

**The European Union and Cooperation in Criminal Matters:
the Search for Balance**

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THE EUROPEAN UNION AND COOPERATION IN CRIMINAL MATTERS: THE SEARCH FOR BALANCE

1. Different perceptions of Brussels

What is the European Union doing to control crime?

In the popular discussion, there appears to be three common opinions of the impact of the European Union on criminal justice. One opinion is dismissive: the European Union spends its time fine-tuning the legal details of instruments that have little impact on everyday life. A second opinion is that the European Union is evolving into a super-state that (perhaps misguidedly?) is seeking to harmonise criminal and procedural law in all the Member States. The third opinion is that the European Union is working hand in hand with law-and-order adherents, focusing on the control of crime and favouring a more punitive criminal policy.

While scattered evidence can be marshalled to support any or indeed all of these views, they remain caricatures of reality. European Union cooperation in criminal justice has evolved so rapidly, and extended so far, that we should not be surprised at how difficult it is to give an objective assessment of what has been done, what is being done, and what will be done next. The present paper seeks to place the work of the EU within the context of broader international cooperation, and thus give a better sense of the direction in which EU criminal justice has evolved and how it may evolve in the years to come. After looking at the evidence for all three of the opinions just mentioned, the paper suggests that

European Union cooperation in criminal justice does not fit any of the three views. Instead, EU criminal justice can be seen to be national criminal justice taken to a new level, with much the same goals and inner tensions as in any and all of the Member States.

2. The background: the evolution and outlines of European Union cooperation in criminal justice

The European Union represents a unique form of international co-operation. Almost all Western and Central European countries have joined together to form an intergovernmental structure. Twenty-five countries acting together deal with important policy questions that have cross-border implications. These decisions concern not only law enforcement and criminal justice, but also for example migration and border control, taxation, the economy, consumer affairs, industry, agriculture, and so on. Further expansion of the European Union is underway. Bulgaria and Romania are set to join in 2007, and negotiations have begun with Croatia, FYROM (Macedonia)¹ and Turkey. More applications can be expected in particular from southeastern Europe (Albania, Bosnia-Herzegovina and Serbia).²

Originally the European Union (then referred to as the European Communities) focused on economic integration and the establishment of the Common Market. The Common Market is based on the principle that persons, products, services and capital should be allowed to move freely from one country to the next. Such freedom of movement obviously benefits the economy, but it also opens up new opportunities for crime, and new possibilities for offenders to slip from one country to another, trying to evade justice.

¹ Macedonia is referred to officially in the EU as “the former Yugoslav Republic of Macedonia”, abbreviated as FYROM.

² It should be noted that all of the Member States of the European Union are also members of a separate intergovernmental organisation, the Council of Europe.³ (Note the potential for confusion in terminology: the Council of Europe is not the same as the European Council.) The Council of Europe has adopted a large number of conventions, recommendations and resolutions on judicial cooperation, including not only an extradition treaty (1957) and a mutual legal assistance treaty (1959), but also the important European Convention on Human Rights and Fundamental Freedoms.

In such a situation, the conventions that had been adopted by the Council of Europe were no longer sufficiently comprehensive and effective to match the pace of integration in the European Communities. For this reason, the 1992 Maastricht Treaty extended the mandate of the European Communities to include co-operation in justice and home affairs.³

Following the Maastricht Treaty, decisions in the European Union on justice and home affairs are primarily made by three bodies, the *Council of Ministers*, the *Commission* and the *European Parliament*. In addition, and in particular after the entry into force of the Amsterdam Treaty, the European Court of Justice exercises some judicial functions. Usually, the Commission makes the proposals that lead in time to EU decisions, although also a Member State can do so. The decisions are prepared in working groups with representatives from the different Member States, and are adopted by the Council of Ministers. For justice and home affairs, this Council consists of the Ministers of justice and internal affairs of each Member State. The European Parliament is consulted, but its views are not binding. Decisions under the third pillar require consensus: each and every one of the twenty-five Member States must agree to the decision, or at least abstain from voting against the measure in question.

The most important types of decisions are called *framework decisions*. These establish a certain goal, such as the criminalisation of certain conduct, or the establishment of certain procedures for cross-border cooperation. It is then up to each Member State to change its own legislation in order to achieve the goals that have been set in the framework decisions. Framework decisions are binding on the Member States. They are, in a way the third pillar counterparts to directives in the first pillar. However, other than is the case with directives, they do not have direct effect. This means that individuals cannot rely on them directly against the state. Nonetheless, they may have some form of “direct applicability”

under certain circumstances, following the Court’s judgement in the Pupino case.⁴

As with framework decisions, also *decisions* under the third pillar are binding but do not have direct effect. “Decisions” are used for any purpose other than approximation of law, for instance to set up bodies such as Eurojust.

The European Union has also drafted its own *treaties* to update and supplement the Council of Europe treaties. This work led to extradition treaties adopted in 1995 and 1996 and to a mutual legal assistance treaty adopted in 2000. The MLA treaty entered into force in August 2005. Neither extradition treaty has entered into force, since they required ratification by all Member States. The ratification process was still in progress when the need for the treaties was obviated by the adoption of the framework decision on the European Arrest Warrant.

The framework decisions, the decisions and the treaties, together with for example the judgments of the European Court, form part of what is known as the *acquis communautaire* of the European Union, the body of law that is binding on all Member States and (in a political sense) also on countries seeking to join the EU. Through the EEA agreement, they also have an effect in Norway, Iceland, Switzerland and Liechtenstein, and are also important to other neighbouring countries that are potential candidates to the EU.

In 1997, the European Union decided on a set of measures (an “action plan”) that needed to be taken in response to organised crime. These measures included the adoption of decisions related to the criminalization of participation in a criminal organisation and money laundering, more effective measures for the tracing of assets, the identification of best practice in mutual assistance, and close cooperation with the countries that had recently applied for membership in the European Union. A system for mutual evaluation was set up, by which teams of experts from different countries would assess how efficiently each Member State was

³ Following the entry into force of the Treaty of Amsterdam, cooperation in police and criminal matters forms what is called the “third pillar” of the European Union. The first pillar consists essentially of issues related to the original internal market as well as asylum, immigration and cooperation in civil law, and the second pillar consists of foreign policy and security policy.

⁴ Case C-150/03, 16 June 2005.

dealing with a certain issue, such as extradition or mutual legal assistance. The action plan also created what is known as the European Judicial Network, which allows the practitioners responsible for extradition and mutual legal assistance to be in direct contact with their counterparts in other countries (instead of, as is the usual case elsewhere in the world, going through diplomatic channels). Because of the strong support given on the highest political level to the action plan, many of the measures called for in the action plan were adopted in less than three years – an impressive achievement in international cooperation.

Two years later, in October 1999, a special European Council organised in Tampere, Finland, laid out a programme for the EU to follow in dealing with questions such as migration, asylum, criminal and civil justice and responding to organized crime.

Each of the Member States of the European Union has its own unique criminal justice system, with its own criminal and procedural laws. As a result, the national definition even of basic types of crime, and the rights enjoyed by suspects and defendants, can vary considerably. These differences can complicate or even prevent extradition or mutual assistance. For example, many Member States have traditionally required double criminality as a condition for extradition or mutual assistance: the offence in question must be recognised as an offence in the Member State requesting extradition or assistance and in the Member State asked to extradite or to provide assistance.

There are basically two ways to overcome these national differences in law: either require that all states have more or less the same laws (*harmonisation*), or have the states agree to enforce decisions and judgments made in another state (*mutual recognition*). Those in favour of harmonisation argue that the laws defining the main forms of cross-border crime, as well as the basic elements of criminal procedure, should be the same in all EU Member States. Those in favour of mutual recognition, in turn, argue that harmonisation is not necessary, as long as the courts and other authorities

of each Member State are prepared to enforce decisions taken in other Member States. (A point of comparison is article IV(1) of the Constitution of the United States, according to which each state should give “full faith and credit” to the judicial proceedings of each other state.)

In 1999, the European Union threw its weight on the side of mutual recognition. However, the European Union also decided that work should continue on harmonisation of key areas of legislation, such as the prevention and control of money laundering.

Two years later, this work on legal integration was hastened by the impact of the terrorist attacks in New York and Washington, D.C. on 11 September 2001. The attacks led to the adoption of an EU decision that harmonised domestic legislation defining terrorist crimes. Furthermore, only three months after the attacks, the European Union agreed its first decision on mutual recognition, the so-called European arrest warrant. This was formally adopted on 13 June 2002. This framework decision replaced extradition proceedings entirely with a much more rapid procedure for the surrender of fugitives. Soon after, a decision was adopted on the mutual recognition of orders on the freezing of property and evidence. As a result of these two decisions, once a court in any Member State orders the arrest of a certain suspect or convicted offender, and the freezing of his or her property, the courts in any and all other Member States can and should enforce these immediately.⁵

Towards the end of 2004, the European Union reviewed the progress it had made since 1999, and decided, by approving the so-called Hague Programme, on what further work was needed to develop the European area of freedom, security and justice. Between 2005 and 2010, decisions were to be made that would help to overcome cross-border problems connected with, for example, minimum standards for dealing with suspects and defendants, the use of pre-trial detention, the collection of evidence, the checking of criminal records, and the transfer of sentenced offenders to their state of

⁵ One more consequence of the terrorist attack was that the EU decided to supplement the existing patchwork of bilateral treaties that the Member States had with the United States, with more general and updated EU-US treaties on extradition and mutual legal assistance

nationality or state of residence. Attention was also to be paid to developing good practice, not only in extradition and mutual legal assistance, but also for example in crime prevention.

The new Constitutional Treaty signed on 29 October 2004 (if and when ratified by all 25 Member States) would lead, among other things, to the elimination of the distinction between pillars. According to the proposal, decisions even on justice and home affairs would no longer have to be made by consensus, but by a “qualified majority.”⁶ The Commission would in practice have the right of initiative, although also one-fourth of all Member States, acting together, can present an initiative. The European Parliament would have a considerably stronger role in influencing the contents of decisions.⁷

3. The first claim: “European Union cooperation in criminal justice has had little impact”

3.1. Overview of progress in EU cooperation in criminal justice

Perhaps the most common opinion of the European Union is that it is a massive intergovernmental bureaucracy that churns out directives and regulations that have no real impact in practice (other than costing a lot of money and causing endless frustration to those entrepreneurs who have to put up with all of this tomfoolery).

But are, in fact, EU provisions on cooperation in criminal justice ineffective? If we take into consideration the fact that this cooperation did not really get underway until the 1992 Treaty of Maastricht gave the EU competence in justice and home affairs, quite a lot of work has been done in the dozen or so years since then. This can be illustrated by comparing present EU cooperation with the “status quo” of ordinary international

cooperation, among the police, prosecutors and the judiciary. Such a comparison is provided in the table below on page 11.

3.2. Police cooperation

The global status quo:

The general rule around the world is that law enforcement personnel do not have powers outside of their jurisdiction. Notices are communicated through Interpol. A few countries have posted liaison officers abroad, and informal contacts are used on an ad hoc basis. Otherwise, officially, information may not and is not exchanged except through formal bilateral channels, and even then only in a few cases. Coordination of cross-border investigations is rare, and requires considerable preparation through formal channels.

The European Union reality:

- *an international body, Europol, coordinates cross-border investigations, and seeks to provide support to domestic law enforcement services in specialist fields.*
- *a network of liaison officers has been developed.*
- *joint investigative teams (with members from the law enforcement agencies of different countries) can be set up.*
- *Europol produces threat assessments on organized crime, bringing together data from all Member States.*

Within the framework of the Schengen conventions, which are in force in over one half of the EU Member States,

- *the Schengen information system allows national law enforcement agencies to share data on many key issues almost instantaneously with their colleagues in other countries. The system encompasses*

⁶ What constitutes a “qualified majority” would depend on a combination of the number of Member States in support, and the size of these Member States.

⁷ As of August 2006, fifteen out of twenty-five Member States have ratified the Constitutional Treaty. However, in referendums organized in France and the Netherlands during the spring of 2005, a clear majority voted against ratification. At the time of writing, the process of ratification is basically on hold. The European Union is engaged in a delicate debate over whether and how to proceed with ratification.

