area of Freedom, Security and Justice have been the object of increasingly systematic treatment over the years. Thus, 'freedom', 'security' and 'justice' are frequently cross-referenced and framed in terms of each other, with policy documents stressing the functional links between the three concepts.²⁶ This has led to what Kostakopoulou has termed the 'discursive chain of freedom, security and justice'.²⁷ The Commission itself has recently acknowledged that the 'Union must resist tendencies to treat security, justice and fundamental rights in isolation from one another'.²⁸

Nonetheless, it is submitted that deeper and perhaps more significant coherence can indeed be identified amongst the three components of the AFSJ. Common to all three goods is the relationship between law and the individual in a democratic society. In an early effort to explore the meaning of the AFSJ, the Commission saw the concept as enshrining at a 'European level the essence of what we derive from our democratic traditions and what we understand by the rule of law'.²⁹ In a different context, this has been called a 'European public order'.³⁰

²⁴ J Monar, 'The Area of Freedom, Security and Justice' in A von Bogdandy & J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart 2010).

²⁵ See N Walker 'In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey' in N Walker (ed), *Europe's Area of Freedom, Security, and Justice* (OUP 2004) 5.

²⁶ Often with the language and discourse of security providing the main frame of reference. Thus, 'if one looks at the three concepts of freedom, security and justice together, one can clearly see that security is the main linking element: it is part of the rationale of the justice concept of the AFSJ and at the same time an essential condition of its concept of freedom' (Monar (n 24)). Indeed, use of the neofunctionalist spill-over theory to explain the security element of the AFSJ is well known. See A Niemann & P Schimetter, 'Neofunctionalism' in A Wiener & T Diez (eds), *European Integration Theory* (OUP 2009) 57.

²⁷ D Kostakopoulou, 'The Area of Freedom, Security and Justice and the European Union's Constitutional Dialogue' in C Barnard (ed), *The Fundamentals of EU Law Revisited* (OUP 2009) 174.

²⁸ Commission, 'Action Plan implementing the Stockholm Programme (Communication) COM (2010) 171 final.

²⁹ Commission, 'Towards an Area of Freedom, Security and Justice' (Communication) COM (1998) 459 final.

³⁰ C Kaunert, 'The Area of Freedom, Security and Justice: The Construction of a "European Public Order"' (2005) 14(4) *European Security* 459; H Lindahl, 'Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity' (2004) 29(4) *EL Rev* 461.

The concept of an AFSJ involves the creation of a single area of common values situated at a European level. This concept of a single area has a symbolic, political value and resonates strongly with the language of integration and indeed moves the process of integration beyond the creation of a common market and the related flanking measures. As stated by Labayle:

Ceci va donc bien au delà du simple jeu de la liberté de déplacement et de séjour et enclenchera inévitablement un processus de rapprochement et d'intégration que les imperfections techniques pourront retarder mais pas empêcher.³¹

The AFSJ, grouping together concepts of justice, freedom, rights, security, the rule of law and increasingly democratic values, can be said to involve the gradual creation of a nascent, and still somewhat ill-defined, 'European public order'. We have already seen how under the Treaty of Maastricht the European Union for the first time became a site of public interest for internal security. Under Amsterdam, with the partial communitarisation of some justice and home affairs matters and the creation of the Area of Freedom, Security and Justice, the Union began the process of integrating more fully certain 'high policy' areas into the heart of the European project and thus transforming it.³² The Treaty of Lisbon continues the construction of an increasingly autonomous 'European Public Order', in particular through the linking of citizenship, territory and public values.

Small but significant changes have been introduced in the designation of the AFSJ as an objective of the Union and its general place in the Treaty architecture. It maintains, and to some extent improves, its position amongst the reprioritised objectives, ranking ahead of the internal market and just below the promotion of peace and the well-being of citizens. As stated by Craig:

it is not fortuitous that mention of the area of freedom, security and justice has 'moved up' the list to become Article 3(2) of the TEU, thereby signifying its centrality to the EU polity.³³

In addition, AFSJ is now integrated fully into the new unified Treaty architecture with the absorption of the third pillar. The important practical implications of this incorporation for the system of integration will be explored in further detail below, but it nonetheless resonates symbolically. The clear designation of the AFSJ as an area of *supranational*

³¹ See H Labayle, 'Un Espace de liberté, de sécurité et de justice' (1997) 33(4) *Revue Trimestrielle de Droit Européen* 813.

³² See von Bogdandy (n 17).

³³ P Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform* (OUP 2011) 338.

governance confirms and strengthens the importance of the European Union as an autonomous site of public interest in these matters, rather than simply a point of inter-governmental interaction.

