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The tension between cross-border cooperation in the European Area of Freedom, Security and Justice and the fundamental rights of mentally ill offenders in detention☆

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ABSTRACT

In two recent judgements, the European Court of Human Rights (ECtHR) has given an alarming signal regarding the placement, care and treatment of mentally disordered offenders in Belgium. This article analyses these judgements and the Court's assessment that Belgium faces a structural problem regarding the detention of people with a mental illness in prison. By exploring other recent ECtHR decisions across the EU and combining this with an analysis of international norms and standards, it contends that there is something amiss regarding the post-trial approach towards mentally disordered offenders in an EU-wide context. The potential hazards of this situation, from both an individual and an EU perspective are then presented by analysing the EU Framework Decision on the transfer of prisoners (which aims to facilitate offender rehabilitation) and the EU Court of Justice's interpretation of the relationship between instruments like the Framework Decision that are based on mutual recognition and fundamental rights. Lastly, the EU's initiative for enhancing procedural rights in criminal proceedings through the Roadmap trajectory, and the subsequent Commission Recommendation of 27 November 2013, are scrutinized. Based on this research, the article pinpoints the flaws and vacuums that currently exist for mentally disordered offenders, and the negative outcome this may have on the legitimacy and effectiveness of the European Area of Freedom, Security and Justice.

1. Introduction

The year 2015 began with an alarming signal from the European Court of Human Rights (hereafter: ECtHR) about the continuing structural problems in Belgium regarding the (detrimental) placement, care and treatment of mentally ill offenders. Barely a month into the new year, Belgium could add eight new decisions to its anthology of ECtHR judgements regarding the detention in prison facilities of offenders suffering from mental disorders (ECtHR, 2015). Over a period of as little as two years – starting with the definitive ruling by the ECtHR in the case of L.B. v. Belgium on 2 January 2013 – Belgium managed to muster a towering collection of 20 judgements against it for breaches of the fundamental principles and safeguards enshrined in the European Convention on Human Rights (hereafter: ECHR or the Convention). In each of these cases, the Court had to rule on the circumstances of the treatment, care and detention in a prison setting of mentally ill offenders (that is, offenders who were found not to be accountable under (Belgian) criminal law because of a mental disorder (Staudt, 2014).[2] Lastly, Belgium became world news with the affair of Mr. Van Den Bleeken, a mentally ill detainee who requested euthanasia because of his unbearable physical suffering (Le Monde, 2015; The Guardian, 2015; The Telegraph, 2014), engaging both Belgium and the Netherlands in the ensuing debate (De Morgen, 2015). Even in the most conservative of interpretations, the accumulated evidence of the past couple of years makes it safe to conclude that something is amiss in this small kingdom when it comes to the way in which mentally ill offenders are treated. Notwithstanding this observation, Belgium is far from unique in the EU in this matter. During the past few years many other European countries have had judgements given against them by the ECtHR in similar circumstances. Last but

☆ This is Madness: Detention of Mentally Ill Offenders in Europe.

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[2] It is noteworthy that the number of mentally ill people who are detained in prison settings in Belgium is a fraction of the total number of this category of offenders. Approximately 1100 of such offenders (making up approximately 10% of the total prison population) are currently held in prisons in Belgium. While the majority of prisoners are released on probation or transferred to specialized facilities, it is precisely this 10% who are the subject of the overwhelming majority of judgements and decisions by the ECtHR as well as the negative reports by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT).

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not least, the following bears repetition (Langford, 2009; Meysman, 2014a): the ECtHR's threshold is still at a considerable height, meaning that judgements are handed down only for the worst – and therefore the most obvious – of breaches. When looking at international norms and standards, CPT reports, and indications coming from non-governmental actors, it becomes obvious that many EU Member States fail to meet their obligations towards this vulnerable category of offenders.

This article first discusses these recent ECtHR judgements within a European context. The existing European diversity vis-à-vis the legal approach of offenders with a mental illness – in terms of procedural rights, effective participation, liability outcome *etc.* – is outside the scope of this article, which instead focuses on the detention conditions of offenders with a mental illness deprived of their liberty.[3] The case law and its implications vis-à-vis the applicable international norms and standards regarding psychiatric detention are analysed. Moreover, the issues raised are discussed within the context of European cooperation in criminal matters. The EU has created a number of instruments – most notably the European Arrest Warrant[4] (hereafter: EAW) – that are aimed at facilitating cross-border cooperation between the EU Member States while simultaneously seeking to enhance the individual rights of the persons involved. Given the collection of serious breaches of mentally ill offenders' human rights, concerns have been raised about how to deal with this specific category of vulnerable defendants when applying these instruments. The European Commission sought to respond to (some of) these issues with the Recommendation on procedural safeguards for vulnerable persons (European Commission, 2013), and hence the article touches upon this recent initiative.

2. Overview and analysis of recent ECtHR case law regarding the detention of mentally ill offenders

2.1. A small kingdom with big issues. Belgium's enduring structural problem

While the greater number of the cases discussed under this heading was decided in the past two years,[5] the conditions of detention and the standard of care for mentally ill offenders[6] are a long-standing problem in Belgium. As early as 1993, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: CPT), following their first visit to Belgium, sets out some serious concerns (CPT, 1993, paras 175–211) regarding the situation for interned detainees. A crucial factor in the treatment of mentally disordered individuals who have committed a crime is whether they are criminally responsible or accountable for the act(s) committed. Because individuals who are not accountable are (at least partly) found not to be guilty, it is generally recognized that they should not be placed in ordinary correctional settings (Court of Cassation, 1946, para. 116).

The CPT, however, lamented the shortage of available and qualified doctors (CPT, 1993, paras 161, 188, 189), and the fact that local staffing, facilities and equipment in the infirmaries at some of the prisons visited were not likely to provide satisfactory medical treatment and nursing care (CPT, 1993, para. 162), and concluded that in general the practise of accommodating detainees in 'psychiatric annexes' (separate wings) in prisons provides them with neither the observation and psychiatric care, nor the staff and infrastructure, of a proper psychiatric hospital or institution (CPT, 1993, para. 191). In conclusion, the CPT stated that "in all respects, the standard of care for patients placed in psychiatric annexes is below the minimal acceptable standard from both an ethical and human point of view" (CPT, 1993, para. 191).

Almost simultaneously with the publication of the CPT's report in 1994, a Mr. Aerts, backed by the European Commission of Human Rights,[7] started an application for alleged breaches of Articles 5 §1, 5 §4, 6 §1 and Article 3 of the Convention. In 1998 the ECtHR concluded in its judgement of Aerts v. Belgium[8] that there had been a breach of Article 5 §1 (because the right to liberty is jeopardized when there is no apparent connection between the purpose of the deprivation of liberty – protection, care and treatment – and the specific place and conditions of the detention, being a psychiatric wing of a prison; specifically, Article 5 §1, (e) addresses the lawful detention of persons of unsound mind) and a breach of Article 6 §1 (because the applicant's right to a fair trial was violated by the refusal to give him legal (pecuniary) aid, which denied him the possibility of bringing his case before the Court of Cassation). For its judgement and the appreciation of the Belgian situation, the Court drew heavily on the CPT's earlier report (Aerts v. Belgium, para. 66). Both the report and the Aerts ruling confirmed that one should not be deceived by the adjectives *forensic* and *psychiatric*, as (Belgian) forensic prison wings cannot be seen as appropriate institutions for treating mentally disordered offenders who were held not to be accountable.

Following the Aerts judgement, and in spite of the Belgian response to the CPT report (Rapport de Suivi, 1996; Rapport Intérimaire, 1995), hardly anything changed for the better regarding the position of mentally disordered offenders. Legislative changes were proposed, postponed and ultimately abandoned, budgets and staffing remained inadequate, and planned infrastructure developments proved to be little more than a mirage. An illustrative example was the announcement by the Belgian government in response to these CPT reports that a so-called 'Penitentiair observatie en klinisch onderzoekscentrum' (POKO) would be created; this would be a clinical observation centre designed specifically to address the need for proper mental health assessments. The centre was, however, never realized in practise (Casselman, 2009; Heimans, Vander Beken, & Schipaanboord, 2014). Nonetheless, the Belgian government enjoyed a period of relative calm before the issue of mental health came back into the headlines in 2011 with the case of De Donder and De Clippel,[9] in which the parents of a young interned offender successfully lodged a case alleging the violation of Article 2 (right to life) and Article 5 ECHR due to their son's detention in the ordinary section of a prison.

