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Maria O'Neill

Policing and European Studies

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Policing and European Studies: Foreword

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THE PARAMETERS OF 'POLICING' DIFFER FROM ONE EU MEMBER STATE TO another. In some, it encompasses leading criminal investigations, whereas in others it includes counter-terrorism protection. Taking a wide definition of 'policing', this special issue is a selection of papers from a conference held on the topic at the University of Abertay Dundee in 2010, which is part of the activities of a UACES-funded research network in this area. In addition, a couple of papers have been added, which originate from a conference on the Area of Freedom, Security and Justice held at the University of Salford, also in 2010. The UACES-funded research network focuses on the law enforcement aspects that arise under the EU Police and Judicial Co-operation in Criminal Matters (PJCCM) developments, an area long neglected in academic discourse. While European Studies normally encompasses, *inter alia*, the disciplines of International Relations, EU law, economics and politics, in order to develop a coherent understanding of PJCCM relevant issues, the disciplines of police studies and security studies have also been added to the mix for the purposes of this area of research. In addition, with the increasing focus on the impact of academic research on the wider world, the feedback from the practitioner community, to include law enforcement officers, is highly relevant to this work. To this end this research network and its output benefit from pre-existing networks with, in particular, the Scottish police forces, which has been developed through the Scottish Institute of Policing Research. Nevertheless all output from this research network is developed from an 'outsider' point of view, with academics not being a position to access the full range of data relevant to this area, as it is only available to the law enforcement community. This is due to data protection and data security laws and regulations, which are in force throughout the EU. It is acknowledged that these laws are in place in order to protect not only the integrity of police investigations, but also the individuals who may become, either correctly or erroneously, caught up in those investigations.

With the above caveats in place, great complexity nevertheless arises from the development of the cross-border policing provisions that are increasingly being legislated for by the EU. Through a variety of opt-in and opt-out provisions, the EU Member States are engaging in a variable geometry approach to the EU policing provisions. The European Free-Trade Area Member States are also highly involved with these developments through their membership of the Schengen Convention that was signed in 1990. In addition, EU international policing provisions have been developing apace, with highly developed relationships *inter alia* with the United States. The Lisbon Treaty, now in force since the 1st of December 2009, has had and will have a very large impact on the development of the

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legal framework in this area. In addition, the Stockholm Programme, which was published at the end of 2009, has set an ambitious programme in the Area of Freedom, Security and Justice, to include the development of the external relations of the European Union in this area, not only with traditional strategic partners, such as the United States and Australia, but now with a particular focus on the countries of the European Neighbourhood Policy and the Euro-Mediterranean Partnership.

The complexity of this developing area of law, policy and practice is reflected in the papers published in this special issue of the *Journal of Contemporary European Research*. These papers are set out in order to transport the reader from the global to the local, through a variety of crimes and issues that arise in the context of transnational law enforcement, recognising that global crime activities in transnational criminal networks are based in localities and affect local policing. The papers are also written from a variety of academic discipline and jurisdictional perspectives.

The first of the papers in this special issue, from **Alexander MacKenzie**, takes a broad view of the EU's increasing role in foreign policy provisions dealing with counter-terrorism. He recognises that the EU provisions on counter-terrorism cross all three pillars of the pre-Lisbon EU. He engages with these issues in the context of the EU's engagement outside its borders. This engagement crosses not only the military activities of the EU Member States, but also supports external policing activity and the counter-terrorism financing provisions of the EU. He advocates a broad interpretation of what is the EU's foreign policy, in order to truly understand the EU's activities in this area, stating that it "is necessary to distinguish between the external dimension of counter-terrorism and foreign policy counter-terrorism, and there is a need to combine these in order to better understand the EU as a counter-terrorism actor". MacKenzie's focus ranges from the EU's role in Afghanistan, through to the EU-US relationship, and the Commission-based Instrument for Stability (IfS) in order to develop his argument that "the EU has made considerable progress towards creating a multi-faceted counter-terrorism policy in the nine years since 9/11".

Moving from the external aspects of EU counter-terrorism activities, the second paper takes a tighter focus on the police function, engaging in a comparative analysis between European and Australian police cooperation measures. Writing from a legal perspective, **Saskia Hufnagel** examines, using broadly the 'fear of insignificance' concept from social psychology, reactions of law enforcement officers to the legal tools developed for cross border co-operation, at the EU level and within the Australian federal structure. It is interesting to note that both jurisdictions have developed many similar tools and strategies to include "cross-jurisdictional joint investigation teams, the creation of common information databases and the mutual recognition of criminal procedural requirements such as surveillance and arrest warrants". No doubt many lessons learned in one jurisdiction can be transferred to the other, with the intention being that the perceptions of law enforcement practitioners "need to be taken into account with a view to enhancing harmonisation in both systems".

The third paper is written by a former law enforcement officer, who examines "the practices of liaison officers and the background and effects of TREVI and EU policy efforts in that field". In particular the role of liaison officers posted to the Russian Federation is examined in depth, as an example of what essentially happens "in any other country". **Ludo Block** points out that the 'personal preferences of the individual liaison officer' are key to the quality and volume of work that can be conducted through the particular liaison officer. He goes on to point out that an important element to the functionality of the liaison officer is his or her 'ability to build a network of privileged contacts as well as their knowledge of legal and organisational particulars of the jurisdictions between which they liaise'. Despite the EU's provisions and policy documents in this area the "posting and

practices of liaison officers remain largely governed by national preferences and are subject to the specifics of the national police systems".

The fourth paper in this special issue focuses on the key issues of data protection and data security in the pre-Lisbon third pillar of the EU. As one of the main ways that the law enforcement agencies are to operate within the EU is the sharing of intelligence, or data, how that data is processed, and protected, both by way of security classifications, security procedures, and from the point of view of the individual either correctly or erroneously caught up in a law enforcement operation, from a data protection perspective, is key to the general functionality in this area. Gaps and overlaps in the EU legal framework in this area are highlighted, with **Maria O'Neill** taking a legal approach to the issue, pointing out that "newspaper headlines have followed previous failures of law enforcement and intelligence communities to share intelligence due to underlying structural failures". She advocates a review of the legal framework in this area, which is now facilitated by the post-Lisbon EU legal framework.

Oldrich Bures writes the fifth paper in this special issue, a paper on Eurojust's fledgling counter-terrorism role. While much work has been done on Europol, little has been written from an international relations perspective on Eurojust, an organisation typically populated by investigating and prosecuting magistrates. Bures points out that "it remains debatable as to whether all EU Member States fully support the strengthening of Eurojust's role in the fight against terrorism". He considers that "the uneven utilisation of Eurojust reflects the deeper and older differences concerning judicial cooperation at the EU level". However, what might also be relevant, as he points out, are the significant "differences in national police and judicial systems" with regard to "the perceptions of the 'proper' relations between judges and policemen". In this Editor's opinion, also relevant would be the allocated roles of 'judges' and 'policemen' in the different EU jurisdictions.

Focusing on the detail of cross-border law enforcement operations, **Laure Guille**, from a criminology background, takes an ethnographic approach to cross-border policing. Guille examines, in particular, cross-border cooperation on the French-Spanish Catalonian border and the Anglo-French border at Folkestone, examining the "gap between policy and practice". As the author states, "[cooperation] at the level of legal negotiations means nothing without the day-to-day work of officers in the field". The work in this paper is based on primary research conducted between December 2002 and June 2006, with some follow-up work being conduced until October 2008. This involved "face to face interviews with police officers, civil servants, prosecutors and liaison magistrates" from the relevant jurisdictions, together with interviews of officials based at Europol, Eurojust and the Council of the EU, together with periods of observation and internships. Of particular interest in this paper was how the "relatively new tools of cooperation" operated in practice.

The final paper focuses on one of the key 'EU crimes', money laundering, from a hybrid law/criminology perspective. Here the UK inter-agency relationships, in particular the Scottish inter-agency relationships, is examined. Given the high level of involvement of the regulated sector in this form of crime control, **Mo Egan** advocates that the traditional definition of 'private police' should be extended to the regulated sector. She examines the "highly precarious position" of the regulated sector within the EU based anti-money laundering framework, which is an area of concern to writers on this topic across the EU. In particular Egan focuses on the latest English case law in this area, and its potential impact in the devolved legal and policing jurisdiction of Scotland.

As Guest Editor, I would like to thank the peer-reviewers for their thorough reviews and helpful comments in assisting the development of all of the articles in this special issue. I

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The European Union's Increasing Role in Foreign Policy Counterterrorism

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Abstract

Since 9/11, the role of the European Union (EU) in counterterrorism has expanded rapidly. Most of the developments were internally derived and would affect only EU Member States and countries on the EU's periphery. However, over the past few years, the EU has become increasingly involved in counterterrorism outside its borders. Although it still has a long way to progress before being recognised as a counterterrorism actor of note, the EU has demonstrated a commitment to include counterterrorism related initiatives into its foreign policies. Analyses of the EU's foreign policy counterterrorism have focused on narrow definitions of foreign policy. It is necessary to distinguish between the external dimension of counterterrorism and foreign policy counterterrorism, and there is a need to combine these in order to better understand the EU as a counterterrorism actor. Foreign policy and counterterrorism therefore need to be broadly defined in order to take account of the full array of EU counterterrorism initiatives. Through the EU's efforts to counter terrorism financing, the EU's role in Afghanistan, the EU-US relationship, and the Commission-based Instrument for Stability (IfS), it will be shown that the EU has made considerable progress towards creating a multi-faceted counterterrorism policy in the nine years since 9/11.

Keywords

Counterterrorism; European Union; EU foreign policy

AFTER EXPERIENCING YEARS OF DOMESTIC SEPARATIST, LEFTIST, AND RIGHT-WING terrorism, European states have since 9/11 - if not before[1] - faced more international terrorist threats. In particular, European countries have faced threats from the Al Qaeda (AQ) core leadership (Osama bin Laden and other leaders), Al Qaeda-affiliated (AQA) groups, such as Al Qaeda in the Islamic Maghreb (AQIM), and Al Qaeda-inspired (AQI) groups, such as those "self-starter cells" (Kirby 2007) who committed the 2005 London Bombing. To a large extent, the terrorist threats against European countries emanate from North Africa and the Afghanistan/Pakistan region due to the suspected involvement of the Moroccan Islamist Combat Group (MICG) in the 2004 attacks on Madrid (Alonso and Rey 2007), the recent concern over the multitudinous security threats in the Sahel (de Kerchove 2009), and European citizens being trained as terrorists in Pakistan and Afghanistan (Gunaratna and Nielsen 2008). Attacks and averted attacks within European countries have served to raise awareness of the threat posed by religiously-inspired

[1] Nesser (2008) goes back to 1994 and the attacks of the Algerian Islamic Army Group (GIA) on France as a reaction to the French government's intervention in Algeria to help overturn the 1991 elections which could have seen an Islamic political party, the Islamic Salvation Front (FIS), come to power.

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terrorism.[2] Although terrorism of domestic origin has not disappeared in Europe[3], it has been overshadowed by the worldwide upsurge of Al Qaeda-based terrorism.

Even so, Europe is the site of relatively few terrorist attacks compared to other areas of the world. In 2008, Pakistan, Afghanistan, and Iraq accounted for about "55 percent of attacks catalogued (…) [and] well over 50 percent" of the 50,000 people either killed or injured were Muslim (National Counterterrorism Centre 2009). However, this does not mean that terrorism is not a threat to Europe; the attacks on Madrid and London, as well as numerous averted attacks, prove that Europe faces a significant and ongoing threat.

Prior to 9/11, the EU had done little in the way of counterterrorism co-operation with third countries; however, EU activity has increased significantly since then (Spence 2008; Wolff 2009). Despite this progress, the EU is not responsible for all areas of European security. In particular, the operational side of counterterrorism remains the preserve of the Member States. Security issues cut right to the heart of sovereignty and Member States have often guarded this jealously (Bures 2006; Kaunert 2010a; O'Neill 2008; Zimmermann 2006), yet interdependence in this sphere is high as a result of the porous borders created by the integration process, which means that no single country can protect its citizens on its own (Lugna 2006).

This article will demonstrate through a broad view of EU foreign policy and a conceptualisation of the EU as a *sui generis* actor that EU action in foreign policy counterterrorism is actually more substantial than previously acknowledged. The evolution through which the EU has gone since 2001 is particularly important here. The achievements since then cannot be exaggerated and, although it would be premature to argue that the EU is a significant counterterrorism actor, the expansion of EU foreign policy counterterrorism initiatives since 2001 cannot be ignored. In order to prove this, the first section will briefly review the literature on EU foreign policy counterterrorism, whilst the second section will discuss what constitutes EU foreign policy and will outline developments since 9/11. The third section will assess the challenges to the EU as a counterterrorism actor. The following section will examine EU action in counterterrorism financing, EU activity in Afghanistan, EU-US counterterrorism co-operation, and the Commission-based Instrument for Stability (IfS). This analysis will demonstrate that the EU is conducting a multi-faceted counterterrorism policy through many of its governance mechanisms and that this activity has rapidly expanded since 2001.

EU counterterrorism

A close examination of the literature identifies two key themes in EU foreign policy counterterrorism. First of all, several authors have argued that the EU is using internal instruments to progress externally (Di Puppo 2009; Lavenex and Wichmann 2009; Mounier 2009; Pawlak 2009; Smith 2009; Trauner 2009; Wolff 2009; Wolff *et al.* 2009). Secondly, there is another strand of literature that discusses traditional foreign policy in EU counterterrorism (Keohane 2008). Neither a discussion of the external dimension of EU counterterrorism nor EU foreign policy can fully explain the EU as a counterterrorism actor.

[2] In line with Hellmich (2008), it is argued that threat perceptions and definitions of terrorism should not be reduced to religious or ethnic stereotypes or over-simplified through religious labels such as 'Islamist' or 'Salafi-jihadi'.

[3] As demonstrated in Europol's annual Terrorism Situation and Trend (TE-SAT) reports (see for example Europol 2010), some EU Member States consider domestic terrorism a greater threat than religiously-inspired terrorism. These reports, being quantitative, are misleading because every terrorist act, regardless of whether it is a simple act of graffiti or a mass-killing, is counted as one incident. In many ways, this underestimates the threat of religiously-inspired terrorism.

In this sense, it is necessary to examine both to better understand the EU in its counterterrorism capacity.

The external dimension of EU counterterrorism

The 'external dimension of counterterrorism' and 'foreign policy counterterrorism' are two different ideas, which need to be distinguished. 'External dimension' implies an externalisation of a policy field that was primarily internally focused. Lavenex and Wichmann point out that "the external projection of internal policies constitutes a new kind of foreign policy, which is usually referred to as the 'external dimension' of a policy field" (2009: 84). Nowhere is this more obvious than in the "external dimension of JHA" (Lavenex and Wichmann 2009: 84). Wolff *et al.* suggest that this can be defined as "an attempt to provide an overall strategic orientation to punctual measures adopted in the policy area of JHA" (2009: 10). Furthermore, they point out that "the JHA external dimension describes the contours of a 'policy universe'. This policy universe covers the external dimensions of various EU internal security policies in the area of terrorism, migration and organised crime" (Wolff *et al.* 2009: 10). The European Neighbourhood Policy (ENP) is but one example of the EU's efforts to expand its *acquis* to nearby third countries.

To date, scholars have focused on EU counterterrorism in the Mediterranean (Wolff 2009), JHA influence in the Western Balkans (Trauner 2009), and JHA policies in Georgia (Di Puppo 2009). By examining the EU's relations with its neighbourhood, these sources are focused only on threats developing near Europe (something of which the EU is often accused). Here, there are certainly wider implications for future EU action in the sense that these tools may in time be used further afield – that is, if they are not being so already. However, in order to prove that EU counterterrorism action has evolved on a global scale since 2001, it is necessary to discuss projects outside of the EU's vicinity - in key third countries such as Afghanistan and Pakistan.

Foreign policy counterterrorism

'Foreign policy counterterrorism' assumes that the action taken is solely foreign policy orientated and does not already exist as an internal policy - as opposed to the 'external dimension of EU counterterrorism'.[4]

Keohane (2008) is one of the few authors who specifically discusses EU foreign policy counterterrorism. He argues that "given the global nature of the threat from terrorism, the relative absence of foreign policy from the EU's counterterrorism is surprising" (Keohane 2008: 127). His analysis, however, appears to be grounded in criticising the EU in the areas where it is weak and lacks competences. For instance, he claims that Member States "are slow to give the Union the powers (such as investigation and prosecution) and resources (such as spies and money) it would need to be truly effective" (Keohane 2008: 129). Furthermore, after establishing the EU's acknowledgement that military missions could potentially contribute to the fight against terrorism, Keohane goes on to argue that "even so, the EU is unlikely to undertake robust military missions specifically against terrorists beyond Europe's borders anytime soon" (2008: 139). There are three problems with this argument, the first two of which are linked. Firstly, Keohane seems to define security narrowly by focusing on Common Foreign and Security Policy (CFSP) (previously second pillar) matters with a specific focus on militarily-related issues, whereas in fact the concept of 'security' – and thus counterterrorism - has broadened considerably since the end of the

[4] EU foreign policy is dealt with in the next section.

Cold War (Zwolski 2009). Secondly, Keohane does not take into account the existence of a broader EU foreign policy and does not discuss in enough detail counterterrorism activities located outside the realm of CFSP. Finally, he appears to employ an implied conceptualisation of the EU as a state – or rather, a state in development. This may or may not come to pass, but it is inaccurate at this time to assume that the EU *is* a state. Consequently, at present, the EU should only be criticised for the tools that it can use. Therefore, this article highlights the EU's use of four counterterrorism tools to which it has full access. In doing so, it will demonstrate that EU action in foreign policy counterterrorism has increased considerably since 2001.

EU foreign policy and counterterrorism

Hill defines foreign policy as "the sum of official external relations conducted by an independent actor (usually a state) in international relations" (2003: 3). This definition is intended to accommodate "the inclusion of outputs from all parts of the governing mechanisms" (2003: 3). This definition shows that many different departments and agencies play a role in the fight against terrorism, not just those which could be considered traditional (CFSP) foreign policy. Furthermore, the EU must be conceived of as a *sui generis* actor (Beyer 2008; Bretherton and Vogler 2006; Carlsnaes 2006; Ginsberg 2001; Smith 2004; White 2006). Therefore, the EU can be studied as an actor in its own right. Any other assessment leads to the false conclusion that the EU is not an actor in counterterrorism because it focuses on the areas where the EU is least effective, has fewer competences, and ignores all that is distinctive about the EU and what it can do (Bretherton and Vogler 2006). By contrast, this analysis will focus on what the EU can do, while also taking into account what it cannot. Thus, the EU's multi-faceted efforts to combat terrorism are taken into account while conceptualising the EU as a distinctive actor.

EU counterterrorism developments since 9/11

In the aftermath of 9/11, European leaders began a process of accelerated change in the EU. Prior to 2001, the EU could not be called a counterterrorism actor, but since then there has been a process of constant change to the point where the EU is taking on an ever-expanding counterterrorism role. It was agreed that terrorism posed one of the five main threats to Europe in the first European Security Strategy (ESS) (Council of the European Union 2003). Additionally, all five threats – *i.e.* terrorism, proliferation of weapons of mass destruction (WMDs), regional conflicts, state failure, and organised crime – were considered intertwined (European Council 2003). Terrorism is still considered a threat, but is linked more clearly with organised crime in the report on the implementation of the ESS from 2008 (Council of the European Union 2008). Again, in the new (draft) 2010 European Internal Security Strategy, terrorism "in any form" is the first threat addressed, suggesting that it continues to remain important to the EU (Council of the European Union 2010).

Specifically as a response to terrorism, the EU adopted on 13 June 2002 a European Council Framework Decision on Combating Terrorism, which, according to Monar (2007: 312), lays down a "reasonably specific definition of the common threat that avoids any simplistic reduction of the threat to its Islamic elements". This is an important area of progress because only seven European states – *i.e.* France, Germany, Greece, Italy, Portugal, Spain, and the UK - had specific laws to fight terrorism prior to 9/11 (European Commission Website July 2005). The extension of counterterrorism laws against terrorism from seven to (potentially) twenty-seven states is an impressive feat. Furthermore, the EU adopted a Plan of Action to Combat Terrorism at a special summit in November 2001 and

this was then revised and realigned in 2004.[5] Then, in 2005, the EU adopted both a Counterterrorism Strategy and a Strategy on Radicalisation and Recruitment. Admittedly, behind these apparent successes lie national threat perceptions and a poor implementation record (Monar 2007: 312). But this does not change the fact that the EU has managed together with its Member States to provide the only example in the world of so many states working together so closely on counterterrorism.

In addition, the EU made assistance to third countries a vital part of its counterterrorism action at the June 2002 summit in Seville where the EU decided to engage in political dialogue with third countries in the fight against terrorism, non-proliferation, and arms control; provide third countries with technical assistance to help them combat terrorism; and include anti-terrorism clauses in agreements with third countries (Wright 2006: 295). With regard to co-operation with third countries, the US was – and still is – seen as the EU's most important counterterrorism partner. Several agreements have been made with the US (discussed below), whilst counterterrorism clauses have been inserted into agreements with Algeria, Egypt, Chile, Lebanon (Wright 2006: 296), and the countries of the African-Caribbean-Pacific Group (ACP) (enshrined in the updated (2005) Cotonou Agreement).[6] Following on from this, the EU states that it has spent EUR400 million in over 80 countries on counterterrorism related assistance (European Commission Website March 2006).[7] For all the criticisms that can be made of these efforts, it is undeniable that the EU's counterterrorism role has substantially increased since 2001. In the words of Spence (2008: 2), the EU's actions against terrorism "may still remain far from an ideal strategy, but it is 'light years' away from the initial floundering which characterised Europe in the weeks after 9/11".

Challenges to the EU as a counterterrorism actor

Countering terrorism is complicated by the fact that it is not a singular policy area. Counterterrorism requires action from every government department: law enforcement agencies, border control, foreign policy and defence departments, finance ministries, health ministries, and education ministries (Keohane 2005: 2-3). This sets out the need to co-ordinate a multifaceted response to a transnational threat – something that the EU has been able to do in conjunction with its Member States to varying degrees of success. EU counterterrorism is thus a broad commitment to combating terrorism across the full panoply of EU areas of governance. A further issue is particular to the EU as a polity; that is, the EU does not have competence in several policy areas where states generally do. In this sense, the absence of a military arm is noticeable, but this is by no means necessarily the most important component of effective counterterrorism policy. Furthermore, the lack of EU executive powers with regard to Member State compliance in EU efforts to combat terrorism has led scholars to question whether or not the EU is an appropriate "vehicle in Europe for the multilateral fight against terrorism" (Zimmermann 2006: 124). The EU can, however, offer a convening and co-ordinating role. This can be a strength or weakness; without the EU, some Member States may never adopt any laws pertinent to

[5] According to Keohane (2008), 30 measures are concerned with the 'external dimension'. For a more detailed analysis of the EU Action Plan to Combat Terrorism, see Bossong (2008).

[6] The counterterrorism clauses included in the Cotonou Agreement and with Lebanon, Algeria, Chile, and Egypt were similar to the following:
The Parties reiterate their firm condemnation of all acts of terrorism and undertake to combat terrorism through international cooperation, in accordance with the Charter of the United Nations and international law, relevant conventions and instruments and in particular full implementation of UN Security Council Resolutions 1373 (2001) and 1456 (2003) and other relevant UN Resolutions. To this end, the Parties agree to exchange:
– information on terrorist groups and their support networks; and
– views on means and methods to counter terrorist acts, including in technical fields and training, and experiences in relation to the prevention of terrorism.

[7] The website, however, does not further elaborate on the exact nature or recipients of this EU assistance.

counterterrorism due to their own threat perceptions, but again this depends on Member State compliance. For example, the Eastern European countries - which have not yet been attacked by terrorists and have little or no experience of it - had to adopt the EU *acquis* in order to accede to the EU in 2004, and the counterterrorism Framework Decisions were a part of this (Wright 2006: 294).

This section will now analyse three issues that may have challenged the EU's ability to combat terrorism: intelligence-sharing in Europe; the US' 'War on Terror'; and the issue of cohesion of threat perceptions in order to conduct an effective foreign policy. This will configure the EU's role in counterterrorism and put it in context.