The Treaty of Lisbon also strengthens the AFSJ links with two other important developments in the European Union, namely the increasingly developed system of fundamental rights and of Union citizenship. Respect for fundamental rights is now explicitly linked with the AFSJ in the first article of the new consolidated provisions on the AFSJ, whereby 'the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States'.³⁴

The notion of the AFSJ is being increasingly associated with citizenship of the Union. In article 3 TEU the objective of developing European citizenship has been to some extent incorporated into the objective of the AFSJ. The development of European citizenship has been dropped as an objective. However, the Union now 'offers its citizens' an AFSJ rather than simply being committed to 'maintaining and developing' an area of freedom, security and justice, as was the case under the Treaty of Amsterdam.

The increasing association of fundamental rights and citizenship with the AFSJ in the Treaty of Lisbon is even more explicit in the more recent policy documents of the Commission and the Council. The Stockholm Programme adopted by the European Council immediately prior to the entry into force of the Treaty of Lisbon is the latest in a series of multi-annual programme documents intended to guide the development of the AFSJ. Entitled 'the Stockholm Programme: An open and secure Europe serving and protecting the citizen', it is intended to move 'towards a Citizens' Europe in the Area of Freedom, Security and Justice'. Equally, the priority for Union action over the five-year period is 'to focus on the interests and needs of citizens. The challenge will be to ensure respect for fundamental freedoms and integrity while guaranteeing security in Europe'. Citizenship and fundamental rights now form integral parts of Union action in this field and indeed form the theme of the programme. Fundamental rights and citizenship, including more 'traditional' citizenship rights previously associated with the internal market such as free movement, are now incorporated into the AFSJ (at least from a policy perspective).

Besides the importance of citizenship, fundamental rights and the development of a community of values, the construction of the AFSJ has a clear territorial element. By speaking of a specific area, the Union is

³⁴ Article 67(1) TFEU.

appropriating a geographic domain for itself, grouping together the territories of the different states. The geographic theme arises in numerous contexts in the AFSJ. In developing a policy for frontiers, both internal and external, the Union is to some extent defining itself in terms of territory.³⁵ At the time of the Treaty of Amsterdam, Twomey spoke of a 'secure space'.³⁶ This territorial element has been strengthened further in the Treaty of Lisbon. Notably, article 67(1) TFEU assimilates the Union itself to the AFSJ, stating that now 'the Union shall constitute an area of freedom, security and justice...'.³⁷

The Treaty of Lisbon marks another step in the construction of a 'political' Europe and a European public order. The consolidation and incorporation of the AFSJ into the supranational architecture represents the recognition of the Union's role in this area, and the reprioritising of the AFSJ as an objective of the Union marks its increasing importance for European polity. Finally, the increased ties between the AFSJ and fundamental rights and citizenship bring together important developments in the European Union and lead to increasing affirmation of the Union as a distinct political entity manifesting a territory, a people and specific values. The AFSJ in Lisbon continues the trend of extending the scope of European integration.

Nonetheless, unlike the internal market or other policy objectives, the creation of the AFSJ continues to lack a 'particular finalité'.³⁸ It is difficult, beyond the abstract (if growing) symbolism in the Treaty and policy documents, to identify the core common components of such a 'European public order'. It is difficult to identify a single guiding policy objective such as the creation of a common market. In areas where the EU acted as a functional union,³⁹ certain tasks such as the suppression of protectionism were 'existential' to the EU – the system itself was premised on particular policy choices.⁴⁰ This is not the case for the AFSJ. Beyond abstract commitments to a high level of protection of fundamental rights, free movement and a 'more secure Europe', there are no specific policy choices that are inherent to the AFSJ. Significant variations still persist amongst Member States regarding the means to achieve these rather ab-

³⁵ H Lindahl, 'Finding a Place for Freedom, Security and Justice: The European Union's Claim to Territorial Unity' (2004) 29(4) *EL Rev* 461.

³⁶ P Twomey, 'Constructing a Secure Space: The Area of Freedom, Security and Justice' in D O'Keefe & P Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing 1999).

³⁷ Article 67(1) TFEU.

³⁸ See Walker (n 25).

³⁹ Von Bogdandy (n 17).