	"ordinary" international cooperation	EU cooperation
police co-operation	<ul style="list-style-type: none"> co-operation is based on informal contacts, relatively rare bilateral agreements, and the work of Interpol only a few non-EU states (in particular the USA) use liaison officers information can be exchanged through Interpol. Otherwise, information is exchanged through slow official channels or through informal channels 	<ul style="list-style-type: none"> Europol co-ordinates cross-border investigations and provides support for national police authorities. Europol's operational powers are to be developed the European Anti-Fraud Office (OLAF) coordinates investigations of offences directed against the financial interests of the EU also other structures for police cooperation have been established (such as cooperation among heads of police) an extensive liaison officer network has been created (including through Europol) the possibility of establishing joint investigative teams has been created (although so far, few such teams have been set up in practice) the exchange of information is being developed, for example through implementation of the "availability of information" principle police cooperation is especially intensive among the so-called Schengen countries (SIS, SIRENE, cross-border supervision, controlled delivery etc.)
prosecutorial co-operation	<ul style="list-style-type: none"> prosecutorial cooperation is based on a very few bilateral or multilateral agreements the International Prosecutors Association provides a loose structure for cooperation 	<ul style="list-style-type: none"> Eurojust coordinates cross-border prosecutorial cooperation an increasing number of EU instruments permit direct cooperation between and among prosecutorial authorities the European Judicial Network facilitates direct cooperation between prosecutorial authorities a liaison magistrate network has been established also the Schengen arrangements facilitate prosecutorial cooperation
judicial co-operation	<ul style="list-style-type: none"> judicial cooperation (primarily extradition and mutual legal assistance) is based on a few bilateral or multilateral agreements requests go through central authorities or through diplomatic channels often, requests are not answered, the response comes too late, or comes in a form that cannot be used in the courts of the requesting State 	<ul style="list-style-type: none"> all EU Member States are parties to the major multilateral agreements on judicial cooperation (Council of Europe 1957, 1959, 1990; United Nations 1988, 2000 and 2003) the EU has its own recent agreements on extradition (replaced by the EAW) and mutual legal assistance the EU promotes standards of good practice, for example through a rigorous peer review system mutual recognition of judicial decisions has become the basis for judicial cooperation within the EU; the first instruments on mutual recognition have entered into force (the EU arrest warrant; the freezing of property and evidence; and fines)
harmonisation of criminal law and criminal procedure	<ul style="list-style-type: none"> harmonisation is based on a few rare multilateral agreements and on a number of non-binding recommendations and resolutions, all of which leave extensive discretion to the State parties 	<ul style="list-style-type: none"> the EU has adopted a large number of instruments on the harmonisation of criminal and procedural law, and these have had an impact in practice attention has also been paid to the rights of victims, and of suspects and defendants
wider international cooperation and technical assistance	<ul style="list-style-type: none"> technical assistance is given almost solely on an uncoordinated ad hoc basis, through bilateral arrangements multilateral technical assistance is rather limited; even so, this may have a significant impact in certain situations (Council of Europe, UN, OECD, World Bank, etc) 	<ul style="list-style-type: none"> the impact of the EU is particularly strong on the evolution of the legal systems of candidate countries the EU seeks to engage in coordinated international cooperation and, as appropriate, technical assistance with a number of countries (the "New Neighbours", the Mediterranean countries, Latin America; China, the US and Canada)

some 50,000 terminals in the Member States.

· law enforcement authorities are allowed hot pursuit across borders (under certain conditions).

· law enforcement authorities are allowed to engage in surveillance in the territory of other countries (under certain conditions).

· law enforcement authorities are allowed to engage in controlled delivery.

Europol

Europol was established in October 1998, when the Europol Convention entered into force among the (then) fifteen European Union countries. Europol is an international organization that has its headquarters in The Hague, in the Netherlands.

The objective of Europol is “to improve ... the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organized criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned.”

The principal tasks of Europol consist of

- 1) facilitating the exchange of information between the Member States,
- 2) obtaining, collating and analysing information and intelligence (including the preparation of annual threat assessments regarding organized crime),
- 3) notifying the competent authorities of the Member States of information concerning them and of any connections identified between criminal offences,
- 4) aiding investigations in the Member States by forwarding all relevant information to the national units, and
- 5) developing a computerized system of collected information.

Europol is also charged with developing specialist knowledge of the investigative procedures of the competent authorities in the Member States and providing advice on investigations, and with providing strategic intelligence to assist with and promote the efficient and effective use of the resources available at the national level for operational activities. For this purpose, Europol can assist Member States through advice and research in training, the organization and equipment of the authorities, crime prevention methods, and technical and forensic police methods and police procedures.

Work in progress. In October 1999, soon after the Europol Convention entered into force, a special European Union Council was held in Tampere, Finland, to discuss the strengthening of the work of the EU in justice and home affairs. In respect of Europol, the Tampere meeting concluded, *inter alia*, that “Europol’s role should be strengthened by allowing it to receive operational data from Member States and authorising it to ask Member States to initiate, conduct or coordinate investigations or to create joint investigative teams in certain areas of crime, while respecting systems of judicial control in Member States”. This was an important goal, since it would allow Europol a considerably more active role in investigations.

In March 2000, a new action plan against organized crime was adopted.⁸ It contains a number of points regarding Europol:

- Europol should be able to carry out studies of practice at the national and European Union level and of their effectiveness, develop common strategies, policies and tactics, organize meetings, develop and implement common action plans, carry out strategic analyses, facilitate the exchange of information and intelligence, provide analytical support for multilateral national investigations, provide technical, tactical and legal support, offer technical facilities, develop common manuals, facilitate training, evaluate results, and advise the competent authorities of the Member States.

⁸ The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new Millennium.

- consideration should be given to the feasibility of setting up a database on pending investigations, making it possible to avoid any overlap between investigations and to involve several European competent authorities in the same investigation.

- Europol should help in establishing a research and documentation network on cross-border crime, and in organizing the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions. The establishment of compatible criminal intelligence systems among Member States should be a long-term goal.

Schengen

Due in part to the slowness with which police cooperation was being developed in Europe and to political differences of opinions over the extent of this cooperation (the 1992 Maastricht Treaty, which created the third pillar, was still in the future), some members of the European Union (originally, Belgium, France, Germany, Luxembourg and the Netherlands) decided to move among themselves to a “fast-track” alternative. The result was the Schengen Agreement of 1985 and the Schengen Convention of 1990, which were designed to eliminate internal frontier controls, provide for more intensive police cooperation, and establish a shared data system.

The need for the “Schengen arrangements” arose with one of the primary goals of economic integration, the elimination of border controls on the transit of persons, goods, capital and services. Quite simply, the Schengen area was to become a “passport-free zone.” Although this elimination of border control undoubtedly promotes trade and commerce, at the same time it makes more difficult the task of controlling the entry and exit of offenders and suspects.

The “Schengen group” currently consists of Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden, as well as, from outside the EU, Iceland, Norway and Switzerland.⁹ The United Kingdom and Ireland have not joined the parts of Schengen relating to border controls, since they wish to retain separate passport controls. The ten new Member States that joined on 1 May 2004 have not yet been approved as “Schengen-ready,” but some may join already during 2007.

Police cooperation within the framework of Schengen includes cross-border supervision, “hot pursuit” across borders into the territory of another Member State; and controlled delivery (i.e. allowing a consignment of illegal drugs to continue its journey in order to discover the *modus operandi* of the offenders, or to identify the ultimate recipients and their agents, in particular the main offenders). These forms of cooperation have been hard-won: they did not see the light of day until after protracted negotiations between the Governments concerned, and even then they have been hedged by a number of restrictions.

As a trade-off to ending checks on internal borders, the Schengen countries agreed on the establishment of the Schengen Information System (SIS). This consists of a central computer (in Strasbourg, France) linked to a national computer in each country, and to a total of some 50,000 terminals. When fully operational, data entered into any one computer (for example data on wanted persons, undesirable aliens, persons to be expelled or extradited, persons under surveillance, and some stolen goods) would immediately be copied to the other national information systems. An electronic mail system (SIRENE; short for Supplementary Information Request at the National Entry) allows for the transfer of additional information, such as extradition requests and fingerprints. Yet another data-connected acronym is VISION, which refers to the “Visa Inquiry System in an Open-Border Network”.

⁹ The principal reason for the inclusion of Norway and Iceland is that these two countries are part of the passport-free zone formed among the Nordic countries. The other three Nordic countries, Denmark, Finland and Sweden, are members of the Schengen group. Switzerland, in turn, is surrounded by EU Member States.

At present, work is underway on the development of “Schengen II”, which could be called the second generation of the information system.

The strength of the Schengen arrangements lies in the fact that they allow for highly practical law enforcement cooperation, at a level that is unique in the world. At the same time, the arrangements have been subjected to criticism. Although the arrangements have been made specifically to respond to the opening of the borders between the countries in question, the question remains whether these arrangements are still insufficient to respond to the increased mobility of offenders. Secondly, the arrangements do not include all European Union countries, while on the other hand they do include three non-EU countries (Iceland, Norway and Switzerland). This inevitably leads to some practical difficulties. Third, since there is no supervisory court structure or any effective parliamentary review of Schengen decisions, it has been suggested that human rights concerns will receive less attention than the law enforcement priorities. (On the other hand, any actions taken would necessarily fall under the jurisdiction of at least one of the Schengen countries, and so the legality of the action could then be scrutinized under the appropriate national law.)

The European Anti-Fraud Office (OLAF)

The European Anti-Fraud Office (OLAF) was established in 1999 to help protect the financial interests of the EU. The EU budget provides considerable sums in financial support, and thus has become a tempting target for fraud and cooperation committed by individual offenders and organized criminal groups.

OLAF is part of the Commission, but has been granted the independent status required to carry out investigations together with competent national authorities. Its mandate is restricted to offences directed against the financial interests of the EU, but this still provides a wide ambit. In the prevention of fraud, OLAF can carry out so-called internal investigations (i.e. within EU structures) or, on the basis of cooperation with national law enforcement agencies, so-called external investigations. OLAF can also cooperate with third countries on the basis of special agreements.

Information gathering and analysis

Law enforcement authorities world-wide would be among the first to agree that a more proactive, intelligence-led approach is needed to detect and interrupt organised criminal activities, apprehend the offenders, demolish the criminal networks, and seize and confiscate the proceeds of crime. Information is needed on the profile, motives and *modus operandi* of the offenders, the scope of and trends in organised crime, the impact of organised crime on society, and the effectiveness of the response to organised crime. This information includes operational data (data related to suspected individuals and to detected cases) and empirical data (qualitative and quantitative criminological data).

On the global level the arrangements for the exchange of operational and empirical data continue to be *ad hoc*, between individual law enforcement agencies or even individuals. Such *ad hoc* arrangements also raise concerns over whether or not domestic legislation on data protection is being followed. Implementation of the United Nations Convention against Transnational Organized Crime (in particular articles 27 and 28) should provide a firmer foundation for this exchange of data, but national practice will undoubtedly be slow in aligning itself with the “soft” requirements of the Convention, which allows for considerable national discretion in implementation.

The Schengen information system has already been mentioned above. Within the broader European Union framework, several arrangements are already in place for gathering and analysing data:

- a joint action adopted in 1996 deals with the role of liaison officers. Their function is specifically to focus on information gathering. They are to “facilitate and expedite the collection and exchange of information through direct contacts with law enforcement agencies and other competent authorities in the host State”, and “contribute to the collection and exchange of information, particularly of a strategic nature, which may be used for the improved adjustment of measures” to combat international crime, including organized crime. So far, over 300 liaison

officers have been posted by EU countries, and they work in close cooperation with one another.

- Europol has produced annual reports on organised crime based on data provided by Member States. These annual reports have been used in an attempt to define strategies. Over the years, the quality and utility of these annual reports have improved, even though continued work is being done to improve the validity, reliability and international comparability of the data. One particular feature of the annual reports is that they contain recommendations based on an analysis of the data. (As of 2006, these reports have been presented in the form of threat assessment reports.)

- various decisions have been taken on the exchange of information on specific subjects. For example, a decision adopted in 1997 requires the exchange of information between law enforcement agencies when potentially dangerous groups are travelling from one Member State to another in order to participate in events.

- the European Union has created a number of financial programs to encourage the closer involvement of the academic and scientific world in the analysis of organised crime.

- a European police research network is being established to act as an information source on research results, other documented experiences and good practice in crime control.

- on 20 December 2002, Europol and the United States signed an agreement on the exchange of personal data. This allows the United States to benefit from the operational and strategic analyses carried out by Europol on the basis of data from all European Union Member States.

Work in progress in police cooperation

At the end of 2004, the European Council adopted a new program that calls for a number of new measures. A key element is the adoption of what has become known as the “principle of availability.” This is defined to mean that a law enforcement officer in one Member State who needs information in order to perform his or her duties can obtain this from another Member State, and that the law enforcement agency in the other Member State which holds this information should make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State. The first instruments implementing the principle are now being drafted. The provision of information would be hedged by some conditions, including data protection.

Within the EU, this issue of data protection in police cooperation has been seen to require a more general approach. For this reason, a second initiative launched during the spring of 2006 is designed to result in a framework decision on the issue. Both the European Council and the European Parliament have given this work a relatively high priority, and the framework decision should be ready towards the end of 2006 or the beginning of 2007.

A third initiative, taken by a smaller group of countries, is the so-called Prüm Convention. Signed on 27 May 2005 by Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Spain (and soon to be joined by Finland), it allows the law enforcement authorities of the different countries to have direct online access to one another’s databases, compare DNA profiles and fingerprints, and exchange the corresponding personal data.

Three initiatives are related to criminal records. The one that is furthest along (as of the summer of 2006) calls for the expedited transfer of criminal records information on request. A second initiative derives from a proposal that central European criminal records be set up. This encountered such resistance (for a variety of legal, practical and technical reasons) that the proposal has been scaled down to a model where a centralised data bank would contain

information only on whether or not criminal records exist regarding a specified individual who is not a EU national in one of the EU countries; if so, the authority requesting the information would turn to the EU country in question. The third initiative deals with the extent to which criminal records should be taken into consideration in criminal proceedings being conducted in another EU Member State.

3.3. Prosecutorial cooperation¹⁰

The global status quo:

International contacts between prosecutorial authorities are based on bilateral and on the few multilateral treaties on mutual legal assistance. Informal contacts are facilitated by the International Association of Prosecutors and other, similar non-governmental organizations.