Intelligence-sharing

Intelligence-sharing has generally continued to go through bilateral channels between states, instead of EU structures (Müller-Wille 2008). The EU itself does not have any sort of large-scale intelligence agency like the US Central Intelligence Agency (CIA). The very prospect of a European CIA suggested in 2004 by Austria and supported by Belgium was rebuffed by the European countries that have a significant intelligence capability, such as France, Germany, Italy, Spain, and the UK (Spence 2008: 16). Furthermore, these countries share intelligence very closely with the US and with each other through bilateral channels[8], and they do not want to jeopardise these links or hand this over to the EU (Bures 2008). Nevertheless, the EU has formed a nascent intelligence capability in the form of its Situation Centre (SitCen) and the European Police Office (Europol). SitCen also produces strategic level reports for EU decision-makers, but this is dependent upon Member States providing it with information (Müller-Wille 2008: 58-9). It is thus impossible to argue that the EU has any sort of significant intelligence capabilities.

Although the bilateral channels are without doubt the most important channels for intelligence co-operation, Europol has established itself as a vital resource for police co-operation in Europe (Mounier 2009). Since its foundation in 1999, Europol's tasks have expanded rapidly to now include counterterrorism.[9] Mounier goes as far as to suggest that Europol has established itself "as the focal point for police co-operation in Europe. Despite the commonly held view that Member States (MS) police forces do not trust this European organisation, figures and interviews indicate otherwise" (2009: 583). On the external side, both Kaunert (2010b) and Mounier (2009) have shown that Europol has strategic and operational agreements with third states. Strategic agreements[10] consist of those where only non-personal data can be transferred, whereas operational agreements[11] allow for the exchange of personal data (Salgo 2009). Although fledgling and bearing in mind that most intelligence still continues to go through bilateral channels, it is interesting to note the increased amount of co-operation taking place in this EU agency.

The US 'war on terror'

A further issue that has obstructed the EU's efforts to develop a coherent response to terrorism is the US "Global War on Terror" (Keohane 2008). The EU had long wished to be treated by the US as an equal in security matters (Rees 2006). In addition, Spence has

[8] France, Germany, Italy, Spain, and the UK constitute the G5. Since 2004 and the Eastern enlargement of the EU, Poland has been included to make the G6. These countries value bilateral ties because of issues of trust and do not wish to jeopardise them.
[9] Under the Treaty of Lisbon, Europol is an 'agency' rather than an 'entity' of the EU. This means that Europol is now funded from the EU budget rather than by Member States' contributions (Kaunert 2010b).
[10] Albania, Bosnia and Herzegovina, Colombia, FYROM, Moldova, Russia, Turkey, Serbia, and Montenegro (Europol Website).
[11] Australia, Canada, Croatia, Iceland, Norway, Switzerland, USA (Europol Website).

rightly pointed out that the EU needed to "create a distinct political alternative to America's 'war on terror'" (2008: 3). The US' 'war on terror' is wrongly caricatured as a purely military struggle (Rees 2006), but US actions after 9/11 served to create the appearance of a 'clash of civilisations' and a simplistic dualism – dividing the world into 'good' and 'evil'. Hoffman has suggested that in the Bush Administration's 'war on terror' "long-term progress was sacrificed for short-term expediency" (2009: 360). Additionally, the National Intelligence Estimates of April 2006 entitled "Trends in Global Terrorism: Implications for the United States" warned that "the U.S. invasion and continued, perceived occupation of Iraq has radicalised the Muslim world and potentially generated untold new terrorist recruits" (Hoffman 2009: 360). The US and its Western allies' action thereby served to amplify the problem. The invasion of Iraq in 2003 split Europe and the US. For many Europeans, Iraq was nothing about fighting terrorism. Even so, it caused divisions in Europe with Poland (not then a member of the EU), Spain, and the UK (in particular) supporting the US, whereas France and Germany vehemently opposed US action. This paralysed the EU and showed how susceptible the EU was to divisions of this kind. Eventually, however, the US found itself in a "quagmire" by 2007 (Spence 2008: 20), which suggested that military action had actually undermined the US in the Middle East and exacerbated terrorism. According to several authors, foreign policy decisions and military responses to terrorism have caused countries to highlight themselves as targets for terrorism (Sedgwick 2004; Spence 2008; Torres Soriano 2009). Experiences in Iraq and Afghanistan seem to have caused the US to re-think its strategy. The Obama Administration has moved away from the Bush Administration's 'war on terror' paradigm. Thus, on this occasion, the US should not be held as a yardstick for the EU to reach to be considered a counterterrorism actor of note.

In contrast with the US, the EU began to "adopt a series of powers flanking the 'hard power' of the US" (2008: 8). In particular, the EU began to spend increasing amounts of money on anti-terrorism assistance abroad, security sector reform, Weapons of Mass Destruction (WMDs) operations and peace building in general (Spence 2008: 8). Eling suggests that there is an emerging "distinctive EU approach to combating terrorism" (2008: 120). Just because the EU acts differently to the US does not mean that it is unimportant and, as the US has proved, over-reliance on the military dimension of counterterrorism can indeed be detrimental to the pursued goal. This suggests that the EU has made strides forward since 9/11 in the field of counterterrorism. It has emerged as a more important counterterrorism actor and has to an extent formed a unique way of combating terrorism, as well as using a variety of tools to complete this objective.

The EU as a cohesive counterterrorism actor? The crime-terror nexus

Scholars have raised concerns over the cohesion of EU Member States towards the threat of terrorism (Bures 2010b; Keohane 2005, 2008). Not all EU Member States have experience of terrorism, and counterterrorism does not necessarily figure highly amongst the priorities of all Member States.

To show the lack of consensus on the perception of the terrorist threat in Europe, Bures has pointed out that "no independent terrorist threat assessment is currently available at EU level" (2010b: 68). He also goes on to say that historical experiences and demographics matter, and therefore it is unsurprising that European countries have different threat perceptions (2010b: 68). However, with attacks, averted attacks, and unrest affecting several countries in Europe (including Denmark after the Muhammad cartoon episode in 2005), more and more countries are seeing themselves as being threatened. Spence has pointed out that:

> EU commitment to countering terrorism has certainly strengthened over time, not only owing to Europe's own experience in Madrid in 2004 and London in 2005, but also because of the belated realisation that Europeans face a real international terrorist threat against them rather than solely against their American allies (2008: 3).

Clearly, in this sense, the UK, Spain, France, and Germany consider themselves to be the most likely targets of violence due to a combination of history, foreign policy decisions, and demography. Terrorism may not necessarily threaten every single EU Member State in the same way, but it is possible for any country to be used as a base for criminal activities linked to terrorism, as well as planning - in the same way Germany and the US were used prior to 9/11 (Newman 2007: 471). From that viewpoint, terrorism potentially threatens every country in Europe.

In addition to this, it is questionable to think of terrorism as a singular crime without background funding or other related nefarious activities. Clarke and Lee suggest in their study of the Provisional Irish Republican Army (PIRA) and D-Company, a South Asian mafia group, that criminal and militant groups have forged partnerships and that this has complicated efforts to combat them (2008: 377). Ultimately, this means that treating crime and terrorism as two mutually exclusive categories is artificial (Clarke and Lee 2008: 377). A crime-terrorism nexus therefore exists, which shows that terrorism cannot easily be seen as a single threat. Many terrorist groups are involved in criminal activities to support themselves. As an example, Afghanistan accounts for over 90 per cent of the world's opium production (Interpol Website) and drugs are clearly linked to terrorism and the insurgency (Hutchinson and O'Malley: 2007: 1096). The resulting heroine ends up on the streets of Europe, and some of the main drug routes are through the Balkans and Russia (Interpol Website). Closer to Europe, AQIM have been involved in numerous kidnappings in the Maghreb, as well as several high-profile terrorist attacks (Marret 2008: 541). If European countries are not concerned by terrorism *per se*, they have reason to act against related criminal threats linked to terrorism. Thus, there is common ground for co-operation to the mutual benefit of all.

Review of external activities

This section will review four areas of the external dimension of the EU's 'fight against terrorism': combating terrorism financing where the EU has been very active, but controversial; the EU's role in Afghanistan where it has played an important, albeit unacknowledged, role since 2001; the EU-US relationship, which, although it is often dominated by US security concerns and is asymmetric, has proved mutually beneficial; and the new Instrument for Stability (IfS), which demonstrates that the Commission has gained a greater role in crisis situations and combating transnational threats. If one had considered the EU's role in many of these areas in 2001, one would have found it to be embryonic at best. Therefore, the progress since then is impressive.

Counterterrorism financing

Terrorism itself is not an expensive activity. The fact that 9/11 is thought to have cost about $500,000 is proof of this (Aydinli 2006: 303). However, this does not mean that efforts to combat terrorism financing are fruitless; it simply means that counterterrorism financing activities are just one area of a multi-faceted counterterrorism policy that can make the environment for terrorism more difficult. Bures has pointed out that counterterrorism financing measures have several key purposes –*i.e.* to prevent attacks, to deter attacks, to investigate groups and attacks - and represent concrete measures in a multi-faceted campaign against terrorism (2010a: 419). In these ways countering terrorism financing can be a vital asset. The actual implementation and follow-up to track money is

down to the EU Member States, but the EU has legislated where there was not in all cases comprehensive enough legislation previously.

Counterterrorism financing is an area in which the internal and external dimensions are blurred – the so-called 'internal-external nexus' (Mounier 2009; Wolff *et al.* 2009). Internal measures to freeze funds have an effect on whether criminals can use funds elsewhere in the world. Thus, EU internal measures play a role internationally. Prior to the introduction of the Lisbon Treaty on 1 December 2009, counterterrorism financing was a cross-pillar activity with the lists of the individuals whose funds were to be frozen being agreed in the third, Justice and Home Affairs (JHA) or, more formally, Police and Judicial Co-operation in Crime and Criminal Matters (PJCCM), pillar and the freezing being done in the first, European Communities or EC, pillar. This cross-pillarisation issue undoubtedly caused problems of communication and co-ordination within the EU (Rees citing Den Boer 2006: 38-39). With the entry into force of the Lisbon Treaty, this should change with JHA now coming under the 'Community' method.

The EU perceives money laundering to be "at the heart of practically all criminal activity" (European Commission Website April 2004). The Commission is a member of the Financial Action Task Force (FATF), an intergovernmental body set up under the auspices of the G-7, which made many recommendations for EU action to combat money laundering. Counterterrorism financing in the EU can be traced back to the First (1991) and Second (2001) Anti-Money Laundering (AML) Directives. The First AML Directive did not specifically mention counterterrorism financing; however, the Second, having been agreed in December 2001, widened the definition of criminal activity to incorporate all serious crimes, including those related to terrorism (European Commission Website April 2004). The Third AML Agreement was agreed in 2005 and further extended provisions to combat money laundering in Europe. The EU has therefore taken decisive action to tackle counterterrorism financing since 2001. The EU has two different terrorist 'lists': one which contains Al Qaeda and Taliban members, based on UN Security Council lists; and the other concerned with terrorists from Europe, the Middle East, Latin America, and Asia (Brady 2009: 10).[12] Being on these lists leads to, among other things, the freezing of assets of the individuals. Brady argues that "contrary to popular belief, substantial amounts of terrorist funding still go through the formal banking system" (2009: 10). Overall, the EU has apparently "been able to effectively target and freeze assets of entities associated with Al Qaeda or the Taliban", but has not been so effective with unassociated groups (Jacobson cited in Bures 2010a: 424). However, as Bures (2010a) points out, statistical data is very difficult to find regarding the success of counterterrorism financing inside and outside the EU. Yet, the European Commission claims that:

> [t]he impact [counterterrorism financing] has had on terrorist networks and their methods of operation needs also to be taken into account, as does the political impact of a decision taken by the EU as a whole to declare a group or an individual as terrorist (…). Furthermore, sanctions measures have reduced the possibilities for terrorists and terrorist organisations to misuse the financial sector and have made it more difficult for certain organisations to raise and move funds (cited in Bures 2010a: 424).

This suggests that the EU has played an important role in counterterrorism financing and has certainly had some success in this area.

For all the potential successes of counterterrorism financing, there are several problems that have been highlighted by Guild (2008). In particular, she highlights the possible negative impact of these measures on human rights (2008: 174). On balance, Guild

[12] See Council of the European Union 2009 document for the consolidated list of proscribed groups and wanted individuals.

recognises that EU Member States have clearly pooled information to make terrorist lists and that this is a success story towards EU objectives; however, it is also the case that the method of listing has come under scrutiny with it having been based on secret intelligence (Guild 2008: 174). Thus, the implications are that individuals have been somewhat arbitrarily listed. Furthermore, these lists have been based on secret intelligence and the UN list was adopted without being checked or challenged in any way. This raises various concerns. The cases of *Kadi* and *Yusuf* highlight the problems of this potentially arbitrary listing (Guild 2010: 3). Both men were subject to this listing and had their assets frozen without either knowing why they were put on this list, and, to compound this, they could only challenge the ruling through the EU (in the Court of First Instance, CFI, and the European Court of Justice, ECJ) rather than at the national level.[13]

In sum, the EU has been able to take some action on counterterrorism financing over the last ten years, taking into account the Second and Third AML directives, and this has certainly made it more difficult for terrorists to access funds and move funds through the system. However, the EU must also be careful not to arbitrarily list people who may have done nothing wrong.

The EU's role in Afghanistan: EUPOL

Ever since 2001, the EU and its Member States have considerably increased their roles in Afghanistan. Afghanistan itself is undoubtedly the EU's biggest project in Asia. European countries currently contribute in excess of 30,000 troops to NATO's International Security Assistance Force (ISAF) in Afghanistan (European Union Council Secretariat 2010). However, these are under the control of EU Member States and ISAF, not the EU. The EU's role in Afghanistan is not a military one; it is mostly done 'behind the scenes' through a combination of financial support for national programmes and co-ordination of Member State activities. Over the past nine years, the EU itself has given over EUR1.8 billion to Afghanistan (and collectively EUR8 billion with its Member States), yet there has been little research on where this money has gone. Most of this assistance has gone towards development programmes which are not even tenuously associated with counterterrorism, such as building hospitals and schools, etc. (European Commission 2010; European Union Council Secretariat 2010). This does not mean, however, that the EU is not contributing to improving the security situation and international counterterrorism efforts in Afghanistan; the EU is undertaking a couple of large-scale projects in Afghanistan. This section will focus upon the policing mission, EUPOL, which has been active since 2007.

EUPOL was designed to build upon the German Police Project Office (GPPO), which started in 2002 and ran until 2007. EUPOL is an example of a civilian European Security and Defence Policy (ESDP) project within the (former) CFSP pillar. Starting in 2007, and with an original mandate to proceed until 2010 (Council of the European Union 2007), EUPOL has recently had its mandate extended until 2013 (Council of the European Union 2010). The rationale for this mission was to

> be set in the wider context of the international community's effort to support the Government of Afghanistan in taking responsibility for strengthening the rule of law, and in particular, in improving its civil police and law enforcement capacity (Council of the European Union 2007).

This demonstrates that EUPOL Afghanistan is just one of the EU's commitments to Afghanistan. As of 6 June 2010, the mission involves 265 international staff from twenty-two Member States plus Canada, Croatia, New Zealand and Norway. Also, the EU will spend EUR54.6 million between May 2010 and May 2011 (European Union June 2010). By

[13] For a more detailed analysis of these cases, see Guild (2008, 2010).

EU standards, this is a serious monetary commitment. The EUPOL Afghanistan mission has provided capability-building to the Afghani police in the capital, Kabul, and will soon be extended to other cities including Herat, Kandahar, Maza-e-Sharif. So far, this project has led to the training of over 1,000 policemen in criminal investigation techniques, 675 police trainers, and over 300 inspectors within the Ministry of the Interior in basic investigation techniques (European Union June 2010). In particular, the emphasis has been on training an Afghani police force that abides by the rule of law and fully respects human rights. It is arguable whether this is specifically a counterterrorism project, but it will certainly lead, in the long-term, to Afghanistan being able to train its own forces to deal with crime - and terrorism is just one possible crime. Even so, the EUPOL mission in Afghanistan has been hampered by problems such as the lack of commitment by Member States that have undermanned and under-equipped personnel. The deteriorating security situation has also played a role in the grounds being unsuitable and unsafe for such a mission (New York Times Website, 17 November 2009).

However, the fact that the EU has been able to deploy this mission represents progress; prior to 9/11, this sort of mission would quite simply not have happened. Most importantly, this demonstrates that the EU is beginning to take on a greater role in certain kinds of foreign policy projects focusing on the 'soft' side of security.

EU-US counterterrorism relationship

Before 9/11, the EU and the US had only informal agreements pertinent to security. The Transatlantic Declaration of 1990 and the New Transatlantic Agenda (NTA) of 1995 made brief references to counterterrorism co-operation and other security threats, but very little that can be considered concrete. Since 2001, co-operation between the EU and the US has broadened rapidly. Rees pointed out that "[t]he US regarded the EU as its most important potential collaborator, but only when the Union was ready to assume this mantle" (Rees 2006: 43). Nine years later, in 2010, there are agreements cutting across many areas of what could be considered counterterrorism co-operation (and were certainly motivated by terrorism): two Europol-US Agreements; two judicial agreements on Legal and Extradition Assistance; the Container Security Initiative (CSI); three Passenger Name Record (PNR) Agreements; and most recently, and perhaps controversially, the so-called 'SWIFT Agreement' (Society for Worldwide Interbank Financial Telecommunication) or Terrorist Financing and Tracking Programme (TFTP). Kaunert argues that in "non-military areas related to counterterrorism, the relationship has been mutually beneficial" (2010a: 42). It has been mutually beneficial because the US has been able to negotiate with one actor rather than 27, and the EU has received recognition from its most important partner (Kaunert 2010a: 42). Thus, the EU-US counterterrorism is both broad-ranging and confers benefits to both sides.

Even so, Argomaniz (2009) has pointed out that, in the case of the PNR Agreement, the EU has adopted the role of 'norm-taker' rather than 'norm-maker'. He suggests that, due to the asymmetrical relationship which exists between the EU and the US as a result of the structural imbalances based on the nature of the two actors, the EU has sometimes reluctantly been forced to adopt US security norms that "did not fit easily with the European threat perceptions and strategy of response" (Argomaniz 2009: 120). The CSI also presents a similar story where the US required its customs officials to be stationed in European seaports to monitor what was going to the US (Rees 2008: 108). This asymmetry may well exist. However, the agreements were not all made with the consent of all the EU's institutions. The European Parliament (EP) challenged the first PNR Agreement and the ECJ struck down the agreement because it lacked an appropriate legal basis (Argomaniz 2009; Pawlak 2009). As Argomaniz points out, this was actually counter-productive because the

second agreement was concluded by the Presidency on behalf of the EU, rather than the EC – where the ECJ had no jurisdiction - and hardened the US Administration's stance on the agreement. In contrast with the PNR Agreement, in the case of the SWIFT Agreement, it has proved much more difficult for the US to force its security agenda on the EU. With the institutional changes introduced by the Lisbon Treaty, the EP has been able to raise several issues regarding the handing over of bulk data of European citizens to US authorities. As a result, the first (interim) agreement, which was adopted in November 2009, was strongly rejected by the EP in February 2010. This has served to gain concessions from the US as shown in the second proposal in June 2010 when *inter alia* a role for Europol was included, which will apparently be able to reject "unjustified requests" for data (EU Observer 10 June 2010). In a second vote, in July 2010, the revised SWIFT Agreement was approved by the EP. Therefore, the US is not always able to get its own way on security matters. Here, it will also be interesting to see how Europol's role develops.

In sum, although the US has initiated most of the above co-operation, it has had to make concessions at times. In particular, this has been the case in relation to the SWIFT Agreement. In itself, the EU's emergence as a recognised actor is of interest because the EU and the US - not the Member States - have been the negotiating parties. The US recognised that the EU has the responsibility for negotiating the agreements (although they do have to be ratified in each Member State's parliament). This is crucial because it means that the EU is increasingly being seen as an international actor in security and counterterrorism – even if certain developments within the EU have been initiated by the US.

The Instrument for Stability (IfS)

The IfS is the 2007 follow-up to the previous Rapid Reaction Mechanism (RRM). The RRM was set up in February 2001 to help increase the EU's capabilities involvement in crisis situations. The IfS is based within the Commission (making it previously a first pillar project), but it has a purely third country focus making it an externalisation of the EU's internal policies. The objective of the IfS is to strengthen "the capacity of law enforcement and judicial and civil authorities involved in the fight against terrorism and organised crime, including illicit trafficking of people, drugs, firearms, and explosive materials and in the effective controls of trade and transit" (European Parliament and European Council 2006). Missions under the old RRM could not exceed more than six months; however, under the IfS, they can now last up to 18 months. The budget of the IfS is EUR2.062 billion between 2007 and 2013.[14] Whereas under the RRM the EU had a budget of roughly EUR30 million a year, the IfS will provide EUR100 million, which will rise to EUR400 million a year by 2013 (European Commission 2008). The IfS shows an expanded capability for the EU to conduct operations autonomously. EUR2 billion may not necessarily be a vast amount of money, but it is a substantial improvement upon previous amounts set aside for EU crisis management – of which counterterrorism can be seen as one part.

The EU has undertaken several projects related to counterterrorism under the IfS. For example, the 2007-2008 Annual Indicative Programme put aside 50 per cent of its EUR19 million to combat drug trafficking in Afghanistan, as well as providing support to the African Centre for Study and Research on Terrorism (ACSRT) (European Commission 2007). Importantly, the IfS is beginning to take significant actions in strategically important areas; for instance, a sizeable civilian project of EUR11.5 million has recently started in Pakistan

[14] The breakdown of the figures is as follows: EUR1.587 billion for crisis response and preparedness, EUR266 million for non-proliferation of WMDs, EUR118 million for trans-regional security threats, and EUR91 million for administrative expenditure (European Commission 2008).

which is aimed at building up law enforcement capability (European Union 2010). In the long term, this kind of project may help third countries to combat the threats that they face. Lastly, the IfS is starting a global project with funding of EUR10-14 million between 2009-2011 to support countries in implementing UN Security Council Resolutions, Conventions and Protocols, and the UN Strategy on Counterterrorism. In particular, projects for the Sahel area of Africa (Mali, Mauritania, and Niger) and Afghanistan and Pakistan are at the top of the agenda. Overall, the IfS is undertaking projects against overlapping threats in many areas of the world. This is evidence again of the EU's increasing identity and role as a counterterrorism actor.

Conclusion

Terrorism, in several forms, poses a threat to many European countries, with respect to fundraising, training, and/or planning. Many EU Member States therefore have an interest in combating terrorism. Because of the porous borders in Europe, the EU has had to take an increasing role in co-ordinating this response. Europe faces threats from North Africa, the Sahel, and the Afghanistan-Pakistan region, but more importantly terrorism in these countries threatens their stability. Thus, the EU must take actions for both the safety of Europe and that of third countries.

In response to these threats, the EU has used both internal tools for external purposes and foreign policy tools. By taking into account a broad understanding of foreign policy and conceptualising the EU as a *sui generis* actor, the EU emerges as an actor that has evolved considerably and in many directions since 9/11. Admittedly, Member States have kept hold of their military and intelligence assets, but this has not prevented the EU from developing in areas other than these. Additionally, the US 'war on terror' has made it difficult for the EU to make alternative efforts, and differing threat perceptions within Europe have without doubt hampered the EU's ability to combat terrorism. However, these challenges have not prevented the EU from developing an increasing number of tools and competences to combat terrorism. Comparing the EU's competences in 2001 with those which it has in 2010 shows how far the EU has come. Although challenges still exist and it is premature to argue that the EU has become a significant counterterrorism actor, it is undeniable that developments since 2001 have been impressive – particularly given the kind of actor that the EU is. Looking at the broad range of activities that the EU has undertaken since 9/11, from counterterrorism financing activity to the IfS, it can be concluded that the EU has made considerable progress in its development as a counterterrorism actor since 2001.