With hindsight, the De Donder and De Clippel case seems to have started the avalanche of judgements that we are currently witnessing, as this time barely one year passed before a new judgement was given. In the case of L.B. v. Belgium, the applicant claimed, again based on the conditions and timespan of his detention, that there had been violations of Articles 5 §1 and 6 ECHR In its judgement, the Court made an assessment from the point of view of the applicant by taking into account the severity and treatability (L.B. v. Belgium, paras 94, 99,

[3] As such, differences between the Member States' legal approach towards offenders with a mental illness – for instance, the referenced Belgian system of 'internment', the Dutch system of 'TBS' or the English-Welsh approach of 'diversion' – may imply a different legal outcome in terms of offender liability (see, f.i. Verbeke et al., 2015) but are taken into account for this article insofar as they result in the deprivation of liberty.

[4] Council of the European Union (2001). Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. OJ L 190/1, 18.07.2002.

[5] L.B. v. Belgium, 2 January 2013 (22831/08); Dufoort v. Belgium, 10 April 2013 (43653/09); Claes v. Belgium, 10 April 2013 (43418/09); Swennen v. Belgium, 10 April 2013 (53448/10); Caryn v. Belgium, 9 January 2014 (43687/09); Lankester v. Belgium, 9 January 2014 (22283/10); Plaisier v. Belgium, 9 January 2014 (28785/11); Gelaude v. Belgium, 9 January 2014 (43733/09); Moreels v. Belgium, 9 January 2014 (43717/09); Oukili v. Belgium, 9 January 2014 (43663/09); Saadouni v. Belgium, 9 January 2014 (50658/09); Van Meroye v. Belgium, 9 January 2014 (330/09); Smits and others v. Belgium, 3 February 2015 (49484/11, 53703/11, 4710/12, 15969/12, 49863/12, 70761/12); Vander Velde and Soussi v. Belgium and the Netherlands, 3 February 2015 (49861/12 & 49870/12).

[6] Under this heading these constitute, as aforementioned, so-called internees under the Belgian system. As such, they may not be considered as offenders by other legal systems, in part due to the fact that they will not necessarily be people who have been convicted by a (criminal) court or have been through (criminal) trial and procedures.

[7] Before the entry into force (in 1998) of Protocol 11 of the ECHR, individuals did not have direct access to the Court and had to lodge their application with the Commission; the Commission would then launch a case before the Court should it deem the case well-founded.

[8] Aerts v. Belgium, 30 July 1998 (25357/94).

[9] De Donder and De Clippel v. Belgium, 6 December 2011 (8595/06).

100) of the applicant's condition and the lack of appropriate care and treatment provided in the correctional facilities in which he was being detained. The Court noted that the Belgian Social Protection Commission[10] had regularly stated, from 2005 onwards, that the applicant's placement in a psychiatric prison wing was provisional, until a better option could be found. Even the Social Protection Commission found that the psychiatric wing of a prison was not an appropriate place for the applicant to receive the care he required with a view to his rehabilitation (L.B. v. Belgium, paras 95, 97). The period of his provisional detention was included in this assessment as well (L.B. v. Belgium, para. 101). Secondly, and in much the same way as in the De Donder and De Clippel case, the Court assessed the government's efforts to alter the applicant's specific situation (L.B. v. Belgium, paras 94, 98) by also taking into account the underlying context of scarce resources and the measures taken on a political level to find a solution to this (L.B. v. Belgium, para. 96). Thirdly, to substantiate its judgement on the alleged violation, the Court once again incorporated the, by now, various CPT reports and other international norms, standards and international reports (L.B. v. Belgium, para. 96). In this way, the Court took a rather benevolent view that accepted the problem of scarce resources as a reality, assessed the efforts and measures taken by the government to overcome this structural issue and ultimately balanced these considerations against the – potential – infringement of the mentally disordered individual's fundamental rights as derived from the various international sources.

It is interesting to see that the Belgian government, in its counter arguments, attributed (part of) the failures regarding care and treatment to the applicant's own "difficult attitude and particular mental state" (L.B. v. Belgium, para. 82). This questionable strategy of pointing the finger at an individual's own responsibility (or even accountability) precisely because of their mental vulnerability is, furthermore, obstinately repeated throughout the other cases that have been brought before the Court.[11] Ranging from accusations of "a lack of motivation" or "a bad attitude and personality" to the more legitimate "severity of the psychiatric disability", the government applies a spurious circular reasoning in which the cause of the applicant's lack of appropriate accommodation, missing therapy and flawed progress is attributed to the specific mental disorder that resulted in the applicant being deemed not to be criminally liable and to be in need of particular care and treatment in an appropriate (forensic psychiatric) institution. The Court has taken little notice of this alleged defence and instead stresses the *notorious* issue that Belgium has numerous offenders detained in inappropriate conditions (L.B. v. Belgium, para. 96). Ultimately, and for motives similar to those in the Aerts case, the Court decided that there had been a violation of Article 5 §1 ECHR.

Likewise, all of the recent judgements deal with – and confirm – breaches of the obligations regarding the lawful detention of persons of unsound mind (Article 5 §1 (e) ECHR). Alongside this, an individual's entitlement to take proceedings under which the lawfulness of his or her detention is to be decided speedily by a court and his or her release ordered should this detention not be lawful (Article 5 §4 ECHR) has become a popular ground under which violations have been confirmed. The Court specifically laments the lack of an accessible and effective (legal) route for the review of the applicant's claims of arbitrary or inadequate detention before the Social Protection Commission.[12] A substantive element in the Court's motivation is the repeated finding that there is a "structural problem in Belgium regarding the approach and management of offenders with mental disorders",[13] as a result of which offenders are detained in inappropriate conditions like psychiatric wings annexed to prisons and face flawed care and treatment opportunities resulting in their chances of rehabilitation or effective therapy being diminished. Notwithstanding this firm position taken by the Court, the Court has only held, in the cases of Claes (2013) and Lankester (2014), that this finding amounted to a violation of Article 3 ECHR regarding the prohibition of torture and inhuman or degrading treatment.

It can be argued that this indicates the high threshold that an applicant must cross in order to succeed when presenting a case in Strasbourg regarding Article 3, especially when – as was indicated in the cases of Aerts and L.B. – the Court takes a rather benign attitude towards a government that can convincingly argue that it is operating within a context of scarce resources and infrastructure problems and that the detention in an inappropriate correctional facility is to be seen merely as a provisional and temporary measure. A lengthy debate on the Article 3 threshold is beyond the scope and focus of this article, but what clearly stands out is the systematic failure of the Belgian government to handle this specifically vulnerable population adequately and to a high standard; this has resulted in a plethora of evidenced breaches of ECHR rights that has ultimately escalated into two decisions directly related to detention that resulted from the violation of the fundamental right not to be tortured or treated inhumanly.[14]

2.2. A few more bad eggs? ECtHR evidence of an EU-wide problem

While Belgium's internment detention record may on its own pose a serious problem for the proper functioning of the European Area of Freedom, Security and Justice (hereafter: AFSJ), it is worth acknowledging that Belgium is not an isolated case. A quick overview of recent ECtHR judgements reveals that there is a strong tension between mental health care and the approach taken in detention in the Member States of the EU. Recent exemplary cases in which the Court found that there had been violations of Article 3 that can be found in the United Kingdom, France, Romania, Poland, Hungary, *etc.*,[15] contain similar observations to those found in the Belgian case law on structural problems regarding overcrowded prison conditions, and, more importantly, reiterate that there is a clear connection between the ground that justifies the deprivation of liberty – *i.e.* the detention of a person of unsound mind – and the place and conditions of detention.

The Court accepts the reality across Europe of scarce resources in forensic psychiatry and therefore allows, at least to a certain extent, the provisional and temporary detention in inappropriate correctional facilities of individuals who are not criminally accountable and who are mentally disordered. The actual detention of such persons, however, can only be regarded as lawful for the purposes of Article 5 §1 (e) ECHR if it takes

[10] The authority that decides on where offenders with a mental disorder who are not criminally accountable should be placed.