The European Union reality:

- *a special structure, the European Judicial Network, has been set up to promote direct contacts between prosecutors. The system involves computerized links between the Member States, and in time will probably allow automatic and direct translation and transmission of requests.*
- *several European Union Member States have posted liaison magistrates abroad, with a specific mandate to facilitate responses to requests for extradition, EAWs and mutual legal assistance, and a more general mandate to promote international cooperation.*
- *prosecutorial and judicial co-operation is promoted also by direct contacts through the Schengen structures.*
- *an international structure, Eurojust, has been set up to assist in the coordination of the prosecution of serious and cross-border cases.*

The European Judicial Network and the strengthening of informal contacts

Among the greatest difficulties in extradition and mutual legal assistance is the lack of information on how a request should be formulated so that it can readily be dealt with in another country, and the lack of information on what progress is being made in the requested State in responding to the request.

In those (rare) cases where the practitioner personally knows his or her counterpart in the other country, informal channels can be used. The European Union has created a structure for fostering direct contacts between practitioners, the “European Judicial Network” (EJN).¹¹ This network consists primarily of the central authorities responsible for international judicial cooperation in criminal matters, and of the judicial or other competent authorities with specific responsibilities within the context of international cooperation. The EJN focuses on promoting cooperation in respect of serious crime such as organized crime, corruption, drug trafficking and terrorism.

The EJN is promoting cooperation in a number of different ways. First of all, it organizes regular meetings (at least three times a year) of representatives of the contact points. These meetings have dealt, for example, with case studies, general policy issues, and practical problems. Organizing the meetings in the different EU Member States provides an additional benefit: the host country can present its system for international cooperation, and the participants can get to know one another. Both factors are important in instilling confidence in one another’s criminal justice system.

Second, the EJN is preparing various tools for practitioners. One such tool is a website and a CD-rom that provide practitioners with information on what types of assistance can be requested in the different Member States (sequestration of assets, electronic surveillance and so on) for what types of

¹⁰ For systematic reasons, prosecutorial cooperation is here dealt with separately from judicial cooperation although most prosecutorial cooperation in most Member States falls into the broader category of judicial cooperation.

¹¹ Joint Action of 29 June 1998. A similar structure has been set up for cooperation in civil matters.

offences, how to request it, and whom to contact. The website and the CD-rom also contain the texts of relevant international instruments and national legislation. A second tool is a computerized “atlas” of the authorities in the different Member States, which shows who is competent to do what in the different Member States in relation to international cooperation. In time, the contact points in all twenty-five Member States will be connected with one another by a secure computer link that can be used not only to follow up on requests, but even to send the requests themselves.

A third tool is a uniform model for requests for mutual legal assistance. Consideration is currently being given to developing a system for automatic translation of these requests, at first into the major European languages, and ultimately into the over twenty languages used in the EU.

Liaison magistrates

The concept of the liaison magistrate is based on the positive experiences with the growing network of liaison officers used to promote cooperation among law enforcement agencies. In law enforcement, the liaison officer uses direct contacts to facilitate and expedite the international collection and exchange of information, in particular information of a strategic nature.¹²

The liaison magistrate is an official with special expertise in judicial co-operation who has been posted in another State, on the basis of bilateral or multilateral arrangements, in order to increase the speed and effectiveness of judicial cooperation and facilitate better mutual understanding between the legal and judicial systems of the States in question.¹³

The liaison magistrate does not have any extraterritorial powers, and also otherwise must fully respect the sovereignty and territorial integrity of the host State.¹⁴

Liaison magistrates are — so far — used almost solely by the European Union countries. In general, liaison magistrates are sent to countries with which there is a high number of requests for mutual assistance, and where differences in legal systems have caused delays. France has been the most active in sending out liaison magistrates, and has sent them not only to the Czech Republic, Germany, Italy, the Netherlands, Spain and the United Kingdom, but also outside the European Union, for example to the United States.

Liaison magistrates work on the general level (by promoting the exchange of information and statistics and seeking to identify problems and possible solutions) and on the individual level (by giving legal and practical advice to authorities of their own State and of the host State on how requests for mutual assistance should best be formulated in order to ensure a timely and proper response, and by trying to identify contact persons who might help in expediting matters). The exact profile of the work of the liaison magistrate varies, depending on such factors as the types of cases, and the extent to which there are direct contacts between the judicial authorities of the two States.

The advantages, from the point of view of the sending State and the host State, are numerous. Language problems are reduced, requests for judicial co-operation can be discussed already before they are sent in order to identify and avert possible

¹² The Treaty of Amsterdam of the European Union (article 30(2)(d)) called on the European Council to “promote liaison arrangements between prosecuting / investigating officials specialising in the fight against organised crime in close cooperation with Europol”. In order to create a basis for the development of this work, on 22 April 1996 the European Council adopted a Joint Action on a framework for the exchange of liaison magistrates to improve judicial cooperation.

¹³ A related concept is that of the legal attaché, who is posted in the mission of the sending State to look after legal issues in general that concern the host State and the sending State. Reference can also be made to temporary exchanges of personnel, which are designed to increase familiarity with one another’s legal system and foster direct, informal contacts. Neither legal attachés nor personnel on temporary exchange, however, have the same expertise and job profile as the liaison magistrate.

¹⁴ See, for example, P.B. Heymann, *Two Models of National Attitudes Towards International Co-operation in Law Enforcement*, Harvard International Law Journal, vol. 31, p. 99, and Alastair Browne, *Towards a Prosecutorial Model for Mutual Assistance in Criminal Matters?*, in Peter J. Cullen and William C. Gillmore (eds.), *Crime sans Frontieres: International and European Legal Approaches*, Hume Papers on Public Policy, vol. 6, nos. 1 and 2, Edinburgh University Press, Edinburgh 1998.

problems, and there is a basis for promoting trust and confidence in one another's legal system.

Eurojust: *A formal structure for prosecutorial coordination*

Even the direct contacts and expertise provided by the EJM and the liaison magistrates cannot always provide the type of coordination needed in investigating transnational organized crime. Over recent years, the idea gradually evolved of setting up a separate entity, somewhat comparable to Europol in the law enforcement field, to coordinate national prosecuting authorities and support investigations of serious organised crime extending into two or more Member States.¹⁵

The idea for the establishment of such an entity received a considerable push at the special European Union Council held in Tampere, Finland in October 1999. A temporary unit, called "Pro Eurojust" (short for "Provisional Eurojust") started work in Brussels in March 2001, and Eurojust itself began its work one year later. As of 1 January 2003, it has been located in The Hague, near its police "cousin", Europol.

Each Member State has sent a senior prosecutor or magistrate on permanent assignment to Eurojust. These representatives work in The Hague and meet every week to discuss both individual cases and general policy for coordinating investigations. Plenary meetings tend to be devoted to policy issues, adopting administrative decisions and on reporting on new cases, while most cases will be dealt with in smaller meetings, among representatives of only the individual countries involved. However, the College of Eurojust has used its powers to recommend centralisation of prosecutions in two cases during 2005, one involving the so-called Prestige case with more than 3000 victims. Its recommendations were followed.

Eurojust itself does not have any operational powers. Instead, the national representatives, having agreed on what needs to be done, contact the competent authorities in their own Member State for the required action. In addition, individual members of

Eurojust may have operational powers according to their national legislation. One of the topics now being debated is what type of operational powers Eurojust itself should be given in the future. One example is that Eurojust might be empowered to ask a Member State to initiate criminal proceedings or to decide on where prosecution should take place in cases of conflicts of jurisdiction.

3.4. Judicial cooperation

The global status quo:

Mutual legal assistance and extradition are based on an incomplete patchwork of bilateral treaties and, in rare cases, multilateral treaties. These treaties tend to cover only some offences, and offer only limited measures. Requests must be sent through a central authority. The procedure tends to be slow and uncertain, with requests often being frustrated by bureaucratic inertia, broad grounds for refusal, and differences in criminal and procedural law.

The European Union reality:

- *all European Union Member States are parties to broad multilateral treaties on mutual legal assistance and extradition.*
- *the European Union has agreed on standards of good practice in mutual legal assistance, and regularly reviews compliance with these standards.*
- *separate European Union treaties on mutual legal assistance and on extradition (replaced by the EAW) have been drafted in order to up-date and supplement the existing multilateral treaties prepared within the framework of the Council of Europe.*
- *the European Union has begun moving towards a system of mutual recognition of decisions and judgments in criminal matters. Such mutual recognition speeds up cooperation considerably: a judicial decision or judgment issued in any Member State can be enforced as such in any other Member State.*

¹⁵ See Hans G. Nilsson, Eurojust – the Beginning or the End of the European Public Prosecutor? in *Europarättslig Tidskrift*, vol. 4, 2000.

· the first steps in mutual recognition have been taken with the adoption of the framework decisions on, respectively, the EU arrest warrant, the freezing of property and evidence, and the enforcement of fines.

· a mutual evaluation system has been established, in which experts from different countries assess the practical conduct of international cooperation in the target country.

Mutual legal assistance

The Member States of the European Union are all parties to the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters.

The 1959 Convention, however, was drafted almost a half century ago. Since then, ideas regarding how mutual assistance should be provided have changed considerably, especially in Europe, where there has been extensive experience in this sector. There has been a clear trend towards simplifying and speeding up mutual assistance by eliminating conditions and grounds for refusals. Since the European Union Member States have a lot of cases in common, they have come to expect certain standards of conduct – after all, if the central authority of one country is itself slow or sloppy in responding to requests, it can scarcely expect others to be better when responding to its requests for assistance.

In 1998, the European Union adopted a set of standards on good practice in mutual legal assistance.¹⁶ Each Member State prepared a national statement of good practice. These were then circulated among all the Member States. The idea here was that the Member States publicly commit themselves to upholding these standards, and can be held accountable.

The set of standards includes for example the following points:

(a) acknowledging all urgent requests and written enquiries unless a substantive reply is sent quickly;

(b) when acknowledging requests and inquiries, providing the name and contact details of the authority (and, if possible, the person) responsible for executing the request;

(c) giving priority to requests which have been marked “urgent”;

(d) where the assistance requested cannot be provided in whole or in part, providing an explanation and, where possible, offering to discuss how the difficulties might be overcome;

(e) where it appears that the assistance cannot fully be provided within any deadline set, and this will impair proceedings in the requesting State, advising the requesting State of this;

(f) submitting requests as soon as the precise assistance that is needed has been identified, and explaining the reasons for marking a request as “urgent” or in setting a deadline;

(g) ensuring that requests are submitted in compliance with the relevant treaty or arrangements; and

(h) when submitting requests, providing the requested authorities with the name and contact details of the authority (and, if possible, the person) responsible for issuing the request.

Although some of these points may seem trivial and mundane, they all have an immediate impact on the day-to-day work of judicial authorities involved in international cases.

The European Union countries have prepared their own Mutual Assistance Convention (adopted on 29 May 2000). This is not intended to be an independent treaty, but instead supplements the 1959 Council of Europe convention and its protocol. It brings these earlier treaties up to date by reflecting not only the emergence of the “good practice” referred to above, but also the development of investigative techniques and arrangements.

¹⁶Joint Action of 29 June 1998 on good practice in mutual legal assistance in criminal matters.

For example, the new European Union Convention includes provisions that deal with:

- the sending of procedural documents directly to the recipient in another State (article 5);
- the sending of requests by telefax and e-mail (article 6);
- the spontaneous exchange of information (article 7);
- restitution of property to its rightful owner (article 8);
- temporary transfer of persons held in custody for purposes of investigation (article 9);
- hearing by videoconference (article 10);
- hearing of witnesses and experts by telephone conference (article 11);
- the use of controlled deliveries (article 12);
- the use of joint investigative teams (article 13);
- the use of covert investigations (article 14);
- interception of telecommunications (articles 17 to 22); and
- the protection of personal data provided in response to a request (article 23).

In particular the provisions on the interception of telecommunications are quite lengthy, and were the subject of extensive debate. Different Member States have different provisions on the conditions under which the interception of telecommunications is allowed. However, given the ease with which people can now move from one country in the European Union to another, and given also the ease with which communications can be traced and listened to, this presumably will become an increasingly important issue, and the time spent on it was undoubtedly well spent. The basic solution in this respect was to allow interception, but to keep the authorities in the countries in question informed.

The Convention brings in some other innovations. Perhaps the most interesting one is that it reverses one fundamental principle in mutual legal assistance. Today, the almost universal rule is that the law

applicable to the execution of the request is that of the requested State. The new Convention provides that the requested State must comply with the formalities and procedures expressly indicated by the requesting Member State. The requested Member State may refuse to do so only if compliance would be contrary to the fundamental principles of law of the requested State.

Extradition

Prior to 2004, extradition among the Member States of the European Union was based largely on the 1957 Council of Europe Convention on Extradition. (In addition, the five Nordic countries of Denmark, Finland, Iceland, Norway and Sweden have agreed among themselves on identical legislation that greatly simplifies extradition among these countries. The Benelux countries had a separate Treaty from 1962.)