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'The Fear of Insignificance': New Perspectives on Harmonising Police Cooperation in Europe and Australia

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Abstract

Despite the fact that Australia and the European Union (EU) have different structures of governance, histories, and cultures, both entities face remarkably similar problems in relation to police cooperation across borders. Australia is divided in nine different criminal jurisdictions, each of them policed by its own police force. Problems of border crossing, information exchange and joint investigations therefore arise similar to those in the EU. These problems have intensified in the 20th century with globalisation and the increased mobility of offenders. Several strategies, both legal and administrative, have necessarily developed to secure inter-state borders. Many of these strategies, like joint investigation teams, common databases and mutual recognition can be compared to solutions developed in the EU. This article will analyse some of the strategies that have been developed in Australia and in the EU to out-balance the lack of borders within them. It will be discussed what the major common impediments to police cooperation are in both entities. As many problems of cross-border policing result from the fact that law enforcement strategies are purely regional, it will be explored how more advanced cooperation strategies could be harmonised at the EU and Australian Federal levels. The major inhibiting factor in relation to harmonisation of legal frameworks in both entities will be defined as 'the fear of insignificance' or the fear of state actors to lose their individual identities in the process of harmonisation.

Keywords

Police cooperation; Harmonisation; European Union; Australia

THIS ARTICLE FOCUSES ON POLICE COOPERATION, SPECIFICALLY INVOLVING AN examination of the similarities and differences between Australian and European Union (EU) strategies and the prospect for legal harmonisation in this field. Police cooperation is an important issue in both systems since, unlike criminals, police agencies are territorially-bound and struggle with significant legal and operational barriers to working across borders. Problems of cooperation arise for Australia and the EU since both comprise a number of distinct legal jurisdictions that do not have uniform or common laws governing criminal procedure, substantive offences and police laws. This article examines the concept and strategies of legal harmonisation employed in these two systems to promote more effective cross-border police cooperation. Harmonisation is defined broadly in this article as encompassing the promotion of legal uniformity or the creation of overarching legal frameworks, as well as 'softer' measures, such as the approximation of standards and practices through common training initiatives and institutions that facilitate police cooperation and information exchange.

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The comparison identifies the challenges to harmonisation processes in both Australia and the EU, focusing on the role of state actors and police practitioners. These two groups do not necessarily welcome legal harmonisation. Police practitioners may resist harmonisation because it adds another layer of bureaucratic complexity and inhibits established (informal) processes of cooperation, while states in turn may resist harmonisation because it infringes upon sovereign powers of law-making in a field which is traditionally regarded as the heartland of national sovereignty. At the state and practitioner levels, the question arises whether resistance to harmonisation of cooperation strategies across-borders is more evident in a supranational union such as the EU, or in a federation, such as Australia. Even though there are constitutional differences between these systems, cross-border cooperation could be enhanced by the adoption of similar solutions and strategies. The article highlights the distinctive features of cooperation strategies adopted in Australia and in the EU, specifically examining whether the approaches introduced in one system could usefully inform the development of policy in the other.

Australia is a federal state and is divided into nine different criminal jurisdictions[1], each of them policed by its own law enforcement agencies.[2] Although Australia and the EU have very different structures of governance, histories, and cultures, both systems face surprisingly similar problems in relation to police cooperation across-borders. In both systems, the importance of police cooperation across jurisdictional boundaries has intensified in the late 20th century with the gradual abolition of borders, globalisation and the increased mobility of offenders.[3] Several strategies, both legal and administrative, have been developed as a response in both systems to secure external and internal borders. In Australia and in the EU, these measures have included the formation of cross-jurisdictional joint investigation teams, the creation of common information databases and the mutual recognition of criminal procedural requirements, such as surveillance and arrest warrants.

EU and Australian legal frameworks in the field of police cooperation

With a multitude of legal competences to deal with crime spread across different jurisdictions in Australia and the EU, a 'patchwork' system of cooperation strategies and laws has emerged. As part of this 'patchwork', some jurisdictions are further advanced in developing their links with other jurisdictions. Since the 1950s, many neighbouring states within Europe have exercised their inherent sovereign right to enter into bilateral and multilateral treaties and agreements to enhance cross-border cooperation. The legal norms governing cross-border cooperation today are a mixture of regional international treaties and agreements, and EU law. The latter has produced a number of EU initiatives aimed at improving cooperation and establishing minimum standards in specific areas, such as information exchange.[4] Due to the resulting diversity of bilateral, multilateral and

[1] Six states, two territories and an overarching federal jurisdiction. For a discussion of the growth of federal criminal law and jurisdiction, see S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), pp 103-106.
[2] M. Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994), pp 14-23.
[3] See for example Bowling, 'Transnational Policing: The Globalization Thesis, a Typology and a Research Agenda', (2009) 3(2) *Policing* 149; H. Busch, *Grenzenlose Polizei? Neue Grenzen und Polizeiliche Zusammenarbeit in Europa* (Dampfboot Verlag, 1995), pp 285-319. In relation to the impact of globalisation on policing see generally Reiner, 'Policing in a Post-Modern Society', (1992) 55(6) *The Modern Law Review* 761 cited in Kempa, Stenning and Wood, 'Policing communal spaces: A reconfiguration of the 'mass private property' hypothesis' (2009) 44 *British Journal of Criminology* 562, 565-566; A. Wakefield and J. Fleming (eds), *The SAGE Dictionary of Policing* (Sage, 2009), pp 70-71 and 124-126. See in relation to Australia: Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement* November 2003, i-v.
[4] See for example M. Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der strafrechtlichen Zusammenarbeit der Europäischen Union* (Bonn University Press, 2007), pp 21-49; V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 235-279.

EU strategies, the creation of an overarching legal framework has frequently been discussed in the EU in recent years.[5] Since the Treaty of Lisbon, with its agenda of enhancing cooperation in a range of fields, this debate has become even more topical.[6]

The development of police cooperation in the EU in the last 20 years is impressive considering that many of its current members were in a state of war less than 70 years ago.[7] The purpose of economic union in the 1957 Treaty of Rome was to prevent future wars among these states by including them in one entity with common interests and goals.[8] These goals were mainly economic when the European Economic Community (EEC) of 1958 was established; a common security policy was at that stage not envisaged.[9] However, economic cooperation culminated in the signing of the Single European Act[10] on 28 February 1986, which intensified the process of economic integration by abolishing the internal borders between Member States (Article 8A). The Treaty on European Union (TEU)[11] that entered into force on 1 November 1993 then addressed law enforcement cooperation between the Member States in Title VI on Co-operation in the Field of Justice and Home Affairs (JHA), which was a significant step towards a harmonised EU framework on police cooperation.[12] Article 29 of the TEU prescribed that citizens should be provided with a high level of safety within an Area of Freedom, Security and Justice by preventing and combating crime in particular among others terrorism, through closer cooperation between police forces, customs authorities and other competent authorities in the Member States.[13]

The existing police cooperation strategies between EU Member States today go far beyond the initial EEC Treaty aims of creating peace, economic prosperity and stability. Advanced bilateral and multilateral cooperation initiatives have developed amongst the Member States and this has required the partial surrender of sovereignty rights in order to facilitate the exercise of powers by law enforcement officials on foreign territory.[14] This development is particularly remarkable as policing is one of the most 'sovereignty sensitive' functions of a nation-state.[15] Furthermore, cooperation strategies were developed notwithstanding the existence of divergent cultures, structures, languages and

[5] See in relation to the harmonisation of criminal law and third pillar measures for example V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 59-110; A. Klip, *European Criminal Law. An Integrative Approach* (Intersentia, 2009); A. Klip and H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Arts and Sciences, 2002); P. Asp 'Harmonisation and Cooperation within the Third Pillar. Built-in Risks' (1999) 4 *Cambridge Yearbook of European Legal Studies* 15.
[6] See for example Ladenburger, 'Police and Criminal Law in the Treaty of Lisbon. A New Dimension for the Community Method', (2008) 4(1) *European Constitutional Law Review* 20.
[7] M. Dedman, *The Origins and Development of the European Union, 1945-1995: A History of European Integration* (Routledge, 1996), pp 10-11; J. Pinder and S. Usherwood, *The European Union: A Very Short Introduction* (Oxford University Press, 2007), pp 1-3.
[8] Preamble to the Treaty establishing the European Coal and Steel Community, Treaty of Paris of 18 April 1951, entered into force on 25 July 1952; P. Craig and G. de Bùrca, *EU Law, Text, Cases and Materials* (Oxford, 2007), p 7; J. Pinder and S. Usherwood, *The European Union: A Very Short Introduction* (Oxford University Press, 2007), pp 3-6.
[9] See Preamble to the Treaty establishing the European Economic Community, Treaty of Rome of 25 March 1957, entering into force on 1 January 1958; J. Pinder and S. Usherwood, *The European Union: A Very Short Introduction* (Oxford University Press, 2007), pp 3-6.
[10] *Official Journal of the European Communities* (Hereafter: OJ) L 169, 29 June1987.
[11] OJ C 191, 29 July 1992.
[12] J. Monar, N. Neuwahl, D. O'Keeffe and W. Robinson, *Butterworths Expert Guide to the European Union* (Butterworths, 1996), p 247; Fijnaut, 'Police Co-operation and the Area of Freedom, Security and Justice', in N. Walker (ed), *Europe's Area of Freedom, Security and Justice* (Oxford University Press, 2004), pp 241-242.
[13] Consolidated version of the Treaty on European Union. OJ C 325/5 of 24 December 2002, p. 21.
[14] See in relation to the Belgium, German, Dutch Cooperation in the common border region Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion', in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), pp 225-226; See more generally J. Sheptycki, *Policing Postmodernism and Transnationalisation* (1996) Paper presented to the Symposium on New Forms of Government, University of Toronto (October 1996, unpublished), 10.
[15] Wallace, 'The Sharing of Sovereignty: the European Paradox', (1999) XLVII *Political Studies* 503, 509-510.

histories of police organisations in those Member States.[16] Today, police cooperation across the 27 Member States of the EU has developed to the point that it can even be compared with cooperation within a federal system such as Australia.

With the emergence of European terrorism in the 1970s, police cooperation became increasingly a focus of attention for law-makers, as well as police and policy practitioners.[17] This led to the development of a number of intergovernmental initiatives, one of the earliest developments being the establishment of the TREVI Group in 1976.[18] TREVI was an intergovernmental forum that dealt with a range of issues, not limited exclusively to terrorism, in regular meetings at ministerial and officer level.[19] This institution is comparable to Australian developments in the field of cooperative federalism, for example, within the framework of the Council of Australian Governments (COAG), the intergovernmental Ministerial Council for Police and Emergency Management – Police (MCPEMP), as well as regular inter-police agency meetings of the Senior Officers Group (SOG) and the Police Commissioners' Conference (PCC).[20]

Since the Federation of the Australian Colonies in 1901, Australia does not have enforced border controls between its states and territories.[21] The nine different jurisdictions work under their own distinct criminal laws and criminal procedures. Each state and territory has its own policing agencies with territorial competences, which are overlaid by federal law enforcement agencies and competences, principally the Australian Federal Police (AFP) and the Australian Crime Commission (ACC).[22] There is no national legislation establishing common policing regulations, standards, practice or policy, and there is no direct federal control of the various state or territory police agencies.[23] Nevertheless, intergovernmental national meetings of Police Ministers, Police Commissioners, Senior Officers and other representatives of the states, territories and the Commonwealth regularly take place to promote coordinated responses to policing and security issues of national importance.[24]

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[16] B. Hebenton and T. Thomas, *Policing Europe: Co-operation, Conflict and Control*, (St. Martin's Press, 1995), pp 24-37. By now, these differences can be observed amongst 27 Member States.

[17] H. Busch, *Grenzenlose Polizei? Neue Grenzen und Polizeiliche Zusammenarbeit in Europa* (Dampfboot Verlag, 1995), pp 285-292.

[18] B. Hebenton and T. Thomas, *Policing Europe: Co-operation, Conflict and Control*, (St. Martin's Press, 1995), pp 70-72; C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), pp 38-39; Klosek, 'The development of international police cooperation within the EU and third party states: a discussion of the legal bases of such cooperation and the problems and promises resulting thereof', (1999) 14 *American Universities International Law Review* 599, 612-619; See in relation to the origins of the name TREVI: J. Occhipinti, *The Politics of EU Police Cooperation – Towards a European FBI* (Lynne Rienner Publishers, 2003), p 31: one explanation is that TREVI was named after the Trevi fountain in Rome where the original agreement was concluded, another that it was a play on words on the name of the first Dutch chairman in 1976, A.R. Fonteijn, and a third that it is an acronym for the French 'terrorism, radicalisme, extrémisme et violence internationale'.

[19] B. Hebenton and T. Thomas, *Policing Europe: Co-operation, Conflict and Control*, (St. Martin's Press, 1995), pp 70-72; C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), pp 38-39.

[20] See outline at Australian Attorney-General's Department Homepage at http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP286BA8F5F45D18D6CA2571D50003D6FB, retrieved 13 May 2010.

[21] *Commonwealth of Australia Constitution Act 1900* (UK) (hereafter the *Constitution*).

[22] M. Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994), p 7; in 2010 ASIO, the Australian Intelligence Office was further granted enforcement powers.

[23] This is subject to the qualification that the AFP is contracted by the ACT Government to provide policing for the Australian Capital Territory.

[24] C. Edwards, *Changing Policing Theories for 21st Century Societies* (Federation Press, 2005), pp 31-33; A recent example is the national response to serious and organised crime, which has led to the widening of the federal criminal law and powers of the ACC. It has also led to the adoption of tougher offences at the state level: see S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), Ch 15.

The competences of the AFP are strictly limited by federal statute.[25] The legislative competences of the Commonwealth of Australia are determined in Chapter I, Part V of the Constitution, while the competences of Australian states and territories are contained in Chapter V.[26] The Constitution recognises autonomy in relation to legislative powers for the states and territories.[27] This has similar effects in practice to the distribution of power between the EU and the Member States, and amongst Member States *inter se*. By cooperating with other states and territories, for example by exchanging information or allowing foreign police on one's territory and state, territorial sovereignty in relation to criminal matters and law enforcement is similarly challenged in Australia and in the EU.[28] Since 2000 there has been a more determined effort to overcome police cooperation problems in Australia. The primary focus has been on facilitating information exchange between police agencies through the CrimTrac national database and regulating covert operations (called "controlled operations") across-borders through mutual recognition measures.[29]

Comparing the EU and Australia in the field of police cooperation

In the EU, the academic literature examining police and judicial cooperation through harmonisation is vast.[30] By comparison, the equivalent Australian literature is under-developed, with limited academic commentary on the topic. There is more extensive material in the field of harmonisation of model criminal laws, and over the past two decades, there has been a succession of discussion papers and reports covering a wide diversity of substantive criminal law topics with a view to completing a Model Criminal Code for Australia. There has been significant scholarly engagement with these reform proposals.[31] However, the only significant analysis examining the 'harmonisation' of cross-border police cooperation laws in Australia remains a 2003 discussion paper and report called *Cross-Border Investigative Powers for Law Enforcement.* This governmental report was prepared by an *ad hoc* group, the Joint Working Group on National Investigative Powers, following a Leaders Summit on Terrorism and Multijurisdictional Crime held in 2002 to address Australia's legal capabilities in this area. The report recommended the introduction of model laws to achieve consistency in the mutual recognition of laws between Australian states and territories across a wide domain of law enforcement

[25] See Section 8 of the *Australian Federal Police Act* 1979 (Cth).
[26] See *Constitution* at http://www.aph.gov.au/SEnate/general/constitution/index.htm.
[27] See in relation to the special standing of territories in Australia Chapter VI, section 122 of the *Commonwealth of Australia Constitution Act 1900* (UK).
[28] A. Sutton and S. James, 'Evaluation of Australian Drug Anti-Trafficking Law Enforcement', (1996) *Australasian Centre for Police Research*, Report Series Number 128, 100-104.
[29] Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement* November 2003, i-v.
[30] See for example V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 59-110; A. Klip, *European Criminal Law. An Integrative Approach* (Intersentia, 2009); A. Klip and H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (Royal Netherlands Academy of Arts and Sciences, 2002); P. Asp 'Harmonisation and Cooperation within the Third Pillar. Built-in Risks' (1999) 4 *Cambridge Yearbook of European Legal Studies* 15.
[31] Mathew Goode, one of the key governmental lawyers involved in the projects, has published widely on the progress of the Model Criminal Code: see Goode, 'Codification of the Australian Criminal Law', (1992) 16 *Criminal Law Journal* 5; Goode, 'Constructing Criminal Law Reform and the Model Criminal Code', (2002) 26 *Criminal Law Journal* 152; Goode, 'Codification of the Criminal Law', (2004) 28 *Criminal Law Journal* 226. Other scholars have been more critical of the lack of implementation of the Code, see Gani, 'Codifying the Criminal Law: Implications for Interpretation', (2005) 29 *Criminal Law Journal* 264. One of the leading textbooks, S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), makes extensive use of the Model Criminal Code recommendations in Chapters 2 and 15.

including controlled operations, assumed identities, witness protection and surveillance warrants.[32]

Both the EU and Australia are similarly committed to creating overarching legal frameworks regulating police cooperation. In Australia, this goes further, including the promotion of uniformity of laws between the Commonwealth, states and territories. This article highlights the challenges arising from the 'patchwork' of legal frameworks governing cooperation strategies, and the obstacles to effective harmonisation in both systems.

The first part of the article introduces the key concepts relevant to the harmonisation of legal frameworks in the field of police cooperation in both systems, such as the actors involved and their power to inhibit the development of harmonisation and legal uniformity. The second part of the article describes the evolution of regional and harmonised police cooperation in Australia and in the EU. Two case studies will be assessed in relation to each system. One case study focuses on regional cooperation, whilst another addresses a harmonised strategy. The outcomes will be compared in the final part of the article to determine in which of the two systems harmonisation is more likely to develop.

Key concepts relevant to the harmonisation of legal frameworks in the field of police cooperation

Actors in the field of police cooperation

Two actors can be distinguished in the field of police cooperation in Australia and in the EU: practitioners working across jurisdictional boundaries and states entering into cross-jurisdictional treaties and agreements to support this cooperation. At the bilateral and multilateral levels, a number of progressive multi-jurisdictional cooperation arrangements have been developed by practitioners and supported by legal agreements between states.[33] However, resistance of these actors could be observed towards the harmonisation of laws, standards and practices at the EU and Australian federal levels.[34]

Practitioners have expressed fears that the harmonisation of laws regulating police cooperation and the creation of common frameworks and institutions reduces the efficiency of cross-border policing. According to interviews with Australian practitioners, the creation of a uniform criminal procedural law is perceived to result in the restriction of their powers. A general preference exists for informal cooperation, rather than regulation under a common legal framework.[35] Similar attitudes can be observed in relation to police

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[32] See the Report of the Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement,* November 2003 and related Discussion Papers in the different Australian Jurisdictions.

[33] See for example in relation to the EU the Meuse-Rhine Euroregion Cooperation Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion', in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008); See in relation to Australia the NPY Lands Cooperation, as for the first time outlined, Fleming, 'Policing Indigenous People in the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Lands', in Hufnagel, S., Bronitt, S. and Harfield, C. (eds), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives* (Routledge, 2010) (Forthcoming).

[34] See below Europol and CrimTrac case studies.

[35] Interviews have been conducted with Australian police officers, commissioned and non-commissioned, from several federal and state police agencies. Interviews conducted with officers in the Australian Federal Police, CrimTrac and Victoria Police in particular, stressed the preferences outlined here. However, there was a general agreement on the advantage of legal harmonisation in the field of criminal procedural law. Fears were more prominent in relation to the particular standards that could be harmonised and the lowering of enforcement powers.

cooperation in the EU. It was stressed in interviews with EU practitioners that the establishment of EU legal frameworks creates another level of bureaucracy potentially slowing down processes of cooperation.[36] In line with the Australian practitioners, interviewees in the EU emphasised the advantages of informal cooperation.[37] However, in both systems practitioners emphasised that they would welcome harmonisation that enhances cooperation practice and specifically tackles existing difficulties.[38] While these findings do not lead to the conclusion that practitioners inhibit harmonisation processes, their perceptions need to be taken into account with a view to enhancing harmonisation in both systems.

Harmonisation can be inhibited by the lack of agreement on or implementation of common legal frameworks by state actors. These are EU Member States in the EU and Australian states and territories in Australia. Due to the sovereignty-sensitive area of state security in which police cooperation is positioned, most decisions to establish common legal frameworks are intergovernmental and require the consensus of all state actors, which is difficult to achieve among 27 EU Member States or nine Australian jurisdictions.[39] The willingness of states to cooperate with a view to the creation of harmonised legal frameworks is therefore of crucial importance. Furthermore, harmonised legal frameworks that were once established, for example, in the form of a Convention in the EU or 'model laws' in Australia, need to be implemented uniformly by all states within the systems.[40] The case studies below will assess whether processes of intergovernmental agreement and the implementation of harmonised legal frameworks are hampered by the behaviour of state actors.

Theoretical framework: the 'fear of insignificance'

This article does not predominantly deal with the practitioner level, but rather with the issue of barriers to 'state-to-state' cooperation. The underlying presumption is that notwithstanding the obvious loss - or due to the obvious loss - of state sovereignty in both systems to the federal and supranational level respectively, Australian states and territories and EU Member States have resisted the trends towards centralisation or at least more centralised coordination by opposing harmonisation processes.[41]

This article broadly applies concepts derived from social psychology to explain state behaviour towards police cooperation. The 'fear of insignificance' is a psychological concept that applies to individuals, but also seems apt to describe the reaction of state

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[36] On the EU side, interviews were conducted with practitioners involved in cross-border cooperation for example in the Common German-French Centre for Police and Customs Cooperation in Kehl, Germany, the Bureau for Euregional Cooperation in Maastricht, The Netherlands, with EU liaison officers, a Europol official and senior officers coordinating cooperation at the German-Dutch border and in the Scandinavian countries.

[37] *ibid.*

[38] All practitioners interviewed in Australia and the EU generally agreed that harmonisation could enhance cooperation. However, they stressed that harmonised legal frameworks needed to take into account the realities of police cooperation, rather than watering down existing standards and creating further bureaucratic hurdles.

[39] See for example in relation to decision-making processes in the EU V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p 9; in relation to Australian law-making processes on the Commonwealth as well as the state and territory levels, see Chapters I and V of the *Constitution*.

[40] See for example in relation to the Schengen Convention C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), p 6; and in relation to Australian model laws Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement*, November 2003, i-xx; since the Lisbon Treaty harmonisation can now take place in the form of binding 'directives', which nevertheless still require implementation by EU member states.

[41] This is a long-standing conflict in the field of European criminal law. See V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p 1.

entities in this field when confronted with loss of power over crime matters, which is traditionally the heartland of domestic and local politics in both Australian states and territories and EU Member States. A correlation could exist between the degree of individual identity that is granted to a state by the overarching entity (EU, Australian federal state) and the way this entity acts in the context of police cooperation. The presumption is that the higher the granting of individuality to a state actor by the overarching entity, the more likely the state actor is to cooperate. The analysis is informed by the Freudian concepts used by Ignatieff in his theory of "the narcissism of minor difference"[42] and the idea that despite the change in culture, identity remains as a prominent issue and will not adapt despite cultural change.[43] Further research informing the final analysis of this article has been conducted by Wenzel *et al.* in relation to the in-group projection model. According to Wenzel *et al.*, sub-groups formed under the umbrella of a super-ordinate group enter into conflict and competition in relation to their prototypicality (individuality) rather than developing better sub-group relations.[44] According to this research, sharing a common super-ordinate identity is not sufficient to develop positive sub-group relations, though similar sub-groups could develop positive relations more easily than dissimilar sub-groups.[45] This assertion will be tested contrasting the Australian cooperation model to the EU framework.