[11] In the cases: Dufoort v. Belgium, para. 87; Claes v. Belgium, para. 87; Swennen v. Belgium, para. 79; Caryn v. Belgium, para. 39; Plaisier v. Belgium, para. 51; Gelaude v. Belgium, para. 48; Moreels v. Belgium, para. 53; Oukili v. Belgium, para. 40; Saadouni v. Belgium, para. 59; Van Meroye v. Belgium, paras 68 and 80.

[12] In the cases: Claes v. Belgium; Van Meroye v. Belgium; Saadouni v. Belgium; Moreels v. Belgium; Oukili v. Belgium; Gelaude v. Belgium; Smits and others v. Belgium.

[13] In the cases: Dufoort v. Belgium, para. 70; Claes v. Belgium, para. 99; Lankester v. Belgium, paras 67 and 93; Van Meroye v. Belgium, para. 82; Saadouni v. Belgium, para. 61; Moreels v. Belgium, para. 55; Oukili v. Belgium, para. 52; Plaisier v. Belgium, para. 53; Gelaude v. Belgium, para. 50; Caryn v. Belgium, para. 41.

[14] In recent years, the Belgian government sought to remedy the large amount of interned offenders in detention settings. Two forensic psychiatric centres (FPC) were planned with currently one completed and operational in Ghent. The second FPC in Antwerp is scheduled to open in 2016, and recently a third FPC was announced in Hofstade. Moreover, and for the first time in its history, Belgium recently announced a long stay solution for untreatable interned offenders at the *Universitair Psychiatrisch Centrum Sint-Kamillus* in Bierbeek. Sint-Kamillus allows for thirty internees with no treatment or recovery trajectory. The current Minister of Justice has furthermore announced that, by 2019, all of the internees will be removed from a prison context. Retrieved from http://www.koengeens.be/news/2015/09/17/langdurig-geinterneerden-krijgen-opvang-buiten-gevangenismuren; http://deredactie.be/cm/vrtnieuws/regio/oostvlaanderen/1.2484113.

[15] Keenan v. the United Kingdom, 3 April 2001 (27229/95); Rivière v. France, 11 July 2006 (33834/03); Renolde v. France, 16 October 2008 (5608/05); Rupa v. Romania, 16 December 2008 (58478/00); Slawomir Musial v. Poland, 20 January 2009 (28300/06); Raffray Taddei v. France, 21 December 2010 (36435/07); Z.H. v. Hungary, 8 November 2011 (28973/11); G. v. France, 23 February 2012 (27244/09); M.S. v. the United Kingdom, 3 May 2012 (24527/08); Ketreb v. France, 13 July 2012 (38447/09); Ticu v. Romania, 1 October 2013 (24575/10).

place in a hospital, clinic or another appropriate institution, and if this is not the case the treatment may amount to torture or inhuman and degrading treatment.

3. Beyond the Court: European diversity and the substandard treatment of mentally ill offenders

The example of Belgium and the recent ECtHR case law may serve as an indication of the way mentally ill offenders may be dealt with across the EU, but since the Court is the only mechanism through which sanctions can be applied to breaches of these principles in today's practical reality (following the exhaustion of the local remedies), this case law ultimately remains but the tip of the iceberg, as only cases that are successfully lodged are presented to the public and analysed by scholars. Moreover, this case law covers only the most severe situations, which unfortunately implies that certain guarantees may not be enforced to their full extent without there being an effective remedy before the Court. Last but not least, because of their specific vulnerability, mentally disordered offenders may find it difficult to access the protection mechanisms offered by the ECtHR (Verbeke, Vermeulen, Meysman & Vander Beken, 2015)). In addition, Member States'practises may not be compliant with international norms and standards beyond the Convention, or with principles enshrined in non-binding instruments. With over half of the 28 Member States running prisons with occupancy levels above capacity (ICPS, 2015), it is not surprising that the mental health status of detainees may potentially be affected and that mental health problems are often undertreated. Although most prisons across Europe have special units for mentally disordered prisoners, sufficient treatment and care cannot usually be offered, which implies that correctional mental health care staff will have to concentrate mainly on the most urgent situations (Blaauw, Roesch, & Kerkhof, 2000). Against this backdrop, it is useful to identify the relevant norms and standards as well as analyse the relevant literature and studies that have dealt with mentally disordered offenders from an EU-wide perspective (Dressing & Salize, 2006; Dressing, Salize, & Gordon, 2007; Fazel & Baillargeon, 2011; Fazel & Danesh, 2002; Gordon & Lindqvist, 2007; Salize & Dressing, 2005; Salize, Dreßing, & Kief, 2007; Vermeulen et al., 2011a; 2011b). This analysis clearly indicates that Member States' approaches to the placement and care of mentally disordered offenders differ greatly.

3.1. International norms and standards

When a person is assessed as not criminally accountable because of a mental illness and is placed in a situation in which they are the subject of a measure aimed at the protection of society as well as their care and treatment, it is a valid starting point to argue that this societal protection should never come before the basic rights to care and treatment of a person who is in need. Moreover, the generally accepted principle of *normalization* or *equivalence* in prison medicine is the standard that obliges prison health services to provide prisoners with care of a quality equivalent to that provided for the general public in the same country (Lines, 2006).[16] In addition, numerous non-binding international documents and instruments have documented this benchmark.[17] These norms and standards are derived from this principle and require that prisoners assessed as vulnerable will be accommodated in that area(s) of a prison as is most convenient and appropriate for monitoring and treatment by health care staff,[18] and that Member States adopt laws or policies to ensure that every prisoner has access to appropriately qualified medical personnel in the prison at all times.[19] Member States also need to ensure that all prison staff receives appropriate training at regular intervals throughout their career[20] and, more specifically, that members of staff who work with particular groups of prisoners such as detained mentally disordered defendants or offenders receive particular training for their individual work.[21] In addition, the equivalence benchmark implies that when a prisoner cannot be granted appropriate care within the prison walls, (s)he must be transferred to more specialized in-patient facilities.[22] The CPT argues in this context that "on the one hand, it is often advanced that, from an ethical standpoint, it is appropriate for mentally ill prisoners to be hospitalized outside the prison system, in institutions for which the public health service is responsible. On the other hand, it can be argued that the provision of psychiatric facilities within the prison system enables care to be administered in optimum conditions of security, and the activities of medical and social services intensified within that system" (CPT, 1993, para. 43). Exceptions to this general rule are not as rare as might be expected (Salize & Dressing, 2005, p. 72). They mainly result from a lack of adequate resources and placement options for this population of offenders. In several Member States, limited capacity in forensic hospital settings therefore results in the placement in correctional settings of people fulfilling the legal criteria for specialist forensic treatment (see infra).

Although most of these instruments are of a non-binding nature, the strength of the norms and standards they contain may also be seen from their effect in ECtHR case law. As mentioned above, the Court, in order to reach its verdicts, is increasingly taking account of reports issued by the CPT when it assesses Member States' compliance with non-binding norms and standards (Slawomir Musial v. Poland, para. 96; Dybeku v. Albania, para. 48[23]; Rivière v. France, para 72). Moreover, to draw up these reports, the CPT uses its own standards (CPT, 2002), but these have been derived from the same norms and standards (CPT, 2002, p. 30).[24] The CPT's work is to be seen as comprehensive and representative in its evaluation of Europe-wide practises since it covers care and treatment not only in strictly correctional settings, but also in forensic prison wings and facilities for persons whose admission to a psychiatric establishment has been ordered in the context of criminal proceedings (high or medium security forensic hospitals and forensic wards in psychiatric or general hospitals) (CPT, 2002, standards 25 & 26).

Table of referenced legislation:

Organisation/Source	Instrument	Article(s)/ Standards	Acronym
United Nations http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx	UN International Covenant on Economic, Social and Cultural Rights (1966) (binding)	Article 12	UN ICESCR
United Nations http://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOf	Standard Minimum Rules for the Treatment of Prisoners (1955)	Articles 22, 24, 47, 62	UN SMR

(continued on next page)

[16] Article 12 UN ICESCR. In a valuable contribution to the on-going debate, Lines (2006) defends the idea that this equivalence implies the need for a higher health care standard for prisoners that goes beyond mere equivalence, because detention cannot be considered equivalent to the outside world of society.

