

The European Union's Area of Freedom, Security and Justice

This presentation offers an examination of the EU's Area of Freedom, Security and Justice (AFSJ), of its theoretical foundations, competences, and principles. We analyse how this cornerstone of EU has developed, what justifies its existence, and how it balances competing interests of Security, Freedom, and Justice.
We will try to summarize the AFSJ's impact on national sovereignty, individual rights, and the very essence of criminal justice within the European legal framework.

by Angela Procaccino

Rhetorical Foundations of EU Area of Freedom Security and Justice

The Power of Political Slogans

The evocative phrase "Area of Freedom, Security and Justice" follows in the tradition of aspirational political taglines like "Life, Liberty and the Pursuit of Happiness" and "Liberté, Égalité, Fraternité." While these historical slogans encapsulated hopes of nation-states, the AFSJ applies to a more limited scope.

Despite this limitation, the AFSJ shares with its historical counterparts the ability to support numerous varied ideologies, all claiming to interpret its "mandate" correctly. This creates significant ambiguity in its practical application.

The Theoretical Vacuum

The introduction of the AFSJ was likely not the result of deeper probing into what the theoretical foundations of a novel, EU system of criminal justice ought to be. Instead, it represents an aspirational concept with minimal direct legal rights and obligations.

The existence of the terminology is significant, precisely because of its aspirational character. It has become synonymous with the EU's efforts to construct a system of criminal justice linking the systems of criminal justice of its Member States.

Freedom: Traditional Criminal Justice Perspective

The Individual-State Relationship

In traditional criminal justice theory, "freedom" represents the relationship between the individual and the state. Citizens are entitled to significant freedom from excessive state intervention in their activities.

Presumption of Innocence

The defining concept of this relationship is the presumption of innocence. National systems have extensive provisions guaranteeing the freedoms of suspects and defendants while they remain unconvicted.

Absence in EU Treaty

A cursory examination of the EU Treaty reveals that the protection of "freedom" in this traditional sense was not a primary concern of the contracting parties, despite being a cornerstone of national criminal justice systems.



Security: A Reactive Policy Area

9/11 Attacks (2001)

Dramatically accelerated adoption of measures that had been "in the pipeline"

Madrid Bombings (2004)