The concept of legal harmonisation in Australia and in the EU

The EU and Australia have likewise used mutual recognition and harmonisation of laws to promote police cooperation.[46] While mutual recognition requires acceptance of the laws of one jurisdiction in another jurisdiction, harmonisation promotes the adoption of common legislation or model laws across all jurisdictions. The two processes are generally inter-dependent: as it is commonly claimed in the EU context, the establishment of mutual recognition of criminal procedural laws cannot occur without the harmonisation of certain standards.[47]

Harmonisation is a process aiming at a certain level of approximation of aspects of laws rather than uniformity.[48] The aim of harmonisation is not to create a single authority on any particular area of law; however, it seeks to coordinate different legal systems by eliminating major differences and creating minimum standards.[49] In Australia, it is often described as promoting 'reasonable consistency' across jurisdictions.[50] This article focuses predominantly on the concept of legal harmonisation, but also addresses mutual

[42] Ignatieff, 'Nationalism and the narcissism of minor difference', (1995) 102(1) *Queens Quarterly* 13.
[43] Moore, 'Beyond the cultural argument for liberal nationalism', (1999) 2(3) *Critical Review of International Social and Political Philosophy* 26.
[44] Wenzel, Mummendey and Waldzus 'Superordinate identities and intergroup conflict: The ingroup projection model', (2007) 18 *European Review of Social Psychology* 331.
[45] *ibid.*
[46] See Vermeulen, 'How far can we go in applying the principle of mutual recognition', in C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 241-257 and Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement,* November 2003, i-xx.
[47] See Vermeulen, 'How far can we go in applying the principle of mutual recognition', in C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 241-257.
[48] See lately in relation to the Lisbon Treaty: Borgers, 'Functions and Aims of Harmonisation after the Lisbon Treaty, A Europen Perspective', in C. Fijnaut, and J. Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), p 348.
[49] *ibid.*
[50] Goode, 'Codification of the Australian Criminal Law', (1992) 16 *Criminal Law Journal* 5; Goode, 'Constructing Criminal Law Reform and the Model Criminal Code', (2002) 26 *Criminal Law Journal* 152; Goode, 'Codification of the Criminal Law', (2004) 28 *Criminal Law Journal* 226. Other scholars have been more critical of the lack of implementation of the Code, see Gani, 'Codifying the Criminal Law: Implications for Interpretation', (2005) 29 *Criminal Law Journal* 264.

recognition, for example where its implementation into state and territory jurisdictions is promoted by Australian model laws.

EU legal frameworks impacting on police cooperation between Member States

General

It is much debated whether the abolition of borders in the EU actually heightened the risks of cross-border crime, and therefore justified enhanced cooperation under the Schengen Convention[51], or whether the moves towards greater cooperation purely followed political rhetoric.[52] It can generally be determined that suspected criminals entering neighbouring countries, and thereby another jurisdiction, leads to difficulties for the police pursuing them to obtain an arrest warrant, gain permission to continue the pursuit or general assistance of the police from the country entered.[53] A heightened significance of police cooperation in the EU in the last 20 years can probably be attributed to a number of factors apart from the anticipated rise of cross-border crime with the abolition of borders, like for example, the effects of globalisation, terrorism, organised crime and generally the increased mobility of offenders.[54] Since the 1980s, national police agencies increasingly relied upon efficient cooperation with the police and law enforcement authorities of neighbouring countries to pursue trans-national criminals effectively and to fight the threats of criminality and terrorism.[55] More than ever before, problems became evident in relation to different laws but also divergent cultures, structures and histories of police organisations.[56]

The numerous harmonised EU police cooperation frameworks can be divided into two main categories: regional initiatives that have worked their way up to the EU level – or cooperation between EU Member States – and EU frameworks influencing the cooperation

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[51] See Convention Implementing the Schengen Agreement (1990) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML; note that the Convention is only being enforced since 1995 and was extended to all EU Member States in 1998 via the Schengen Protocol to the Treaty of Amsterdam (OJ L 239 of 22 September 2000, pp. 1-473); J. Monar, N. Neuwahl, D. O'Keeffe and W. Robinson, *Butterworths Expert Guide to the European Union* (Butterworths, 1996), pp 268-269.

[52] See for example a very critical approach focusing on state rhetoric to justify the widening of security powers: H. Busch, *Grenzenlose Polizei? Neue Grenzen und Polizeiliche Zusammenarbeit in Europa* (Dampfboot Verlag, 1995), p 319; M. Anderson and M. den Boer (eds) *Policing Across National Boundaries* (Pinter, 1994) pp 9, 27, 184.

[53] Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721; Schneider, 'Ein grenzüberschreitendes kooperatives Sicherheitssystem. Oder – Auf der Suche nach einer neuen Qualität der Zusammenarbeit', (1998) 52(5) *Kriminalistik* 306; Storbeck, 'La coopération des polices en Europe', (1995) 13 *Les Cahiers de la Sécurité Intérieure* 175.

[54] See among many Bowling, 'Transnational Policing: The Globalization Thesis, a Typology and a Research Agenda', (2009) 3(2) *Policing* 149; H. Busch, *Grenzenlose Polizei? Neue Grenzen und Polizeiliche Zusammenarbeit in Europa* (Dampfboot Verlag, 1995), pp 285-319; In relation to the impact of globalisation on policing see generally Reiner, 'Policing in a Post-Modern Society', (1992) 55(6) *The Modern Law Review* 761 cited in Kempa, Stenning and Wood, 'Policing communal spaces: A reconfiguration of the 'mass private property' hypothesis' (2009) 44 *British Journal of Criminology* 562, 565-566; A. Wakefield and J. Fleming (eds), *The SAGE Dictionary of Policing* (Sage, 2009), pp 70-71 and 124-126.

[55] See J. Monar, N. Neuwahl, D. O'Keeffe and W. Robinson, *Butterworths Expert Guide to the European Union* (Butterworths, 1996), p 247.

[56] See Fijnaut, 'International Policing in Europe: Present and Future', (1994) 19(6) *European Law Review* 600, 600-603; Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721; Schneider, 'Ein grenzüberschreitendes kooperatives Sicherheitssystem. Oder – Auf der Suche nach einer neuen Qualität der Zusammenarbeit', (1998) 52(5) *Kriminalistik* 306; Storbeck, 'La coopération des polices en Europe', (1995) 13 *Les Cahiers de la Sécurité Intérieure* 175.

of Member States – or cooperation within the European Union.[57] EU frameworks influencing Member States' cooperation are, for example, instruments regulating mutual assistance in criminal matters and agencies like Europol and Eurojust. A regional initiative that worked its way up to the EU level is the Schengen Convention, which institutionalised collaboration of EU and non-EU Member States at the legal and operational levels. Other existing police cooperation frameworks are bilateral and multilateral, as well as EU initiatives that have been adopted to enhance the previously mentioned cooperation strategies.[58]

Harmonised European legal frameworks regulating police cooperation

Several European legal frameworks facilitating police cooperation amongst the Member States of the EU have been established since the 1950s.[59] The earliest include the 1957 European Extradition Treaty[60] and the 1959 European Convention on Mutual Assistance in Criminal Matters adopted by the Council of Europe.[61] The Schengen Convention supplemented this European Convention later on with a view to making it more effective.[62] The Conventions facilitated the establishment of a number of regional strategies, such as the conclusion of the 1962 Benelux Treaty on Extradition and Mutual Legal Assistance in Criminal Matters[63], NebedeagPol[64] and cooperation in the Meuse-Rhine Euroregion.[65] While not leading to harmonisation of standards and practices between all Member States, the Conventions led to the creation of advanced and innovative cross-border enforcement in some European regions. The cooperation in the Meuse-Rhine Euroregion will be discussed in more detail below in order to demonstrate the impressive extent to which states have ceded competences in the regional context.

A later harmonised instrument of mutual legal assistance in the EU was the EU Convention on Mutual Assistance in Criminal Matters between the Member States of the EU of 29 May 2000 and the Additional Protocol of October 2001.[66] This Convention is particularly interesting with regard to police cooperation practice as it introduced in its Article 13 a cooperation provision on Joint Investigation Teams (JITs), which became a much debated, but less frequently practiced strategy that highlights the gap between policy and practice in the EU and the reluctance of practitioners to accept a further level of bureaucracy in cooperation.[67] The Convention further harmonised the use of covert policing techniques, such as controlled deliveries (Article 12), undercover operatives (Article 14) and the

[57] See in relation to this distinction Gless, 'Police and Judicial Cooperation between European Union Member States' in C. Fijnaut and J. Ouwerkerk (eds), *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 27-28.
[58] *ibid.*
[59] The term EU will be used more broadly not only describing the present EU, but also all ist legal antecedents, although, from a legal perspective, this is less precise.
[60] See European Convention on Extradition, Paris, 13 December 1957 at http://conventions.coe.int/treaty/en/Treaties/Html/024.htm.
[61] European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959 at http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm.
[62] See Militello and Mangiaracina, 'The Future of Mutual Assistance Conventions in the European Union', in C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 174-175.
[63] See at www.benelux.be; note that the Treaty was amended by the Protocol of 11 May 1974.
[64] Regional cooperation agreement of 1969 between police from The Netherlands, Belgium and Germany in the area of Maastricht, Aachen and Luik.
[65] See T. Spapens and C. Fijnaut, *Criminaliteit en rechtshandhaving in de Euregion Maas-Rijn* (Intersentia, 2005), p 8.
[66] OJ C197 of 12 July 2000.
[67] See Block, 'EU Joint Investigation Teams: Political Ambitions and Police Practices', in S. Hufnagel, S. Bronitt and C. Harfield (eds) *Cross-Border Law Enforcement Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives* (Routledge, 2010) (Forthcoming).

interception of telecommunications (Article 18).[68] While these Conventions furthered regional cooperation, they cannot generally be attributed a harmonising effect. However, the countries that created closer cooperation with neighbouring states under the Conventions demonstrated a considerable willingness to give up competences to enable cooperation, as the case studies will reveal.

Agencies enhancing police cooperation in the EU

In addition to overarching legal frameworks, several other initiatives have been developed to foster EU police cooperation. In relation to information exchange, the most prominent development was the creation of the Europol agency.[69] Like the Schengen Convention, the Europol Convention (and since 2010 the Europol Decision) does not only provide a legal framework for certain forms of police cooperation, but also for operational arrangements. The creation of Europol can be seen as a major surrender of national competences to enhance police cooperation and security. Although the mandate and powers of Europol were and still are subject to controversial debates amongst Member States, in particular in relation to possible enforcement powers[70], the agency is by now an integral part of EU policing. This becomes particularly apparent in more recent developments, such as the expansion of the Europol mandate to initiate investigations and participate in JITs.[71] Europol will therefore be discussed as a case study below.

The Schengen Convention

Already in the times of the European Community and today within the EU context, the Schengen Agreement of 1985[72] and the following 1990 Convention Implementing the Schengen Agreement of 14 June 1985[73] (Schengen Convention) provided a legislative framework for cross-border enforcement between the European states that signed on to them.[74] France, Germany, Belgium, the Netherlands and Luxemburg were the first EU Member States to abolish their common borders.[75] For this reason, a focus lies on these participating countries in the comparison.

The Schengen Convention is a broad legal framework that provides considerable scope and latitude for police initiatives. Amongst other measures, it established the Schengen Information System (SIS)[76] and the possibility of cross-border surveillance (Article 40) and

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[68] See also Article 73 Schengen Convention of 1990.
[69] Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) of 26 July 1995, OJ C316 of 27 November 1995, as well as its protocols, now Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) (OJ L 121/37 of 15 May 2009).
[70] J. Occhipinti, *The Politics of EU Police Cooperation – Towards a European FBI* (Lynne Rienner Publishers, 2003), pp 42-43; V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 165-166.
[71] See in particular in relation to the expansion of the Europol mandate the 'Danish Protocol' OJ C2 of 6 January 2004, p. 3.
[72] See Schengen Agreement (1985) at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&numdoc=42000A0922(01)&model=guichett&lg=en .
[73] See Convention Implementing the Schengen Agreement (1990) at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922(02):EN:HTML; note that the Convention is only being enforced since 1995.
[74] C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), p 6.
[75] These countries signed an Agreement in Schengen on 14 June 1985 on the gradual abolition of checks at their common borders.
[76] The Schengen Acquis as referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999 at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_239/l_23920000922en00010473.pdf at 2.5.

pursuit (Article 41). Title III of the Convention deals with police and security and more particularly its Chapter 1 (Articles 39-47) with police cooperation. In relation to 'hot pursuit', the Convention confers on Member States some flexibility in implementation, which leads to the application of varying degrees of restrictions (Article 41). The impact of the Convention and the measures taken therefore differ from country to country.[77] This makes apparent that, although many sovereignty concerns have been overcome since the establishment of the EU, states still do not surrender competences easily towards the EU and among each other. Article 41 Para 9 of the Convention, for example, gives signatories the margin of appreciation to limit or extend the pursuit into neighbouring states. The drafters of the Convention introduced these individual limits to safeguard the sovereign rights to criminal jurisdiction of Member States.[78] Despite the introduction of the Schengen Convention, France opted out of Article 41 in 1995 and only gradually allowed pursuit into its territory for particular offences.[79] Until recently, Germany, by not having particular restrictions to Article 41, allowed French police officers to engage in 'hot pursuit' onto German territory, though France conversely did not allow similar pursuits by German police officers.[80] It follows that a harmonised approach under the Convention can only be achieved gradually as states try to preserve their sovereignty in this field.

However, the first five Schengen states have already developed very advanced cooperation strategies that involve considerable ceding of competences under the Schengen Convention, like for example the Meuse-Rhine Euroregion cooperation. In particular in the regional context, states use the Convention to promote police cooperation. This becomes also apparent in other regions, like the Nordic countries, although the Schengen Convention was less influential in the establishment of this cooperation. This Nordic Police cooperation scheme[81] has further been labelled 'best practice' in the EU.[82] As the Nordic countries had already abolished passport controls at their common borders in 1957 through the Nordic Passport Control Agreement[83] and display considerable similarities in culture and language, they will be considered in the final comparative analysis with Australia.

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[77] C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), pp 15-17, 538-542.

[78] Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721, 724.

[79] Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721, 724; Interviews at Common German-French Centre for Police and Customs Cooperation conducted in 2007 and 2009; only since 2005 was a mutual cross-border hot pursuit allowed between both countries.

[80] Hertweck, 'Hindernisse auf dem Weg nach Europa: Probleme der grenzüberschreitenden justiziellen Zusammenarbeit', (1995) 49(11) *Kriminalistik* 721, 724.

[81] The five Nordic countries – Denmark, Finland, Norway, Iceland and Sweden have established close police cooperation since the 18th century. In 1952 the Nordic Council was created and in 1957 a mutual passport agreement was established resulting in the abolition of systemic control at the internal borders between the Nordic countries. See D. Koenig and K. Das, *International Police Cooperation: A World Perspective* (Lexington Books, 2001), pp 229-244.

[82] *EU Schengen Catalogue, Volume 4, Police Co-Operation: Recommendations and Best Practices* (Council of the European Union, General Secretariat, June 2003), p. 16.

[83] C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), p 31.

Other developments

Further initiatives that were developed with the intention to improve police cooperation in the EU are the Swedish Initiative[84] and the Treaty of Prüm.[85] In relation to information exchange, both the Swedish Initiative and the Treaty of Prüm make use of the principle of mutual recognition to enable information exchange between Member States and eliminate boundaries created by the differences in national data protection laws.[86] The Treaty of Prüm, similarly to the Schengen Convention, promotes the development of advanced initiatives at regional level.[87] This treaty is, like Schengen, a regional initiative that has been acceded to by an increasing number of Member States and has, at least partly, been adopted at EU level.[88] The development of these initiatives shows that intergovernmental initiatives continue to grow in the field of police cooperation. Harmonised legal frameworks facilitate regional cooperation and enhance law enforcement across borders. A constant interaction takes place between harmonised and regional initiatives, which ensures continued innovation in the field of EU police cooperation and the further surrendering of competences by Member States.

Australian legal frameworks impacting on police cooperation between states and territories

General

The border controls between Australian states and territories have been abolished since the former Australian colonies became a federation in 1901. As all states and territories have different jurisdictions and criminal laws overlaid by federal jurisdiction, they have been facing the problem of cross-border enforcement and police cooperation for considerably longer than the EU.[89] The difficulties of cross-border enforcement in Australia today can be observed in particular in relation to calls for new laws to enable cross-border investigation. These reform proposals deal with mutual recognition of law governing controlled operations, assumed identities, electronic devices and witness anonymity.[90] Although police cooperation has always been very important in the Australian criminal justice system, it has now become increasingly important with regard to the growing threat of terrorism and organised crime, and there have been numerous initiatives to encourage more effective cross-border investigation.[91]

Police cooperation under the constitutional framework

In the Australian context, the power to enforce state and territory laws and the autonomy in making these laws stem from the Australian Constitution. The Commonwealth of Australia Constitution Act states in Chapter V, section 108 that

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[84] Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union (OJ L 386 of 29 December 2006).
[85] Council of the European Union, Treaty of Prüm, 10900/05, Brussels, 7 July 2005.
[86] See for example M. Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der strafrechtlichen Zusammenarbeit der Europäischen Union* (Bonn University Press, 2007), pp 21-49.
[87] For example, it led to the strengthening of cooperation within the German-French Centre for Police and Customs Cooperation as was stressed in interviews conducted at the Centre in 2007 and 2009.
[88] See for a comprehensive overview of the Prüm process Bellanova, 'The "Prüm Process": The way forward for police cooperation and data exchange?', in E. Guild and F. Geyer (eds.), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), pp 201-221.
[89] M. Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994), p. 7.
[90] See the Report of the Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement*, November 2003, i.
[91] *ibid* i-v.

> Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth, shall, subject to this Constitution, continue in force in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration and of repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

The Australian Constitution thereby creates autonomy in relation to legislative powers for the states, which has similar effects in practice as EU Member States' sovereignty. By cooperating with other states and territories, for example by exchanging information or allowing foreign police on one's territory, state sovereignty[92] in relation to national jurisdiction and law enforcement is endangered. This constitutional framework led to the need for states and territories to either trade powers on a bilateral and multilateral basis or give up competences to the federal government to enhance cross-border police cooperation. However, there are also federal criminal laws. Nevertheless, the absence of any plenary power to enact federal laws means that federal criminal laws, to be valid, must be related to a head of power. Thus, drug importation may be proscribed under federal law under two heads of power: the trade and commerce power and the external affairs power, respectively ss51(i) and 51 (xxix). The federal parliament can regulate imports and exports (including narcotics) under trade and commerce, but also under the external affairs powers because of the myriad of international treaties, which Australia has signed to suppress drug trafficking.[93]

The Australian Federal Police

The creation of the Australian Federal Police (AFP) in 1979 has enhanced cross-border law enforcement, but has not furthered cross-jurisdictional cooperation between Australian states and territories. The constitutional limits to the powers of the AFP and the unwillingness of states and territories to transfer more powers to the AFP limit its potential benefits to police cooperation. Similar to the competences of Europol, the powers of the AFP are limited to certain subject areas (see Section 8 of *Australian Federal Police Act 1979* (Cth)).[94] Federal criminal laws, which trigger AFP competence, can also be enforced by state and territory police. This adds a certain level of difficulty to cooperation and indicates a struggle for competences, but can also facilitate cooperation. As the AFP is responsible for federal offences in all states and territories and is therefore not limited by borders, the different jurisdictions can commission the AFP to carry out cross-border tasks, like for example VIP protection.[95] Vice versa, state and territory police can be commissioned to act in investigations falling under AFP competence.[96] This indicates that the existence of different jurisdictions with multiple competences can be beneficial to cross-border policing in Australia.

The AFP can also be a helpful asset to JITs as AFP practitioners usually have a broad knowledge of the legal requirements in a multitude of different jurisdictions.[97] However, the employment of the AFP in cross-jurisdictional teams also presents challenges.

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[92] Only Australian states have sovereignty under Chapter V, Section 108 of the Constitution while the two territories (Northern Territory and Australian Capital Territory) are more dependent on the federal state. However, the territories are also separate jurisdictions as they generate their own legislation, for example in the fields of criminal law and criminal procedure.
[93] S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), pp 810-824.
[94] Note that the AFP unlike Europol has enforcement powers.
[95] Information derived from interview with former AFP officer employed in the field of VIP protection.
[96] See *Australian Federal Police Act* 1979 (Cth), in particular Part I s 4AA and 6-12A.
[97] Interviews conducted with AFP and Victoria Police officers: As AFP officers operate frequently cross-jurisdictionally they get to know a variety of jurisdictions and work and get acquainted with different legal requirements in many jurisdictions.

According to interviews with officers from Australian police forces, state and territory police protect the sovereignty of their jurisdictions towards the AFP, which can hamper cooperation, for example in the area of information exchange.[98] AFP officers are also usually recruited from a higher educational level and often do not have as much experience in 'street level' police work as state and territory police, which can lead to a lower degree of acceptance by state and territory colleagues.[99] These attitudes, however, are personal rather than concerning entire organisations.[100] Particularly in the context of JITs, interviewees stressed that the AFP officers effectively facilitate cooperation and support and/or lead the investigations with often broad knowledge of a multitude of systems. This is an advantage compared to the European model. Europol, while being able to participate in JITs, cannot do so as actively as the AFP as it lacks cross-jurisdictional enforcement powers.[101]

The competences of AFP officers are, however, limited. AFP officers are competent in relation to law enforcement with a cross-border aspect (outside of Australia), federal offences and state offences with a federal aspect.[102] The struggle for asserting competence over particular issues even becomes apparent in the wording of Part I s4AA of the Australian Federal Police Act 1979 (Cth): "(…) (1) For the purposes of this Act, a State offence has a federal aspect if, *and only if*: (…)" (emphasis added). The use of this wording by the drafters of the Act implies an existing fear of the overlapping of state and federal competences. It can be concluded that protection of state sovereignty in the Australian context can be observed at both the practitioner and state levels. While this rather reflects personal attitudes at the practitioner level, it is more objectively reflected in legislation and the reluctance to give up competences to the AFP at the state level.

Cross-border incursions

In the area of cross-border incursions, states have implemented uniform 'special constables' provisions into their legislation to facilitate cross-border enforcement.[103] Due to the territorial sovereignty of states and territories, an Australian police officer can cross a border into another state, but stops being a police officer the moment he enters another jurisdiction. If he is caught exceeding the speed limit for example, he is liable for a traffic infringement.[104] As the 'hot pursuit' of criminals across state and territory borders and other cross-border incursions would otherwise have been impossible, all Australian jurisdictions introduced the legal construct of the 'special constables' into state, territory and Commonwealth law.[105] A 'special constable' is sworn into more than one jurisdiction

[98] Interviews with AFP, Victoria, and former officers from the New South Wales Police were conducted between July 2007 and May 2010 for the underlying PhD research.
[99] Interviews with this result were conducted with officers from the Victoria Police, but AFP officers confirmed these observations.
[100] AFP, Victoria Police, and former New South Wales practitioners were interviewed on the topic of cooperation with the AFP and all highlighted this difficulty.
[101] See in relation to the employment of Europol as head of Joint Investigation Teams: de Lima, 'Europol as the Director and Coordinator of the Joint Investigation Teams', (2006) 9 *The Cambridge Yearbook of European Legal Studies* 313.
[102] See *Australian Federal Police Act* 1979 (Cth), in particular Part I s 4AA and 6-12A.
[103] See Part IV *Australian Federal Police Act* 1979 (Cth); Part 9 *Police Act 1998* (SA); Part IV *Police (Special Provisions) Act 1901* (NSW); Part II *Police Administration Act 2007* (NT); Part V *Police Service Administration Act* 1990 (Qld); Part II *Police Service Act* 2003 (Tas); Part VC *Police Regulations Act* 1958 (Vic); Part III *Police Act* 1892 (WA).
[104] See in relation to controlled deliveries, where the problem becomes even more prominent, Report of the Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement*, November 2003, 1-5.
[105] Part IV *Australian Federal Police Act* 1979 (Cth); Part 9 *Police Act 1998* (SA); Part IV *Police (Special Provisions) Act 1901* (NSW); Part II *Police Administration Act 2007* (NT); Part V *Police Service Administration Act* 1990 (Qld); Part II *Police Service Act* 2003 (Tas); Part VC *Police Regulations Act* 1958 (Vic); Part III *Police Act* 1892 (WA).

and therefore does not leave his/her powers at the border.[106] The 'special constable' provisions are one of the few initiatives to facilitate police cooperation that have been implemented uniformly.

Information exchange

Another more major development - as it brought with it a previously unexperienced amount of harmonisation - was the creation of the CrimTrac agency. CrimTrac is the first Australian common police database that brings together a growing number of different types of information (fingerprints, DNA, etc.) with a view to enable its exchange between the different police forces.[107] CrimTrac was only operational one year after Europol, in 2000. Despite Australia being a federation since 1901, state and territory police could not centrally access certain information up to that date. As CrimTrac has developed innovative strategies to ensure intergovernmental agreement on its initiatives, it will be addressed as a case study below.