[17] Article 40 EPR; Articles 10, 11, 12, 19 & 52 R(98)7; Article 35 R(2004)10; Standards 31, 32 & 38 CPT 2002; Article 22 UN SMR; Article 1 UN PME; Articles 1 & 20 UN PPPMI.

[18] See, for example, Articles 12, 39, 43, 46 & 47 EPR; Standard 43 CPT 2002; Articles 22 & 62 UN SMR.

[19] See, for example, Articles 1, 2 & 4 R(98)7; Article 40 EPR; Standards 34 & 41 CPT 2002; Article 24 UN SMR; Article 24 UN BOP.

[20] See, for example, Articles 8, 76 & 81 EPR; Article 47 UN SMR.

[21] See, for example, Article 10 R(82)17; Article 12 R(2004)10; Article 81 EPR; Standards 41 & 43 CPT 2002.

[22] See, for example, Articles 12, 42 & 46 EPR; Articles 8, 9 & 35 R(2004)10; Articles 3, 7, 43, 44, 45, 46, 47 & 55 R(98)7; Standards 35, 36, 37 & 43 CPT 2002; Articles 22 & 62 UN SMR; Articles 9 & 20 UN PPPMI; Article 9 UN BPTP.

[23] Dybeku v. Albania, 18 December 2007 (41153/06).

[24] The CPT standards make explicit reference to Recommendation R(98)7 concerning the Ethical and Organisational Aspects of Health Care in Prison as a source of inspiration.

(*continued*)

Organisation/Source	Instrument	Article(s)/ Standards	Acronym
Prisoners.aspx			
United Nations http://www.ohchr.org/EN/ProfessionalInterest/Pages/MedicalEthics.aspx	Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1982)	Article 1	UN PME
United Nations http://www.un.org/documents/ga/res/46/a46r119.htm	Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care (1991)	Articles 1, 9 and 20	UN PPPMI
United Nations http://www.un.org/documents/ga/res/43/a43r173.htm	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988)	Article 24	UN BOP
United Nations http://www.ohchr.org/EN/ProfessionalInterest/Pages/BasicPrinciplesTreatmentOfPrisoners.aspx	UN Resolution on the Basic Principles for the Treatment of Prisoners (1990)	Article 9	UN BPTP
Council of Europe https://wcd.coe.int/ViewDoc.jsp?id=955747	Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules (European Prison Rules)	Articles 8, 12, 39, 40, 42, 43, 46, 47, 76, 81	European Prison Rules (EPR)
Council of Europe https://bip.ms.gov.pl/Data/Files/_public/bip/prawa_czlowieka/zalecenia/987.pdf	Recommendation R(1998)7 concerning the Ethical and Organisational Aspects of Health Care in Prison	Articles 1, 2, 3, 4, 7 10, 11, 12, 19, 43, 44, 45, 46, 47, 52, 55	R(98)7
Council of Europe http://www.coe.int/t/dg3/healthbioethic/Activities/08_Psychiatry_and_human_rights_en/Rec%282004%2910%20EM%20E.pdf	Recommendation R(2004)10 concerning the Protection of the Human Rights and Dignity of Persons with Mental Disorders	Articles 8, 9, 12, 35	R(2004)10
Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) http://www.cpt.coe.int/en/documents/eng-standards.pdf	CPT standards (2002) – Health Care Services in Prisons & Involuntary Placement in Psychiatric Establishments	Standards 31, 32, 34, 35, 36, 37, 38, 41, 43	CPT, 2002
Council of Europe http://www.ochrance.cz/fileadmin/user_upload/ochrana_osob/Umluvy/vezenstvi/R_82_17_treatment_dangerous_prisoners.pdf	Recommendation R(1982)17 concerning Custody and Treatment of Dangerous Prisoners	Article 10	R(82)17
EU, Council of the European Union http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008F0909&from=EN	Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union	Articles 1, 3, 4, 6, 8, 9, 10	FD 909

3.2. EU-wide studies on mentally ill offenders and their treatment across Europe[25]

As indicated by an EU-wide study (Salize & Dressing, 2005), placement will largely depend on the causal relation between the mental state of the offender and the crime(s) committed.[26] When this causal relation is apparent, specific forensic care must be provided to these individuals. Since forensic psychiatry is a sub-speciality of psychiatry and an auxiliary science of criminology, this forensic care and treatment will focus not only on the amelioration of the mental disorder, but also on a reduction in the risk of re-offending. This care is provided throughout the EU within the correctional system in dedicated prison wings or in high or medium security forensic hospitals, but could also include care in forensic wards of psychiatric or general hospitals (Salize & Dressing, 2005, pp. 43, 67 & 68). In addition to these variable practises, for each one of these placement options Member States provide a variety of service types, which differ considerably with regard to their organisation as well as their quantity or intensity of care. Some Member States, for example, offer special forensic services for offenders with specific mental disorders. In most cases these are services for substance abusers and sex offenders (Salize & Dressing, 2005, pp. 67 & 70). This diversity leads these researchers to conclude that "a consistent, Europe-wide system of classification for forensic facilities based on functional criteria would be preferable for a number of purposes, including research or health-reporting. Unfortunately, no such system currently exists" (Salize & Dressing, 2005, p. 67). In addition to this diversity, a more worrying conclusion in many of the studies is that substandard care and treatment is provided to mentally disordered offenders. In the study by Vermeulen et al. (2011a), it was established that certain Member States did not adopt laws or policies specifically requiring that prisoners with mental health difficulties should be entitled to care appropriate to their circumstances that was commensurate with the type of care available for people with similar mental health difficulties in the community, did not have laws and policies in place ensuring that vulnerable prisoners are accommodated in such area(s) of the prison as is most convenient and appropriate for monitoring and treatment by health care staff, had not adopted laws or policies to ensure that every prisoner has access to appropriately qualified medical personnel in the prison at all times, and had not adopted laws or policies to ensure that members of staff who work with vulnerable groups of prisoners should receive appropriate training (Vermeulen et al., 2011a, Annex 1). The 2007 EUPRIS study identified similar problems regarding psychiatric prison beds, mental health care staff in prison and the training of mental health care staff (Salize et al., 2007, pp. 22-27), and even stated that, in routine care in European prisons, even the most basic requirements for adequate treatment often seem to be missing (Salize et al., 2007, p. 6). The 2000 study by Blaauw and others of 13 Member States (Blaauw et al., 2000) established that there were similar problems in these countries, making it fair to say that the problems that have been identified are persistent.

4. Repercussions for the European Area of Freedom, Security and Justice

Conceived at the Tampere Council of 1999 (Council of the European Union, 2001; European Council, 1999), the AFSJ was created to ensure the free movement of persons and to offer a high level of protection to citizens. With the traditional concept of state sovereignty and the

[25] These studies are extensive and cover the entire spectrum of the way in which mentally ill defendants are treated. For the scope of this article, however, only the relevant information regarding the accommodation, care and treatment of mentally ill offenders was taken into account.

[26] One should bear in mind that a causal relationship between mental health and the crime(s) committed can also be apparent in the case of mentally disordered offenders who are accountable for their actions. They too are in need of specific forensic care programmes.

specific nature and delicacy of criminal law in mind, the AFSJ has been called one of the most far-reaching constitutional developments in (recent) EU law (Mitsilegas, 2012, p. 24). An important part of the AFSJ was to provide the EU with an answer to the increasing mobility of crime and the subsequent cross-border nature of criminal procedures. To address this, the EU adopted the principle of mutual recognition as the bedrock for judicial cooperation in criminal matters within the AFSJ.[27] The aim and purpose of mutual recognition is that in an area of freedom, security and justice, judicial decisions should circulate freely from one Member State to another and be treated as equivalent (Morgan, 2010, p. 232). To effect this, the Tampere Council Conclusion 33 stated that "enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation would facilitate cooperation between authorities and the judicial protection of individual rights."