Further impetus for counter-terrorism cooperation

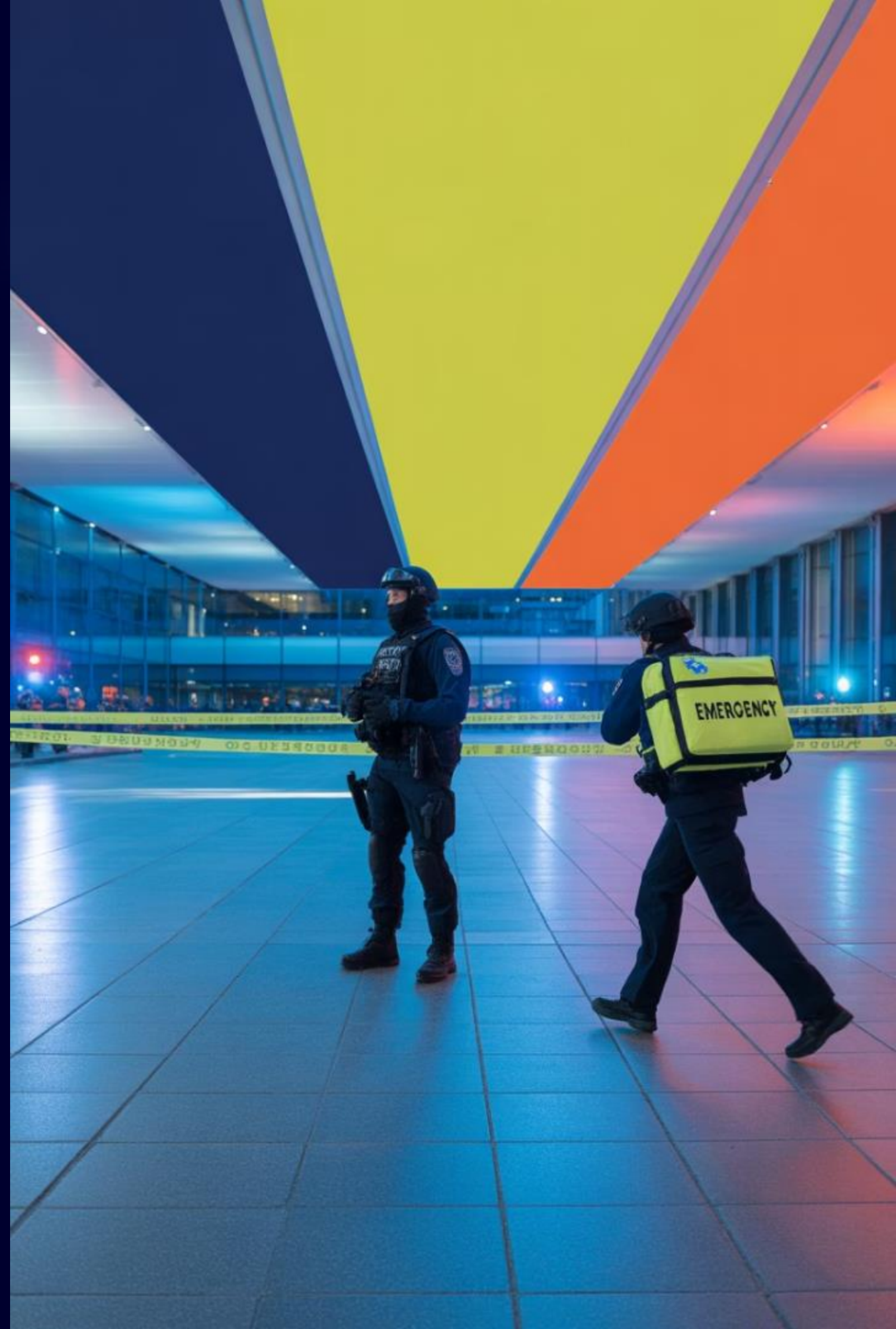
London Bombings (2005)

Reinforced perception of ongoing threat requiring coordinated response

Continued Threat Perception

Maintained political momentum for security-focused legislation

The AFSJ has been characterised by its reactive nature to theese events. This reflects the EU's desire to demonstrate "output legitimacy" by responding to public concerns about security threats.
Eurobarometer surveys in 2000 showed that fighting organised crime and drug trafficking ranked as the second highest priority for EU action in the public's view.





Legal Bases:

Article 3(2) of the Treaty on European Union (TEU) sets out the EU's key objectives in the area of freedom, security and justice (AFSJ).

Title V of the Treaty on the Functioning of the European Union (TFEU) – Articles 67 to 89 – is devoted to the AFSJ. In addition to the general provisions, this title contains specific chapters on:

1) Policies on border checks, asylum and immigration;
2) Judicial cooperation in civil matters;
3) Judicial cooperation in criminal matters;
4) Police cooperation.



EU Treaty: Legal Basis for Judicial Cooperation

Articles 82 to 86 of the Treaty on the Functioning of the TFEU.

Treaty Provisions for Penal Law and Criminal Procedure

Art 82:

Art. 83

Art. 82 (ex Article 31 TEU)

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures to:

a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;
b) prevent and settle conflicts of jurisdiction between Member States;
c) support the training of the judiciary and judicial staff;
d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

a) Mutual admissibility of evidence between member States

b) The rights of individuals in criminal procedure

C) The rights of victims of crime

D) Any othe specific aspect of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

AArt. 83 TFEU (ex art. 31 TUE)

1. The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.
Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Main legislative acts adopted (most under the ordinary legislative procedure):

Regarding the law of evidence (admissibility of evidences, in the words of art. 82 TFUE)

Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters…(EIO Directive)

And now: the «E-evidence Package»: Regulation (EU) 2023/1543 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings;
Directive (EU) 2023/1544 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings

2) Common minimum standards for criminal proceedings: The accused perspective

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;

Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the Right to Information in criminal proceedings;

Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the Right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty;

Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the Strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;

Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on Procedural safeguards for children who are suspects or accused persons in criminal proceedings;

Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on Legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings.