Model laws

Model legislation has been introduced in Australia to promote national consistency in the area of criminal procedure. However, the existence of model legislation in this field does not prevent individual jurisdictions from making adjustments appropriate to their particular circumstances and therefore does not ensure a high level of uniform implementation and harmonisation.[108] Due to the sovereignty of states and territories in the field of criminal procedure, they are granted a margin of appreciation in the implementation process, similar to EU Member States in relation to the Schengen Convention. More recently, the principle of mutual recognition has been promoted through model laws in the field of controlled operations, assumed identities, electronic devices and witness anonymity on the basis of the 2003 Cross-Border Investigative Powers Report. The concept of introducing mutual recognition through model laws has already been adopted in relation to forensic procedures[109] and the recognition of search warrants.[110] The model laws promoted by the 2003 Report would be more advanced than the forensic procedures and search warrant initiatives. Under the new laws, a police agency could obtain warrants from the courts in its own jurisdiction that would apply in another jurisdiction.[111] If implemented, this initiative would represent the so far most considerable surrender of competences by Australian states and territories in relation to model laws. However, the implementation process is by now taking seven years and is still not completed.

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[106] Note that a special constable can also be a part-time civilian officer or 'weekend' police.
[107] See www.crimtrac.gov.au.
[108] *ibid* v.
[109] *Crimes Act* 1958 (Vic), ss. 464ZGG-464ZGO; *Crimes Act* 1914 (Cth), Part 1D; *Crimes (Forensic Procedures) Act* 2000 (NSW); *Forensic Procedures Act* 2000 (Tas); *Criminal Investigation (Identifying People) Act* 2002 (WA); *Crimes (Forensic Procedures) Act* 2000 (ACT); *Police Powers and Responsibilities Act (Forensic Procedures) Amendment Act* 2003 (Qld) Part 9 (ss318N-318ZQ).
[110] *Crimes Act* 1958 (Vic), Part IIA (ss. 340-345); *Search Warrants Act* 1985 (NSW), Part 4 (s 24A); *Criminal Investigation (Extraterritorial Offences) Act* 1984 (SA); *Crimes Act 1900* (ACT), Part XA (ss 358A - 358E); *Criminal Investigation (Extraterritorial Offences) Act* 1985 (NT); *Criminal Investigation (Extraterritorial Offences) Act* 1987 (Tas); *Criminal Investigation (Extraterritorial Offences) Act* 1987 (WA).
[111] See the Report of the Leaders Summit on Terrorism and Multijurisdictional Crime *Cross-Border Investigative Powers for Law Enforcement*, November 2003, v-vi.

Regional cooperation agreements in Australia

Unlike in the EU, harmonised legal frameworks facilitating cross-border police cooperation do not exist in Australia.[112] Few bilateral and multilateral formal agreements between Australian states and territories regulating cooperation regionally have been created, which represents a major difference to the EU.[113] Most operations across state and territory borders, if regulated at all, occur upon *ad hoc* Memoranda of Understanding (MOUs).[114] While practitioners by now call for harmonised legal frameworks facilitating cooperation at the regional and federal levels, Australian states and territories rarely enter into formal cooperation agreements.[115] It follows that little advanced cooperation initiatives have developed in Australia leading to a considerable surrender of sovereign powers compared to the EU. It could follow that state and territory sovereignty is even more strongly protected amongst Australian states and territories than amongst EU Member States. However, being a federal system, several federal agencies, like the AFP, have developed that are competent across all jurisdictions and therefore take over cooperation tasks that would in the EU be carried out through bilateral and multilateral Member States cooperation.

Regional cooperation strategies: case studies

Both systems have developed regional cooperation strategies that lead to a considerable ceding of competences by EU Member States and Australian states and territories respectively. The regional cooperation strategies assessed here are the Meuse-Rhine Euroregion cooperation in the EU and the NPY lands cooperation in the Australian context. By examining these regional initiatives in greater depth, common principles can be identified, which could help to promote further harmonisation in both systems.

Meuse-Rhine Euroregion cooperation

In the German, Dutch, Belgium border region, also called 'Meuse-Rhine Euroregion', drug import, tourism and major cities on the German side of the border create problems related to frequent border crossing.[116] A particular problem in this region results from the tolerant approach to soft drugs in the Netherlands, which is based on the regulation of the supply of cannabis through 'coffee shops'.[117] The specific regional demographics and the different drug policies in these neighbouring countries have led to the development of an extensive amount of specialised police cooperation initiatives dealing with these issues.[118]

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[112] S. Bronitt and B. McSherry, *Principles of Criminal Law* (Thomson Reuters, 2010), Ch 15.
[113] An exception is the NPY lands cooperation, see Fleming, 'Policing Indigenous People in the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Lands', in Hufnagel, S., Bronitt, S. and Harfield, C. (eds), *Cross-Border Law Enforcement Regional Law Enforcement Cooperation - European, Australian and Asia-Pacific Perspectives* (Routledge, 2010) (Forthcoming).
[113] See below Europol and CrimTrac case studies.
[114] See for example MOU: 0203-2009 between the Department of Child Protection Western Australia and Western Australia Police in relation to The Family and Domestic Violence Co-location Model at www.childprotection.wa.gov.au.
[115] Interviews conducted with Australian police practitioners from the AFP, VicPol and CrimTrac.
[116] See T. Spapens and C. Fijnaut, *Criminaliteit en rechtshandhaving in de Euregion Maas-Rijn* (Intersentia, 2005), p 8.
[117] Korf, 'Dutch Coffee Shops and Trends in Cannabis Use', (2002) 27 *Addictive Behaviour* 851, 852.
[118] Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion', in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), p 225.

The creation of the Meuse-Rhine Euroregion cooperation was supported by a number of European Conventions, but also regional cooperation arrangements.[119] Cross-border cooperation strategies for this region are laid out in the Benelux Cooperation Treaties[120], which were expanded by the Treaty of Senningen,[121] the Treaty of Enschede,[122] and the Treaty of Prüm,[123] as well as several other bilateral and multilateral agreements. According to these legal frameworks, police in the Meuse-Rhine Euroregion are allowed to cross the borders in 'hot pursuit',[124] to carry weapons, and to make use of their weapons when crossing into another jurisdiction.[125] Furthermore, they are allowed to exercise certain powers on foreign territory, for example in case of emergency, and can even exchange physical evidence directly.[126] Information exchange between these states takes place directly between the criminal investigation departments in charge.[127] The borders and main transport routes are patrolled by Joint Hit Teams (JHTs) consisting of law enforcement personnel from both sides of the border.[128] Several institutions facilitating police cooperation in this border region have been created, such as EMMI (Euregional Multimedia Information Exchange) and EPICC (*Euregionales Polizei-Informations-Cooperations-Centrum*).

To enable this very advanced cooperation, the participating Member States have had to surrender considerable competences. This has been facilitated in a regional context as only a limited number of Member States have been involved that have had a history of close cooperation since the 1960s.[129] The Meuse-Rhine Euroregion cooperation is also exclusively beneficial to a specific region, rather than along an entire common border, which further limits the surrender of sovereignty. Strategies in the case of the Treaty of Enschede, for example, only apply at certain parts of the border, rather than uniformly.[130] This indicates in turn the prevailing sovereignty concerns between the participating Member States.

However, regional cooperation initiatives such as the Meuse-Rhine Euroregion are an integral part of the advancement of European police cooperation. They are on the one hand the result of EU legal harmonisation, but can on the other hand promote further harmonised legal frameworks. The Meuse-Rhine Euroregion cooperation was partly

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[119] For example the 1957 European Extradition Treaty and the 1959 European Convention on Mutual Assistance in Criminal Matters, but also the regional police working group between The Netherlands, Belgium and Germany, called 'NebedeagPol'.

[120] See in particular the Benelux Treaty on Extradition and Mutual Legal Assistance in Criminal Matters was signed in Brussels, 27 June 1962 and entered into force on 11 December 1967 (available at http://www.benelux.be/).

[121] *Verdrag tussen het Koninkrijk België, het Koninkrijk der Nederlanden en het Groothertogdom Luxemburg inzake grensoverschrijdend politieel optreden*, 8 June 2004.

[122] *Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de grensoverschrijdende politiële samenwerking en de samenwerking in strafrechtelijke aangelegenheden*, March 2005.

[123] *Prüm Convention* (2005) Brussels, 7 July 2005, Doc 10900/05 see at http://register.consilium.europa.eu/pdf/en/05/st10/st10900.en05.pdf.

[124] Before those treaties were concluded, police crossing borders in hot pursuit had to stop within a certain radius from the border, between The Netherlands and Germany 10 km.

[125] Interview with cooperation coordinator of the Dutch Police, Dutch-German border region, Venlo The Netherlands, 2008.

[126] *ibid.*

[127] Spapens, 'Policing a European Border Region: The Case of the Meuse-Rhine Euroregion', in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union* (Ashgate, 2008), p 229.

[128] *ibid* 226-229.

[129] One of the underlying initiatives, the NebedeagPol working group had been established in 1969 and the Benelux Treaty on Extradition and Mutual Legal Assistance in 1967.

[130] *Verdrag tussen het Koninkrijk der Nederlanden en de Bondsrepubliek Duitsland inzake de grensoverschrijdende politiële samenwerking en de samenwerking in strafrechtelijke aangelegenheden*, March 2005.

established under preceding harmonised and regional European initiatives, like the 1962 Benelux Treaty, the 1959 Convention on Mutual Legal Assistance including its 1978 and 2001 Protocols and NebedeagPol. It was also influenced by more comprehensive legal frameworks, such as the Schengen Convention and the 2000 Mutual Assistance Convention,[131] which were of crucial importance to develop sophisticated strategies in this region.[132] Advanced regional cooperation initiatives that have inspired the Euroregion cooperation, such as the cooperation under the Benelux Treaties and NebedeagPol, have been incorporated into the Schengen Convention.[133] It follows that regional cooperation (Benelux, NebedeagPol) has inspired harmonised cooperation frameworks (Schengen Convention), which in turn facilitated the creation of further regional cooperation, such as the later bilateral and multilateral agreements in the Meuse-Rhine Euroregion. Therefore, there is a constant dynamic interaction between regional and harmonised frameworks enhancing police cooperation in the EU. This interaction leads to the surrender of competences by member states at least at the regional level. Following this reasoning, the Euroregion cooperation, despite being limited to a specific border region, could nevertheless inspire future harmonised legal frameworks, thereby enhancing EU police cooperation more generally. The Euroregion case study, therefore, emphasises the value and importance of harmonised legal frameworks and regional cooperation alike, as the incentive for states to surrender sovereign powers.

Australian NPY lands cooperation

A similar case study to the Meuse-Rhine Euroregion has been chosen in the Australian context. Like the EU example, the NPY lands cooperation was created in response to a particular need in a border region, which led to the development of an advanced cooperation initiative. In the Australian scenario, aboriginal people movement across borders and the long distances between aboriginal settlements are the major challenge for police forces in the South Australian (SA), Western Australian (WA) and Northern Territory (NT) border regions.[134] Problems in this region, the Ngaanyatjarra Pitijantjatjara Yankuntjatjara (NPY) lands, relate to domestic violence, child abuse, sexual abuse, substance abuse, and other forms of offending behaviour.[135] The cooperation measures created for this region are probably the most advanced of all Australian border regions, although they still need to be tested in practice. The NT Cross-Border Justice Act 2009, the WA Cross-Border Justice Act 2008 and the SA Cross-Border Justice Act 2009 allow police to exercise their powers (within certain limits) in each of the three jurisdictions under recognition of the laws of their state/territory. In other Australian border regions, a police officer must be sworn into the other system to exercise his or her power in the other jurisdiction (typically they are assigned the powers of a 'special constable' as in Police (Special Provisions) Act 1901 NSW). The Cross-Border Justice Acts have further established the principle of mutual recognition in relation to evidence. This demonstrates the considerable extent to which states traded sovereign powers to enable this cooperation. It is further remarkable how quickly legislation evolved between these three states, from the start of the initiative in 2003 to implemented Acts in all three jurisdictions in 2009. The NPY lands cooperation is so far the only formalised Australian regional police cooperation initiative that goes beyond minimum federal requirements. In the NPY lands scenario the considerable giving up of sovereign power between the states and the territory was

[131] See T. Spapens and C. Fijnaut, *Criminaliteit en rechtshandhaving in de Euregion Maas-Rijn* (Intersentia, 2005), p 26.
[132] *ibid.*
[133] *ibid.*
[134] Standing Committee on Legal and Constitutional Affairs on *Law and Justice (Cross-border and Other Amendments) Bill* 2009 (May 2009), Chapter 2, see at http://www.aph.gov.au/senate/committee/legcon_ctte/cross_border/report/report.pdf.
[135] *ibid.*

triggered by an overwhelming need to counter major problems in the region. However, this model could also help improve police cooperation between all states and territories. The Australian Attorney-General's Department has already pointed out that the NPY Lands cooperation scheme could be used to improve the federal Service and Execution of Process Act 1992 (Cth) (SEPA) with a view to further harmonisation.[136]

Similar to the regional EU case study, this example shows that sovereignty concerns can be overcome between bordering states and territories with particular cross-border crime problems. However, the previously discussed reluctance to implement 'model laws' uniformly in all states and territories is an indicator that the surrender of sovereign powers is problematic in relation to the Australian federal state. According to the case study, it seems more likely that competences are given up in a regional context rather than uniformly. It could even be concluded that sovereignty concerns between Australian states and territories are greater than between EU Member States as the NPY lands cooperation is so far the only formal regional initiative promoting such a considerable ceding of competences. Even at the regional level, Australian states and territories seem reluctant to surrender sovereignty by entering into formal cooperation agreements. Harmonisation resulting from an interaction of regional and harmonised legal frameworks does not exist in Australia either. However, due to the existence of federal police agencies, the need for direct state and territory cooperation is considerably lower than in the EU and the lack of regional cooperation does not necessarily only relate to sovereignty concerns.

In both case studies the particular problems in the border regions were the incentive to create advanced regional cooperation strategies. An enabling factor in both systems seemed to be the small number of states participating in the initiatives, which facilitates the reaching of a common agreement. Unlike in the federal 'model law' or European Europol context, there was no 'top down' pressure exercised upon the states. The states acted according to their own 'will' rather than in response to a federal or EU initiative. In the regional context states are more empowered and retain more influence over the initiative, which seems to be an important factor in both entities. This emphasises the advantages of intergovernmentalism and regionalism rather than 'top down' federalism in the area of police cooperation.

Harmonised cooperation strategies: case studies

Europol

Europol was legally established in its current form in 1999 under the Europol Convention (signed by the EU Member States on 26 July 1995, before coming into effect on 1 July 1999).[137] According to Articles 2 and 3 of the Europol Convention, the institution of Europol shall facilitate fast access to information amongst EU Member States on persons suspected to have committed a criminal offence within the territory of Europol competence or who have committed or are suspected to commit such criminal offences in the future.[138] Europol handles criminal intelligence and, while it lacks law enforcement powers, its mandate was expanded in 2003 to the initiation of criminal investigations and

[136] See Attorney-General's Department Supplementary Submission to the Standing Committee on Legal and Constitutional Affairs: *Inquiry into Harmonising Legal Systems relating to Trade and Commerce*, Committee Responses to the further questions received from the Secretariat on 22 March 2006 and questions and notice taken at the public hearing on 21 March 2006, p. 11.
[137] Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention) of 26 July 1995 OJ C316 of 27 November 1995 as well as ist protocols, now Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA) (OJ L 121/37 of 15 May 2009).
[138] M. Böse, *Der Grundsatz der Verfügbarkeit von Informationen in der strafrechtlichen Zusammenarbeit der Europäischen Union* (Bonn University Press, 2007), p 34.

the participation in JITs.[139] An important, but certainly not exclusive, driving force in its establishment was the then German Chancellor Helmut Kohl.[140] At the time of its establishment, there was no pressing practical need for the institution, which explains why practitioners have often criticised Europol for being superfluous and why it is still partly hampered by the reluctance of Member States to engage in information sharing.[141] As Europol was not mainly established by practitioners or designed to cater for their practical needs in relation to police cooperation, it experienced for a long time after its establishment a lower level of acceptance than Interpol.[142] When Europol started operating, there were already many systems of information sharing in place and practitioners considered it more a bureaucratic burden than a benefit to information-sharing.[143]

While these problems of practitioner acceptance in the early phase of Europol predominantly apply to the working of the Europol database, no obvious problems were experienced in relation to the network of Europol liaison officers. As the exchange of sensitive information requires a high level of trust, not only amongst the Member States, but also amongst the individual officers on the ground, Europol does not only consist of a common database, but also a liaison officer network.[144] The liaison officers of all Member States and even non-EU Member States are based in one building to encourage the establishment of close working relationships. They are also not directly supervised by Europol, which gives them a greater freedom to cooperate informally.[145] Practitioners have accepted this network immediately and appreciate the opportunity to know their counterparts from other Member States personally as it enhances trust.[146] Also, the possibility to cooperate formally as well as informally within this network was stated to be an advantage.[147]

The information exchange through liaison officers is perceived as being successful, while the establishment of a further database was initially perceived as a bureaucratic burden. This leads to two conclusions in relation to the EU law-making and policy process. Firstly, practitioners need to be involved in the law-making process as this will ensure their acceptance of a common initiative from the start. Secondly, practices that involve close working relationships between police officers of the different Member States enable the creation of trust and closer police cooperation. In this particular example, the problem was not only the establishment or the reaching of a common agreement of the Member States towards the initiative[148], but also the creation of actual practice under it, which required acceptance of the initiative by practitioners. The importance of the practitioners in the harmonisation process of police cooperation strategies can therefore be concluded from the Europol case study.

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[139] J. Occhipinti, *The Politics of EU Police Cooperation – Towards a European FBI* (Lynne Rienner Publishers, 2003), p 61; V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 165-166; See in particular in relation to the expansion of the Europol mandate the 'Danish Protocol' OJ C2 of 6 January 2004, p. 3.
[140] Woodward, 'Establishing Europol: The Story of Europol from its Origins to Present', (1993) 1(4) *European Journal on Criminal Policy and Research* 7.
[141] J. Sheptycki, *In Search of Transnational Policing: Towards a Sociology of Global Policing* (Ashgate, 2002), p 43; V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p 187.
[142] M. Anderson, M. den Boer, P. Cullen, W. Gilmore, C. Raab and N. Walker, *Policing the European Union. Theory Law and Practice* (Clarendon Press, 1995), p 77.
[143] Wilzing and Mangelaars, 'Where does Politics Meet Practice in Establishing Europol?', (1993) 1(4) *European Journal on Criminal Policy and Research* 71, 77-79.
[144] V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), p 165.
[145] *ibid* 165-166.
[146] Interviews conducted with Europol official and liaison officer in 2007.
[147] *ibid.*
[148] As outlined above in this article, state resistance to the establishment of Europol and in particular the debate about enforcement powers was also a prominent issue between Member States; See V. Mitsilegas, *EU Criminal Law* (Hart Publishing, 2009), pp 165-166 and J. Occhipinti, *The Politics of EU Police Cooperation – Towards a European FBI* (Lynne Rienner Publishers, 2003), pp 29-46 and 51-75.

CrimTrac

A broadly similar initiative to Europol is CrimTrac,[149] the Australian common police database that was established in 2000.[150] A prominent case revealing the problems CrimTrac confronted in its establishment is the Falconio case.[151] In this case, a backpacking couple had been attacked by a man in the Northern Territory and one of the backpackers, Peter Falconio, was killed in 2001.[152] The investigation in what first appeared to be an abduction and later turned out to be a murder case was led by the NT, WA and SA police forces, but also involved assistance by other Australian law enforcement agencies like New South Wales (NSW) and Queensland police.[153] The offender was arrested in 2003 by the SA police and was extradited to the NT for trial.[154] The main problem of the Falconio case was the exchange of data related to DNA recognition. Bloodstains were found on the t-shirt of the female backpacker, Joanne Lees, and as they were not of the male murder-victim, a strong possibility was given that it could identify the offender.[155] A suspect in the case was living in NSW and his DNA sample was requested by the NT police.[156] NSW law at the time, however, did not allow the transfer of information regarding DNA into jurisdictions with obviously different laws.[157] NSW legislation, therefore, needed to be adapted to make the information exchange possible, like for example the Crimes (Forensic Procedures) Act 2000 (NSW). After extensive political pressure was exercised upon the NSW government, NSW and NT concluded an agreement on DNA exchange, regulating information exchange over CrimTrac (based on the principle of mutual recognition).[158]

However, information exchange through CrimTrac is by now an Australian success story. Unlike the problems that still existed at the time of the Falconio case, since 2009 full matching occurs also in relation to DNA between all Australian states and territories.[159] CrimTrac is therefore an example of gradual giving up of sovereignty in the name of harmonisation. Australian practitioners interviewed in relation to CrimTrac were all enthusiastic about the initiative. The acceptance gap that could be observed in the early days of Europol was not an issue in the establishment of CrimTrac.[160]

A potential explanation for the greater practitioner acceptance could be that, while Europol was a political initiative mainly involving Heads of State, CrimTrac was established under cooperation of practitioners and initiated by practitioners as well as under cooperation of representatives from all states and territories and the AFP.[161] There was also a pressing practical need in Australia to establish a common database after 100 years of relying on separate databases and incomplete national systems. However, the state

[149] In relation to the type of information exchanged, CrimTrac would be more comparable to the Schengen Information System, however, with regards to the political issues involved, it is closer to Europol.
[150] See www.crimtrac.gov.au.
[151] Gans, 'The Peter Falconio Investigation: Needles, Hay and DNA', (2007) 18 *Current Issues in Criminal Justice* 415.
[152] *ibid.*
[153] See ABC Report at http://www.abc.net.au/a,/stories/s697700.htm, retrieved 6 June 2010.
[154] *ibid.*
[155] Gans, 'The Peter Falconio Investigation: Needles, Hay and DNA', (2007) 18 *Current Issues in Criminal Justice* 415, 424.
[156] *ibid* 425.
[157] *On Trac*, 2009, Vol 2, Issue 1, p 11.
[158] Gans, 'The Peter Falconio Investigation: Needles, Hay and DNA', (2007) 18 *Current Issues in Criminal Justice* 415, 424-426.
[159] *On Trac*, 2009, Vol 2, Issue 1, p 11.
[160] 10 practitioners from the AFP, CrimTrac, Victoria Police and former officers of the New South Wales Police were interviewed in relation to the initiative between 2007 and 2010.
[161] See *Memorandum of Understanding between New South Wales Police, Victoria Police, Queensland Police, Western Australia Police, South Australia Police, Northern Territory Police, Tasmania Police, ACT Policing, Australian Federal Police and The CrimTrac Agency, 2006* establishing the board of members consisting of all state and territory as well as Commonwealth heads of agencies as well as special officers.

reluctance to adapt legislation to facilitate information exchange through CrimTrac made the establishment of a common system very difficult.[162] While the problems of DNA exchange have by now been overcome, the introduction of another initiative, the Automated Number Plate Recognition System, presents new challenges to CrimTrac.[163] According to an interview with the CrimTrac CEO in 2009, these challenges are again situated in the field of data protection and privacy rights, but also relate to financial concerns of the states and territories.[164] Two strategies have been developed as a response to convince the police ministers who form the board of management of CrimTrac to uniformly introduce the initiative.[165] Firstly, after the production of an extensive scoping study, trial runs were successfully initiated between two Australian states to assess the practicability of the initiative.[166] Secondly, these trial runs were filmed; a promotion movie was produced from this material. This movie was subsequently distributed among Australian law-enforcement agencies and at the state and territory government level to generate interest and acceptance. This will hopefully convince the decision-makers concerned to uniformly introduce this new initiative.

A further strategy used by CrimTrac to generate interest and ensure practitioner and state acceptance are regular meetings with all actors involved in information-sharing. This includes primarily the board of management (police ministers of all jurisdictions), but also other actors.[167] Further, CrimTrac has never been perceived as a federal initiative due to its structure, which involves all state and territory police equally.[168] According to statements by practitioners, this has ensured a high level of trust in the initiative and prevented the fear of being overrun by harmonised structures threatening state sovereignty.[169] To this extent, CrimTrac can be seen as a model to overcome practitioner and state and territory sovereignty concerns. Due to the intergovernmental decision-making structure, states are fully recognised and given ownership over the initiative. Despite being a federal 'top down' initiative, the sensitive approach to intergovernmental decision-making of CrimTrac has ensured acceptance by both, practitioners and state actors.