⁴⁰ Menon and Weatherill make this point in relation to EU trade law when discussing the legitimacy in the EU. A Menon & S Weatherill, 'Democratic Politics in a Globalising World: Supra-Nationalism and Legitimacy in the European Union' (2007) *LSE Law Society and Economy Working Papers No 13/2007*, 8.

stract goals. Furthermore, the AFSJ represents an area of 'high politics' that can be said to affect the core of state sovereignty. The sensitivity of the policy area naturally raises questions of adequately accommodating differences in national preferences. The construction of the AFSJ, in contrast to the internal market, involves a form of integration more respectful of the autonomy of national legal systems and allowing greater space for the accommodation of difference.⁴¹

III. The system of integration in the Area of Freedom, Security and Justice post-Lisbon

The Lisbon Treaty collapsed the pillar structure and incorporated the remaining aspects of the AFSJ into the (former) Community structure. To this extent, the AFSJ now represents a 'normal' area of European integration and enjoys all the highly developed features of such a system. However, in recent decades European integration has become increasingly fragmented and differentiated.⁴² This is not a new phenomenon, nor is it particular to the AFSJ.⁴³ However, the AFSJ continues this trend and to some extent epitomises it. The following section assesses the system of integration in the AFSJ based on certain parameters of integration identified by Dehousse and Weiler.⁴⁴ While the nature of integration and legislative action in the EU has changed somewhat since they were developed, they are still useful as a means of representing the type of integration in a particular system. These parameters include the nature of competences, the decision-making process, the binding effect of certain norms, enforcement, the territorial scope of the integration, and the techniques designed to achieve legal integration.

i. The nature of competences in the AFSJ

The first step in determining the role of the EU in any policy area is an assessment of its competences. For the most part, the number of policy areas covered by the AFSJ was not substantially increased under the Treaty of Lisbon. Nonetheless, the EU was granted significant new powers within these areas.

⁴¹ This could equally be described as 'lesser' integration compared to the internal market and this is to some extent implicit in the analysis. However the focus of this piece is not so much to place the AFSJ on a spectrum of integration from 'integrated' to 'not integrated', but rather to assess its form in the light of the Treaty of Lisbon and to suggest why it has developed in such a way.

⁴² See Shaw (n 4) and, for the constitutional implications, N Walker, 'Flexibility Within a Metaconstitutional Frame: Reflections on the Future of Legal Authority in Europe' in de Búrca & Scott (n 5).

⁴³ See Weatherill (n 6) ch 4.

⁴⁴ Dehousse and Weiler (n 7).

Under the Treaty of Lisbon's new system of enumerated competences, the AFSJ falls under the title of shared competences, meaning that Member States may act in the area to the extent that the Union has not exercised its competences. Thus, a doctrine of pre-emption operates whereby Member States' competences will be gradually replaced as the Union exercises its own competences. In this regard, the system of integration would appear to favour the supranational level, emphasising as it does the progressively exclusionary nature of EU competences. However, as stated by Craig, 'the nature of the power sharing between the EU and the Member States can only be divined by looking at the detailed provisions of the particular area'.⁴⁵ Such a detailed examination reveals certain characteristics of competences in the AFSJ that would appear to limit to some extent action by the Union,⁴⁶ by implication preserving Member State autonomy, thus favouring a more decentralised form of integration.

Firstly, whereas the principle of attributed competences governs the allocation of competences to the EU generally,⁴⁷ in the AFSJ this principle is applied particularly rigorously. Not only are the areas of Union action specifically defined, but the Treaty also lists the specific measures that may be taken within these areas. In the AFSJ, the EU is not granted general powers to take measures to achieve a certain defined goal, such as the free movement of goods. Instead, its powers are limited to taking specific measures. The manner in which 'competences' are allocated in the AFSJ thus particularly limits the action of the Union.⁴⁸

⁴⁵ Craig (n 33).

⁴⁶ This would appear to be consistent with Protocol (No 25) on the Exercise of Shared Competences, added to the Treaty of Lisbon in order to emphasise that pre-emption only operates with respect to the act in question and not the entire area.

⁴⁷ The principle of conferred powers implies that the Union may only exercise those powers that are conferred upon it by the Treaties. In other words 'la compétence nationale demeure le principe et la compétence communautaire l'exception' (D. Simon *Le système juridique communautaire* (3rd edn, PUF 2001)). An analogous rule can be found in various federal systems, eg in the US '[t]he powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively or to the people' (US Constitution, Amendment X).

⁴⁸ Thus, in the field of asylum, seven specific measures are to be adopted including measures concerning the creation of a uniform status for refugees and those enjoying subsidiary protection, and the procedures to grant and withdraw such a status, reception conditions, burden sharing arrangements between Member States and arrangements with third countries (article 78 (2) TFEU). Similar lists of measures to be taken within the context of a policy developed by the Union can be found for immigration policy (article 79(2) TFEU) and judicial cooperation (article 81(2)). See also D Chalmers and A Tomkins, *European Public Law* (CUP 2007) 211. Similarly, in the area of criminal law, while the Treaty appears to define a general area within which Union action can be taken, subsequent provisions create very specific limits. Thus, the Union may develop legislation with a view to defining certain criminal offences and sanctions, notably those that are 'particularly serious' and with a 'cross-border dimension' (ie an open category, defined by objective criteria). However, the same paragraph limits this power to nine specific areas of crime (ie a closed list of specific crimes).