3) Protection of victims:

•Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims;

•Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography…(but see reform Proposal →next slide);

•Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order;

•Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

The fight against terrorism:

Directive (EU) 2016/681 of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime;

Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA;

Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online;

Regulation (EU) 2023/2131 of the European Parliament and of the Council of 4 October 2023 amending Regulation (EU) 2018/1727 of the European Parliament and of the Council and Council Decision 2005/671/JHA, as regards digital information exchange in terrorism cases.

The fight against corruption, cybercrime, fraud and money laundering:

Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (the Cybercrime Directive);
Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union;
Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (the Market Abuse Directive);
Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA;
Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law;
Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing;
Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law;
Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders;
Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA.

Substantive EU Criminal Law: Context and Development

Substantive EU criminal law presents a unique methodological challenge. While clearly present in numerous instruments harmonising definitions of certain offences across the European Union, it frustratingly defies systematic categorisation. The seemingly disparate collection of criminal offences defined at EU level lacks an immediately obvious underlying rationale.

This presentation examines the development and scope of substantive criminal law in the European Union, exploring its complex relationship with national legal systems and sovereignty concerns. We will analyse the key motivating factors behind EU harmonisation of criminal offences, including the protection of EU objectives, facilitation of cross-border judicial cooperation, and expressions of shared moral values.

Through examining landmark cases and legislative instruments, we will explore how the EU navigates the delicate balance between respecting Member States' legal traditions and ensuring effective prosecution of cross-border crime in an increasingly integrated Europe.

 by Angela Procaccino

Framework Decisions: The Dominant Instrument

Money & Economy

- Counterfeiting (2000)
- Fraud/forgery in non-cash payments (2001)
- Money laundering (2001)
- Corruption in private sector (2003)

Human Exploitation

- Trafficking in human beings (2002)
- Illegal migration (2002)
- Sexual exploitation of children (2004)

Security Threats

- Terrorism (2002)
- Drug offences (2004)
- Cyber crime/hacking (2005)
- Environmental crimes (after ECJ ruling)

Following the Amsterdam Treaty, framework decisions became the primary legal instrument for harmonising criminal offences. These instruments required Member States to achieve specific results while leaving the choice of form and methods to national authorities. This approach respected national legal traditions while ensuring minimum standards across the Union.

The framework decisions covered diverse areas reflecting both traditional criminal concerns and newer threats. While this legislative activity demonstrates the EU's expanding role in criminal law, critics have argued that some harmonisation efforts represented knee-jerk reactions rather than systematic policy development.

Ne Bis In Idem: A Complementary Principle



Legal Basis

Convention implementing the Schengen agreement (CISA) Article 54 prevents an individual from being tried again in a second Member State for acts already adjudicated in another Member State.



ECJ Interpretation

Court has ruled that the outcome of a criminal trial in one Member State is conclusive throughout the EU with respect to the facts tried, regardless of different legal classifications.



Protective Function

Provides safeguard against potential overreach of mutual recognition by ensuring finality of decisions across the entire Union.