It can be concluded that to develop a successful harmonised institution, practitioners and states need to be equally involved to ensure state support and practice under the initiative. Acceptance by states and practitioners cannot be replaced by the creation of common laws and institutions. The efforts to make these frameworks work need to go further. Particular strategies, such as those employed in the context of CrimTrac, can convince state actors and practitioners of the value of an initiative. This facilitates the establishment of common state agreement on and common practice under a new initiative. Such strategies to generate acceptance could also be applied in the EU context, for example in relation to the widening of the mandate and powers of Europol. However, the downside of these processes, as DNA exchange has shown in the example of CrimTrac, is that they take a long time, in the DNA example nearly ten years. It is also unlikely that strategies of persuasion of state actors can change long established political attitudes

[162] See for more information www.crimtrac.gov.au and in particular the yearly reports depicting the reluctance of states and territories to overcome data protection provisions until December 2009.
[163] See CrimTrac Project Report on Automated Number Plate Recognition System 2009 and CrimTrac ANPR Scoping Study Report 2008978-0-9805644-0-2; See also www.crimtrac.gov.au/systems_projects/AutomatedNumberPlateRecognitionANPR.html.
[164] Interview with CrimTrac CEO conducted for PhD research in 2009, Canberra, Australia.
[165] *ibid.*
[166] See CrimTrac Project Report on Automated Number Plate Recognition System 2009 and CrimTrac ANPR Scoping Study Report 2008978-0-9805644-0-2; See also www.crimtrac.gov.au/systems_projects/AutomatedNumberPlateRecognitionANPR.html and Interview with CrimTrac CEO conducted for PhD research in 2009, Canberra, Australia.
[167] See at www.crimtrac.gov.au/about_us/BoardofManagement.html.
[168] *ibid.*
[169] 10 practitioners from the AFP, CrimTrac, Victoria Police and former officers of the New South Wales Police were interviewed in relation to the initiative between 2007 and 2010.

against a strategy or the widening of competences. However, they might speed up processes in cases where agreement is more easily reached.

Harmonisation efforts in Australia and in the EU – Conclusions

The following assessment of the previously presented cooperation strategies in Australia and in the EU is based on the presumption that the harmonisation of laws impacting on police cooperation should encounter fewer difficulties in Australia than in the EU. As Australia is a federation consisting of similar police organisations with a common working language, culture and structure, problems relating to sovereignty and differences between state systems should be less apparent than in the EU. Similarities between the two systems should therefore not exist to the extent outlined above. The in-group projection model might nevertheless explain similarities, as well as differences, in instances where cooperation is inhibited to an even greater extent in Australia than in the EU.

This article has provided a small insight into the challenges to harmonisation in both systems. Common impediments were identified as practitioner reluctance to accept harmonised strategies and state reluctance to reach common agreement on harmonised strategies and to surrender sovereignty. In comparison, regional bilateral and multilateral initiatives were established that led to a far-reaching ceding of competences amongst EU Member States and amongst Australian states and territories respectively. However, a prominent difference between Australia and the EU is that such regional cooperation frameworks have developed frequently in the EU since the 1960s, whereas the only comparable cooperation framework in Australia is the 2009 NPY lands cooperation. This is partly due to the structure of the federal system and the existence of federal agencies like the AFP that have cross-border enforcement powers, facilitating cooperation and making formalised regional cooperation less necessary. However, it could also be explained by a greater reluctance of Australian states and territories to cooperate, compared to EU Member States.

In the EU as well as in Australia, states have the freedom to adopt or retain measures or legislation that provide higher standards than the minimum requirements set by harmonised rules.[170] It follows that the implementation of common legal frameworks is rarely uniform in both systems. This was observed in the EU in relation to the Schengen Convention and with regard to 'model laws' in the field of criminal procedural law in Australia. While harmonisation, even to the degree of uniformity, has been achieved in Australia through 'model laws' in the field of forensic procedures and search warrants, the process of implementation has not been successful in other fields.[171] Although it could have been assumed that uniform implementation occurs to a greater extent in a federation of states, this conclusion could not be drawn from the above research.

In the example of Europol, it was observed that practitioners adapt positively to harmonised 'top down' strategies, even though they consider them initially to be a bureaucratic burden. However, states display greater reluctance to accept harmonised initiatives. This was particularly apparent in relation to the legal reform required to implement CrimTrac and model criminal investigation laws in Australia. Also, the widening of the competences of Europol has been a constant debate amongst Member States, and the implementation of the Schengen Convention has not yet been embraced uniformly

[170] Vermeulen, 'How far can we go in applying the principle of mutual recognition', in C. Fijnaut and J. Ouwerkerk, *The Future of Police and Judicial Cooperation in the European Union* (Martinus Nijhoff Publishers, 2010), pp 241-257; See in relation to Australia: Report of the Leaders Summit on Terrorism and Multijurisdictional Crime, *Cross-Border Investigative Powers for Law Enforcement* November 2003, iii and iv.
[171] See at http://www.pcc.gov.au/uniform/National%20Uniform%20Legislation%20table.pdf, retrieved 06/06/2010.

across the EU. State actors in both systems, often citing sovereignty concerns, therefore have the capacity to impede significantly harmonisation processes.

The assumption that harmonisation of laws in the field of police cooperation would more likely be achieved amongst Australian jurisdictions, due to their similarity has, therefore, been disproved. The question arises as to why the Australian jurisdictions do not cooperate more readily than EU Member States. A possible approach to answering the question may be found in the discipline of social psychology. According to the in-group projection model, as outlined above, sub-groups formed under the umbrella of a super-ordinate group enter more readily into conflict and competition in relation to their prototypicality (individuality) rather than developing better sub-group relations under the common framework.[172] Applying this model very loosely to the comparison between Australia and the EU, police cooperation within both systems could be hampered by the existence of an overarching entity. Consistent with this model, states and territories within Australia and in the EU may object to surrendering their sovereignty rights in the field of law enforcement, thereby inhibiting cooperation. However, Wenzel *et al.* further identify that sharing a common super-ordinate identity is not sufficient to develop positive sub-group relations, though similar sub-groups could develop positive relations more easily than dissimilar sub-groups.[173] It would follow that Australian states and territories, due to their structural, organisational and cultural similarities, would cooperate more successfully than EU Member States. However, according to the research findings presented here, this is not the case.

It is interesting to note that cooperation has been successfully developed between EU Member States with less prominent differences between cultures and languages, particularly in the Nordic countries. The Nordic cooperation scheme is even considered to be 'best practice' in the EU.[174] It could, therefore, be concluded in the EU context that similar sub-groups cooperate better than different sub-groups, which contradicts the Australian experience.[175] Australian sub-groups seem to feel a greater need to preserve their prototypicality than these Nordic states. Hence, it could be concluded that different nation states, as they retain a greater amount of national identity and control, even when surrendering sovereignty in specific areas, are more likely to cooperate than Australian states and territories. However, another suggestion within the same model is that greater prototypicality is advantageous for sub-groups, also in relation to their relationship with the superordinate group.[176] This supports a prior conclusion that sovereign nation states, due to their greater sense of individuality, are more secure and confident in cooperating with each other without fear of giving up their identity to the superordinate group. It can be argued that resistance to harmonisation in Australia is due to the struggle for preserving individuality among its states and territories, which may be termed as 'a fear of insignificance'. Here, the concepts derived from social psychology are only broadly used. However, further research in this area could shed greater light on state behaviour in a

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[172] Wenzel, Mummendey and Waldzus 'Superordinate identities and intergroup conflict: The ingroup projection model', (2007) 18 *European Review of Social Psychology* 331.
[173] *ibid.*
[174] *EU Schengen Catalogue, Volume 4, Police Co-Operation: Recommendations and Best Practices* (Council of the European Union, General Secretariat, June 2003), p. 16.
[175] See for further discussion C. Joubert and H. Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (Kluwer Law International, 1996), p 7; Gammelgård, 'International Police Cooperation from a Norwegian Perspective', in D. Koenig and K. Das (eds), *International Police Cooperation: A World Perspective* (Lexington Books, 2001), pp 232-234; Takala, 'Nordic Cooperation in Criminal Policy and Crime Prevention', (2005) 5(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 131; Larsson, 'International Police Co-Operation: A Norwegian Perspective', (2006) 13(4) *Journal of Financial Crime* 456.
[176] Wenzel, Mummendey and Waldzus 'Superordinate identities and intergroup conflict: The ingroup projection model', (2007) 18 *European Review of Social Psychology* 331, 338.

supranational union and a federal entity, which could provide further insights on the processes of harmonisation in the field of police cooperation in both systems.

By contrasting the EU with the Australian federal system, the article suggests that the 'fear of insignificance' and the resulting opposition to the harmonisation process may intensify between similar state entities, perhaps because similar entities feel a greater need to assert their individuality.[177] An implication of this insight, counter-intuitively, is that the 'similarity' of cooperating entities may actually inhibit the degree of harmonisation achievable. It appears that entities that are very different (in terms of laws and police organisational structures) do not have to assert their individuality as much, as their individuality is more apparent and obviously taken into account to a higher degree by the overarching entity. As a result, the differences in EU systems can even be considered an advantage for promoting cooperation and harmonisation, while the similarities within the Australian system can be considered a disadvantage. By examining the efforts in the area of cross-border policing within the Australian federal system, the challenges of cooperation within the EU are brought into sharp relief. According to the theory outlined here, harmonisation processes may become more difficult to achieve as EU Member States grow closer together under the EU integration framework in the field of justice and police cooperation. To avoid this, harmonisation processes may need to take into account the individualism of national actors (the 'fear of insignificance') by avoiding 'top down' strategies that infringe upon individualism at the lower level, and should include an incentive structure for compensating and rewarding states contributing to harmonisation efforts. As with the police practitioners involved, incentives must be provided for states that cooperate across borders, in addition to public recognition for this cooperation.

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[177] *ibid* 331-372.

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Bilateral Police Liaison Officers: Practices and European Policy

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Abstract

Police from the European Union (EU) Member States make significant use of bilateral liaison officers to cooperate with police in other countries. In the past decades, a number of TREVI and EU Council policy instruments have aimed to enhance the common use of liaison officers by the Member States. This research article discusses these policy instruments from the perspective of the practicalities of the work of liaison officers, examines the underlying rationalities of the instruments and assesses their effects. The findings show that national interests of Member States remain paramount in posting liaison officers. Practices of liaison officers are largely governed by national regulations and organisational particulars, but also depend on the high level of discretion that liaison officers can exercise. In contrast, the policy instruments are largely driven by a political rationality and little intended effect of these instruments can be detected.

Keywords

Police cooperation; Liaison officers; TREVI; JHA

IN SEPTEMBER 2000, A DEAD MAN WAS FOUND IN A MEADOW JUST NORTH OF Amsterdam with a Russian passport lying close to his body. The victim's body was severely mutilated and police suspected a connection with organised crime. As a consequence, they set up a large homicide team. Since getting information from Russia through Interpol channels could take some weeks, the team contacted the liaison officer of the Netherlands in Moscow, who within a few hours was able to confirm the identity of the victim. Moreover, he could inform the team that the Moscow police chased the victim, together with another person, on suspicion of rape five days earlier and lost them near the capital's airport, Shermetyevo. The other person had already been found deceased in the landing gear compartment of a Boeing 737 that had arrived in Amsterdam from Moscow. Apparently the victim fell from the same plane when it had lowered its undercarriage whilst flying over the meadow where he was found (The Moscow Times 2000). The swift information exchange with the Russian authorities through the liaison officer made it possible to directly end the investigation, which otherwise could have taken a few weeks.

This is just one example of the effectiveness of the work of liaison officers in police cooperation. Police from the European Union (EU) Member States make use of different strategies for information exchange and cooperation, and one widely used strategy is maintaining a network of bilateral liaison officers, also known as Drug Liaison Officers, International Liaison Officers or Overseas Liaison Officers.[1] The use of liaison officers in

[1] Throughout this article, the general designation 'liaison officer' will be used.

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Available at: http://www.jcer.net/ojs/index.php/jcer/article/view/266/205

police cooperation has been subject to various policy efforts at the European level that aim to regulate the posting of liaison officers, formalise their role and tasks, and make a common use of liaison officers possible. These efforts commenced in the 1980s with policy instruments of the TREVI[2] Council of Ministers and continued after 1993 with several instruments adopted by the EU Council.

A key question is whether these instruments have led to changes in practices in the Member States with regard to the posting of liaison officers and the liaison officers' role and tasks. It has been argued that EU policy instruments on Justice and Home Affairs lack practical orientation because of the limited participation of content-oriented law enforcement professionals in this strongly executive-driven policy-area (Bigo 2000: 183; Den Boer 2006). Snellen (2002) argues in this respect that 'good' public policy meets simultaneously the requirements of four rationalities, *i.e.* political, legal, economic and professional rationality. Consequently, the acceptance and full implementation of public policy that shows an unbalance towards one or two of the four rationalities, is unlikely (Snellen 2002). This would suggest that EU policy instruments that lack a practical orientation would have a limited effect on police practices.

This article investigates the practices of liaison officers and the background and effects of TREVI and EU policy efforts in that field. A review of the academic literature on police cooperation reveals only a few contributions based on original research regarding the practices of liaison officers (*i.e.* Bailey 2008; Bigo 1996 and 2000; Block 2007; Fowler 2008; Nadelmann 1993). Other contributions that discuss practices of liaison officers usually build on Bigo or Nadelmann. Bigo (2000) provides an extensive account on the use of liaison officers in European policing, but does not go into detail regarding their practices. Nadelmann (1993) details many practices of liaison officers, but specifically from a US law enforcement perspective.

The following section will therefore be largely descriptive. It discusses the practices of European liaison officers in detail with the aim of providing a background against which the policy efforts in this field can be examined. It will offer a detailed description of the role and tasks of liaison officers in police cooperation for which mainly practices of EU liaison officers posted in Russia are used as illustrations. The nature of the work of European liaison officers posted in the Russian Federation however is essentially the same in any other country (Interview 27 September 2009; Interview 27 October 2009). Section three will then examine the emergence, development and current relevance of liaison officers in European police cooperation. Thereafter in section four, the policy instruments related to the posting and tasks of liaison officers adopted under TREVI and by the EU Council will be examined in detail. Particular attention will be given to the rationalities that played a role in the policy-making of each of these instruments. At the same time, the effect of these instruments will also be assessed. The concluding section will provide a summary of the findings and a brief reflection on their implications.

Practices of liaison officers

Role of liaison officers in police cooperation

Liaison officers are law enforcement officers posted on behalf of their agency in another country (*i.e.* the host country) to 'liaise' with the law enforcement agencies in that country. This strategy has emerged as a practical form of interagency cooperation between police

[2] The TREVI forum was set up in 1975 and brought together Home Affairs and Justice Ministers and high officials from the European Community. In 1992, TREVI was integrated in the third pillar of the EU.

and allows them to directly (horizontally), sometimes informally, exchange information across borders and coordinate cooperation efforts mostly in criminal investigations.

The exact role of liaison officers is subject to national preferences and regulations and can differ widely between Member States. Liaison officers have in common that they develop and maintain a network of privileged contacts in their host country and act as intermediaries between their agency and the law enforcement agencies in the host country. They provide support to and have an intelligence role in operational police cooperation. However, it is important to realise that liaison officers do not have powers to investigate in the jurisdiction where they are posted. Through their direct contacts in either country they facilitate requests from and to their home country for information, evidence, interrogations, arrests and extraditions. Depending on the specific tasks assigned and particulars of the investigation, this can expand to coordinating joint (covert) operations or facilitating the judicial follow-up of the initial information exchange. A simple request for intelligence could end up in a long lasting logistically and legally challenging endeavour. Furthermore, liaison officers often have a role at the tactical level in explaining the legal and operational particulars of the law enforcement systems of their host country to their colleagues at home and advising on the most promising avenues for cooperation. Some liaison officers are also tasked with informing and advising their agencies at the strategic level regarding issues and developments in the host country.

Most EU liaison officers are accredited as diplomats in the host country, or host countries if they serve multiple countries, and enjoy diplomatic immunity. With few exceptions, they are seconded to their country's embassy or consulate in the host country and maintain an office there. In the 1980s, there were discussions amongst the European Community (EC) Member States on whether liaison officers should have diplomatic immunity. Some Member States argued that particularly liaison officers stationed within the EC should have the same status as police officers in the host country. For liaison officers posted outside the EC all Member States agreed that they should have diplomatic immunity (CRI 1992). Nowadays it is common practice that EU liaison officers posted in or outside the EU are accredited diplomats. This offers them a formal position; both Bigo and Nadelmann emphasise in this respect the ambiguity of the role of liaison officers. On the one hand liaison officers can use their informal direct contacts with local law enforcement to exchange information and to secure quick responses to the requests of their agency. On the other hand they are the formal representatives of their agency and can choose where necessary to formalise their efforts when informal solutions prove to be insufficient (Bigo 2000: 70; Nadelmann 1993: 109). An exception to the practice of seconding liaison officers to an embassy can be found with the counter-terrorism liaisons officers in Europe posted under the aegis of the Police Working Group on Terrorism. Those are usually seconded to the counter-terrorism agency in the host country where they, because of the sensitivity of the matter, function as a dedicated point of contact between two specific agencies without a wider remit (Bigo 2000: 75, Interview 4 October 2005).

Case work

Within the EU, the police can choose between multiple channels for exchanging information and cooperation such as, for example, Interpol, Europol, the Schengen Information System and direct contacts. Requests for information, usually referred to as 'cases', are likely to be routed through liaison officers instead of through the other available channels whenever a case requires more active support than a simple information-exchange because of its complexity, sensitivity or urgency. It should be noted that, as with many other aspects of policing, no standard exists in European policing for what constitutes a 'case' (Hobbing 2008). In the work of liaison officers a case could refer to anything between a single one-time request and a complex investigation that stretches

over multiple years. Although cases usually relate to serious and organised crime investigations, liaison officers can also support local crime problems. For example, a detective of London's Metropolitan Police has been posted as a liaison officer in Jamaica in support of an operation targeting local gun violence in London (BBC News 2000).

Cases can originate from the home country of the liaison officers or can be brought to the liaison officer's attention by the host country. Bailey calls the former "referred cases", whilst the latter are known as "discovered cases" (Bailey, 2008: 97). The bulk of a liaison officer's casework is likely to consist of referred cases although discovered cases can from a perspective of reciprocity receive equal priority (Interview 27 September 2009; Block 2007: 375). Liaison officers are regarded as effective and efficient because through their personal contacts and knowledge of the system they are in a better position to handle the bureaucracy or other hurdles in the system of their host country. In particular, when a liaison officer presents a case in person to the requested agency, he or she is often able to obtain support at the highest level necessary and subsequently gets the case directly assigned to a competent case officer. This has two advantages. Firstly, it increases the speed with which the case is handled. Secondly, it decreases the risk of premature disclosure, an advantage that is particularly valued by the police when dealing with countries outside the EU.

Differentiation in tasks and practices

How liaison officers organise their work depends on national regulations, the police system in their home country and their personal preferences. An example of variation in tasks as a result of diverging national regulations is whether a liaison officer is tasked by his or her agency to use covert human intelligence sources (CHIS) in the host country. The EU Member States diverge in their legislation and approach regarding the use of CHIS. Therefore, some Member States allow their liaison officers posted abroad to use CHIS, whilst others do not. In addition, the host country may have restrictive regulations on what liaison officers are allowed to do or not. For example, regulations in the Netherlands do not allow foreign police liaison officers posted there to use CHIS (*Ministerie van Justitie* 2002).

Moreover, the differences between the police systems of the Member States result in diverging tasks for liaison officers. Some Member States mostly send out very high ranking officers as liaison officers, whereas other Member States value investigative competencies more than rank and send out lower ranking, but seasoned, investigators. The latter usually focus more on operational tasks, while the former generally focus on maintaining contacts at the highest level possible in their host country. Finally, the personal preferences of the liaison officers form a third important source for further variation in their practices. Liaison officers may differ in the agency, department or person they trust and prefer to contact and whether they choose a formal approach as representative of their country or a more informal approach as 'colleague' (Interview 27 September 2009).

The process of intelligence exchange

For a deeper understanding of the nature of the work of liaison officers, their role will be described in the process of criminal intelligence exchange. When a liaison officer receives a request for information from his or her home country, the first step he or she usually takes is to determine the best channel to manage to answer the request. This entails finding the appropriate legal context and in the liaison officer's perspective the most competent agency, and sometimes person, to deal with the actual substance of the case. In the Russian Federation, for example, there is no single central point of contact for

foreign liaison officers, whilst, at the same time, the various law enforcement agencies have overlapping mandates. Therefore, liaison officers can *de facto* choose the agency, and sometimes department, that they consider the most adequate to handle their request. Simultaneously, there is limited inter-agency coordination and intelligence sharing between the Russian Federation law enforcement agencies. Choosing one agency to which to send the request entails the risk that relevant intelligence available in one of the other agencies remains untapped. Of course, a request can be sent simultaneously to multiple agencies, although unwritten rules prescribe the liaison officer then to inform all requested agencies accordingly. In practice, the liaison officer then runs the risk that none of the receivers would give much priority to the request. Therefore, the liaison officer chooses the agency to which the request is forwarded on the basis of the substance of the case, past experience and personal preferences (Block 2007).

Significant effort then goes into adapting the inquiry to meet the local legal and operational requirements, so that the case can be dealt with quickly. This entails providing sufficient information in the preferred format of the requested agency, rephrasing the query so that it fits into the world of comprehension of the requested agency, and possibly rephrasing the specific questions to match the way information is stored in their databases. The answer from the requested agency is in turn translated and evaluated to determine the origin, classification and quality of the received information to ensure that it can indeed operationally and legally be used in the liaison officer's home country. Thereafter, the answer is annotated where necessary with other information available to the liaison officers and sent back to the requesting agency in the home country.

The practicalities of the liaison officers' work as depicted in this section show that liaison officers have a significant level of discretion with regard to the organisation of their work. Their efficacy depends on their knowledge of investigative and operational issues in the different legal and organisational systems in the jurisdictions between which they liaise. Additionally, liaison officers should possess extensive experience in crime investigations because, "if they [in the host country] see that you don't understand how it works, you'd better go home" (Interview 27 October 2009). Finally, personal skills in forging relationships and maintaining a network, as well as linguistic and cross-cultural competencies, are key in performing the tasks of a liaison officer. These elements are important to remember when we examine the TREVI and EU policy efforts with regard to liaison officers.

Liaison officers in European police cooperation

Emergence

Until the 1970s, European police forces did not use liaison officers as a strategy for bilateral cooperation. It is likely that the first liaison officer was posted by France in 1971 in Washington D.C. (Bigo 2000: 76). Throughout the 1970s, an increasing number of European countries began to post liaison officers in other European countries, as well as in source countries in relation to the issue of illicit drugs. For example, the first foreign liaison officers posted in the Netherlands arrived in 1974 and in 1976, whilst the Dutch police sent out its first liaison officer to Bangkok - where the Swedish National police had been the first European police force to post a liaison officer (Anderson 1989: 124).

The concept of using liaison officers in law enforcement cooperation was not new. The FBI sent its first special agent in a 'liaison' capacity abroad in 1939 and started its legal attaché (LEGAT) program in the 1940s with legal attaché's posted in Latin America, London and Ottawa (Fowler 2008: 111; Nadelmann 1993: 151-152). The Federal Bureau of Narcotics, which preceded the US Drug Enforcement Agency (DEA), sent its first permanent liaison

officer abroad to Rome in 1951 (Nadelmann 1993: 131). The first use in the 1970s of liaison officers by European police forces coincided with a significant increase in the US drug enforcement presence abroad (Nadelmann 1993: 140-141). These European liaison officers were initially solely active in the field of combating drugs. Later, their use expanded into other areas like combating organised crime and counter-terrorism (Bigo 1996: 30).