From this, it is absolutely clear that mutual recognition follows a strictly identified two-way path: the facilitation of judicial cooperation and the enhanced protection of individual rights. The bedrock for this enhanced recognition and cooperation was clarified by the Programme of Measures, which stated that "implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. That trust is grounded, in particular, on their shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law"(Council of the European Union, 2001, para. 6). As such, mutual recognition is based on a common and reciprocal mutual trust, between the Member States, that their criminal justice systems, and the (judicial) decisions resulting therefrom, are firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law (European Council, 1999, Conclusion 1).

The above-mentioned studies and their continual laments about the substandard quality (the primary concern) and wide diversity (a more practical assertion) across Europe, in combination with the ECtHR's judgements corroborating these claims, however, demonstrate an accurate image of the present quagmire in which mentally disordered offenders find themselves. This begs the question of how the EU will and should deal with this in the Area of Freedom, Security and Justice. The confrontation with continual indications of practises contrary to the presupposed commitments of the members should prompt a substantive response.

4.1. Mentally disordered offenders in cross-border situations. Assessing the need and feasibility of an EU approach

Before we can look at the repercussions for the instruments based on mutual recognition that are under investigation in this article, we need to establish that there is indeed a platform for dealing with mentally disordered offenders on an EU level. Such affirmation should come from both practical exigency and legislative competency. As for the first requirement, it pays to look back briefly at the ECtHR judgements mentioned above. In two of these cases a cross-border element was present: in the case of Lankester (2014), the applicant fled to the Netherlands. This prompted the Belgian government to demand – on the basis of Article 68 of the Convention implementing the Schengen Agreement – that the Dutch authorities should resume the detention, and this led to the incarceration of the applicant in the Netherlands. The applicant was released some time later, and then again apprehended in Belgium following a routine verification of his identity. The Dutch authorities then solicited the Belgian authorities to execute the measure that required the deprivation of liberty in the Netherlands; this prompted no positive reply, and ultimately this led to an ECtHR judgement that there had been a violation of Articles 3 and 5 ECHR. In the recent case of Vander Velde and Soussi (2015), the applicant fled to the Netherlands where he was apprehended and returned by the Dutch authorities (despite his opposition) following the issuing of a European Arrest Warrant by the Belgian government. Again, this case culminated in a confirmed violation of Article 5 ECHR. Both cases may serve as examples of the problems that mentally disordered offenders may face in cross-border situations.[28]

Apart from this, the aforementioned studies lament the paucity of information (Salize et al., 2007, p. 6) combined with the substandard screening methods and general under-identification of mental vulnerability, the overall shortage of evidence about the prevalence of psychiatric and mental health care in prisons, which has been described as "nothing less than dramatic" (Salize et al., 2007, p. 71), and finally the fact that "even the most rudimentary health-reporting standards for mental health care in prisons are lacking almost everywhere in Europe" (ibid) which "at least imply the possibility of a much higher number of mentally vulnerable persons involved in cross-border proceedings that slip through the net" (Meysman, 2014b, p. 190). All of this contributes to establishing the need for a comprehensive approach, and moreover indicates the relevance of the problem in the AFSJ. Notwithstanding the fact that the (established) mentally ill offenders remain a minority within the general offender population, this group is most likely under-identified. When it finds itself in a cross-border context then it is in dire need of additional safeguards. In terms of competency, the EU itself has – seemingly – settled this debate by developing a rather flexible interpretation of Article 82(2) TFEU[29] when it comes to introducing additional (procedural) safeguards for individuals involved in criminal proceedings (see infra).[30]

4.2. Mutual recognition in the light of EU diversity and substandard care and treatment. The Framework Decision on the transfer of prisoners[31]

The so-called FD 909 applies the principle of mutual recognition to judgements imposing custodial sentences or measures involving the deprivation of liberty. Hence, this instrument targets the more 'classical' outcome of a criminal proceeding, where convicted offenders are deprived of their liberty.[32] FD 909 aims at enhanced cooperation by

[27] This principle originally hailed from the single market policy area, and the change from a policy aimed at facilitating freedom and mobility – and thus at removing restrictions – to a more coercive policy targeting the unwanted side-effects of this mobility – increased cross-border criminality – has not been flawless (Möstl, 2010).

[28] Not included here, because no official cross-border involvement was ever established, is the Van Den Bleeken case. The – theoretical – debate was over the question of whether Van Den Bleeken could or should be transferred to a specialized institution in the Netherlands, and whether this was possible under the Treaty that Belgium and the Netherlands had previously agreed to on the provision of the Dutch penitentiary of Tilburg for Belgian prisoners (see: Verdrag tussen het Koninkrijk België en het Koninkrijk der Nederlanden over de terbeschikkingstelling van een penitentiaire inrichting in Nederland ten behoeve van de tenuitvoerlegging van bij Belgische veroordelingen opgelegde vrijheidsstraffen, 31 oktober 2009, BS 1 Februari 2010, p. 4287) and/or under the Framework Decision on the transfer of prisoners (see: Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. OJ L 327, 5.12.2008).

[29] According to Article 82(2) of the Treaty on the Functioning of the European Union (TFEU), only "to the extent necessary to facilitate mutual recognition of judgements 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."

[30] Seemingly, because it remains to be seen how well the Member States will respond and comply with the minimum procedural guarantees that are envisaged.

[31] Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. OJ L 327, 5.12.2008 (hereafter: FD 909).

[32] Before the inception of FD 909, The Council of Europe Convention on the Transfer of Sentenced Persons of 21 March 1983 (CoE Convention) and the Additional Protocol to this Convention of 18 December 1997 (Additional Protocol) were aimed at facilitating cross-border transfers of sentenced persons. With the entry into force of FD 909, both these instruments were replaced.

envisioning a fast-paced relocation (with limited options for refusal) to the Member State of nationality of the sentenced person where they live, or to the Member State of Nationality when an expulsion or deportation order is included (or consequential to) the judgement, even though this is not the State of the sentenced person's habitual residence (FD 909, Article 4, 1. (a) and (b)). Moreover, there remains an option to transfer the sentenced person to any other Member State (without an evident link with the individual[33]), but this requires the consent of both the person and the state (FD 909, Article 4, 1. (c)). The purpose of the instrument, according to Article 3(1), is to establish the rules under which a Member State, with a view to facilitating the social rehabilitation of the sentenced person, is to recognize a judgement and enforce the sentence. As such, the instrument requires that both states[34] endorse the facilitation of the social rehabilitation of the sentenced person as a prerequisite for the transfer of the sentence. Moreover, Article 3(4) stipulates that the instrument shall not have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles that is enshrined in Article 6 of the Treaty on the European Union (TEU). A combined reading logically concludes that no transfer may be sought under this instrument when it has not been adequately established that social rehabilitation will be facilitated, or when there is not a sufficient guarantee that fundamental rights will remain respected.

As is made clear from Article 1 on the definition of a sentence, decisions imposing detention (or any other given appellation possible under the laws of the Member States) are included in the definition used in the instrument, as they consist of a) measures involving the deprivation of liberty that are b) imposed for a limited or unlimited period of time c) on account of a criminal offence and d) on the basis of criminal proceedings.

At first glance, the instrument therefore provides an interesting opportunity for the transfer of mentally disordered offenders with a view to facilitating their social rehabilitation prospects (hence, at *minimum* their care and treatment will be aimed at reducing the potential for personal and societal harm) while safeguarding their individual rights. However, the instrument itself firstly seems to diminish the actual prospect of transferring mentally disordered offenders, and, secondly, the instrument operates within the AFSJ context of mutual trust-based cooperation in criminal matters. We will look at these two points in turn.

Considering the first, Article 9.1 (k) provides that the competent authority of the executing state may opt (under FD 909, there are no mandatory grounds for non-recognition) to refuse to recognize a judgement or to enforce a sentence if (part of) that sentence includes a measure of psychiatric or health care that cannot be executed by the executing state in accordance with its legal or health care system. In this way, the executing state may still decide to refuse to recognize a judgement should it become clear that the transfer would not benefit the mental health treatment of the sentenced person because – and this remains a sad assertion, however just it might be – the sentence is incompatible with its legal or health care system. A combined reading of Articles 9, 3. and 10, however, leads to the conclusion that prior to any such decision to refuse recognition, consultation between the two states is mandatory and an assessment should be made of whether a partial recognition – *in casu* the recognition of the custodial part of the sentence, or at least the part involving the deprivation of liberty that does not include a psychiatric or health care component – would be feasible in terms of the facilitation of the individual's social rehabilitation,[35] but under the condition that the enforcement may not result in an aggravated duration of the sentence (FD 909, Article 8, 4.).