Also here, the Member States of the European Union had sought to supplement the Council of Europe Convention by drafting new treaty obligations. In 1995, the European Union adopted a Convention on simplified extradition within the EU. Essentially, the Convention focuses on the many cases where the person in question consents to extradition. One year later, in 1996, the European Union adopted a Convention on the substantive requirements for extradition within the European Union.

In October 1999, the European Union agreed on the importance of mutual recognition of decisions and judgments which, in its view, “should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union.” The argument was that already today, the Member States of the European Union share fundamental values and legal principles. The authorities of a Member State should have full faith and confidence in the operation of the legal system of the other states. Accordingly, it should be made possible for a decision or judgment handed down in one Member State to be immediately enforced as such in any of the other states.

The European Union further identified two priority areas in criminal law where the principle of mutual recognition should be applied, “fast track

extradition” and pre-trial orders, in particular those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable.

Work proceeded slowly. For a time, it seemed as if work on mutual recognition would be buried by the many legal, technical and practical problems involved. The terrorist attacks on 11 September 2001 changed the situation dramatically, in that the European Union decided that the draft “EU arrest warrant” and a second draft decision on the freezing of property and evidence should be completed by December 2001. This political imperative galvanized those officials responsible for hammering out the details and reaching the necessary compromises. Agreement on the EU arrest warrant was indeed reached in December 2001; agreement on the second decision came a few months later.

Prior to 9/11, work on the EU arrest warrant had been slowed by the fact that it represented a paradigm shift in extradition. Simply put, the new decision (which entered into force on 1 January 2004) replaces extradition among the EU Member States with a new system, whereby suspects and convicted offenders are “surrendered” to the requesting state. The process no longer needs to go through the central authorities but has become purely judicial. An arrest warrant issued by a court in one state will be recognized as valid throughout the EU, and is to be enforced by any and all national courts. As a result, the terminology has changed: there are no more requesting or requested States but “issuing” and “executing” States. Moreover, the framework decision also imposes a deadline of 60 days within which an EAW must be decided (which may be extended exceptionally by another 30 days) and a deadline of 10 days for the actual surrender.

A European arrest warrant may be issued for offences punishable under the law of the issuing Member State by a custodial sentence or a detention order for a maximum period of at least twelve months or, where a sentence has been passed or a detention order has been made, for at least four months. The decision lists thirty-two offences which are outside the scope of the condition of double criminality.

Thus, for these offences, the requested State cannot refuse to extradite on the grounds that it does not regard the act in question as a criminal offence. This list may be expanded along with the passage of time. For all other offences, the requested State may refuse surrender on the grounds of the absence of double criminality.

The requested person has the right to be informed of the EU arrest warrant, of its contents and of the possibility of expediting the procedure by consenting to it. He or she has the right to legal counsel and, if needed, an interpreter. If the requested person does not consent to the surrender, he or she has the right to be heard by the judicial authority in the requested state. It should be noted that this hearing only concerns the legality of the surrender. Any defence against the actual charges on which the person is wanted is to be made before the court in the issuing state.

A person surrendered from one EU Member State (A) to another (B) may be surrendered on to a third EU Member State (C). The consent of state A is not required if the requested person agrees to the surrender, or if the rule of speciality referred to above would not apply *mutatis mutandis*. In other cases, the consent of state A is required. Obtaining this consent follows more or less the same procedure as with the original surrender from A to B; for example, the same grounds for refusal apply.

If the surrender is to be made outside of the EU, the consent of state A is always required. This consent, in turn, is governed by the laws and agreements by which state A is bound. Thus, for example if a person is surrendered from France to the United Kingdom, and the United States requests the extradition of this person directly from the United Kingdom, the consent of France will depend on her national law and on the agreements existing between France and the United States.

The decision on the EU arrest warrant has brought about a significant change in both extradition law and practice. It closely resembles the “fast-track extradition” process that had been used between Ireland and the United Kingdom, and (in an experimental manner) between Italy and Spain. It

has considerable potential for speeding up the process, in particular since it will eliminate or reduce a number of traditional grounds for refusal. Data for 2005 suggest that the average time from request to extradition / surrender has in fact been cut from about nine months to less than two months. At least 1500 persons were surrendered in the EU during 2005 (statistics are still lacking from some Member States).

As with all major changes, the EU arrest warrant has also given rise to various concerns. Some persons are concerned that it may in practice hamper the rights of the defence, since when a person is taken into custody for surrender, he or she can contest only the surrender in the requested state. Any pleas against the actual charges would have to be presented in a foreign court. Other persons are concerned that the extensive curtailment of the condition of double criminality will lead to cases where a person must be surrendered to another Member State even if the act in question would not have been an offence if committed in the requested state. (However, in this respect the decision is subject to a limited principle of territoriality.) Yet other persons have noted that the relatively short time limits set down in the decision may prove quite difficult to observe in practice. This concern is associated with the fact that the decisions will now be made by individual courts, and not by the central authority. Clearly, a lot of work has been needed to inform judges and court personnel on how the process should be put into place.

Perhaps the greatest cause for concern is that the decision was pushed through the drafting process in record time, to meet political imperatives in the wake of the terrorist attacks in the United States. Usually, drafting work of this nature can extend over several years, allowing for example for extensive consultation with national Parliaments, and for fairly leisurely reflection in each of the Member States on what the implications of various options would be. Short-circuiting this process of consultation and

reflection may, conceivably, have led to a decision that will lead to considerable difficulties in practice. (In fact, in at least Germany, Poland and Cyprus, the national laws that put the EU arrest warrant into effect met with serious constitutional challenges.) Once sufficient experience has been gained with the EU arrest warrant, more drafting work may prove to be needed to smooth out the rough edges.

Mutual recognition of decisions and judgments

As was noted above in connection with the presentation of the EU arrest warrant, mutual recognition of decisions and judgments has traditionally been almost non-existent in international cooperation. Because of jurisdictional limits (and undoubtedly also because of a deep-rooted lack of confidence in the criminal justice systems of other countries), the almost iron-clad rule is that court decisions and judgments cannot be directly enforced abroad. For example, if a court in one country orders that a suspect be arrested, that his or her assets be frozen, or that his or her house be searched for evidence, the authorities of that country have to use mutual legal assistance in order to request that the decision be carried out abroad. The process inevitably takes some time – time during which the suspect can empty out his or her bank accounts and move on to a third country, escaping the administration of justice.

So far, relatively little attention has been paid to recognising the validity of a decision taken by a foreign authority or court, and enforcing it as such. This principle of mutual recognition would enable competent authorities to quickly secure evidence, seize assets and immobilize offenders. This would, of course, also be in the interests of the victim.¹⁷

There are few bilateral or multilateral treaties on this topic. One of the few is the European Convention on the International Validity of Criminal Judgments, prepared within the framework of the Council of Europe in 1970. Even this treaty has very

¹⁷ Protecting the interests of the victim is one of the priorities of the European Union. On 15 March 2001, a framework decision was adopted in order to ensure uniform minimum legal protections for victims in criminal proceedings. A Council Directive was adopted on 24 April 2004 on unification of compensation to victims from the State.

few signatories, and even fewer ratifications.¹⁸ Indeed, even most EU Member States have not ratified it, and so it has very little practical importance. Furthermore, the Convention only applies to legally final judgments, and not for example to decisions made in the course of an investigation.¹⁹

With the increasing integration of Europe, and as shown with the example of the EU arrest warrant, the EU Member States are now moving towards mutual recognition of decisions and judgments. It is widely regarded as an effective and indeed almost unavoidable tool in cooperation. Furthermore, proponents argue that the close ties among the EU countries, and the fact that they are all signatories to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, has led to a situation in which all Member States should have full faith and confidence in the operation of the criminal justice system in one another's country. To give an example, if a judge in one country orders that a suspect should be arrested, courts in all other European Union countries should have confidence that the decision was made according to law and with due respect to human rights.²⁰

In the view of the Tampere European Council in October 1999, mutual recognition should become the cornerstone of judicial co-operation in both civil and criminal matters within the European Union.

The EU arrest warrant, described above, is the prime example that can be given of mutual recognition. A second framework decision was adopted soon afterwards (on 28 February 2002), on the mutual recognition of decisions on the freezing of property and evidence. The framework decision makes it possible, for example, for the decision of a court in

one Member State on the freezing of the accounts of a suspect to be enforced immediately in any and all of the other Member States. On 14 February 2005, a third framework decision on mutual recognition was adopted, this time on financial penalties. A few days later, on 24 February 2005, a fourth framework decision was adopted, this time on confiscation orders.

Work in progress on judicial cooperation

A fourth decision on mutual recognition is expected before the end of 2006: on 1 June 2006, the Council reached political agreement on what is known as a "European evidence warrant." As soon as a few national Parliaments give their approval to the decision, it will be formally adopted. On the basis of a European evidence warrant, a court can request objects, documents or data that are available in any of the other Member States. (However, the EEW cannot at this stage be used to obtain for example testimony from a witness in another Member State. This and other issues will be dealt with in a second negotiation stage of the process.)

In November 2004, the heads of State of the EU countries adopted an updated program on progress in justice and home affairs. In respect of mutual recognition, they ordered that work should proceed on instruments related, respectively, to the gathering and admissibility of evidence, conflicts of jurisdiction and the *ne bis in idem* principle, and the execution of final sentences of imprisonment or other (alternative) sanctions. In addition, work is underway on an instrument dealing with pre-trial release and supervision of suspects, and on ensuring that persons guilty of specific offences against children are barred from jobs that would place them in contact with children.

¹⁸ Of the 25 EU Member States, only Austria, Cyprus, Denmark, Estonia, Latvia, Lithuania, the Netherlands, Spain and Sweden have ratified the 1970 Convention as of August 2006. An additional seven EU countries have signed, but not yet ratified, the Convention.

¹⁹ There is one further exception to the lack of mutual recognition internationally. The five Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) recognize one another's decisions and judgments, and refusals are almost unheard of. This system is based on the fact that the Nordic countries share very much the same legal system, and also otherwise have long-standing cooperation with one another.

²⁰ As noted earlier, an analogy can be made with the "full faith and credit" doctrine contained in article IV, section 1 of the Constitution of the United States. According to this section, "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

3.5. Mutual evaluations

Over the years, the Member States of the European Union have made a number of commitments to improving their response to organized crime, and to improving international cooperation. These commitments were undoubtedly made in good faith, and with all intention to implement them in full. However, the practical reality of investigation, prosecution and adjudication (for example, lack of resources, and differences in priorities in different sectors and on different levels) can mean that the work that is actually carried out remains at odds with the commitments.

One way to identify what problems exist is to carry out expert reviews. The OECD has instituted a system of mutual evaluation of Member States on measures taken to prevent and control money laundering. These evaluations are carried out by teams of experts from different countries who, because of their background, are able to talk as colleagues with experts and practitioners in the target country, ask the right questions and place the answers that they are given into the proper context. This approach has been deemed so successful that the European Union has adopted it on a broader scale. Accordingly, on 5 December 1997 the European Union decided to use this mutual evaluation to see how the Member States implement their commitments to respond to organized crime.

Following the OECD model, small international teams of experts visit the target country, interview practitioners, report on their assessment and make recommendations. The assessment is confidential,²¹ and the target country is given many opportunities to respond to any criticism made.

So far, two rounds of evaluations have been carried out in all Member States. The first round dealt with mutual legal assistance and urgent requests for the tracing and restraint of property, and the second round dealt with law enforcement and its role in the fight against drug trafficking. A third round dealing

with the exchange of information inside and between Member States and with Europol, is nearing completion during the summer of 2006 and a fourth round on the EAW has begun in 2006.

The Member States have been quite satisfied with the way in which the mutual evaluations have been carried out. The process has not only contributed to greater understanding of the differences that exist between the countries, but has also resulted in many changes in law and practice.

In October 2002, the European Union adopted a similar mutual evaluation mechanism to be used in respect of anti-terrorism measures. This mechanism relies primarily on written responses from the Member States to specific questions, to be followed up if necessary by on-site visits by experts.

At the end of June 2006, the Commission presented a proposal for an evaluation mechanism that would apply far more broadly to the adoption of EU measures and their implementation on the national level, not just in respect of organized crime, but in all other justice and home affairs sectors as well. The relation between the proposed mechanism and already existing evaluation mechanisms – such as the mutual evaluation mechanism just described – remains to be worked out.

3.6. Cooperation in the formulation of domestic law and policy

The global status quo:

International cooperation on the formulation of domestic law and policy is almost entirely limited to general provisions in bilateral and multilateral treaties, and to even more general recommendations, resolutions and declarations.

The European Union reality:

· the European Union has adopted binding decisions calling for criminalization of a number of offences. The definitions are generally rather tightly drawn, and have

²¹ With the permission of the country in question, the report can be published. Indeed, so far all of the reports on mutual assistance have in fact been published. The second and the third round, on law enforcement issues, remain confidential because of the sensitivity of the subjects.

forced countries to amend their legislation accordingly.

· the European Union has begun cooperation in the prevention of crime, including organized crime.

· the European Union has adopted a number of action plans and programs that have had a clear effect on policy and practice in all the Member States.

· there are signs that the European Union may be moving towards “communitizing” criminal law, in other words to a situation where, instead of each individual Member State determining the contents of its criminal law and criminal procedure, the decision is taken by all twenty-five Member States working together.