At the time, two other types of liaison officers existed. Some of the EC countries had posted liaison officers at the Interpol headquarters. Those were, however, not 'bilateral' liaison officers in the sense that they maintained direct contacts between law enforcement agencies, but rather acted as liaison officers on behalf of Interpol often assigned to maintain contacts in a number of countries, most specifically in the field of combating drug trafficking. This practice started within Interpol in 1972 (Bresler 1992: 133 and 227-231). In 1987, there were 13 liaison officers from EC countries posted at Interpol (TREVI 1987a). The other type of liaison officers that existed were the officers posted abroad by the *Service de Coopération Technique International de Police* (SCTIP) of the French Interior Ministry. France did not regard them as liaison officers because they were not tasked with operational cooperation. The SCTIP exclusively focused on technical police cooperation, although it has been argued that sensitive political and intelligence interests were involved in its establishment, which coincided with de Gaulle's decolonisation of sub-Saharan Africa (Anderson 1989: 154). Nonetheless, in the 1990s, the focus of the SCTIP shifted because of the "*réalités du moment*" (the current situation) and the *"impératifs de sécurité"* (the security requirements) (French Interior Ministry 2003). Nowadays operational cooperation is a primary task of the SCTIP liaison officers abroad (French Interior Ministry 2008).

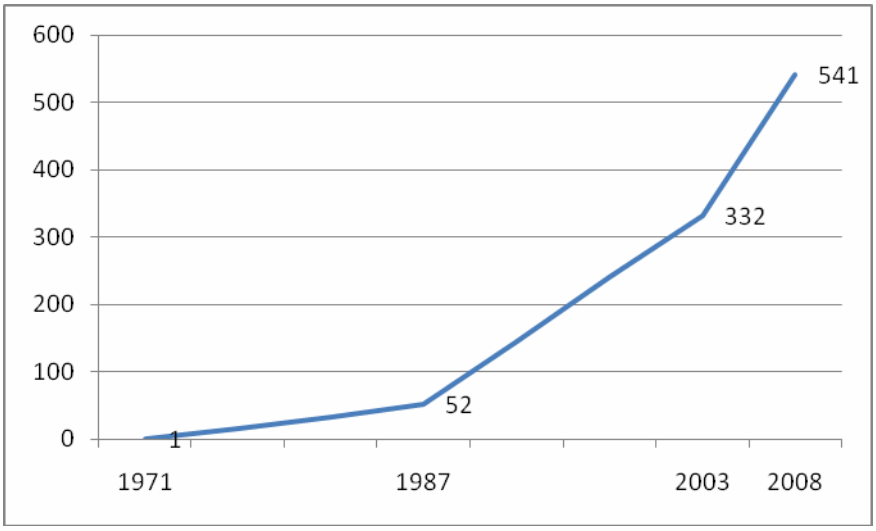
Development

Over the first decade after liaison officers emerged in European police cooperation their number increased rather slowly. An overview circulated in 1987 within TREVI Working Group III showed that the 12 EC Member States at that moment together had 52 liaison officers posted in 21 countries in and outside the EC (TREVI 1987a). These included ten liaison officers jointly posted by the Nordic countries (Denmark, Finland, Sweden, Norway and Iceland), which have pooled their police and customs liaison officers since 1982 (Gammelgård 2001:233).

By the end of the 1980s and early 1990s, the use of liaison officers in European police cooperation expanded further. France, Spain, Italy and the UK in 1992 had together posted a total of 70 liaison officers abroad. Throughout the 1990s, the use of liaison officers in European police cooperation increased significantly. At present, the police forces of the EU Member States have posted a large number of liaison officers in countries both inside and outside the EU. This number increased particularly in the past decade. In 2003, the then 15 EU Member States had 255 liaison posts[3] outside the EU and 77 inside the EU (Council 2003a). By 2008, this number had risen to a total of 541 liaison posts, of which 337 were outside the EU in different regions of the world (Council 2008). Figure one shows the development of the number of liaison officers posted by the EC/EU Member States over time.

[3] Sometimes, more than one liaison officer is stationed at a liaison post. Therefore, the number of liaison officers mentioned here is in fact the minimum number.

Figure 1: Number of liaison officers posted by the EC/EU Member States, 1971-2008



Not all these liaison officers are necessarily 'police liaison officers' because some of the EU Member States, like for example the Nordic countries, make no explicit distinction between police and customs liaison officers. Furthermore, the number of liaison officers does not include the so-called 'Europol Liaison Officers' (ELOs) that are posted by the Member States and some third countries at Europol. By December 2008, there were 124 ELOs posted at Europol (Europol 2008). Although the tasks of an ELO are more or less similar to those of bilateral liaisons, their role differs from bilateral liaison officers as they cooperate only with each other within the contained environment of Europol and do not maintain direct contact with different law enforcement agencies in a host country.

Significance of liaison officers for European police cooperation

A total of 541 liaison officers are of course but a tiny fraction of the total of police capacity in the EU Member States. Nonetheless, especially given the fact that only a small number of police officers in Europe are engaged full time in transnational cooperation, liaison officers are a significant dimension of police cooperation, both within the EU and with third countries. The importance of liaison officers for police cooperation within the EU can be illustrated by the regional distribution of the liaison posts maintained by the EU Member States. A large proportion of these posts (*i.e.* 38 per cent) is located within the EU, even though ample other channels for information exchange and cooperation are available.

Table 1: Distribution of liaison posts maintained by the EU Member States in 2008

European Union	Central and Eastern Europe	Africa	Asia Pacific	South Asia	Middle East	Americas
204	108	70	42	17	24	76

Source: Council 2008

Bigo argues that the use of liaison officers has been a crucial development in European police cooperation. In his view, "since the widespread interconnection of police files is

forbidden, and even undesirable for operational reasons, they have become the human interface for data interconnection" (Bigo 2000:79).

In the EU policy arena the role of liaison officers in police cooperation has also been acknowledged as vital in the fight against organised crime. The following quote from a note to one of the working groups of the EU Council is illustrative for this:

> In particular, past experience has shown that, in the fight against drugs, they have developed into an absolutely vital means of ensuring efficient cooperation with the law enforcement agencies of other States in the "advance deployment strategy", direct provision of information, direct cooperation with the law enforcement agencies on the spot and constant evaluation with regard to the emergence of new criminal trends in the receiving States. This wealth of experience in practical cooperation, which the liaison officers possess, should be drawn upon constantly (Council 1998).

The significance of liaison officers for police cooperation with third countries can be particularly well-illustrated with the EU liaison officers posted in the Russian Federation. Police cooperation between the EU Member States and the Russian Federation is still cumbersome for many reasons including the language difference, the different legal systems and organisational structures and of course the still present political contrasts. Therefore, the available channels for information exchange and cooperation are limited mainly to Interpol and liaison officers (Block 2007). Since the 1990s, the number of EU liaison officers posted in the Russian Federation has grown significantly. In 2004, their total number reached 31, representing 17 EU Member States. [4] Almost all liaison officers have one or more local support staff, resulting in more than 50 persons dealing full-time with law enforcement cooperation on behalf of EU Member States in the Russian Federation. In 2004, the EU Member States' liaison officers in the Russian Federation handled approximately 4,000 cases, with the actual number varying between 60 and 500 cases per Member State. In comparison, during the same year, the National Central Bureau (NCB) of Interpol in Moscow handled a comparable number of cases, of which the great majority - that is 70 to 80 per cent – related to European countries. Thus, the overall workload of the liaison officers represents a fairly large, if not the largest, part of the cooperation in criminal investigations and criminal intelligence exchange between European law enforcement agencies and the Russian Federation.

These findings show that liaison officers represent a significant strategy for transnational cooperation by the police from the EU Member States, not only with third countries but also in the EU, despite the existence of multiple alternative channels available.

TREVI and EU policy instruments concerning liaison officers

Policy efforts under TREVI

The first time that liaison offers became subject to intergovernmental policy-making in Europe was in the TREVI forum, when the TREVI Working Group III examined issues of drug liaison officers (DLOs) in police cooperation in September 1986. Different aspects of the use of liaison officers were considered but it was recognised that sharing liaison officers was not possible for financial, legal, practical and linguistic reasons. After this first discussion, it was agreed that the delegations would provide the UK Presidency with details on their liaison officers and that this information would be used within TREVI as a

[4] The quantitative data in this subsection was gathered through a survey conducted at the end of 2004. Of the 31 liaison officers posted in the Russian Federation, 27 responded. The findings have been published in more detail in Block 2007.

basis to further, as far as possible, the exchange of liaison officers and transfer of information between Member States (TREVI 1986a).

The focus on liaison officers as a policy subject received the most important momentum at the TREVI Ministers Conference on 20 October 1986. In his speech, the Dutch Minister of Justice proposed to add a paragraph on liaison officers in the TREVI *Conclusions on Drugs* (*Ministerie van Justitie* 1986). This was accepted with some amendments and the conclusions asked the Member States to build

> on the good co-operation which already exists between law enforcement agencies, by posting drugs liaison officers (DLOs) within the Member States, by Member States posting DLOs to other countries, and by supporting a world-wide directory of contacts for drugs related messages. To this end Ministers asked Trevi Working Group III to examine the scope for building on existing arrangements to create a coordinated network of drug liaison officers to monitor developments in producer countries (TREVI 1986b).

This sudden emphasis by the Netherlands on liaison officers was actually prompted by the fear that in the TREVI ministerial meeting the European drug policy would predominantly be viewed from a repressive perspective. The relatively liberal drug policy in the Netherlands had some weeks earlier received heavy criticism in a session of the European Parliament and therefore a senior policy advisor to the Dutch Minister of Justice proposed to focus on liaison officers as a diversion towards a more preventive approach (*Ministerie van Justitie* 1986).

In April 1987, the TREVI Ministers united on a seven-point agreement on drugs liaison officers, which included rationalising the existing network by taking into account other DLOs already posted; cooperation between the DLOs; and the direct exchange of information of an urgent operational nature (TREVI 1987b). Further discussions in Working Group III eventually led to the inclusion of two paragraphs on liaison officers in the TREVI Program of Action adopted in 1990 where the designation 'DLO' was changed into the more general designation 'liaison officer' (TREVI 1990). In 1991, the TREVI Ministers adopted two recommendations on liaison officers (TREVI 1991a, TREVI 1991b), but their content was largely similar to the text in the 1990 Programme of Action. Some details in these recommendations were based on the answers to a questionnaire issued in 1990. An overview of the results of the questionnaire shows that on many subjects relating to liaison officers (*e.g.* posting, tasks, accreditation, competencies) no common opinion amongst Member States existed (CRI 1992). The effect of the TREVI policy efforts relating to liaison officers is difficult to assess in detail. Nevertheless, their apparent lack of effect was noted in 1996 as a reason to initiate further EU policy efforts (Council 1996c).

EU Policy Instruments on liaison officers

After the inclusion of the TREVI acquis in the third pillar of the EU, the first reference to liaison officers in EU policy documents can be found in a report of the Working Party on Drugs and Organised Crime in 1995. The report highlights the role of liaison officers particularly with regard to combating drug trafficking:

> Member States should make efforts to enhance co-operation and coordination between DLOs both within the EU and in third countries, through increased exchanges of information and intelligence and through regular in-country meetings (Council 1995).

This led up to new policy efforts on liaison officers. Subsequently, the EU Council adopted in 1996, 2000, 2003 and 2006 five policy instruments concerning the posting and tasks of

the EU Member States' police liaison officers. Each of these instruments will be discussed below.

1996

During early 1996, discussions on a new instrument were initiated by a note written by the Italian Presidency (Council 1996a). The note built on the TREVI Ministers' recommendations of June 1991 and consisted of a questionnaire on the use of liaison officers by the Member States. The Italian Presidency subsequently drafted a Joint Action, which was adopted in the second half of 1996 (Council 1996d). The idea was to take the earlier agreements on the common use of liaison officers further. The document stated that "[it] would therefore appear desirable for the Member States to agree on a strategy to identify areas for action and procedures for possible shared use of the networks of liaison officers". That ambition was tempered by a response from the German delegation supporting most of the Italian suggestions, though stating firmly that "liaison officers are deployed according to national considerations" (Council 1996b).

The underlying arguments for the draft Joint Action did not contain any reference to practical aspects of liaison officers' work in relation to, for example, the diverging legal systems and traditions between EU Member States or the differences in police powers, police practices, structures and culture. These aspects all add to the complexity of transnational police cooperation (Block 2008) and therefore affect the proposed sharing of liaison officers. Subsequent policy documents related to discussions on the Italian proposal for the Joint Action also do not show any evidence of any discussion on these issues.

In 2001, the results of the implementation of the 1996 Joint Action were assessed in the Police Cooperation Working Party (Council 2001c). On the basis of the answers given to a questionnaire, it was concluded that little progress had been made in the cooperation between Member States on the posting and tasking of liaison officers (Council 2002a). Closer scrutiny of the actual answers provided by the Member States to the questionnaire shows diverging practices between Member States with regard to the use and posting of liaison officers, and little, if any, tangible implementation of the provisions of the Joint Action. Cooperation between the liaison officers of the Member States did take place though, predominantly on an informal and bilateral basis and not in a way intended by the Joint Action (Council 2002b).

2000

In 2000, liaison officers received a prominent role in the Action Plan on common action for the Russian Federation on combating organised crime. The action plan was "designed to promote close cooperation between the European Union and its Member States, and the Russian Federation in the fight against organised crime". The Action Plan summed up seventeen possible law enforcement cooperation arrangements and included a special paragraph devoted to the Member States' liaison officers posted in the Russian Federation. That paragraph stated that "these officers [should] meet on a regular basis…exchange relevant information [and] should have the opportunity to consider the implementation of the action plan and to put forward proposals for strengthening that process" (Council 2000).

In practice, the only identifiable consistent action taken on the basis of the Action Plan since 1999 has been the organisation of annual meetings for the EU liaison officers by the consecutive Presidencies. These meetings usually have a pre-drafted programme and

conclusions usually supporting national priorities of the Presidency with little space available for input – as recommended in the Action Plan – from the liaison officers (Block 2007).

More regular meetings between the EU liaison officers posted in the Russian Federation as suggested in the Action Plan to promote information exchange have been held since 1999 and have continued since then. These informal meetings are held between all (and not only EU) liaison officers. Such meetings are common in places where multiple foreign liaison officers are posted. A well-known example are the meetings of the Foreign Anti Narcotic Community (FANC), an informal working group of the foreign Drug Liaison Officers posted in Thailand, which was set up in 1979 (AFP 2002). Overall, close cooperation between the liaison officers of the EU Member States posted in the Russian Federation exists mainly on an informal basis and independently from the Action Plan.

2003

In 2003, the Council adopted two instruments concerning liaison officers. The first was a Council Decision aiming to regulate the posting and tasks of police liaison officers, which replaced the 1996 Joint Action (Council 2003b). The initiative for the Decision was taken by Denmark (Council 2002d), although the discussion started in 2001 when Sweden proposed to open "joint liaison offices" citing the cooperation between the Nordic countries on liaison officers (Council 2001a). However, except for Sweden, Denmark and Italy, all other Member States considered that proposal to be too far-reaching. It was argued that further developments in co-operation between liaison officers should instead be based on already existing agreements, formal as well as informal (Council 2001b).

The purpose of the Danish initiative was to further enhance co-operation between liaison officers of the Member States and to create a legal basis for Europol and Member States to make use of all EU liaison officers posted in third states and international organisations. The main difference with the 1996 Joint Action laid in the new possibility for the liaison officers of the Member States to directly exchange information with each other, in addition to information exchanges between the authorities of one Member State and a liaison of another Member State posted in a third country. Also, the Danish proposal created the possibility for Europol to forward requests to liaison officers of the Member States in third countries or international organisations where Europol is not represented. An emphasis was further put on cooperation and coordination in third countries where Member States should ensure that their liaison officers provide assistance to each other and that they share tasks. The explanatory note with the proposal mainly summed up political reasons for the proposed Decision, but did not offer any further explanation of, or references to, actual practices of liaison officers (Council 2002c).

A particularly interesting part of the Decision was the emphasis on the common use of liaison officers. The Nordic states successfully pool their liaison officers; the Nordic model is often quoted as 'best practice' in this regard. However, neither the proposal itself, nor the explanatory note, referred to these best practices of Nordic cooperation. Also, the question of why the close cooperation between the Nordic countries in posting liaison officers is successful and whether similar arrangements would also work at the EU level was not posed nor answered in the policy discussions. Gammelgård (2001) argues that the geographical, cultural and linguistic communalities between the Nordic countries are an important factor in their already longstanding police cooperation. However, in the policy documents relating to the discussion on the Danish proposal, no reference can be found to communalities amongst EU Member States, practical aspects or the feasibility of the idea of a common use of liaison officers. Questions like how a common use actually could work in practice or what obstacles could be met do not appear to have been discussed.

Asked whether liaison officers could represent other Member States, an interviewed liaison officer replied:

> If you look at the liaison officers, of course they can. But the problem lies with the different standards between the Member States. It is like with the so-called Swedish initiative: everyone should be able to communicate everything with everyone. Sure. But as long as we each have different standards this simply does not work (Interview 27 September 2009).

The implementation of the 2003 Decision was evaluated two years after its adoption. The outcome of the evaluation shows a similar picture as the evaluation of the 1996 Joint Action. It is concluded that the exchange of information is functioning well, though no statistics or other evidence is provided. The element of task sharing seems to be rare. Processing requests from Europol seems to be equally rare. Representation of another Member State by liaison officers takes only place in the framework of bilateral agreements and between the Nordic countries. Meetings of EU liaison officers posted in third countries are being held, but again informal ties between liaison officers often appear to be the driving force behind these meetings (Council 2005a).

The only effect of the 2003 Decision that was found are the efforts of the Benelux countries (Belgium, the Netherlands and Luxembourg) to pool their liaison officers. With the 2003 Council Decision in mind, the chiefs of police from the Benelux countries developed ideas on a common liaison network in November 2003. The Benelux countries have a long history of police cooperation that, for example, formed an important basis for the 1985 Schengen Agreement (Fijnaut 1993: 39). A pilot for enhanced cooperation between the liaison officers from the Benelux countries posted in five countries was formalised in April 2004 and took place in 2004 and 2005. A further agreement at ministerial level, with a focus on cooperation between the liaison officers from the Benelux countries posted in the Balkan region, was reached in 2006 (Benelux 2006a) and the official 2006 Benelux Annual Report is highly positive on the project (Benelux 2006b: 9). There has been a widely published success story of the apprehension in Poland of a suspect of a murder committed in Brussels partly due to the efforts of the Dutch liaison officer in Warsaw (Ministry of the Interior of Belgium 2006). However, the involved practitioners are less convinced and see significant differences between the practices of liaison officers of the three Benelux countries that are not easily overcome (Interview 31 May 2007). To be more precise, taking care of routine requests on behalf of one of the other countries is usually not problematic. However, in sensitive and complex situations where liaison officers could have their most added value, the cultural, legal and practical (*e.g.* language, standards, procedures) differences between the Dutch and Belgian police systems represent formidable obstacles (Interview 27 October 2009).

The second instrument adopted by the Council in 2003 concerning liaison officers was a Resolution on the posting of liaison officers with particular expertise in drugs to Albania (Council 2004). Italy put forward the initiative for the Resolution in July 2003 (Council 2003c), although it had voiced an interest in joint liaison efforts in that region already in 2001. In the report from an expert group on the idea of a pilot scheme concerning the common use of liaison officers of the Member States in third countries, Italy proposed the Balkans as an interesting area for a joint pilot scheme (Council 2001b). Italy underpinned its initiative in 2003 largely from a political point of view and the first seven points in the preamble of the proposal cite other political developments rather than operational considerations. Points eight to ten of the pre-amble make reference to a sizeable increase in cannabis smuggling through Albania into Italy and the rise of Albanian organised crime groups in drug trafficking in general. This indicates that the domestic interests of Italy played a significant role in their decision to table the initiative. In 2009, six years after the adoption of the Resolution, nine EU Member States had a police liaison posted in Tirana.

Two Member States, Italy and Greece, had already a liaison office in Tirana before 2003, two are 'new' Member States since 2004, which means that five 'old' Member States posted a new liaison officer after 2003. Even so, it is difficult to assess the extent to which this expansion has been the result of the Resolution, as over the years crime groups from Albania emerged as a serious nuisance all over Europe (Arsovska 2008). It is more likely that violent organised Albanian crime on their own territory, rather than the Resolution, was what, for example, prompted Denmark in 2005 and Belgium in 2006 to post a liaison officer in Tirana (Copenhagen Post 2005, Expatica 2007).

2006

In 2006, the Council adopted another Decision concerning liaison officers, which amended the 2003 Decision on the common use of liaison officers (Council 2006). The initiative for this Decision was put forward by the UK and Ireland (Council 2005b) on the basis of the evaluation of the 2003 Decision on the common use of liaison officers. The main changes related to two issues.

Firstly, Article eight of the amended Decision made the use by Member States of liaison officers posted by Europol to third countries or international organisations possible. However, the practical relevance of this provision can be questioned. Since 2002, Europol has had only one liaison office abroad, *i.e.* in Washington D.C. (US). In addition, an evaluation of this particular office questions its added value. The cooperation between the US and EU law enforcement agencies still predominantly takes place through long established bilateral channels (Council 2005c). The second change introduced by the 2006 Decision related to formalising the cooperation by, for example, appointing "lead nations" that will be given responsibility for the coordination of the EU cooperation in a particular country or region. The discussion on how to organise the coordination of the liaison officers' network in third countries and the role of a 'lead nation' in each region has been ongoing since then, as not all Member States stand unequivocally positive to a more formalised approach (e.g. Council 2009a).

Again, the documents relating to the policy-making on the 2006 Council Decision do not show any residue of discussions on the practical aspects of the proposed provisions. Only in the discussions on the actual implementation of these provisions did it become clear that the Member States held very different views. In its responses to a questionnaire relating to the discussion, Germany, for example, stated that it "does not consider the inflexible formalised expansion of the liaison officers' meetings indispensable". The United Kingdom even questioned the existence of 'best practices' because "each EU nation operates their LO functions in a different way and their priorities/strategic imperatives also differ" (Council 2009b). It might be too early to assess the effects of the 2006 Decision. However, to date, little of the intended effects on the posting and practices of liaison officers can be seen.

Summary and reflection

This article has examined the practices of the use of liaison officers as a strategy for police cooperation by the police in the EU Member States, as well as policy-making in this field in the TREVI forum and later the EU Council.

The findings with regard to the practices of the use of liaison officers show in the first place that the posting of liaison officers is primarily governed by domestic considerations and priorities. This is also visible in some statements of Member States in the EU policy discussions on liaison officers and in the actual posting of liaison officers in Albania.

Moreover, the findings show that the role, tasks and practices of liaison officers are determined by national regulations, the particulars of the police system in their home country and the personal preferences of the individual liaison officer. The efficacy of liaison officers in coping with the complexity of transnational police cooperation depends on their ability to build a network of privileged contacts, as well as their knowledge of legal and organisational particulars of the jurisdictions between which they liaise. Combined with the high level of discretion liaison officers can exercise in their work, there are arguments to say that liaison officers embody the professional autonomy seen by Deflem as one of the conditions for successful police cooperation (Deflem 2002). The findings show that, despite the existence of multiple alternative channels, the police, also within the EU, make significant use of liaison officers for cooperation.

An important finding of the analysis of the policy-making concerning liaison officers is that only the documents from the TREVI Working Group III show residue of some discussion of the practical aspects of the work of liaison officers. The examination of the EU Council policy documents shows that the different instruments concerning liaison officers were almost fully underpinned by a political and legal rationality. Those usually referred to the construction of the common Area of Freedom, Security and Justice, but failed to consider the practical issues relevant to the work of liaison officers such as, for example, the legal, organisational and cultural differences between police systems in the Member States.

In line with the points highlighted by Snellen (2002), the findings show that the EU Council policy-instruments regarding liaison officers have had little, if any, effect. The findings suggest that the lack of practicality of the instruments is an important factor for this limited effect. Nevertheless, it should also be noted that, in spite of what the Member States agree in the Council, they appear to be reluctant to surrender control over the liaison officers. The posting and practices of liaison officers remain largely governed by national preferences and are subject to the specifics of the national police systems.

Nonetheless, it seems that there is ample room for improving EU policy-instruments if the aim is to create a common use of liaison officers. This might require reconciliation of the different standards and practices in the EU Member States with regard to police cooperation in general, and concerning liaison officers in particular, but in any case increasing the practicality of the instruments by giving due consideration to professional rationality in the policy-making. Perhaps further research on liaison officers' practices in different situations, such as the successful Nordic pooling of liaison officers and the work of the liaison officers at Europol, could provide the necessary ingredients.