All of this may protect a sentenced person with mental health care needs against a possible deterioration of their position, but the instrument does not explicitly foresee a positive obligation for the Member States (Vermeulen & Meysman, in press). As such, it has the potential to prevent both transfers that are *undesired* – because of incompatible psychiatric or health care provisions in the system of the state to which the application is made – and also those that are *unwanted* – that is, the recognition and execution of judgements that impose (sometimes) lengthy, costly and difficult psychiatric measures – without providing a clear cut alternative.

An example of this can be found in the Belgian implementation of the Framework Decision: Belgium's *Wet inzake de wederzijdse erkenning van vrijheidsbenemende straffen*[36] (hereafter: Wet WEVS) explicitly prohibits the recognition and execution of a judicial decision when this judgement includes a measure that has a psychiatric and/or health care nature (Wet WEVS, Article 12, 7°). Although seemingly equivalent to FD 909's Article 9, 1. (k), the Belgian Wet WEVS moves beyond the optional nature of the ground for refusal and makes the refusal mandatory. In this way, the Belgian government has *de facto* installed a veto against any potential certificate containing these measures and has excluded, on a compulsory basis, cross-border cooperation on the recognition and execution of such judgements. Recalling that FD 909's main focus is on transferring a sentenced person to the state with which they have an established link based on nationality and/or habitual residence, this furthermore implies that intended return of mentally ill Belgian offenders who are sentenced abroad is called into question. Although this is just one example – and, for example, the Dutch government similarly decided to make this a mandatory ground for refusal in Article 2:13 of its own implementation Wet[37] – the reciprocity of cross-border cooperation and the mutuality of trust assumed by the EU leave little or no room for Member States to go *cavalier seul*, as this undermines the basic premise of the AFSJ.

Alongside the analysis that the instrument itself allows for an exclusion of psychiatric/health care measures and therefore, in a broader sense, for the refusal of transfers of mentally disordered offenders, there is the – second – global argument about the context in which the instrument operates, which is the AFSJ context of mutual trust-based cooperation in criminal matters. Hence, and notwithstanding the explicit references to the purpose of social rehabilitation[38] and the obligation to respect fundamental rights, the presupposed compatibility of the Member States' legal systems and detention facilities with the principles of freedom, democracy and respect for human rights as enshrined in various (international) norms and standards is the

[33] For completion, there remains one other option: to 'transfer' the execution of the judgement to the Member State to which the sentenced person has fled or has otherwise returned. In this scenario, there is no actual transfer of the person, but the mere recognition and execution of the original detention sentence or measure that deprives him/her of his/her liberty (see FD 909, Article 6, 2. (c)) by the Member State to which the person has fled or returned. In this scenario no consent is needed from the individual, but consent is still required from the state that will execute the judgement.

[34] In the terminology of mutual recognition, these are, respectively, the issuing state (the state that issues the demand for transfer) and the executing state (the state that recognizes and executes the foreign judicial decision).

[35] An example may occur when a combined sentence is given, and the Member States opt – in consultation – to a transfer to the executing state where an evidenced link is established (the offender is closer to family, friends or representatives or is able to use his/her native tongue, or be in his/her own culture and surroundings, *etc.*) for the non-psychiatric and/or health care part, and then for the sentenced person to serve the latter part of the sentence in the issuing state.

[36] "Wet inzake de toepassing van het beginsel van wederzijdse erkenning op de vrijheidsbenemende straffen of maatregelen uitgesproken in een lidstaat van de Europese Unie", 15 mei 2012, BS 08 Juni 2012.

[37] Wet wederzijdse erkenning en tenuitvoerlegging vrijheidsbenemende en voorwaardelijke sancties. Retrieved from http://wetten.overheid.nl/BWBR0031814/geldigheidsdatum_30-06-2015.

[38] However, there is no clarification as to what exactly is meant in terms of both the social rehabilitation itself and its facilitation. The only direct reference can be found in Recital 9 of the instrument, where it states that "In the context of satisfying itself that the enforcement of the sentence by the executing State will serve the purpose of facilitating the social rehabilitation of the sentenced person, the competent authority of the issuing State should take into account such elements as, for example, the person's attachment to the executing State, whether he or she considers it the place of family, linguistic, cultural, social or economic and other links to the executing State." A possible explanation for the absence of a precise definition is that the concept is still the matter of much debate (van Zyl Smit & Snacken, 2009, pp. 73–85; Vermeulen & Dewree, 2014).

cornerstone on which the instrument should operate. As such, any transfer of a mentally disordered offender that might successfully occur needs to pass this threshold. It has already been established that many a Member State has – albeit with various degrees of severity – shown signs of incompatibility regarding the detention, care and treatment of mentally disordered offenders. The implications of this for the efficiency and desirability of using FD 909 for transferring such offenders remain obscure:

- The nebulous nature of the purpose of facilitating social rehabilitation may win out against the explicit objective, leading to an approach that allows fast-paced transfers with little consideration for the individual involved. As an early warning of this, the 2011 study of Vermeulen et al. (2011a) on the instrument and on the cross-border execution of judgements involving the deprivation of liberty showed – using the results of an extensive questionnaire given to respondents throughout the Member States – that 33% of the respondents assumed that if prisoners served their sentence in their home state this would automatically facilitate their social rehabilitation, rather than assessing this on a case-by-case basis and with due consideration of the state's legal and detention systems (Vermeulen et al., 2011a, pp. 47-55).
- Furthermore, as no official refusal based on human rights is foreseen in the instrument, it leaves unanswered the question of whether a Member State may refuse cooperation because of serious concerns in this area.

With a small sidestep to the ECtHR's and CJEU's recent rulings in cases concerning the transfer of asylum seekers, this article clarifies these potential issues for transferring mentally disordered offenders using FD 909, and the general consequences for the AFSJ.

4.3. A textbook example of a systemic failure? The Belgian situation in the light of the asylum rulings by the CJEU and the ECtHR

In the cases heard in the ECtHR[39] and the CJEU,[40] both Courts had to assess the application of the principle of mutual trust in the context of transferring asylum seekers between Member States (Billing, 2012; Bossuyt, 2011; De Bondt & Suominen, 2016; Heard & Mansell, 2011; Suominen, 2014). The (earlier) ECtHR judgement had to assess whether or not the transfer of an asylum seeker between Belgium and Greece created a real risk[41] that the applicant's Article 3 rights would be violated (M.S.S. v. Belgium and Greece, para. 365). The Court found – by observing various reports by international bodies and NGOs[42] – that these facts had been well known and freely ascertainable from a wide number of sources *before* the transfer of the applicant (ibid, para. 366). The Court therefore considered that, by transferring the applicant to Greece, the Belgian authorities knowingly exposed him to detention that amounted to degrading treatment, in violation of Article 3 (ibid, para. 368).

Prudently following the ECtHR judgement, the CJEU applied (for the most part) the same reasoning (N.S. v. Secretary of State for the Home Department, paras 3, 86, 89, 94, 106 & Conclusion 2) by concluding that the presumption that fundamental rights were protected in all Member States must be rebuttable in situations in which Member States have *systemic flaws* in their asylum procedures and reception conditions for asylum applicants. This was later confirmed – and tightened – in the CJEU's Shamso Abdullahi judgement, (Shamso Abdullahi v. Bundesasylamt, para. 60).

These recent judgements have been heralded as a new beginning for (or even the end of) the Dublin asylum system, and analogies have been drawn to cooperation in criminal matters. One can indeed presume that there is a parallel between a non-consenting asylum seeker being removed to a Member State using the Dublin Regulation and the European Arrest Warrant procedures. In the same way, a (non-consenting) offender being transferred through the use of FD 909 would fit this categorization.