A second feature of the system of competences in the AFSJ is the lack of provisions granting flexibility that are common in other areas of EU policy, in particular the internal market. There is no equivalent of article 114 TFEU granting general powers to the Union to take measures 'which have as their object the establishment and functioning of the internal market'. Where such provisions do exist, they tend to be specific to a particular area and operate by way of unanimity.⁴⁹

As a corollary of this limitation on the powers of the Union, certain actions are specifically reserved to the authorities of the Member States. If the Union is to act in these areas, the coordinating nature of its role is emphasised.⁵⁰ An example of this is found in the area of national security.⁵¹ Where coordinating actions are envisaged, it is quite clear that the main agents in achieving this coordination are the Member States.⁵²

ii. Decision making in the AFSJ

The decision-making process of the AFSJ has, since the changes introduced as part of the Lisbon Treaty, been more closely aligned with the rest of the Union. Significant advances have been made to create a more fully developed supranational structure for the development of law in the area, including a shift to the ordinary legislative procedure in a majority of areas and an increased role of the Commission. However, the AFSJ still displays a number of residual characteristics that limit centralising tendencies and, to a certain extent, emphasise the continued importance of the Member States in the decision-making process.

Firstly, in certain areas of the AFSJ, the Commission's power of legislative initiative is shared with the Member States.⁵³ In these areas, the Commission is less able to shape the particular agenda and to influence legislative outcomes.⁵⁴ Secondly, the continued existence of some (ad-

⁴⁹ For example, article 83(1) contains a provision allowing for the list of crimes that may be subject to approximation to be modified by unanimity.

⁵⁰ See Monar (n 24).

⁵¹ Eg article 72 TFEU which states '[t]his Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security'. And article 73 TFEU 'It shall be open to Member States to organise between themselves and under their responsibility such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security'.

⁵² See articles 72-74 TFEU.

⁵³ Under article 69 TFEU legislative initiatives can be introduced by a quarter of the Member States in the areas of judicial cooperation in criminal matters and police cooperation.

⁵⁴ Speaking of arrangements in Title IV of the TEC following the Treaty of Amsterdam, Monar states: 'It may be asked whether a transfer of policy areas to the Community framework which departs, even temporarily, from the principle of the Commission's exclusive right of initiative still merits the term "communitarisation"' (Monar (n 23) 329).

mittedly limited) vetoes,⁵⁵ quasi-vetoes and the ‘emergency brake procedure’⁵⁶ represents an aspect of the AFSJ where individual Member States exercise greater influence over the decision-making process.⁵⁷ While less dramatic than the deployment of a veto and probably entailing significant political costs,⁵⁸ the effect on the negotiating dynamics in the Council remains, ensuring that the ‘fundamentals’ of the various criminal justice systems are not affected. A final aspect of the institutional arrangements in the AFSJ that reflect a more cautious approach towards centralised law making is the stress laid on the principle of subsidiarity⁵⁹ and the corresponding role of national parliaments.

iii. Binding effect of norms

Perhaps one of the most significant changes introduced in the Treaty of Lisbon was the replacement of the old third pillar measures, such as the convention, the common position and the framework decision. As noted above, these measures were originally rather inter-governmental in nature. Even when modified after the Treaty of Amsterdam,⁶⁰ third

⁵⁵ Principally in family law, in ‘paraselle’ provisions extending the range of measures that can be taken by the Union, in the areas of police cooperation and in the establishment of a European Public Prosecutor’s Office. Provision is made for fast tracked enhanced cooperation in the event that consensus is unachievable.

⁵⁶ For an analysis, see S Peers *EU Justice and Home Affairs Law* (3rd edn, OUP 2011) 65.

⁵⁷ The draft directive is then referred to the European Council while the procedure is suspended. If the European Council is unable to reach a consensus on the matter, then the directive remains suspended with the possibility of nine Member States going ahead under the enhanced cooperation facility. The legal service of the Commission is of the opinion that the use of the wording ‘considers’ makes it less likely that this provision will be justiciable in a meaningful way before the Court of Justice. In a submission to the House of Lords, a member of the Legal Service was of the opinion that ‘it is hardly controllable by the Court because the sentence starts with “Where a member of the Council considers that” it affects ...’ See European Union Committee, *The Treaty of Lisbon: An Impact Assessment* (10th Report HL 2007-08, 62-II) 80.

⁵⁸ See European Union Committee (n 57).