Criminal law and criminal procedure

On the global level, in the area of criminal law and criminal procedure, very little international cooperation exists. Where it does exist, it primarily concerns the very few substantive provisions in bilateral and multilateral treaties, such as the minimum definitions of participation in a criminal organization, corruption, money laundering and obstruction of justice in the United Nations Convention against Transnational Organized Crime. There are also a number of resolutions, recommendations and declarations regarding criminal law and criminal justice, but these have tended to have little actual impact on law, practice and policy.

This is not the case with the European Union, where not only is there extensive discussion about the harmonisation of both criminal and procedural law, but much has been done in practice.²² Among the issues that have already been dealt with are the following (this list is not exhaustive):

Fraud and counterfeiting

- fraud and other crimes against the financial interests of the Communities

(Convention of 26 July 1995, protocols of 27 September 1996 and 19 June 1997)²³

- fraud and counterfeiting of non-cash means of payment (framework decision on 28 May 2001)

- counterfeiting of the euro (framework decisions on 29 May 2000, 6 December 2001 and a Decision on 6 December 2001)

Drug trafficking

- illicit cultivation and production of drugs (Council resolution of 22 November 1996)

- “drug tourism” (Council resolution of 22 November 1996)

- sentencing for serious illicit drug trafficking (Council resolution of 6 December 1996)

- drug addiction and drug trafficking (joint action of 9 December 1996)²⁴

- drug trafficking (framework decision on 25 October 2004)

Trafficking in persons and related offences

- trafficking in human beings and sexual exploitation of children (joint action of 21 January 1997)

- trafficking in human beings (framework decision on 19 July 2002 and Directive on 28 November 2002)

- combating the sexual exploitation of children and child pornography (framework decision of 22 December 2003)

- initiatives to combat trafficking in human beings, in particular women (Council resolution of 20 October 2003)

- combating illegal immigration (Council recommendation of 22 December 1995)

²² The EU debate on harmonisation is discussed in greater detail below, in section 4.

²³ In May 2001, the Commission proposed a Directive which would amalgamate the various Convention provisions relating to fraud against the financial interests of the EU. This proposal has not been followed through.

²⁴ A “joint action” has been replaced by framework decisions in the Amsterdam Treaty.

Corruption

- corruption (Convention signed on 26 May 1997)
- corruption in the private sector (joint action of 22 December 1998, and framework decision of 22 July 2003)

Other offences

- racism and xenophobia (joint action of 15 July 1996)
- football hooliganism (Council resolution of 28 May 1997)
- money laundering (joint action of 3 December 1998, framework decision 26 June 2001)
- arms trafficking (Council recommendation of 7 December 1998)
- participation in a criminal organization (joint action of 21 December 1998; supplemented by a framework decision on which agreement was reached in April 2006)
- combating terrorism (framework decision of 13 June 2002)
- protection of the environment through criminal law (framework decision of 27 January 2003)
- attacks against information systems (framework decision on 24 February 2005)
- ship-source pollution (framework decision on 12 July 2005 and Directive on 7 September 2005)

Procedural issues

- interception of telecommunications (Council resolution of 17 January 1995 and Article 13 of the 2000 MLA Convention)
- protection of witnesses in the fight against international organized crime (Council resolution of 23 November 1995)
- individuals who cooperate with the judicial process in the fight against international organised crime (Council resolution of 20 December 1996)

- cooperation between financial intelligence units (Decision on 17 October 2000)

- widening the scope of confiscation (framework decision on 24 February 2005)

- the investigation and prosecution of genocide, crimes against humanity and war crimes (Council decision of 8 May 2003)

- treaties on extradition and mutual legal assistance with USA; treaties with Norway and Iceland on mutual legal assistance and on an arrest warrant

- setting up of joint investigative teams (framework decision on 13 June 2002; Recommendation on a model agreement on 8 May 2003)

- freezing orders (framework decision 22 July 2003)

Work in progress

With the current focus on mutual recognition in the European Union, there are fewer initiatives on further harmonisation of criminal and procedural law. Work continues to be underway on the minimum provisions on the constituent elements of offences and penalties relating racism and xenophobia. This project had ground to a halt during the spring of 2003, largely over the concerns of some countries over the freedom of speech. An attempt to resuscitate the work was made at the beginning of 2005, but with little more success. A new effort has been launched during the spring of 2006.

The Commission has advanced various proposals for further harmonisation of substantive criminal law, for example in respect of tax offences; violation of intellectual property rights; and the penalties for counterfeiting offences. A considerable amount of attention has also been focused on money laundering, and on the freezing of the assets of offenders. For example, a framework decision on money laundering and on the identification, tracing, freezing or seizure, and confiscation of the instrumentalities and proceeds of crime was adopted on 26 June 2001, and the Commission is preparing

a further proposal on cash payments and money laundering.

A major project has to do with the procedural rights of suspects and defendants in criminal proceedings. Essentially, this project has sought to define what the minimum rights of the defence are. The discussions have revealed that, although all EU Member States are signatories to the European Human Rights Convention, there are still considerable areas of disagreement as to specific rights. As of the spring of 2006, the future of the project is very much in doubt. A strong minority of Member States has taken the view that the proposal would not provide any added value, and indeed may in time result in a weakening of some of the rights of suspects and defendants.

The prevention of organized crime

Organised crime, just as is the case with crime in general, does not spread at random. It is often a planned and deliberate activity. Accordingly, it depends to a great deal on the presence of motivated offenders, on the existence of the opportunity for crime, and on the orientation of the work of those who try to prevent and respond to organised crime. In line with this so-called situational approach, the Member States are exploring ways to ensure that the commission of crime is made more difficult, that committing crime involves greater risks to the offender (in particular the risk of detection and apprehension), and that the possible benefits to the offender of committing crime are decreased or eliminated.

Also the Tampere European Council stressed the importance of crime prevention. It suggested that common crime prevention priorities should be developed and identified. Elements for an emerging crime prevention policy are contained in the Council resolution of 21 December 1998 on the prevention of organised crime. In March 2001, the Commission and Europol presented a report on a European strategy on the prevention of organised crime.

One further step in developing and identifying priorities was made on 15 March 2001, when the European Union decided on the establishment of a crime prevention network. This network consists of contact points in each Member State, representing not only the authorities but also civil society, the business community and researchers. The network functions by organizing meetings, compiling a database and otherwise by seeking to gather and analyse data on effective crime prevention measures on the local and regional level in order to disseminate information on "good practices." At the summit held in November 2004, the heads of State agreed that the European Crime Prevention Network should be further strengthened and professionalised.

European Union policies and programs

On 16-17 June 1997, the European Union adopted a Plan of Action to combat organised crime. Instead of the resolutions, recommendations and declarations that have so often been adopted in other fora - regrettably often with little practical impact - the European Union decided, for the first time anywhere, on specific action, with a clear division of responsibilities, a clear timetable and a mechanism for implementing the action plan. The strong consensus reached by Member States on the 1997 Plan of Action helped to create the political and professional climate required on both the EU level and the national level to take and implement the necessary decisions.

The 1997 Plan of Action changed the rate of the evolution of international cooperation against organized crime. Examples of the progress that has been achieved are the mutual evaluation mechanism, the entry into force of the Europol Convention, the establishment of the European Judicial Network, criminalization of participation in a criminal organisation, the establishment of a variety of funds to support specific measures, the adoption of joint actions on money laundering, asset tracing, and good practices in mutual assistance, the pre-accession pact with the candidate countries, and the identification of further measures in respect of the prevention of organised crime.

The period allotted for the 1997 Plan of Action ended on 31 December 1999. A follow-up plan was adopted in March 2000.²⁵ Specific forms of crime that are the focus include economic crime, money laundering and off-shore centres, terrorism, computer crime, and urban crime and youth crime.

At the same time, broader strategies for dealing with justice and home affairs were being developed. When Finland held the Presidency of the European Union during the second half of 1999, the Tampere European Council (15-16 October 1999), adopted a set of priorities not only in the response to cross-border crime, but also in respect of migration and asylum issues.

Five years down the road, these various priorities – known in the European Union as the “Tampere milestones” – have been replaced by an updated and quite ambitious program adopted by the heads of State in November 2004.

Among the points stressed in the November 2004 program are the following:

- the sharing of information among law enforcement and judicial authorities (while maintaining the proper balance between privacy and security);
- establishment of a coherent overall approach to combat terrorism;
- strengthening the prevention of organised crime;
- strengthening the tools to address the financial aspects of organised crime;
- improving general crime prevention;
- creating a “European judicial culture”; and
- promoting the principle of mutual recognition of judicial decisions.

At the time of this writing, August 2006, Finland again holds the Presidency, and is working closely together with the Commission in preparing a review of the implementation of the Hague Programme. At

the end of June 2006, the Commission issued a “Scoreboard Plus” report on implementation, as well as proposals for how implementation can be made more effective in key areas of the Hague Programme. The goal is the identification of which priority areas in the Hague Programme are particularly behind in terms of implementation, and therefore require an added political push by the European Council.

Cooperation with candidate countries and other third countries

Even if all the European Union Member States could effectively develop their laws and systems to prevent and control organized crime within their borders, this would not be enough. Preventing and controlling organised crime requires broader, global co-operation.

One particular focus within the EU is cooperation with the so-called candidate countries. For several years in advance of the mammoth enlargement of the European Union in May 2004, the EU negotiated actively with the then ten “candidate countries.” The infusion of extensive technical assistance and millions of euros, combined with the strong political pressure exerted from within and from without these countries, resulted in the ten countries being able to carry out an extensive reform process in a remarkably short time.

This same process is now underway with Bulgaria and Romania (both seeking to join the EU in 2007) as well as Croatia, FYROM (Macedonia) and Turkey. Other countries, including Albania, Bosnia-Herzegovina and Serbia, have already indicated their interest in becoming members, and may thus soon be brought within the scope of this cooperation.

In this process, considerable attention is being paid to the prevention and control of organized crime. The European Union has already adopted a large number of measures (referred to as the *acquis communautaire*), and the Member States have implemented them in their domestic legislation and practice. In order to avoid a situation where

²⁵ The new plan of action is known as “The Prevention and Control of Organised Crime: A European Union Strategy for the beginning of the new Millennium.”

organized criminal groups take advantage of a sudden expansion of the European Union, also the candidate countries must fully accept and implement the *acquis*.

A second focus for the EU is the Russian Federation. In 1999, a special European Union Action Plan was prepared on common action with the Russian Federation on combating organized crime. This in essence sets up a structure and process for continuous consultations and cooperation between the European Union and the Russian Federation. In addition, there is a broader “partnership” agreement with the Russian Federation (and with Ukraine) that provides a basis for cooperation and a broad agreement to set up a “common space” between Russia and the EU.

Other geographical areas with which the European Union is seeking to strengthen co-operation include the Mediterranean, South Eastern Europe, China, North America, Latin America and the Caribbean. In December 2005, the Council decided to take a more proactive approach to its external relations in justice and home affairs. The decision identified a number of ways in which the EU would work with partners on a range of issues. At the same time, it was decided that the EU should from time to time focus on certain regions and certain issues. To start with, these points of focus would include Afghanistan and drugs, the Western Balkans and organized crime, Northern Africa and illegal immigration, and Northern Africa and counter-terrorism. Russia is also to be given a special focus in this manner.

Following the terrorist attacks of 9/11, the United States (and the response to the threat of terrorism) understandably enough became a top priority. This could be seen in the broad range of co-operative measures put into place, ranging from cooperation between the US authorities and Europol, to the very rapid negotiation of agreements on extradition and mutual legal assistance between the EU and the US. These agreements were significant in several respects. They were specifically between the United States and the European Union, and not between the United States and the (then) fifteen Member

States of the EU. To a large extent, they brought up to date the bilateral agreements that the US had with the European countries.

The European Union is also active in working through intergovernmental organizations such as the Council of Europe and the United Nations. For example, throughout the negotiations on the United Nations Convention against Transnational Organized Crime and on the United Nations Convention on Corruption, the European Union countries worked very closely together in seeking to ensure that the resulting Convention was as effective and broad as possible.

4. The second claim: “European Union cooperation in criminal justice is an attempt to create a unified criminal justice system, with its own criminal and procedural law”

The concepts of harmonisation and approximation

The question of how far the criminal law and procedural law of the Member States of the European Union should be harmonised has long been a subject of considerable controversy. Everyone appears to agree that some degree of harmonisation is necessary in order to ensure smooth international cooperation, as long as by “harmonisation” one means the *approximation* or co-ordination of different legal provisions or systems by eliminating major differences and creating minimum requirements or standards. To use a musical analogy, each Member State can continue to play its own national music, as long as it is in harmony with the music of the other twenty-four Member States, and meets a certain standard of quality.

Everyone also appears to agree that, at least at this stage, we are not talking about the *unification* of criminal and procedural law within the European Union, in the sense that the twenty-five distinct legal systems would be replaced by one system. To use the musical analogy, no one supports the idea of

replacing the orchestra with a single synthesizer, no matter how technically advanced.

A number of arguments can be presented in support of the harmonisation or approximation of European criminal and procedural law. All of Europe can be said to share cultural values to the extent that the different countries can and should share the same laws. The approximation of laws would simplify the application of law, since more or less the same laws would apply throughout the European Union. This would reduce the number of cases (usually admittedly marginal, but at times serious) where one Member State refuses to extradite or provide mutual legal assistance to another Member State, on the grounds of the absence of double criminality.²⁶ The approximation of laws would also encourage all the Member States of the EU to assign more or less the same priority to the detection and prosecution of different offences, thus decreasing the risk of a situation where one country does not take sufficiently vigorous steps to detect and prosecute (for example) fraud against the European Union.