As is correctly observed by Suominen (2014, p. 223), the position of these individuals should not suffer because the proceedings have a European character, and their rights should not become less protected as the result of mutual recognition being applied. What remains to be established by these individuals in order to oppose such a planned transfer successfully, however, is a rebuttal of the presupposed trust in states' commitment to international (fundamental) norms and standards. Likewise, when a Member State wishes to – or should – refuse cooperation on the basis of the well-founded establishment of potential human rights infringements, it has to argue against the AFSJ's cornerstone. There is an important distinction between the thresholds set by the ECtHR and the CJEU for doing this successfully. The ECtHR looks to the various reports (see supra) as evidence for a systemic shortcoming in order to conclude that there may be a violation of (amongst other provisions) Article 3. This means that the Court does not hold that *only* thoroughly demonstrated systemic deficiencies will suffice to halt the transfer (or removal) of a person. The premise of the CJEU, on the other hand, is that pleading systemic deficiencies is the only way. It is likely that this indicates a distinction between the Courts, with the ECtHR playing the role of the protector of the individual, and the CJEU appearing to be more focused on the conformity and uniformity between fundamental rights and the cooperation in criminal matters in the AFSJ (Asp et al., 2013).

However, even when the CJEU's higher threshold needs to be applied, for instance when a Member State makes use of the prejudicial procedure of Article 267 TFEU because it has serious concerns regarding systemic deficiencies in a country's approach towards mentally disordered offenders and asks whether it may (or even should) refuse a certificate that has been issued to demand a transfer under FD 909, then, regardless of the fact that no ground exists for a refusal on the basis of fundamental rights, it would be safe to assume that for at least one particular small kingdom in the EU this would be a serious concern. It is precisely the finding of this article (that there seems no way in which Belgium could counter an allegation that it has systemic deficiencies regarding the approach of its legal and detention system towards mentally disordered offenders) that is problematic for the AFSJ.

This conclusion for just one of the twenty-eight Member States (and this article indicated above that currently the conclusion can certainly be drawn for others) may disrupt the entire area. Moreover, Member States appear increasingly less ready to sacrifice fundamental rights and specific safeguards on the altar of rapid cooperation in criminal matters (Alegre, 2005; Alegre & Leaf, 2004; Suominen, 2011; Vermeulen, 2014).[43]

5. The EU's response

5.1. Neither hot nor cold? The (CJ)EU's lukewarm approach to fundamental rights in the AFSJ

As mentioned above, the CJEU serves as a guardian vis-à-vis the relationship between fundamental rights and cooperation in criminal

[39] M.S.S. v. Belgium and Greece, 21 January 2011 (30696/09).

[40] European Court of Justice (ECJ), 21.12.2011, joined cases C-411/10 and C-493/10, N.S. v. Secretary of State for the Home Department [2011]; ECJ, 10.12.2013, C-394/12, Shamso Abdullahi v. Bundesasylamt [2013].

[41] Soering v. the United Kingdom, 7 July 1989 (14038/88).

[42] Such as the CPT (M.S.S. v. Belgium and Greece, para. 163), the UNCHR (ibid, para. 213), Amnesty International (ibid, para. 165) and Médecins sans Frontières (para. 166). All these reports confirmed that there were systematic (ibid, para. 161) and severe shortcomings.

[43] Belgium itself is no stranger to this: early in 2013, it refused the execution of a number of European Arrest Warrants issued by Spain because its competent authorities had serious concerns regarding the detention conditions of an ETA defendant and decided that it could potentially raise fundamental rights violations (Meysman, 2014a). This situation of the pot calling the kettle black may lead to a reciprocity in which mutual mistrust takes the upper hand in the Area of Freedom, Security and Justice.

matters in the AFSJ. With its interpretative powers, it holds the key to assuring the conformity and uniformity of the EU's legislative instruments against a backdrop of international norms and standards. Precisely this dual function has prompted the CJEU to prefer a different assessment in asylum cases, creating a more challenging threshold for applicants who are trying to oppose a removal. The reason for this, as one may imagine, is that the Court cannot play *cavalier seul* and move headlong towards a conclusion that places either one of the individual right or the principle of cooperation in criminal matters above the other, but must strive to find a prudent and fitting balance. Nonetheless, a careful observer must confess that, in the past, the Court has (perhaps intentionally) ignored the chance to speak out – and more importantly to set guidelines – on this precarious relationship.

In the Radu case (Tinsley, 2012),[44] the Court sidestepped the actual prejudicial question of whether the Charter of Fundamental Rights (hereafter: CFREU) would allow a state to refuse to execute a European Arrest Warrant; it reduced its judgement to the assessment of whether such a refusal could be grounded on the assertion that the person was not heard by the issuing authority, and answered this question in the negative. In the Melloni case,[45] the Court concluded that a Member State may not make use of its national (higher) human rights protection to reject a European Arrest Warrant that has been issued and that meets the (lower) protection criteria set by the CFREU. Once again, the Court reiterated that any other assessment would impair the principles of mutual trust and recognition that the Framework Decision aims to increase. Moreover, the Court claimed that such an interpretation would compromise the effectiveness of the Framework Decision because it would question the uniformity of the fundamental rights protection as established by that Framework Decision (Stefano Melloni v. Ministerio Fiscal, para. 63). An important aspect of the Court's reasoning was that the EU had already established an harmonisation pathway and therefore, that allowing a higher national level of fundamental rights protection would run counter to the aim of the provision to provide a common understanding of that refusal ground (Armada, 2015; Labayle, 2013a, 2013b; van der Hulle & van der Hulle, 2014). Hence, in areas where the EU legislator has established (common minimum) definitions at EU level, the member states' margin of action will be smaller than in cases where no common definitions exist and the principle of mutual recognition will be more powerful – with more limited exceptions to this principle – where approximation is available (Janssens, 2013, p. 204). In both cases, the CJEU thus gave precedence to its role as watchful protector over the soundness of the AFSJ and its principles that underpin mutual recognition in criminal matters. In short, it implied that mutual trust and the assumed conformity by the Member States with fundamental rights may not be hindered by questions as to how these fundamental rights should be upheld in cooperation scenarios that are based on mutual recognition.

While these judgements invoked a fair amount of criticism (Tinsley, 2012) or relativisation (van der Hulle & van der Hulle, 2014), the Court created a complete uproar (Douglas-Scott, 2014; Peers, 2014) when it presented its opinion on the EU's accession to the ECHR (Court of Justice of the European Union, 2014). This controversy aside, the Court's opinion contained a view that was both interesting and concerning regarding the relationship between mutual trust in the AFSJ and fundamental rights. In paragraph 191 of its opinion, the Court explained that "it should be noted that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law", before adding in paragraph 194 that "in so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine the autonomy of EU law."

From this, the Court concludes in paragraph 258 that "in the light of all the foregoing considerations, it must be held that the agreement envisaged is not compatible with Article 6(2) TEU or with Protocol No 8 EU in that it is liable adversely to affect the specific characteristics and the autonomy of EU law in so far it … does not avert the risk that the principle of Member States' mutual trust under EU law may be undermined …".

While, bearing in mind the Radu and Melloni judgements, this in itself should not be considered as such a shocking conclusion, it is worrying to notice how the Court considers the accession to the ECHR to be contrary to the principle of mutual trust as it would potentially open the gates for a state to check the fundamental rights situation in the Member State that has demanded its cooperation in the AFSJ. Yet, as we have discussed, it is precisely the shared commitment of the Member States to – amongst other things – the ECHR that would allow them to trust each other to begin with. If nothing else, the Court has, with this reasoning, reiterated – in, perhaps for the first time, crystal clear language – that it is trust for trust's sake that is at the helm of the Area of Freedom, Security and Justice.

Looking back at the problems that have been identified in this article and that have led to a growing number of ECtHR judgements, the substantiated evaluation that – most prominently – Belgium has breached the CJEU's own threshold of systemic deficiencies, thus trumps any potential cooperation in the AFSJ, and ultimately the Member States' own increasing weariness with the automatic results of a blind mutual trust, it seems that the EU and its most prominent Court are barking up the wrong tree.