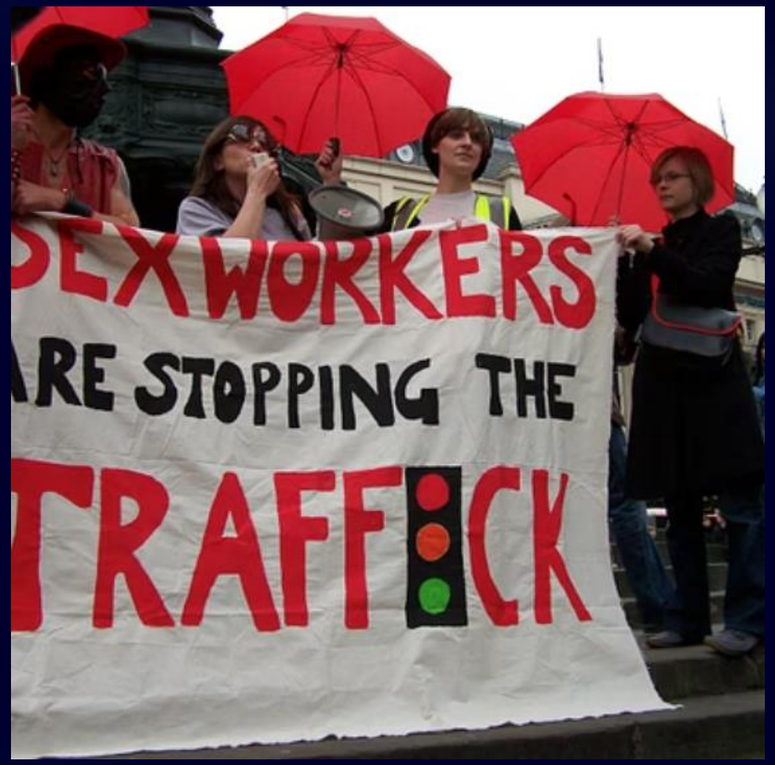
The principle of ne bis in idem (prohibition on double jeopardy) serves as an important complement to mutual recognition. Through expansive ECJ interpretation, this principle ensures that decisions in one Member State regarding the legality of specific acts are binding throughout the Union.

This approach reinforces mutual recognition while protecting individuals from multiple prosecutions based on different national classifications of the same conduct. It also indirectly strengthens territoriality-based jurisdiction by giving binding effect to decisions made where the acts occurred.

Moral Exemplarity: Criminal Law as Value Expression







Beyond its practical functions, criminal law often serves to express societal values and moral standards. The EU's harmonisation of certain offences, particularly in areas like terrorism, human trafficking, and child protection, can be understood partly as statements of fundamental EU values.

While these instruments may have practical benefits for cross-border cooperation, they also demonstrate the EU's moral stance on particularly reprehensible behaviours. Even when existing national laws already criminalised such conduct, EU-level definition signals collective condemnation and commitment to combating these phenomena.

Child Sexual Exploitation: A Case Study in Moral Legislatio

Sexual Exploitation

Framework Decision 2004/68/JHA criminalises coercing or recruiting a child into prostitution or pornographic performances, as well as sexual activities using coercion, payment, or abuse of trust.

Child Pornography

Criminalises production, distribution, acquisition and possession of pornographic material depicting real children, persons appearing to be children, and realistic images of non-existent children.

Controversial Aspects

The inclusion of simulated, computer-generated and animated images raises questions about balancing moral condemnation with prevention objectives and free speech concerns.

Framework Decision 2004/68/JHA on combating the sexual exploitation of children and child pornography exemplifies legislation driven primarily by moral exemplarity. While few would dispute the importance of protecting children from exploitation, the framework decision's approach to simulated imagery raises complex questions about the boundaries of criminalisation.

The decision to criminalise computer-generated material that harms no actual children reflects a moral stance on paedophilia itself, potentially prioritising condemnation over prevention considerations raised by some researchers.

The Subsidiarity Question: Limits on EU Action

Subsidiarity Principle

Article 2 EU establishes that EU objectives shall be achieved while respecting the principle of subsidiarity. This applies to all EU action, including in criminal law.

Material Need Test

For EU legislation in substantive criminal law to be justified, there must be both an adequate legal basis in the EU Treaty and an established material need for EU-level action.

Beyond Mere Harmonisation

The absence of a common approach alone is insufficient to justify EU harmonisation, as differences often reflect legitimate national policy choices.

The subsidiarity principle poses important constraints on EU criminal law initiatives driven primarily by moral exemplarity. While the EU Treaty may provide legal basis for action in areas like racism or child protection, this does not obviate the need for subsidiarity assessment.

EU action should be justified by demonstrating that Member States cannot sufficiently achieve the objectives, and that EU-level action provides clear added value beyond symbolic statements of shared values.