⁵⁹ In the AFSJ, the scrutiny of the national parliaments is likely to be that bit more intense with a special mention of the role of national parliaments in the area and the existence of a slightly modified ‘yellow card’ system. See article 69 TFEU and Protocol No 2 on the application of the principles of subsidiarity and proportionality (article 7(2)). The successful issuing of a ‘yellow card’ by the national parliaments on concerns related to proportionality or subsidiarity obliges the proposing institution to withdraw, amend or maintain an act and it must give reasons for its decision. However, it should be noted that the impact of the principle of subsidiarity in criminal law in the EU has been judged by some to be limited. See E Herlin-Karnell, ‘Subsidiarity in the Area of EU Justice and Home Affairs Law—A Lost Cause?’ (2009) 15(3) *European Law Journal* 351.

⁶⁰ In the original TEU, ‘conventions’, ‘joint positions’, ‘joint actions’ and ‘common positions’ were to be adopted under the third pillar. Subsequent to the reforms at Amsterdam, asylum and immigration and civil cooperation were moved to the first pillar and made subject (with some important modifications) to the ‘Community method’, thus allowing for directives to be adopted in these fields while the ‘framework decision’ was introduced in the third pillar (see article 34 TEU (old)) and became increasingly popular. For an overview of the instruments in the third pillar following the Treaty of Amsterdam, see Monar (n 23) 326-327.

pillar measures were limited in their binding effect and in particular lacked direct effect.⁶¹ Their replacement with the more familiar 'Community' instruments of regulations and directives strengthens considerably the system of integration in the AFSJ, applying as it does the doctrines of supremacy and direct effect that distinguish Union law from traditional international law.⁶²

iv. Enforcement

Not only is the binding effect of laws adopted in the AFSJ now enhanced, the mechanisms for their enforcement have been considerably strengthened. One of the features of the AFSJ prior to the Treaty of Lisbon was the weakness of the enforcement mechanisms. The preliminary reference procedure, long a central plank in the system of judicial control and in ensuring the uniform application of law in the context of the Community, was severely curtailed both in the third pillar⁶³ and within the 'communitarised' Title IV TEC.⁶⁴ The problem of a limited preliminary reference procedure was exacerbated by the lack of an infringement procedure in the third pillar. The combination of these two aspects significantly limited the role of the Court of Justice in the AFSJ generally and in the third pillar in particular. However, it should be noted that this did not entirely prevent the Court from influencing the development of the law in the AFSJ.⁶⁵ Given the historic role of the Court of Justice as an engine of integration,⁶⁶ the limited judicial role constituted a major weakness of the system of integration in the AFSJ. The Treaty of Lisbon remedies this defect, bringing the jurisdiction of the Court of Justice and the powers of the Commission to launch infringement proceedings in the AFSJ into line with the rest of the Treaty.

⁶¹ In particular, the framework decision, in deliberate contrast to the directive, was specifically precluded from having direct effect. This did not, however, prevent the Court of Justice from ruling that such measures do enjoy indirect effect, in particular they carry a duty of conform interpretation (Case C-105/03, Criminal Proceedings against Maria Pupino [2005] ECR I-5285 concerning the application and interpretation of Framework decision 2001/220 on the standing of victims in criminal proceedings).

⁶² Nonetheless, it should be noted that the existence of a transitional regime will prologue the complexity for a number of years to come. For an overview, see Peers (n 55) 61. For a general overview of the differences between EU law and EC law prior to the Treaty of Lisbon, see A Hinarejos, 'The Lisbon Treaty Versus Standing Still: A View from the Third Pillar' (2009) 5 *European Constitutional Law Review* 99.

⁶³ Ex article 35 TEU.

⁶⁴ Ex article 68 TEC.

⁶⁵ For an overview of the Court of Justice's role in the AFSJ prior to the Lisbon Treaty, see K Lenaerts, 'The Contribution of the Court of Justice to the Area of Freedom, Security and Justice' (2010) 59 *ICLQ* 255.

⁶⁶ The role of the Court of Justice in the integration process has long been a subject of debate and controversy amongst political scientists. For an overview of the literature in the area, see L Conant, 'The Politics of Legal Integration' (2007) 45 *Journal of Common Market Studies* 45.