Furthermore, if all countries would apply more or less the same criminal and procedural laws, this would help in fostering mutual trust and cooperation among courts and other judicial authorities, thus strengthening the basis for the mutual recognition of judgments and other judicial decisions.

At the very least, according to this line of argument, the Member States should be able to agree on the criminalisation at least of the most serious offences (even if the precise definitions vary from one country to the next). And surely with the European Human Rights Convention in force throughout Europe, the Member States should be able to agree on the core of protections under procedural law: the inviolability of the person, the protection against self-incrimination, the right to be informed of the charges against oneself, the right to a proper defence, and so

on (even if the way in which these rights are ensured varies from one country to the next).

Those who criticize efforts at approximation within the European Union are often answered that they are fighting a paper tiger. According to this line of response, no one is seeking full harmonisation of criminal and procedural law. Instead, only a basic level of harmonisation is sought for two main purposes: in order to ensure that all Member States criminalize the more serious offences (in particular, serious cross-border offences), and in order to support mutual recognition of judgments. Here, an analogy can be made with the United States, where there is both federal and state legislation. Criminal law on the federal level focuses on activity that has cross-border implications. Each state can and does legislate on other criminal acts.

Proposals to increase the extent of approximation

The Tampere programme adopted in 1999 was relatively clear in stating that mutual recognition is the cornerstone of judicial cooperation (in both criminal and civil matters). However, the Tampere programme also refers to “the necessary approximation of legislation” (paragraph 37).²⁷ What is “necessary” appears to be a matter of dispute.

This dispute has been evident for almost the entire period that the EU has been cooperating in justice and home affairs. The dispute has been perhaps the most heated in connection with the need to protect the financial interests of the European Union, for example against subsidy fraud, embezzlement and corruption. In 1997, a group of experts presented the results of the so-called “Corpus Juris” project.²⁸ Briefly, they proposed not only harmonisation of the definition of offences against the financial interests of the European Union, but also the establishment of a European Public Prosecutor system, using identical procedural law provisions in each Member State. What they proposed was, essentially, the

²⁶ The requirement of double criminality is strongly entrenched in international cooperation in criminal matters. In essence, it means that country A will not provide assistance or extradite a suspect to country B for an offence, unless this is an offence also in country A.

²⁷ Along much the same lines, the Hague programme (which followed the Tampere programme) states that the approximation of substantive criminal law facilitates mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension (section 3.3.2.).

²⁸ See <http://www.law.uu.nl/wiarda/corpus/engelsdx.html>. The project was first presented on 17-18 April 1997.

creation of a European criminal and procedural law: the European Public Prosecutor would apply exactly the same criminal law, following exactly the same procedure, no matter whether he or she was preparing a prosecution in Ireland or Italy, in Spain or Sweden.

Proponents have said that this degree of uniformity is necessary in order to prevent organized criminal groups from utilising differences between the Member States. Critics, in turn, see this as the first step on the road to a very extensive European criminal and procedural law, distinct from the national criminal and procedural laws.

The Corpus Juris project did not lead to legislative action. The Commission returned to the matter by issuing a “Green Paper” on the proposal for a European Public Prosecutor.

The disagreement emerged once again when the new Constitutional Treaty was being drafted in 2002 and 2003. The critics of harmonisation succeeded in preventing language that would have specifically called for the creation of a European Public Prosecutor, but the proponents succeeded in getting at least a reference to it in the Constitution, as an idea that is to be reconsidered when the Constitutional Treaty enters into force.

The impact of changes in EU decision-making 1: decision C-176/03

The European Public Prosecutor project raises broader issues of how far the approximation of criminal and procedural law can go, and who can make the decisions. Questions of criminal law have so far always been reserved to the Member States themselves to decide, on the basis of consensus. Article 34 of the Treaty of Amsterdam gave the Commission a right of initiative in these matters and Article 31 (e) specified that initiatives on approximation could include organised crime, terrorism and organised crime. Article 47 of the Treaty provides that the first pillar takes precedence over the third pillar. The exact implication of article 47, however, has been questioned. Most Member States have been of the view that the Commission is

limited to the right of initiative and that the Community may not adopt decisions on criminal law, and only the Member States themselves may make any decision on criminalization. However, a minority – and the Commission – have been of the view that article 47 in effect gives the Community the right to *oblige* Member States to adopt criminalisations on certain issues, if criminal law sanctions are the only way to protect core Community interests.

For several years, an uneasy working compromise had been used: decisions under article 31(e) were made in tandem, with the Community taking decisions on matters within its power, and the Member States (through the Council) taking decisions at the same time on matters that they deemed within their powers.²⁹

The basis for this working compromise came to a jolting end on 13 September 2005, when the European Court of Justice issued a long-awaited ruling. On 19 December 2002, the Council had adopted a framework decision on the protection of the environment through criminal law. The Commission has argued that the Council had no right to take such a decision, since environmental matters clearly belong under the first pillar, where the Commission has the sole right of initiative and the Community (through the Council) (together with Parliament) has the right of decision. The Council, in turn, unanimously decided that criminal law matters – even when related to what would otherwise be a first pillar matter – belong under the third pillar and are thus in the competence solely of the Council. When the Council took this decision, the Commission brought the case to the European Court of Justice.

In its decision C-176/03, the European Court essentially ruled that under certain conditions, provisions relevant to the protection of the environment through criminal law could and indeed should be taken under the first pillar. The reasoning of the Court, however, was narrow enough to lead to considerable disagreement between the Commission and the Council as to what, exactly,

²⁹To complicate matters, the Constitutional Treaty – when and if it enters into force – gives the Commission greater powers of initiative, and in practice puts an end to the requirement that Council decisions on home and justice affairs must always be made by consensus.

the Court had decided. While there was agreement that the original framework decision on the protection of the environment through criminal law had to be revisited, there was no agreement as to whether this was true of Council decisions taken in other areas. Apparently, conclusions will have to await further decisions of the Court on parallel cases.

In the mean time, the Commission has identified a number of decisions given in the third pillar which in its view should have been given in the first pillar. It is currently preparing the corresponding proposals. It has already amended its proposal, at the time under consideration by the Council, for a first pillar directive and a third pillar framework decision on the protection of industrial property rights, and replaced it with a proposal for a first pillar directive.

The impact of changes in EU decision-making 2: difficulties in negotiation and implementation

At present, the debate between the proponents and critics of far-reaching harmonisation has entered into a new stage. This is only partly a result of the European Court decision referred to above, a decision which appears to give the Commission – long a supporter of approximation in tandem with mutual recognition – more leverage in presenting new proposals. Two other developments need to be mentioned: the difficulties encountered in negotiating and implementing new decisions on mutual recognition, and a proposal to transfer matters from the third pillar to the first pillar.

Even though mutual recognition has been accepted as the cornerstone of judicial cooperation, this does not mean that all Member States are as enthusiastic about expanding the scope of mutual recognition. It took the horror of the terrorist attacks of 9/11 to get the EU to agree on the very first decision on mutual recognition, the EU arrest warrant. That decision was ultimately pushed through in three months, a remarkably short period – especially given the fact that the decision marked a shift in paradigm in international cooperation in criminal justice. The next decision, on the freezing of property and evidence, came soon afterwards.

Since then, however, the pace of negotiation appears to have slowed down considerably, even though

several mutual recognition topics remained to be dealt with, among them the transfer of prisoners, community-based sanctions, pre-trial release and the supervision of suspects, disqualifications and loss of rights, and the principle of *ne bis in idem* (double jeopardy). Deadlines established in the Hague Programme have not been met. For example, a decision concerning disqualifications (in particular in connection with sexual offences against children) was to be taken by the end of 2005. However, this proposal is still being negotiated, and quite possibly will continue to be under negotiation for a considerable time to come.

Two factors in particular appear to have contributed to this appreciable slowing in the pace of development, enlargement, and difficulties encountered by some Member States in the implementation of decisions.

On 1 May 2005, the European Union expanded by taking in ten new Member States. These ten states had done considerable work to ensure that their law and practice was in accord with the *acquis communautaire*. There thus should be no doubt as to the commitment of the new Member States to continue to work on priority issues.

Nonetheless, the expansion can be argued to have complicated negotiations over new instruments. From the simple logistical point of view, presenting and considering twenty-five positions takes more time than presenting and considering fifteen positions. Even more importantly, each of the twenty-five has its own domestic legal and administrative systems, laws, practice and interests, and this will be reflected in their approach to the negotiations.

The second factor is difficulties in implementation. There has been increased external and internal criticism of the way Member States have implemented EU decisions. The Commission has become more rigorous in assessing the transposition of EU instruments. For example, it has faulted the way in which several Member States have implemented the 2002 framework decision on the European Arrest Warrant, by not bringing the decision into force on time, by inappropriately

adding grounds for refusal, by turning facultative grounds of refusal into absolute grounds for refusal, and so on. Domestically, the Constitutional Court of Germany has struck down the German law by which the European Arrest Warrant was brought into force within Germany, on the grounds that the law was unconstitutional by requiring the surrender of German nationals to other EU Member States unless certain conditions (allowed for by the framework decision but not implemented by Germany) were fulfilled. Germany has since then amended its law. (Corresponding difficulties were encountered in Poland and Cyprus, which now have decided to amend their constitutions in conformity with the framework decision.)

Another example of difficulties in implementation is the framework decision on the freezing of property and evidence. The decision was to have been implemented in all Member States by August 2005. One year later, however, less than half of the Member States have in fact brought it into force.

As a result of these difficulties, the negotiators of several Member States may well have become more critical regarding how instruments are formulated. At times, it almost seems as if negotiators have implicit instructions not to allow any EU instruments that would require extensive changes in law and practice in one's own country.

The impact of changes in EU decision-making 3: transfer from the third pillar to the first pillar?

As noted above, a third development that has led to a new stage in the debate between the proponents and critics of far-reaching harmonisation – alongside of the European Court decision of 13 September 2005, and the growing difficulties in developing new instruments on mutual recognition – is a proposal to transfer matters from the third pillar to the first pillar.

As described in section 2 above, decisions in the third pillar are made by the twenty-five Member States acting together in Council, after consulting the European Parliament and on the basis of unanimity. If even one Member State disagrees, no decision is possible. This has inevitably led in many cases to very convoluted and lengthy negotiations.

Certainly, if slow and careful work leads to decisions that are relatively easy to implement, have a minimum of unanticipated side-effects, and are effective in achieving their goal, even lengthy times spent in drafting could perhaps be acceptable. However, the demand for unanimity appears to be resulting in compromises which make the texts more difficult to understand, with many exceptions, cross-references and the use of lengthy, technical provisions. Furthermore, the compromises tend to lower the level of ambition of the original proposal, leading to doubts as to whether the outcome will in fact have “added value.”

The requirement that these decisions are to be made by consensus was included in the Maastricht Treaty, which brought justice and home affairs into the scope of the work of the European Union. The reason was that these issues can raise national sensibilities; after all, they affect basic legal protections and basic values. However, when the Maastricht Treaty was drafted, the negotiators foresaw the possibility that the EU might at a later stage wish to review how decisions are taken. For this reason, the Treaty contained a provision (now Article 42 of the Treaty on the European Union) that allows the EU to change the way decisions are made. According to article 42,

The Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action in areas referred to in Article 29 shall fall under Title IV of the Treaty establishing the European Community, and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements.

Translated into more understandable language, this provision means that the Council can decide that some or all matters involving cooperation in criminal matters (including for example cooperation among the police, prosecutors and judicial authorities) would be transferred from the third pillar to the first pillar. At the same time, the Council can decide that decisions would henceforth be made by qualified

majority. This transfer has several implications, among them a stronger role for the Commission in taking the initiative for new proposals, greater involvement of the European Parliament in the negotiation of proposals, and the elimination of the requirement of unanimity among the twenty-five Member States.

At the end of June 2006, at the same time as the Commission presented its “Scoreboard Plus” on progress in justice and home affairs, the Commission also proposed that article 42 be applied. Finland, as the holder of the Presidency of the EU during the second half of 2006, has taken up the proposal together with the Commission, and it will be discussed throughout the remainder of the year. Both the Commission and Finland argue that using article 2006 will result in greater efficiency in decision-making, and – because of the stronger involvement of the European Parliament – remedy what has been called a “legitimacy deficit” (or “democracy deficit”).

More proposals for approximation?

It is not clear how these three developments – the ruling of the European Court of Justice on 13 September 2005, the difficulties in the negotiation and implementation of decisions, and the proposal for transfer of matters from the third pillar to the first pillar – may affect the debate on approximation in the European Union. The Commission and several Member States have argued that one of the underlying reasons for the difficulties in the negotiation and implementation of mutual recognition decisions is insufficient trust and confidence in the criminal justice systems of other Member States. If this trust and confidence can be increased, negotiators (and courts) would be more prepared to assume that judicial decisions taken in other Member States are based on due process. The Commission and the Member States in question further argue that one of the main ways of increasing trust and confidence is to develop EU-wide rules on procedural guarantees, and to approximate legislation criminalizing the key types of offences.