The Treaty Changes: Formalising Criminal Law Competences

Article 83 TFEU

Establishes competence to approximate definitions of "particularly serious" crimes with "cross-border dimension"

- Terrorism
- Trafficking in human beings
- Sexual exploitation of women and children
- Illicit drug trafficking
- Illicit arms trafficking
- Money laundering
- Corruption
- Counterfeiting of means of payment
- Computer crime
- Organised crime

Article 83 TFEU

Enables approximation of criminal offences and sanctions when "essential to ensure the effective implementation of a Union policy" in harmonised areas

Formalises distinction between core and regulatory criminal law established through ECJ jurisprudence

Removes link between approximation and mutual recognition, establishing independent material criteria for EU action

The Treaty of Lisbon formalised the distinction between core and regulatory criminal law that had emerged through practice and ECJ jurisprudence. It provided clearer competence boundaries while maintaining the EU's ability to ensure effective implementation of its policies through criminal sanctions when necessary.

Sanctions: The Overlooked Dimension

Substantive Convergence

Broad agreement across Member States on criminalisation of most behaviours, with systems tending to converge rather than diverge

Sentencing Divergence

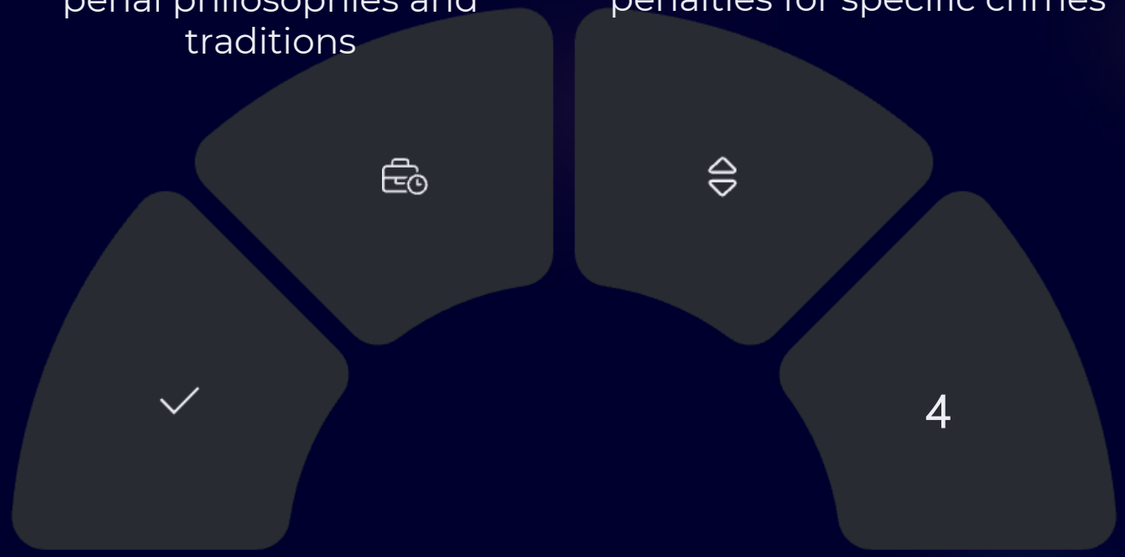
Significant diversity in sanction levels for similar offences across Member States, reflecting different penal philosophies and traditions

Ordinal Justice

Each legal system has its own hierarchy of offence seriousness, which may be disrupted by EU-mandated penalties for specific crimes

EU Approach

Current harmonisation primarily sets "minimum maximum" sentences, leaving considerable national discretion while potentially pulling sentencing upward



While EU criminal law has focused on substantive offence definitions, the area of sanctions may prove more important for the functioning of the Area of Freedom, Security and Justice. Despite broad convergence on harmonising criminalisation, Member States maintain significantly different approaches to punishment severity and philosophy.

This diversity in sanctions can undermine mutual trust between criminal justice systems and create perception problems when identical conduct receives dramatically different penalties in different Member States.