v. Territorial scope

The AFSJ is one of the clearest examples of ‘multi-speed Europe’. Given the fitful development of the AFSJ and the historically sensitive nature of the subject matter, some Member States were unwilling to cede national sovereignty over matters of asylum, immigration and national security, and so a system of vetoes prevailed. As vetoes have been abolished in the communitarised parts of the AFSJ in the Treaty of Amsterdam, mechanisms were introduced to safeguard national sovereignty in the AFSJ. Firstly, systems of opt-out/opt-ins for AFSJ matters were created under the Treaty of Amsterdam and extended in the Treaty of Lisbon.⁶⁷ Secondly, the introduction of the emergency brake procedure will also make enhanced cooperation easier to activate in certain areas of the AFSJ, removing as it does the need for a separate authorisation decision by the Council if the emergency brake is successfully applied.⁶⁸ Moreover, given the sensitive nature of some of the subject matter in the AFSJ, it is likely to be a prime candidate for the future deployment of the mechanism generally. Indeed, examples of enhanced cooperation have taken place recently in the AFSJ, notably a regulation on the law applicable to divorce and legal separation.⁶⁹

vi. Techniques of integration

While, since the entry into force of the Lisbon Treaty, the same legal instruments exist in the AFSJ as exist in other areas of EU law, it is worth highlighting a number of specific features of their use in the AFSJ that point to a particularly decentralised form of integration and which correspondingly leave a significant role for national legal systems as sources for the development of rules.

The first point to be made concerns the type of instrument that is most commonly employed in the AFSJ. In virtually all areas of the AFSJ,

⁶⁷ The United Kingdom and Ireland enjoy a general opt-out of all Part II, Title V matters under the Treaty of Lisbon and a specific protocol on the application of the Schengen acquis. See Protocol (No 21) On the Position of the United Kingdom and Ireland with respect to the Area of Freedom, Security and Justice, and Protocol (No 19) On the Schengen Acquis Integrated into the Framework of the European Union. See also E Fahey, ‘Swimming in a Sea of Law: Reflections on Water Borders, Irish (-British)-Euro Relations and Opting-out and Opting-in after the Treaty of Lisbon’ (2010) 47(3) CML Rev 645. Denmark also enjoys various opt-outs, including opt-outs relating to the AFSJ and a special position regarding the Schengen acquis. See Protocol (No 22) On the Position of Denmark that includes provisions on the Schengen acquis and the AFSJ more generally. A referendum may take place in the near future in Denmark on the issue of relinquishing the opt-outs.

⁶⁸ See in particular articles 82(2) and 83 TFEU in relation to cooperation in civil and criminal matters.

⁶⁹ Council Regulation (EU) 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/2.

the directive (or its old third pillar counterpart, the framework decision) is the instrument of choice. The Treaty prescribes the use of directives for most substantive legal issues.⁷⁰ Where regulations are employed, they are to deal with operational or technical matters such as the establishment and operation of agencies⁷¹ and information systems.⁷² The directive, instructing the Member States as to the goals to be achieved but leaving its implementation to national law, is particularly suited to a coordinating rather than consolidating role.⁷³ In principle, it provides an overarching framework allowing Member States to tailor implementation to the particular circumstances of their legal systems, and facilitates decentralised integration.

A second feature of legislative action in the AFSJ is the minimal approach taken towards 'harmonisation', establishing a floor for Member State action and leaving them free to apply stricter criteria. The creation of 'minimum' standards is evident from the titles of many directives⁷⁴ and most of these provisions allow Member States to introduce 'more favourable' provisions.⁷⁵ Whereas prior to the Treaty of Lisbon the Union was expressly limited to enacting minimum measures in certain fields such as asylum and immigration, since the entry into force of the Treaty of Lisbon this limitation has been removed. Nonetheless, in practice the Commission would appear to be retaining its pre-Lisbon practice of merely proposing measures of minimum harmonisation in the field, suggesting that legislative practice in the area will continue to favour a decentralised

⁷⁰ Thus, in the area of immigration law, provisions on the status of long term residents (Directive 2003/109/EC), family reunification (Directive 2003/86/EC), immigration for researchers, students and highly skilled workers (Directive 2005/71/EC) are all regulated by Directives.

⁷¹ Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime (2002/187/JHA).

⁷² Regulation 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention.

⁷³ As mentioned by Labayle 'mis à part le cas particulier de la politique des visas qui fait usage de l'outil réglementaire, l'action de la communauté en matière migratoire repose sur la technique de la législation indirecte impliquée par la volonté de rapprocher, d'harmoniser et de coordonner les législations nationales' (H Labayle, 'Vers une politique commune de l'asile et d'immigration dans l'union européenne' in F Julien-Lafarrière, H Labayle & O Edstöm (eds), *Politique Européenne d'immigration et d'asile: Bilan critique 5 ans après le traité d'Amsterdam* (Bruylant 2005) 36).

⁷⁴ Ex Directive 2004/83/EC is entitled 'minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted'. However, it should be noted that with the change introduced in the Lisbon Treaty, the Union is no longer limited to the creation of 'minimal standards' in the areas of immigration and asylum. It remains to be seen if this will have an impact on legislative developments in these areas.