Given this orientation, it is possible that the Commission will use the possibilities open to it to present proposals along these lines. At the same time,

however, the decision to adopt each proposal will ultimately rest with the Member States – either all of them together (on the basis of unanimity) or a large majority (should the Council decide to use the Article 42 procedure referred to above). As a result, it is likely that the scope of approximation will gradually expand, but its scope will tend to be largely limited to those offences which often have cross-border effects (for example terrorism, various forms of organized crime, crimes over the Internet) or are directed against core EU interests (in particular, offences directed against the financial interests of the EU). Since the vast majority of offences that are committed (such as property offences and violent offences) usually do not have such effects, the national criminal and procedural law of each Member State will retain its own distinct elements.

5. The third claim: “European Union cooperation in criminal justice is leading towards a more punitive criminal policy”

In particular since the terrorist attacks of 11 September 2001 (followed, in Europe, by the train bombings in Madrid on 11 March 2004 and the underground and bus bombings in London on 7 July 2005), the European Union has undertaken a number of measures designed to respond to the threat of terrorism and organized crime. Suspects and convicted offenders can now be extradited (surrendered) more quickly from one Member State to another, information is being collected on the time and length of telephone calls and on who calls whom, the exchange of data between law enforcement agencies is being simplified and expedited, and so on.

Presumably there is wide-spread agreement that these, and similar, decisions are a necessary part of the unified response of the EU to terrorism and organized crime. However, the way in which the decisions were taken, and some of their contents, have given rise to concerns that EU cooperation in criminal justice stresses the law-and-order approach and is moving towards a more punitive criminal

policy. At the same time, according to these concerns, the EU is giving less attention to human rights and constitutional protections. The arguments given to back up these concerns tend to follow three different lines:

- the decision-making process suffers from a “legitimacy deficit,” in that EU decisions on police cooperation and cooperation in criminal matters are prepared by civil servants and made by Ministers, with relatively little input from the European Parliament or, on the part of several Member States, with relatively little oversight by national Parliaments. Furthermore, the EU has set up a number of institutions and networks (such as Europol, Eurojust and the European Judicial Network) with partly overlapping mandates, lack of transparency and insufficient respect for due process;
- the topics of EU decisions themselves tend to focus excessively on law-and-order themes (as opposed to procedural safeguards), and the decisions themselves do not sufficiently take into consideration the requirements of due process and constitutional protections; and
- in the decision-making process, the contents of decisions tend to follow the line of those Member States with a more punitive criminal justice policy.

Does the EU third pillar suffer from a legitimacy deficit?

The first argument takes the view that there is a “legitimacy deficit” in decision-making in the third pillar. It should be noted that there is no absolute measure of the legitimacy of local, national or international structures. However, the term implies that decision-making in the EU is not open, and that the EU has a tendency to emphasize efficiency of crime control at the expense of accountability.³⁰

Is there, indeed, a “legitimacy deficit”? The issue needs to be analysed on both the EU and the national level, and in respect both of legislative functions (the Council on the EU level, and national Parliaments) and executive / operational functions.

To turn first to the EU level and to legislative functions, it is undeniable that the European Parliament has a considerably weaker role in the drafting of decisions in the third pillar, as compared to the first pillar.³¹ In the third pillar, the European Parliament is consulted about proposals. The opinion of the European Parliament – usually in the form of quite detailed proposals for amending the proposal in question – is then considered by the Council. The experience has been that relatively few amendments proposed by the European Parliament are accepted.

There may be various reasons why so few proposed amendments are accepted. One significant reason is that the European Parliament has not had the possibility of following the negotiations in the Council on the proposal, and thus is probably not aware of why certain formulations have been preferred over others. Quite often, the European Parliament proposals reflect ideas that had already been considered – and rejected – in the Council working groups. A second factor is that the text prepared in the Council working groups has benefited from input from legal experts from all twenty-five Member States, and thus (presumably) has been drafted so that it would fit in with the unique features of each of the criminal justice systems. Although the Members of the European Parliament can avail themselves of highly professional staff members, they do not necessarily have the same working knowledge of criminal law, criminal procedure and the operation of the criminal justice system in each Member State. As a result, the European Parliament may propose amendments that, while they might be appropriate in some Member States, may not have the same desired impact in others.

³⁰ For a discussion of the concept of “legitimacy deficit”, see Anthony Arnall and Daniel Wincott (eds.): *Accountability and Legitimacy in the European Union*. Oxford Studies in European law, 2003.

³¹ This issue was mentioned above in section 4, where reference was made to the proposal of the Commission to apply Article 42 of the Treaty on the European Union. This would lead to the shift of some or all of the contents of the third pillar to the first pillar. One of the results would be to give the European Parliament a much stronger role in the negotiation of new decisions on police cooperation and cooperation in criminal justice.

Another feature of decision-making on the EU level is the almost total absence of direct input from academia and civil society. On the national level, various interest groups and experts are often heard in the course of the decision-making process. This is especially true of the drafting of legislation. Once bills are introduced in Parliament, they generally become available to the public, and the public has an opportunity to provide an input.

In the EU, most proposals are submitted by the Commission. When preparing proposals, the Commission often arranges for public hearings, thus providing groups active in EU matters an opportunity to have their say. Once the proposals are submitted to the Council, however, the process becomes less transparent. Over the months and (often) years that the proposal works its way from the working group level up to the Council level (where the decision is formally approved), it is very difficult for persons outside of Government to know how the proposal is evolving, much less what reasons have been given for any changes made to the text. EU working groups do not have the same practice as many Parliamentary committees, of holding public hearings on the proposals.

Even on the Council level, the debates have long been closed to the public. Only as recently as June 2006 has the Council decided to increase the transparency of its sessions by allowing web-casts of at least part of its deliberations.

As for the EU level and operational functions, the concerns over a “legitimacy deficit” has to do with the perception that several EU institutions and networks have been set up with partly overlapping mandates and with insufficient transparency. The usual point of comparison is national institutions, which are generally subject to political and legal oversight by the Government, by Parliament, by ombudsmen, and similar bodies.

In the justice and home affairs sector, the main institutions and networks in question are Europol, Eurojust, OLAF, the Police Chief Task Force, the Joint Situation Centre, Frontex, the European Police College, and the European Judicial Network.

Of these, the European Police College (which helps Member States in the training of senior police officers) and the European Judicial Network (which seeks to help practitioners identify how requests for mutual legal assistance and extradition should be formulated) do not appear to have raised any concerns about “overlapping mandates and lack of transparency.”

Two other institutions are quite new, and – perhaps in part because of their newness – have also not figured in this third pillar debate: the Joint Situation Centre, and Frontex. The Joint Situation Centre (SitCen), although it began work soon after 9/11, did not begin to deal with internal security measures until after the Madrid bombings in 2004. It provides the Council with strategic intelligence-based assessments on counter-terrorism matters. Frontex, in turn, was set up to coordinate the activities of the national border guards. Its role in respect of the third pillar would thus relate primarily to helping coordinate the national response to such offences as trafficking in persons, drug trafficking and smuggling.

Concerns regarding “overlapping mandates and lack of transparency” would seem to concern primarily Europol, Eurojust, OLAF and the Police Chief Task Force. Each has a relatively distinct mandate. Europol provides support for national law enforcement agencies for example by facilitating the exchange of information between them, providing assistance in the analysis of intelligence, and helping in the coordination of cross-border investigations. Eurojust, in turn, coordinates the work of national prosecuting authorities in the case of cross-border investigations of serious organised crime. OLAF’s mandate is focused on offences directed against the financial interests of the EU.

Each of these three has built-in accountability structures, such as Europol’s Management Board, Eurojust’s Joint Supervisory Body and OLAF’s Supervisory Committee. OLAF, as noted, is part of the Commission. Both Europol and Eurojust report to the Council.

The Police Chief Task Force, in turn, brings together top level law enforcement officials to exchange experience and information on cross-border crime, and to help in the planning of operational activities. Unlike the other three institutions, the PCTF does not have an explicit legal basis. Because it is designed to bring together top law enforcement officials, it is perhaps best described as an informal network. It meets twice a year, once in a plenary composition (in Brussels) and once for operational planning (at Europol in The Hague). And because it meets so rarely, it has less impact than does Europol on day-to-day operational matters (which moreover in any case remain the responsibility of national law enforcement agencies).³²

To turn to the national level and to the legislative function, the main question in respect of the “legitimacy deficit” is the extent to which Governments consult with their Parliament at the time proposals are being negotiated in working groups in Brussels. Problems arise if little or no consultation takes place, since once a framework decision or a decision is adopted by the Council, the Government has taken on the political commitment (indeed, one could say a legal commitment, since framework decisions and decisions are binding according to the Treaty) to “transpose” the framework decision into national law and practice.

Each Member State has its own constitutional (and political) arrangements for dealing with this question. In the United Kingdom, for example, the responsible Minister (usually the Home Secretary) is required to inform Parliament in a very short time of the tabling of a proposal in Brussels, and must soon after report to Parliament on what position the Government takes on this proposal. Members of Parliament have the benefit of a staff that is quite experienced in EU matters, and who follow discussions in the working groups quite closely.

Another example is Finland, where Parliament has a special “Grand Committee” to follow EU matters. As in the UK, the Government in Finland must report to Parliament on new proposals, and then on the Government position on these proposals. In particular the Legislative Committee often calls in civil servants to provide information on EU developments and on Government policy. In advance of each Council meeting, the responsible Minister must report to the Grand Committee on what items are on the agenda, and on what the Government position is to be.

Because of this close cooperation between Government and Parliament, neither the United Kingdom and Finland tend to have problems with subsequent adoption of the national legislation needed to implement EU decisions. In some other Member States, where there is less cooperation, problems have occurred more often.

In addition, a number of Member States must obtain the approval of their Parliaments before agreeing in Council to a decision. In most cases, this is a formality, since the Parliaments in question have been informed during the course of the negotiations as to the expected contents of the decision. However, in some cases last-minute amendments to the proposals may cause problems between the Government and Parliament.

As for operational functions on the national level, the picture is relatively clear: Member States have kept relatively tight control over who can carry out operational activities in their territory. The main principle, with few exceptions in theory and in practice, is that only the authorities of the Member State in question can carry out operational activities. The few exceptions concern the Schengen arrangements: hot pursuit, and cross-border surveillance. In both cases, the Schengen arrangements underline the fact that these are

³² One further EU body should be mentioned, the proposed Standing Committee on operational cooperation on internal security (COSI). The proposal for COSI is included in the Constitutional Treaty, and is motivated at least in part by the fact that – if and when ratified – the Constitutional Treaty would eliminate the need for the so-called Article 36 Committee, which coordinates the preparation of decisions on police cooperation and cooperation criminal justice that are going to the Council. Discussions in 2005 focused largely on whether COSI would be operational, strategic or legislative, or perhaps a mix of all three. The discussions were inconclusive, and were shelved when it became clear that the Constitutional Treaty would not enter into force for some time to come.

exceptions. A law enforcement officer in hot pursuit of a suspect into the territory of a neighbouring Member State, or conducting cross-border surveillance, must inform the authorities of the Member State concerned within a very brief time, and only the authorities of that Member State can use coercive measures (such as arrest). Also in the case of joint investigative teams, where representatives of the law enforcement agencies of two or more Member State work together on a case, there are clear rules as to who has the responsibility and which law applies.

Does the EU focus on law-and-order themes at the expense of due process and constitutional protections?

The second argument mentioned above is that EU decisions tend to focus on law-and-order themes and do not pay enough attention to due process and constitutional protections. One could, of course, try to see to what extent this argument is true simply by counting how many decisions deal with (for example) improved cooperation or the creation of new offence categories, as opposed to how many decisions deal with protection of the rights of suspects and defendants. However, such a count would overlook the primary purpose of the third pillar, which is to improve police cooperation and cooperation in criminal matters. Arguing that since the EU has adopted so many decisions on criminalization and cross-border cooperation, and so few decisions related to due process, would be somewhat like faulting the police for spending too much time chasing suspects and too little time directing traffic or finding lost children.

Such a count would also overlook the fact that a good deal of the negotiation in working groups, and all the way up to the Council level, is focused precisely on due process and constitutional protections. The adoption of some proposals has been slowed – and most recently in the case of the proposed framework decision on racism and xenophobia, has even been blocked – by disagreements over the extent to which they endangered constitutionally protected freedoms.

Even if there is no specific reference to due process and constitutional freedoms (and, almost invariably,

such specific references are in fact made by many delegations), EU decisions would have to conform with the requirements of the European Convention on Human Rights, and national commitments.

Is the EU becoming more punitive?

The third argument is a corollary of the second argument: in part because of an alleged legitimacy deficit (which lessens the impact of an electorally accountable Parliament, or of non-governmental organizations seeking to protect human rights) efforts to develop a European criminal policy tend to gravitate along the lines of the more punitive countries.

The concept of punitiveness has several aspects. It may be evident in the scope of criminalization: more punitive countries would define a wider scope of behaviour as criminal, and thus as requiring a response by the authorities. It may also be evident in the powers given to the police: more punitive (law-and-order oriented) countries would allow the police a greater range of investigative tools, ranging from electronic surveillance to detention for extended periods without trial, and with fewer and lighter judicial supervision over their use. And it may be evident in the type and severity of sanctions: more punitive countries would use more invasive sanctions (in particular, imprisonment), and for longer periods.