On the 24th of July 2015, the *Hanseatisches Oberlandesgericht* of Bremen, Germany, requested a preliminary ruling from the CJEU in the Aranyosi case[46] and demanded a clarification and interpretation from the Court whether the European arrest warrant is to be interpreted as meaning that extradition is impermissible where there are strong indications that detention conditions infringe the fundamental rights of the person concerned. Furthermore, the Bremen court wanted to know if, in such circumstances, a Member State can or must make the decision on the permissibility of extradition conditional upon an assurance that detention conditions are compliant and whether it can or must lay down specific minimum requirements applicable to detention conditions. With such a clearly structured demand for clarification/interpretation on the relationship between fundamental rights and detention conditions in a mutual recognition context, the Court's answer is eagerly awaited.

5.2. The Commission's recommendation on the rights of vulnerable defendants

At around the same time as the EU's Court is shifting into a higher gear in the defence of mutual trust as a *per se* principle, the EU has developed a step-by-step approach to try and cater for some of the concerns and criticisms that have arisen with regards to the AFSJ's instruments for cooperation in criminal matters (Alegre, 2005; Alegre & Leaf, 2004; Ambos, 2008; Anderson, 2008; Labayle, 2013a, 2013b;

[44] ECJ, 29.01.2013, C-396/11 (Curte de Apel Constanța v. Ciprian Vasile Radu), [2013].
[45] ECJ, 26.02.2013, C-399/11 (Stefano Melloni v. Ministerio Fiscal), [2013].
[46] ECJ, 24.07.2015, C-404/15 (Hanseatisches Oberlandesgericht in Bremen/Pál Aranyosi), Request for Preliminary Ruling, OJ C 320, 28.09.2015. [2015]. Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015CN0404&from=EN.

Marguery, 2013; Nilsson, 2005) and to address the decline in trust (Thellier de Poncheville, 2013; Vermeulen & De Bondt, 2011, p. 18). Following a rough start (Blackstock, 2012; Morgan, 2012; Vermeulen, 2014; Vermeulen & Van Puyenbroeck, 2011) the Council presented its Resolution[47] endorsing a Roadmap for strengthening the procedural rights of suspected or accused persons in criminal proceedings (hereafter: the Roadmap). This article focuses only on the Roadmap's instrument that specifically targets suspects or accused persons with a mental disorder as vulnerable defendants.[48] The principal conclusion is the inevitably voluntary character of this instrument. While it is a formal EU instrument, it merely recommends (European Commission, 2013, Rec. Section 1.1) that states strengthen certain procedural rights of vulnerable defendants. Given the issues identified and the considerable legal, monetary and practical burdens to which they would lead should the Member States wish to address them, one must temper one's expectation of seeing an actual change of scenery brought about by this Recommendation. Furthermore, and this is inherent in the Roadmap approach, the Recommendation only targets the specific procedural rights of vulnerable persons from the time they are suspected of having committed an offence until the conclusion of the proceedings (European Commission, 2013, Rec. Section 1, 2.). One of the major issues that has been identified is the post-trial placement (and transfer) of convicted mentally disordered offenders, and this remains unaddressed. This is not illogical because if the EU was to begin to introduce binding minimum norms in the area of the conditions for detention and the procedures for transfer of detainees, an outright refusal (if not uproar) by the Member States would be the result. Nonetheless, and as mentioned above in this article and in many others (De Bondt & Vermeulen, 2010; Lööf, 2006; Morgan, 2012; Vermeulen, 2014; Vermeulen & Van Puyenbroeck, 2010), the EU's flexible interpretation of its competence under Article 82(2) TFEU – by which minimum norms can be introduced but only to the extent that they strengthen mutual recognition in cross-border proceedings – has already raised some eyebrows. Likewise, the Recommendation and its suggestions[49] apply – as explicitly mentioned – in European Arrest Warrant proceedings, but also regardless of any mutual recognition or cross-border connection.

6. Concluding remarks. Is everyone waltzing to a different tune?

The increasing number of cases from the ECtHR is conclusive about violations of the right to freedom and about unlawful detention, about the lack of an effective (legal) remedy for these situations and, sadly enough, also about violations of the absolute prohibition of torture, inhuman or degrading treatment or punishment throughout Europe. As it turns out, this is just the tip of the iceberg, as mentally ill people deprived of their liberty based on offences committed remain an underdetected, under-protected and – in more cases than one would like to admit – maltreated group of vulnerable people. From a European Union perspective, this brings up the question of how to deal with this category of detainees and with the accumulating evidence of their predicament in the Area of Freedom, Security and Justice.

Within this area, the EU has determined that mutual recognition should be the cornerstone for cross-border cooperation in criminal matters, based on mutual trust between the Member States, with the self-proclaimed purpose of facilitating cooperation while simultaneously enhancing the individual (fundamental) rights of the persons involved. Confronted with direct questions concerning this purpose and the difficult relationship between mutual recognition and the protection of fundamental rights, the EU's Court of Justice initially – in the AFSJ context of asylum and migration – digressed from the ECtHR reasoning by applying a higher threshold for success in opposing planned removals and transfers, and ultimately – in its opinion on the EU's accession to the ECHR – decided that mutual trust is a *per se* principle that must remain intact regardless of legitimate and necessary concerns related to fundamental rights.

Simultaneously, the EU is developing a new set of safeguards with its Roadmap that adds additional provisions regarding individual (procedural) guarantees to the already well-stacked deck of international norms and standards. For the Member States, this triangle will present the conundrum of how to deal with mutual recognition requests when a positive reply risks a judgement against that state by the ECtHR, while a negative answer opposes the CJEU's mantra that trust must remain unscathed. On top of this, they now risk additional penalties if flaws are found in their Roadmap compliance, while they may very well escape an ECtHR judgement. From the individual's perspective, the perspective of a mentally disordered offender, the instrument (FD 909) that aimed to enhance their social rehabilitation prospects and was designed to transfer them to the state (ideally) best connected to them and best suited for their care and treatment has run into trouble because of the European reality of evidenced breaches of fundamental rights. In a way that matches the CJEU's interpretation, for people in this vulnerable category the *only way* of opposing transfers under FD 909 is by pointing out systemic deficiencies. One has to guess how this could be done by a mentally disordered defendant, given that for one Member State simply to *check* the fundamental rights situation in another Member State is already considered to be contrary to the AFSJ's tenet of mutual trust. The lifeline provided by the ECHR is, furthermore, far away, as the ECtHR's threshold is still considerably high, especially for members of a vulnerable category who are less likely to make a successful application. Lastly, the EU's procedural Roadmap has (thus far) only delivered one instrument that is anywhere near targeting mentally disordered defendants and, by any interpretation, is a dud for convicted mentally disordered offenders.

In anticipation of a decisive ruling by the CJEU on how to interpret fundamental rights in a mutual recognition context involving detention conditions, and analogous with the asylum case law, a manageable recommendation would be a revised motivational duty for Member States aiming to engage in FD 909 transfers. Rather than a *pro forma* appraisal of the social rehabilitation of the individual, transfer decisions should contain a well-founded and motivated determination of the rehabilitation prospects, including an assessment of the material detention conditions in the sought State.

In an era of European cooperation based on mutual trust, there is a question that needs to be addressed. This is whether non-compliance with international norms and standards, and even frequent and evidenced breaches of the fundamental rights enshrined in the ECHR, are an obstacle to cooperation between Member States when the transfer of mentally disordered offenders from one Member State to another is involved. This article's conclusions indicate that mutual trust is – or should be – lacking in this particular context, that there is therefore a potential risk for the Area of Freedom, Security and Justice and lastly that the recent EU initiatives fail to address this issue in an appropriate manner.

[47] Council of the European Union (2009). Resolution of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

[48] European Commission (2013).

[49] Some of them very useful, like suggestion 14 that "Member States should take all steps to ensure that deprivation of liberty of vulnerable persons before their conviction is a measure of last resort, proportionate and taking place under conditions suited to the needs of the vulnerable person. Appropriate measures should be taken to ensure that vulnerable persons have access to reasonable accommodations taking into account their particular needs when they are deprived of liberty" and suggestion 12 that "vulnerable persons should have access to systematic and regular medical assistance throughout criminal proceedings if they are deprived of liberty".

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