⁷⁵ Article 3(5) of Family Reunification, Directive 2004/8/EC, allows Member States to introduce 'more favourable' provisions. For a discussion of the implications of this 'margin of appreciation' and in particular when assessing the directive's conformity with human rights, see Case C-540/03 *European Parliament v Council* [2006] ECR I-05769.

regime.⁷⁶ In addition, much of the legislation in the AFSJ includes optional provisions that Member States ‘may’ apply, while some directives are replete with derogations⁷⁷ with the effect of varying the impact of a directive depending on the choices made in its implementation.

Much of the ‘harmonising’ legislation in the AFSJ includes references or ‘renvois’ to national law, thereby incorporating national law terms and definitions into the Union measure. Thus, EU law may provide that national law is to determine certain aspects of the applicable legal regime such as the penalties to be imposed under the framework decision on combating terrorism.⁷⁸ The applicable law is therefore constructed from a combination of Union law and national law.

It can be seen that through minimum harmonisation and the use of options, derogations and renvois, much of the normative content in the AFSJ arises from national law, thereby preserving to a certain extent national law-making autonomy and facilitating varying national preferences. Nonetheless, EU law does exert a degree of coherence and homogeneity within the AFSJ, in particular since the changes introduced in the Treaty of Lisbon. The AFSJ now enjoys a fully fledged supranational legal system complete with a doctrine of supremacy, direct effect and a supranational judicial system. Furthermore, recent developments in the jurisprudence of the Court of Justice suggest that certain general principles of law and interpretation may act as a limiting force on the differentiated tendencies in the AFSJ.

Through its jurisprudence, the Court of Justice appears to place limits on the decentralising tendencies of such legislation.⁷⁹ Thus, the

⁷⁶ For the Commission’s proposals on the next generation of asylum measures, see Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted COM(2009) 551 final; Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection COM(2009) 554 final; and Commission, Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers COM (2008) 815 final.

⁷⁷ de Bruycker cites the example of one commentator counting fifty possible derogations in the procedures directive (P de Bruycker, ‘Le Niveau d’harmonisation législative de la politique Européenne d’immigration et d’asile’ in Julien-Lafarrière, Labayle & Edstöm (n 73) 54).

⁷⁸ Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism [2002] OJ L164/3, art 5(2). Similarly, under Regulation No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, the determination of whether custody rights exist or not is to be made by reference to national law as has been recently decided by the Court of Justice in Case C-400/10 PPU J McB v L E [nyr] paras 43-44.

⁷⁹ Although fundamental rights may sometimes have the opposite effect on the operation of a coherent European legal system, posing a threat to uniform solutions. See the recent Opinion of AG.

fact that it is national law that complements or derogates from rules laid down in the directive does not remove the matter from the jurisdiction of the Court.⁸⁰ A directive leaving a certain margin of appreciation for Member States cannot implicitly or explicitly authorise measures that would breach European standards of fundamental rights.⁸¹ Similarly, in the context of references to national law, it would appear that such a reference would only be valid if the national law itself was compatible with fundamental rights.⁸² Equally, 'more favourable provisions' can generally be implemented only 'in so far as they are compatible with the Directive'.⁸³ The result is that implementing measures cannot compromise the purposes of the Directive.⁸⁴

Particular mention should be reserved for the use of 'mutual recognition' in the AFSJ. As with the 'flexible harmonisation' approach, this is not a new technique nor is it particular to the AFSJ.⁸⁵ However, its use in the AFSJ, in particular in the areas of judicial cooperation, has been enthusiastically embraced and now forms the central plank in the Union's efforts at integration in the AFSJ. In practice, it has long been considered the 'cornerstone' of integration efforts in the AFSJ.⁸⁶ However, the Treaty of Lisbon enshrines its importance in the Treaty and would appear to privilege its use,⁸⁷ while the Commission in its action plan implementing the Stockholm programme notes that the 'focus will remain primarily on mutual recognition and the harmonisation of offences and sanctions will be pursued for *selected cases*'.⁸⁸

Mutual recognition is differentiated integration *par excellence*, allowing integration while maintaining legal diversity. It creates a form of interpenetration between legal systems, extending the scope of one legal system beyond its own geographical frontiers and into the territory

⁸⁰ *European Parliament v Council* (n 75) para 22.

⁸¹ *ibid* para 23.

⁸² See *J McB v L E* (n 78) para 49.

⁸³ Ex Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12.

⁸⁴ Cases C- 57/09 and C-101/09 *Germany v B&D* [nry] para 115.

⁸⁵ There are, however a number of key differences that should be taken into account between the use of the concept in the internal market and in the AFSJ. See M Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 CML Rev 405, 408-409.

⁸⁶ European Council, Tampere Council Conclusions 15-16 October 1999 point 4 <http://www.europarl.europa.eu/summits/tam_en.htm> accessed 3 April 2011.