To turn first to the idea that the scope of criminal behaviour is widening in the EU, it is true that, as noted in section 3.6, the EU has adopted a very large number of recommendations, resolutions, joint actions and framework decisions calling upon Member States to criminalise certain forms of behaviour. However, in practice this has only rarely led to the need in Member States to amend their national laws, since most of what has been required on the EU level had already been implemented nationally: such basic offences as fraud, drug trafficking, trafficking in persons, corruption, money laundering, and so on, are already defined in domestic criminal law.

In those cases where national legislation was lacking, often the Member State in question would closely question why the criminalization is necessary, and

would generally succeed in obtaining flexibility in the application of the new decision. The most recent example of this is the framework decision on participation in a criminal organisation, where one of the issues was whether it should be an offence to be a member of a criminal organisation if in fact the organisation has not taken any concrete measures to carry out any offence. Some Member States objected to such a criminalisation, and it was removed from the text.

As for the scope of police powers, there are in fact few EU decisions on the matter (see section 3.6), and they do not appreciably expand the scope of police powers in any of the Member States. Police powers could in theory be expanded through decisions on mutual recognition. One could assume that if a court must recognize a decision given by a court in another Member State, this might require that court to also recognize the wider police powers allowed in that other State. However, the EU decisions on mutual recognition have been formulated so as not to require Member States to carry out measures which are not in accord with their constitutional principles.

It is perhaps in respect of the type and severity of sanctions that there is the most visible tendency to increase the punitive level in the EU. The indirect cause of this is the argument that the level of sanctions should be approximated (if not harmonized) across the EU. In its Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union (COM(2004)334 final), the Commission lists a number of arguments for such approximation:

- the symbolism of defining common offences and penalties in relation to certain forms of crime;
- the development of a shared sense of justice;
- the pedagogic value of signalling that certain forms of conduct are unacceptable and punishable on an equivalent basis;
- the corollary of a European area of justice, that the same criminal conduct incurs similar penalties wherever the offence is committed in the EU;

- the role of EU minimum standards in preventing offenders from “forum shopping”;
- easing acceptance of the *ne bis in idem* principle;
- the argument that the current focus on instruments based on the principle of mutual recognition has eliminated the need for certain mechanisms for judicial cooperation that depended on the level of penalties;
- the link between approximation of criminal law and the effective implementation of a Union policy where harmonisation measures have been taken; and
- easing acceptance of mutual recognition.

At least the following points can be made regarding the objectives identified in the Green Paper.

The symbolic value of common offences and penalties. The definition of and, to a growing extent, maximum minimum penalties for, key offences with transnational aspects are already covered by EU instruments. Even without EU instruments, these offences are already extensively covered by national law. Since the individual criminal justice systems thus have the necessary tools to respond to these crimes, it is questionable whether any “message” on an EU level would add anything of substance. There does not appear to be any criminological evidence that such a symbolic message would have an appreciable impact.

The development of a shared sense of justice. This argument is closely analogous with the preceding one, the symbolic value of common offences and penalties. The legal sociology literature contains considerable material on the concept of a sense of justice, including on the extent to which such a sense of justice can be fostered. The sense of justice varies extensively within countries, even within communities. From this point of view, it can be doubted whether approximation would have the desired effect.

The pedagogic value of signalling that certain forms of conduct are unacceptable and punishable on an equivalent basis. This is a rather ambiguous objective. As noted, the key offences are already criminalized through the EU, and so there is no demonstrable need for a pan-European “signal” that these forms of conduct are unacceptable. Stating that the objective is to have such conduct “punished on an equivalent basis” would seem in this context to be an example of circular reasoning: the objective of approximation is justified by invoking the objective of approximation.

The corollary of a European area of justice, that the same criminal conduct incurs similar penalties wherever the offence is committed in the Union. The concept of a “European area of justice” does not necessarily require similar penalties throughout the EU; what would seem to be fundamental is that the same standard of justice is applied in all Member States. The analogy to a federal State can be made: no one would deny that federal states constitute “areas of justice,” even though the law is drafted and applied somewhat differently in the different *Länder*, cantons or other administrative units.

The role of Union minimum standards in preventing offenders from “forum shopping.” There does not appear to be any criminological evidence that offenders in fact decide where to commit an offence on the basis of which Member State has the laxest law or the most lenient punishment. To the extent that offences are planned (as seems to be the case with most serious cross-border crimes, although a large number even of these offences are opportunistic), the factors offenders take into consideration include the expected gain and the risk of apprehension. The gravity of the likely punishment if apprehended and convicted tends to play considerably less of a role, if for no other reason than the implicit assumption made by most offenders that they will not be apprehended.

Easing acceptance of the “ne bis in idem” principle. Since in practice there are few cases where the *ne bis in idem* principle applies, its use as an independent objective has limited value.

The argument that the current focus on instruments based on the principle of mutual recognition has eliminated the need for certain mechanisms for judicial cooperation that depended on the level of penalties. The logic behind this objective appears to be difficult to discern. The fact that, for example, extradition is conditioned on a certain minimum level of expected penalty, and that extradition has largely been replaced by the use of the EU arrest warrant, would seem to have nothing to do with approximation of criminal sanctions one way or the other.

The link between approximation of criminal law and the effective implementation of a Union policy where harmonisation measures have been taken. Although article III-172(2) of the Constitutional Treaty (which, it should be noted, is not – yet – in force) does indeed make a link between approximation of criminal law and the effective implementation of a Union policy, this article simply sets out one of the (legal) conditions for further approximation.

Easing acceptance of mutual recognition. As noted in section 4, a theoretical argument can indeed be made that approximation promotes the acceptance of the principle of mutual recognition. However, in that context, the reference is usually to the approximation of substantive criminal law and procedural law, not to the approximation of sanctions. There is little evidence on any linkage between mutual recognition and similarities or dissimilarities in the levels of punishment.

The issue here, however, is not whether or not the approximation of sanctions on an EU-wide level is desirable, but what impact approximation would have on the type and severity of punishment. It is, of course, possible to agree, throughout the EU, that the goal of approximation should be a relatively modest level of sanctions: extensive use of non-custodial sanctions, for example, and if and when custodial sanctions are used, having as short a sentence as possible. There are indeed strong arguments for seeking wider promotion of a rational and human criminal policy.

The debate in the EU over the approximation of sanctions was at its hottest during the first years of the present decade. In connection with the drafting of almost each new decision on criminalisation, some Member States with relatively high penal latitudes would suggest that their levels be taken as the point of departure, and that Member States with more lenient latitudes would have to adjust at least their minimum sentences accordingly. Almost invariably, when representatives of the latter Member States would defend their own levels of punishment as appropriate, representatives of the first group would respond with the admonition: “but having a low level of sentences would send the wrong political signal!”

The continuous debates were calmed by the adoption, on 26 April 2002, of Council conclusions that essentially stated that subsequently, offences would be divided into four levels, with different “minimum maximums” (i.e., the lowest maximum sentence that each Member State was required to enact into its national law): 1 – 3 years for level one offences, 2 to 5 years for level 2 offences, 5 to 10 years for level three cases, and at least 10 years for level four cases.

It may be noted here that what was distinctly absent from the discussion was the suggestion that some “levels” should lead to fines or other non-custodial sanctions. There were understandable reasons for this. The most important is presumably that the EU focuses on serious cross-border crime. Such a concept may inevitably lead most observers (and negotiators) to make the assumption that no matter what the individual offence is, if it is a “serious cross-border crime”, it must merit imprisonment.

6. Pulling it all together: what is the reality behind the myths?

This paper has looked at three common “myths” about the impact of the European Union on criminal justice: EU decisions have little impact on reality, the EU is becoming a super-state with a harmonized criminal and procedural law, and the EU is focusing

on the control of crime at the expense of due process and constitutional protections, resulting in a law-and-order mentality and a more punitive criminal justice system.

Regarding the first opinion of the EU, it does not hold true. The EU has been actively engaged in home and justice affairs for somewhat over ten years (if one ignores the informal cooperation that evolved before the Maastricht Treaty entered into force), and in that time the extent and scope of police cooperation and cooperation in criminal justice has far outpaced cooperation elsewhere. In many areas, the EU is breaking new ground, and other regions and subregions are beginning to see to what extent they can adapt EU forms of cooperation to their own circumstances.

Although it appears that the process of negotiating new decisions has slowed in the EU, new decisions are still being prepared.

The second opinion of the EU also does not hold true, in that there are strong institutional and other factors that limit the extent to which the Member States are prepared to harmonize their criminal and procedural law. Many Member States emphasize that their interest in greater cooperation extends only to serious forms of cross-border crime: they are not prepared to approximate legislation on forms of crime that usually do not have cross-border implications.

The third opinion of the EU is true to the extent that much of what the EU is doing in police cooperation and cooperation in criminal justice is designed to make such cooperation more effective. However, many Member States are quite sensitive to arguments of due process and fundamental rights, and the end result – the EU decision that has to be implemented on the national level – tends to reflect a balance between what is known in the criminological literature as the “crime control model” and the “due process model.”

As noted at the outset, the European Union represents a unique form of international cooperation. However, the tensions and assumptions reflected in the three myths described in this paper

are not unique to the EU. To a large extent, they appear also in debates on criminal justice on the national level.

On this national level, members of the public, representatives of the media and often also practitioners may be quick to suggest that the politicians and the criminal justice system are not in fact doing anything (or at least are not doing enough) about the “crime problem.”

The idea that the EU is becoming a “super-state” that is taking over from the Member States has its own parallel in the debate on what is known as “green criminal policy,” the idea advocated by scholars such as Louk Hulsman, Derick McClintock and Nils Christie that the State has too much power in defining what is criminal, and is too active in intervening in the lives of citizens – victims and alleged offenders alike.

As for the idea that the EU is a law-and-order advocate, also this has a familiar ring on the national level. Criminology has seen both short-term and long-term swings from periods of punitive criminal policy to periods of more liberal criminal policy, and back again. (At the time of this writing, politicians in some EU Member States are advocating restoration of the death penalty.)

What can be said is that over the past ten years, the European Union has transformed the European debate on criminal policy. Many key debates which had previously been conducted on the national level have now moved to the European Union level, and European Union decisions have considerable influence on national law, policy and practice. Agreement has been reached on the minimum requirements when criminalising a number of different offences (such as trafficking in human beings and sexual exploitation of children, and participation in a criminal organization). International co-operation in criminal matters has been smoothed by the establishment of Europol, Eurojust and the European Judicial Network, and by a fairly rigorous system for mutual evaluation of the day-to-day practice in international co-operation. Conventions have been adopted in order to simplify extradition and mutual assistance. The growing

scope of mutual recognition has made the enforcement of court decisions and judgments much more rapid and effective.

At the same time, the European Union is entering into new territory. The current debates for example on transferring the contents of the third pillar to the first pillar, and on finding the proper balance between mutual recognition and approximation show that there is keen interest in improving the ability of the twenty-five Member States of the EU to work together to find the proper response to criminal justice issues, a response that balances effectiveness with due process guarantees.

HEUNI Papers:

1. Report on the visit to Lithuania on behalf of HEUNI. 8-12 February 1993 by Dr. Katarina Tomasevski. (out of print)

2. International Co-operation. The Development of Crime Prevention and Criminal Justice in Central and Eastern Europe by Dr. Matti Joutsen. 1994 (out of print)

3. The Interchangeable Roles of Victim and Victimizer. Second Inkeri Anttila Honour Lecture, Department of Criminal Law and Judicial Procedure, Faculty of Law, University of Helsinki, September 9, 1993. by Ezzat A. Fattah.

The following documents are available electronically from:
<http://www.heuni.fi>

4. Developments in the Prison Systems of Central and Eastern Europe. By Roy Walmsley. 1995 (out of print)

5. Crime, Justice and Human Rights in the Baltics by Maeve McMahon. 1995 (out of print)

6. Organised Crime Across the Borders, Preliminary Results by Ernesto U. Savona, Sabrina Adamoli, Paola Zoffi with the assistance of Michael DeFeo. 1995 (out of print)

7. Alien-Smuggling and Uncontrolled Migration in Northern Europe and the Baltic Region. By Christopher J. Ulrich. 1995 (out of print)

8. Managing International Technical Assistance Projects in Criminal Justice. By Matti Joutsen. 1996

9. Motor Vehicle Theft in Europe. By Markku Liukkonen. 1997 (out of print)

10. Prison Populations in Europe and North America. By Roy Walmsley. 1997 (out of print)

11. Anticipating instead of Preventing: Using the Potential of Crime Risk Assessment in Order to Minimize the Risks of Organized and Other Types of Crime. By Seppo Leppä. 1999

12. Compensation Practices of States of the European Union Connected to Crimes Against Women. By Christian Bochmann and Kai-Uwe Griesheim. 1999

13. Drug Offenders in the Global Criminal Justice System. By Sheryl Van Horne and Graham Farrell. 1999

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24. Organized crime, corruption and the movement of people across borders in the new enlarged EU: A case study of Estonia, Finland and the UK. By Jon Spencer, Kauko Aromaa, Mika Junninen, Anna Markina, Jüri Saar and Terhi Viljanen. 2006

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