Future Directions: Balancing Harmonisation and Diversity

Respect for Subsidiarity

Greater attention to whether harmonisation is truly necessary or whether mutual recognition with appropriate safeguards suffices

Institutional Reform

Enhanced role for European Parliament and national parliaments in criminal law initiatives to ensure democratic legitimacy and legislative quality

Coherent Framework

Development of a more systematic approach to EU criminal law, addressing both substantive offences and sanctions in a coherent manner

Jurisdictional Clarity

Better resolution of jurisdictional conflicts to reduce the need for substantive harmonisation while ensuring effective prosecution

The future of substantive EU criminal law requires a delicate balance between necessary harmonisation and respect for legitimate national diversity. While some approximation remains essential to facilitate cooperation and ensure effective enforcement of EU policies, this should be guided by clear principles of subsidiarity and proportionality.

Enhanced institutional balance—particularly a stronger role for the European Parliament and improved judicial oversight—would improve both the quality and legitimacy of EU criminal legislation. Similarly, a more coherent approach to sanctions that respects national systems of ordinal justice would strengthen the overall effectiveness of the Area of Freedom, Security and Justice.



EU Police Cooperation in Criminal Matters

The EU-wide fight against crime is achieved through closer cooperation between national law enforcement organisations, including police forces, customs authorities and other competent authorities across Member States. This cooperation has evolved significantly since the Treaty of Amsterdam in 1999, which built upon foundations laid during the Maastricht era and within the Schengen system.

The focus remains on operational cooperation and information exchange to effectively combat cross-border crime. While EU-level bodies like Europol have emerged to facilitate cooperation, the objective is not to create an EU police force but rather to increase the effectiveness of national law enforcement agencies working together.



by Angela Procaccino

Legal Basis for EU Police Cooperation

Art 87 TFEU (Ex art. 30 EU Treaty)

Provides a non-exhaustive list of common actions in police cooperation, including operational cooperation, information exchange, training initiatives, and evaluation of investigative techniques.

Art. 89 TFUE (ex art. 32 EU Treaty)

Mandates the Council to stipulate conditions under which competent authorities may operate in the territory of another Member State in liaison with local authorities.

Art. 72 TFEU (ex art. 33 EU Treaty)

Clarifies that Member States retain responsibility for maintenance of law and order and internal security, protecting national sovereignty in policing matters.

The Amsterdam Treaty and then the Lisbon Treaty (TFEU) established a clear legal mandate for action in the field of police cooperation. These provisions ensure that while cross-border cooperation is facilitated, Member States' fundamental responsibilities for internal security remain unaffected. This careful balance acknowledges the political sensitivity around national policing powers.

These Treaty articles are complemented by strategic documents from the European Council and Commission which help to outline priorities and track progress in this complex area.

Conclusion: Balancing Integration and Sovereignty

Achievements

The EU has developed a sophisticated framework for police cooperation that facilitates information exchange, joint operations, and coordinated responses to cross-border threats. Europol has evolved into a central hub for intelligence sharing and operational support, while technical systems enable unprecedented connectivity between national agencies.

The principle of availability has fundamentally altered how information flows between law enforcement agencies, creating a more integrated approach to tackling transnational crime.

Ongoing Challenges

Despite these advances, the balance between integration and national sovereignty remains delicate. Member States continue to jealously guard their competences in internal security matters, as reflected in Article 33 EU's protection of national responsibilities for law and order.

Data protection concerns, practical obstacles to cooperation, and disparities between national capabilities all require continued attention. The emergence of extra-EU initiatives like the Prüm Treaty highlights both the limitations of current EU frameworks and the appetite for deeper cooperation.

The future of EU police cooperation will likely continue to follow the established pattern: increasing the effectiveness of national law enforcement through EU-level coordination rather than creating integrated EU capabilities. Within this approach, however, the depth and breadth of cooperation will continue to expand as new threats emerge and technologies evolve.

Ultimately, successful police cooperation depends on striking the right balance between operational effectiveness, fundamental rights protection, and respect for national sovereignty—a complex equilibrium that remains at the heart of the European project.