⁸⁷ On procedural matters, approximation of laws are only to take place in so far as is necessary to facilitate mutual recognition. See article 82(2) TFEU.

⁸⁸ See Commission Action Plan (n 28) (emphasis added).

of another.⁸⁹ And whereas in the internal market this amounted to economic regulatory interpenetration, in the AFSJ it is connected to the administration of justice. The mutual recognition of judgments is perhaps the most visible and widely commented on form of mutual recognition in the AFSJ.⁹⁰

It should also be noted that the existence of a lack of trust between national legal systems has attracted significant controversy and comment.⁹¹ It is in this area that mutual recognition and approximation of laws are complementary in nature. The existence of approximation is intended to generate sufficient trust between legal systems to allow mutual recognition to take place between legal orders. '[A] means/ends relationship exists between approximation and mutual recognition. The former is conceived as a tool to promote the development of the latter'.⁹² The creation of such 'mutual trust' by approximation measures in the area of criminal procedure would now appear to be a priority of the Union post-Treaty of Lisbon, and a roadmap for the development of defendants' rights has been incorporated into the Stockholm Programme.⁹³ Thus, measures such as the recent Directive on the right to interpretation and translation in criminal proceedings are justified by the need to increase levels of trust between Member States' legal systems.⁹⁴

Tension therefore exists at the heart of the system of integration in the AFSJ between the creation of a single system while at the same time facilitating variation. On the one hand, it can be seen that certain aspects of integration in the AFSJ aim at establishing a coherent system.

⁸⁹ These differences notwithstanding the founding principle of mutual recognition in both internal market and criminal law is similar: the recognition of national standards by other EU Member States. In that sense, as Nicolaidis and Shaffer have noted, "recognition creates extraterritoriality". National standards must be recognised "extraterritorially", in the sense that they must be applied and/or enforced by another Member State'. See V Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43 CML Rev 1277, 1281. In the article by Nicolaidis and Shaffer quoted by Mitsilegas, the authors describe mutual recognition as 'extraterritoriality applied in a consensual or at least bi- or plurilateral, "other-regarding" manner' (K Nicolaidis and G Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005) 68 Law and Contemporary Problems 263, 267).

⁹⁰ Following the 'flagship' measure of the European Arrest Warrant, its use has been extended, with the European Evidence Warrant being perhaps the most important follow-up (Framework Decision 2008/978/JHA on the European Evidence Warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters [2008] OJ L350/72).

⁹¹ See Mitsilegas (n 89).

⁹² M Fichera, 'The European Arrest Warrant and the Sovereign State: A Marriage of Convenience?' (2009) 15 ELJ 70, 77.

⁹³ See Stockholm Programme (n 3) 5.

⁹⁴ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings [2010] OJ L280/1.

In particular, the institutional arrangements, the exclusionary nature of competences, the binding nature of norms and mechanisms of enforcement post-Lisbon are classically supranational in character. On the other hand, elements such as the specificity of competences and the tools and techniques employed in fostering integration in the area represent a particularly strong form of differentiated integration. In this respect, the system established within the AFSJ appears aimed at organising variation. This tension between coherence and differentiation is reflected in the jurisprudence of the Court of Justice that appears to be attempting to strike a balance between the autonomy reserved for Member States and adherence to common general principles.

Conclusion

In analysing the Area of Freedom, Security and Justice as part of the broader story of European legal integration, the purpose of this paper has been twofold. The first purpose has been to gain an understanding of what the AFSJ entails as a new area of integration and what it implies for the construction of the European Union. The second purpose has been to assess the system of integration that currently exists in the AFSJ. In both respects it can be seen that, in the light of the Treaty of Lisbon, the AFSJ reflects broader trends in European integration, namely the increasing scope of European law combined with a more flexible model of integration. Integration in the AFSJ can therefore be seen to be a system for organising difference.

The AFSJ has gradually developed into a significant new domain of action for the Union that appears to be in the process of constructing a 'public order' at the level of the European Union founded on fundamental rights, citizenship and a community of values. This process, in particular the incorporation of citizenship and fundamental values, has been confirmed in both the Treaty of Lisbon and in the Stockholm Programme. In a related move, the Treaty of Lisbon has completed the process of creating a fully-fledged supranational system of integration complete with binding norms, a supranational decision-making structure and a key role for the Court of Justice. At the same time, the AFSJ reflects increased flexibility and differentiation in integration. The limited nature of its competences, the increased capacity for a 'multi-speed' Europe and above all the variety of tools and techniques aim, not to construct a complete pan-European legal regime, but rather to increase cooperation and inter-operability between national legal systems and thereby manage variation within a single coherent system.