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The Issue of Data Protection and Data Security in the (Pre-Lisbon) EU Third Pillar

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Abstract

The key functional operability in the pre-Lisbon PJCCM pillar[1] of the EU is the exchange of intelligence and information amongst the law enforcement bodies of the EU. The twin issues of data protection and data security within what was the EU's third pillar legal framework therefore come to the fore. With the Lisbon Treaty reform of the EU, and the increased role of the Commission in PJCCM policy areas, and the integration of the PJCCM provisions with what have traditionally been the pillar I activities of Frontex, the opportunity for streamlining the data protection and data security provisions of the law enforcement bodies of the post-Lisbon EU arises. This is recognised by the Commission in their drafting of an amending regulation for Frontex[2], when they say that they would prefer "to return to the question of personal data in the context of the overall strategy for information exchange to be presented later this year and also taking into account the reflection to be carried out on how to further develop cooperation between agencies in the justice and home affairs field as requested by the Stockholm programme."[3] The focus of the literature published on this topic, has for the most part, been on the data protection provisions in Pillar I, EC. While the focus of research has recently sifted to the previously Pillar III PJCCM provisions on data protection,[4] a more focused analysis of the interlocking issues of data protection and data security needs to be made in the context of the law enforcement bodies, particularly with regard to those which were based in the pre-Lisbon third pillar. This paper will make a contribution to that debate, arguing that a review of both the data protection and security provision post-Lisbon is required, not only in order to reinforce individual rights, but also inter-agency operability in combating cross-border EU crime. The EC's provisions on data protection, as enshrined by Directive 95/46/EC, do not apply to the legal frameworks covering developments within the third pillar of the EU. Even Council Framework Decision 2008/977/JHA, which is supposed to cover data protection provisions within PJCCM expressly states that its provisions do not apply to "Europol, Eurojust, the Schengen Information System (SIS)" or to the Customs Information System (CIS). In addition, the post Treaty of Prüm provisions covering the sharing of DNA profiles, dactyloscopic data and vehicle registration data pursuant to Council Decision 2008/615/JHA, are not to be covered by the provisions of the 2008 Framework Decision. As stated by Hijmans and Scirocco, the regime is "best defined as a patchwork of data protection regimes", with "no legal framework which is stable and unequivocal, like Directive 95/46/EC in the First pillar".[5] Data security issues are also key to the sharing of data in

[1] Police and Judicial Cooperation in Criminal Matters.
[2] Proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) {SEC(2010) 149} {SEC(2010) 150}, COM(2010) 61.
[3] *ibid.* in pages 4-5 of the introduction.
[4] H. Hijmans and A. Scirocco; Shortcomings in EU data protection in the third and the Second Pillars, Can the Lisbon Treaty be expected to help? CMLRev. 46: 1485-1525, 2009.
[5] *ibid.* at p.1496.

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organised crime or counterterrorism situations. This article will critically analyse the current legal framework for data protection and security within the third pillar of the EU.

Keywords

Data protection; Data security; PJCCM; Europol; Eurojust; Schengen: Prüm

DATA PROTECTION LAWS ARE VERY MUCH A CHILD OF OUR TIMES, WITH "automated massive processing of personal data"[6], bringing the issue to the fore. Legal frameworks began to be developed in the 1960s, with much of their development happening during the 1970s and 1980s.[7] EU concepts underlying data protection have developed differently from those in other parts of the world, notably the United States, where the divide between the two "is a stark example".[8] The concepts of data protection and privacy are seen as being closely connected, with "a significant overlap between the two"[9], and privacy being "a contested legal concept".[10] The German Federal Constitutional Court[11] has developed what has become the EU approach on the matter.[12] OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data were adopted in 1980[13], with the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data being signed in 1981.[14] The UN also published Guidelines Concerning Computerised Data files in 1990.[15] Most of these initiatives have been in the area of commercial data, with the intention of defending "individuals against the "intrusive" State."[16] The processing of data for counter-terrorism and law enforcement purposes have, however, not been so well addressed, with the drive for "security" coming to the fore post 9/11, requiring "affirmative action", which some have distinguished from the terms "safety" and "surveillance".[17] While there has been recent acknowledgment of the issues that arise with regard to EU law enforcement data collection[18], data protection in this area must be analysed in conjunction with the issue of data security. When these twin issues are analysed together, a very complex picture emerges, which should be re-examined in the post-Lisbon era. While Hijmans and Scirocco point out that "legal instruments facilitating the access to and exchange of information are a priority for the EU legislature"[19], much still needs to be done to anticipate all possible scenarios that may arise, in order to both protect the individual from a data protection perspective and facilitate properly directed law enforcement operations across the EU. As can be seen from the sketched outline in the following table, both the data protection and data security regimes for the EU law enforcement agencies are highly fragmented.

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[6] de Hert, Papakonstantinou, The data protection framework decision of 27 November 2008 regarding police and judicial cooperation in criminal matters – A modest achievement however not the improvement some have hoped for, 25 (2009) *Computer Law & Security Review* 403-414, p.403.
[7] *ibid.*
[8] Birnhack, The EU Data Protection Directive: An engine of a global regime, 24 (2008) *Computer Law & Security Report* 508-520, p.509.
[9] Kuner, An international legal framework for data protection: Issues and prospects, 25 (2009) *Computer Law & Security Review* 307-317, p.309.
[10] Birnhack, n8 above, p.508.
[11] Bundesverdassunsgericht, Judgment of 15 December 1983, 65 BVerfGE 1.
[12] Kuner, n9 above, p.308.
[13] Birnhack, n8 above, p.511.
[14] *ibid.*
[15] *ibid.*
[16] De Hert, Papakonstantinou, n6 above, p.404.
[17] *ibid.*
[18] In particular, H. Hijmans and A. Scirocco; Shortcomings in EU data protection in the third and the Second Pillars, Can the Lisbon Treaty be expected to help? CMLRev. 46: 1485-1525, 2009.
[19] H. Hijmans and A. Scirocco, n4 above, p.1492.

Table 1: EU law enforcement data protection and data security overview

	Data protection	**Data Protection Supervisor**	**Data security standards**
Europol	Europol Documentation (Council Decision 2009/371/JHA)	Europol Data Protection Officer, post- 2009 reforms	Council Decision 2009/968/JHA
Eurojust	Eurojust Documentation (Council Decision 2002/187/JHA, to be replaced by Council Decision 2009/426/JHA, when it comes into force)	Eurojust Data Protection Officer since 2002	Council Decision 2001/264/EC as amended
Frontex (ex. EC)	Regulation 45/2001	European Data Protection Supervisor	None specified pre-reforms; Council Decision 2001/264/EC as amended, post-proposed Frontex reforms
Schengen	SIS I – none. SIS II – Articles 56 to 63 of Council Decision 2007/533/JHA on the second generation of Schengen	SIS I – none. SIS II - European Data Protection Supervisor	None specified; presumably Council Decision 2001/264/EC as amended
Prüm Council Decision	National data protection laws	National Data Protection Supervisors	None specified
Anything else ex. pre-Lisbon third pillar	CFD 2008/977/JHA	National Data Protection Supervisors	None specified

Caught between the panoptic demands[20] of the surveillance society, in a world of increasing securitisation, and the requirements of the European Convention on Human Rights and domestic privacy laws, to include the needs of the criminal law for due process before 'conviction' for a criminal offence, data protection laws have been attempting to keep up with rapidly developing technology and the growth, for a variety of reasons, of complex and detailed databases. The precursor to EC and EU law in the area of data protection was the Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data. The definition of what is 'personal data' is still being refined, with the EU's Article 29 Working Committee, the "EU's data protection think tank"[21] often coming into conflict with national definitions of what is personal data, as was the case with the UK definition, as developed in the UK Court of Appeal ruling in *Durant* v. *FSA*.[22] Nevertheless, much has been written about data protection laws implemented pursuant to Directive 95/46/EC[23], which provides the legal framework for data protection in the first pillar of the EU, as it was known prior to the coming into force of the Lisbon Treaty[24], which specialises in commercial and civil law. More recently, the "complex relations between data protection and the activities of the State to ensure security" [25] has come to the fore in legal and political debates. Policing and other security agencies use of data, which needs to be protected by data protection legislation, is also required by society to be used in order to prevent and combat crime. In addition, the particular needs of the law enforcement community for data security, which is also affected by security classification issues, is highly relevant. Post-Lisbon these allied issues, and the requirements for the inter-operability of EU law enforcement agencies, need to be re-examined. Both the law enforcement community and society more generally require coherent and acceptable data protection and data security legal frameworks across the EU, both for the interoperability of databases in combating crime and the protection of the individual citizen who is caught up, either innocently or otherwise, in a law enforcement operation. As has been stated by the US General Accounting Office, "inaccurate and incomplete data may lead to restrictive measures being adopted on innocent people ("false positives"), at the same time impinging on the capacity to effectively target their real addressees ("false negatives")."[26]

The legal frameworks of both the data protection and data security regimes in the area of law enforcement appear quite fragmented, as set out in Table 1 above. They lack a joined-up approach which would increase their operability and the confidence of the general public in the system. In addition, the impact of both the regulatory authorities in this area and the EU Charter of Fundamental Rights are relevant. The coming into force of the Lisbon Treaty gives rise to opportunities to resolve a number of the issues discussed in this paper, should the EU Member States, and the various institutional actors in this field, choose to grasp this opportunity. What will become clear is that, as has been recognised by the Commission when drafting an amending regulation for Frontex[27], an "overall strategy for information exchange"[28] which is to be presented later in 2010, is required, which will take "into account the reflection to be carried out on how to further develop cooperation between Agencies in the justice and home affairs field as requested by the

[20] M. Foucault, *Discipline and Punish: The Birth of the Prison*, (Penguin 1977).
[21] Grant, Data protection 1998-2008, 25 (2009) *Computer Law & Security Review* 44-50, p.45.
[22] 2003 EWCA Civ. 1746.
[23] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OL L 281/31.
[24] 1st December 2009.
[25] H. Hijmans and A. Scirocco, n4 above, at p.1493.
[26] *ibid.* at page 1511.
[27] Proposal for a Regulation amending Council Regulation (EC) No 2007/2004, n2 above.
[28] *ibid.* at page 4 of the introduction.

Stockholm programme."[29] The same can be said about the data security provisions, which to even a non-security cleared outsider, without access to the relevant detail, look disjointed.

This article intends to critically examine these issues of data protection and data security as they arise in the context of law enforcement within the various EU agencies, such as Europol[30], Eurojust[31], and through the Schengen Information System[32], and to locate their provisions within the larger EU law enforcement picture.

Data protection in the pre-Lisbon first pillar

The most coherent legal framework on data protection has developed in the pre-Lisbon first pillar of the EU, pursuant to Directive 95/46/EC.[33] It is to be interpreted on the basis that data protection rights are not absolute, but are to be balanced with other fundamental rights, which in the *Promusicae* case required the balancing of the data protection rights with the right "to the protection of property".[34] This is despite the fact that the right to data protection is expressly provided for in Article 8 of the EU Charter on Fundamental Rights 2000. If the right to data protection, and its ancillary right to privacy can be counterbalanced by a right to property under the EC commercial law jurisprudence, then the right to data protection and privacy will all the more be compromised by the needs of the law enforcement community in legitimate crime detection and crime prevention activities. At the other end of the scale, as stated by Peers, the right to data protection would also appear to have to defer to "the right of freedom of expression and the right of access to documents" on the basis of the "democratic society" principle, which "would point towards the release of information concerning lobbying of public authorities and MEP's private interests".[35] In addition, in the pre-Lisbon *Neukomm* and *Rundfunk* judgement[36], the ECJ was prepared to compromise the right to data protection for the sake of the "proper management of public funds"[37], where the names of recipients of personal remuneration over a particular high threshold paid from the public purse were to be widely disclosed, as well as the amount of their remuneration. The data protection directive was interpreted in "light of Article 8 ECHR including the prospect of limitations under Article 8(2)".[38] References were made in the case to "Strasbourg case law and principles" to include "the specific objectives justifying a limitation on the right, the requirement that limits be 'prescribed by law' and 'necessary in a democratic society', the Strasbourg proportionality test and the margin of appreciation".[39] The right to data protection, therefore, is not an "absolute prerogative and can be subject to restrictions in the general interest".[40] It is only the "right to life and the right to be free from torture or

[29] *ibid.* at page 4/5 of the introduction.
[30] Europol Convention 1995, but to be replaced by the Europol Council Decision 2009/371/JHAof 6 April 2009 establishing the Europol Police Office (Europol), OJ L 121/6, which came into force on the 1st January 2010.
[31] Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63/1.
[32] Schengen Convention 1990.
[33] Directive 95/46/EC, n23 above.
[34] Case C-275/06 *Productores de Música de España (Promusicae)* v. *Telefónica de España SAU* [2008] ECR I-271.
[35] S. Peers: Taking Rights Away? Limitations and Derogations, p. 141, Chapter 6 in Steve Peers and Angela Ward (eds.) The EU charter of fundamental rights politics, law and policy, essays in European Law, Hart Publishing, Oxford and Portland Oregon, 2004, p.168.
[36] Joined Cases C-465/00, C-138/01 and C-139/01; *Neukomm* and *Rundfunk* [2003] ECR page I-04989.
[37] At paragraphs 50 and 94 of the Judgment, and paragraph 1 of the ruling.
[38] S.Peers, n35 above, p.144.
[39] *ibid.* p.144.
[40] *ibid.* p.143.

inhuman or degrading treatment or punishment" which can be seen to be absolute and non-derogable.[41]

The pre-Lisbon legal status of the Charter of Fundamental Rights was "something paradoxical"[42], given its status as "soft law"[43], not having any formal legal effect, being "merely a political statement"[44], but still having a profound effect on the operation of the EU in general, and the jurisprudence of the ECJ in particular. As Cartabia has pointed out, the Charter had given a new lease of life to the "creative ability of the European Court" pre-Lisbon.[45] This creative ability of the ECJ will continue to be relevant in the post-Lisbon framework, with the post-Lisbon Article 6.1 TEU upgrading the Charter to the same legal status as the Treaties.[46] It must be pointed out however, that this upgrading of the Charter is subject to a UK and Polish opt-out[47], to the extent that the Charter "will not be justiciable in British courts or alter British law".[48] The UK was, however, party to the "solemn proclamation at the Nice European Council of December 2000" which, according to Ward, "amounts to persuasive evidence in determining the content of fundamental rights that are judicially enforceable in the EU system".[49] The extent to which the UK and Polish opt-out from Article 6.1 TEU, post-Lisbon but still subject to the effect of the "solemn proclamation" at Nice, will have an effect on the impact of ECJ jurisprudence on these two Member States, to which they are still bound, has yet to be established. In addition, pre-Lisbon the European Union Agency for Fundamental Rights has already been set up[50] under the pre-Lisbon framework and the ECJ had already adjudicated on Directive 95/46/EC, using, not Article 8 of the EU Charter, but Article 8 ECHR.[51]

Article 16 TFEU expressly provides a treaty provision for data protection regulation post-Lisbon. This article provides little detail, however, apart from stating at Article 16.1 that "Everyone has the right to the protection of personal data concerning them". It does provide that the provisions in Article 16 are to be "without prejudice to the specific rules laid down in Article 39" TEU, which deals with data protection within the Common Foreign and Security Policy (CFSP). Article 16 TFEU does become subject to Article 6a of UK and Ireland's post-Lisbon Schengen Protocol,[52] which, quite logically provides that any data protection provisions adopted with regard to judicial cooperation and police cooperation which forms part of the Schengen *acquis*, which either country has not subsequently opted into, will not apply to them. A similar "even more complicated"[53] Schengen relevant derogation has also been provided for Denmark in its post-Lisbon Schengen protocol.[54]

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[41] *ibid.* referring to the Case C-112/00, *Schmidberger* [2003] ECR p.I-05659
[42] M. Cartabia: Europe and Rights: Taking Dialogue Seriously, European Constitutional Law Review, 5: 5-31, 2009, p.15.
[43] J. Dine; Criminal Law and the Privilege Against Self-Incrimination, p. 269, Chapter 11 in Steve Peers and Angela Ward (eds.) The EU charter of fundamental rights politics, law and policy, essays in European Law, Hart Publishing, Oxford and Portland Oregon, 2004, p.270.
[44] M. Cartabia, n42 above, p.15.
[45] *ibid.* p.8.
[46] As elaborated further in Protocol (No. 8) Relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, attached to both the TEU and the TFEU.
[47] Protocol (No. 30) on the application of the charter of fundamental rights of the European Union to Poland and to the United Kingdom, attached to both the TEU and the TFEU.
[48] F. Ferretti, "The "Credit Scoring Pandemic" and the European Vaccine: Making Sense of EU Data Protection Legislation, 2009 (1) *Journal of Information, Law & Technology*, p.11.
[49] A. Ward; Access to Justice, p. 123, Chapter 5 in Steve Peers and Angela Ward (eds.) The EU charter of fundamental rights politics, law and policy, essays in European Law, Hart Publishing, Oxford and Portland Oregon, 2004, p.127.
[50] Regulation (EC) No. 168/2007 of 15 February 2007, OJ L 53/2 22.2.2007.
[51] Joined Cases C-465/00, C-138/01 and C-139/01; *Neukomm* and *Rundfunk* [2003] ECR page I-04989.
[52] Protocol (No. 21) on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice.
[53] H. Hijmans and A. Scirocco, n4 above, p.1516.
[54] Article 7 of Protocol (No 22) on the Position of Denmark.

The drafting of updates to the EU data protection provisions, therefore, needs to be clear on whether it is to form part of the core EU provisions, or to be subject to the various continuing Schengen opt-out provisions. Nevertheless, it is fair to say, that the Lisbon Treaty "improves the judicial protection of citizens"[55] for pre-Lisbon second and third pillar issues. As has been pointed out by Hijmans and Scirocco, this will happen, in particular, "after the expiry of the transitional period of 5 years" set out in Protocol no. 36 attached to the TEU and TFEU, which "despite" the provision contained in Protocol no. 30, "on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom".[56]

Directive 95/46/EC has been complemented by Regulation 45/2001[57] to provide data protection to "data subjects" when their data is being processed by EC institutions and bodies. Frontex, a pillar I law enforcement agency provides[58] that Regulation 45/2001 is to apply to its processing of personal data. Article 8.3 of the 2000 Charter requires that "compliance with these [data protection] rules shall be subject to control by an independent authority". Such an authority is the European Data Protection Supervisor (EDPS) whose position was established by Regulation 45/2001/EC.[59]

This coherent structure set up for Pillar I activities, to include Pillar I law enforcement activities, was not transferred to Pillar III Police and Judicial Co-operation (PJCCM) activities, which of itself becomes an issue in the post-Lisbon framework. Both previous pillars have now been reintegrated into the unitary post-Lisbon treaty framework, all be it with continuing exceptions for the Common Foreign and Security Policy (CFSP), which now has its own data protection provisions under Article 39 TEU. "Public security, defence, state security…. and the activities of the State in the areas of criminal law" were expressly provided as exceptions to Directive 95/46/EC[60], as were the activities of "Titles V and VI of the Treaty on European Union"[61], *i.e.* the then CFSP and PJCCM policy areas. Equally, standard data protection rules could be curtailed where data originally collected for non-law enforcement matters were now required for law enforcement purposes, to include taxation matters.[62] A clear division between the commercial and law enforcement data protection activities had always been envisaged. In addition, the EDPS did not, in the pre-Lisbon framework, have competence to supervise the activities of "bodies established outside the Community framework".[63] A fractured structure develops when the provisions of the pre-Lisbon third pillar is examined. Now that the PJCCM agencies are to be brought into the post-Lisbon EU framework, their data protection and data security provisions need to be re-examined.

Not only were PJCCM policy areas more politically contentious than perhaps those in the EC pillar, but "police information is something completely different"[64] from data processed by the private sector for commercial purposes. As pointed out by de Hert and Papakonstantinou, police data can often, until an investigation develops, be "based on uncertain facts or on assumptions and hearsay", which does not match the nature of hard

[55] H. Hijmans and A. Scirocco, n4 above, p.1523.
[56] *ibid.*
[57] Regulation (EC) No. 45/2001 of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8/1.
[58] At paragraph 19 to the preamble to Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 349/1.
[59] Regulation (EC) No. 45/2001, n57 above, at Articles 41 to 48.
[60] Directive 95/46/EC, n.23 above, at Article 3.2 first indent.
[61] *ibid.* at Article 3.2 first indent.
[62] *ibid.* at Article 13.1.
[63] Regulation (EC) No. 45/2001, n57 above, at paragraph 16 of the Preamble.
[64] De Hert, Papakonstantinou, n6 above, p.408.

data covered by the mainstream data protection directive.[65] While the pillar issues may have been resolved by the Lisbon Treaty, the nature of data being used in law enforcement operations remains quite different to commercial data post-Lisbon and will probably continue to require a separate legal regime.

In addition, the issue of data security comes squarely into the picture when dealing with police intelligence and covert surveillance 'data'. While provisions are made in Regulation 45/2001 to deal with issues of professional secrecy by the EDPS "with regard to any confidential information which has come to their knowledge in the course of the performance of their official duties"[66], this is not quite the same issue as the law enforcement security classifications covered in Council Act of 3 November 1998[67], which deals with Europol data security classifications.

Provisions were made for data security provisions in the EC, and throughout the EU, but outwith Europol, by Council Decision 2001/264/EC[68] as subsequently amended.[69] While some of these provisions focus on industrial security, namely Council Decision 2005/952/EC, it is clear that national security is also covered, with the EU classifications of "EU Top Secret", "EU Secret", "EU Confidential" and "EU restricted" being mapped, not only against national security classifications of the EU Member States, but also those of the military organisations of NATO and the Western European Union.[70] The proposed reform of the Frontex legal framework will make express reference to the application of Commission Decision 2001/844/EC, ECSC, Euratom, which brings with it the security classification regime set out in Council Decision 2001/264/EC.[71]

The pre-Lisbon third pillar: the 'standard' rules

While accepting that policing relating data may require a separate legal regime from the one being used for commercial data, but reflecting "the tension between the quest for effectiveness on the one hand and the preservation of state sovereignty on the other"[72], it is regrettable to note that there is not one policing data protection regime, but many. Council Framework Decision 2008/977/JHA[73] appears to give a unitary response to the issue of data protection for EU law enforcement activities, but its provisions are subject to so many exceptions that the question does arise as to its actual applicability. The Framework Decision, which is deemed to form part of the Schengen *acquis*[74], purports to provide "a high level of protection of the fundamental rights and freedoms of national persons, in particular their right to privacy"[75] for PJCCM related data processing. However,

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[65] *ibid.*
[66] Regulation (EC) No. 45/2001, n57 above, at Article 45. .
[67] Council Act of 3 November 1998 adopting rules on the confidentiality of Europol information 1999 OJ C 316/1.
[68] Council Decision 2001/264/EC of 19 March 2001 adopting the Council's security regulations, OJ L 101/1.
[69] Council Decision 2004/194/EC of 10 February 2004 amending Decision 2001/264/EC adopting the Council's security regulations, (2004/194/EC) OJ L 63/48, Council Decision of 12 July 2005 amending Decision 2001/264/EC adopting the Council's security regulations (2005/571/EC), OJ L 193/1, Council Decision of 20 December 2005 amending Decision 2001/264/EC adopting the Council's security regulations (2005/952/EC), OJ L 346/18, and Council Decision of 18 June 2007 amending Decision 2001/264/EC adopting the Council's security regulations, (2007/438/EC),OJ L 164/24.
[70] *ibid.*
[71] Proposed new Article 11.b at point 15 of Proposal for a Regulation amending Council Regulation (EC) No 2007/2004, n2 above.
[72] V. Mitsilegas; The third wave of third pillar law. Which direction for EU criminal justice, E.L.Rev. 2009, 34(4), 523-560, p.560.
[73] Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, OJ L 350/60.
[74] With not only the UK and Ireland opting into these provisions, but also involving Norway, Iceland, Switzerland and Lichtenstein.
[75] Council Framework Decision 2008/977/JHA, n.73 above, at Article 1.

its actual scope is "very limited".[76] As one would expect, the "transmission of personal data by the judiciary, police or customs (…) in the context of criminal proceedings" is excluded.[77] The issue of data protection in the case of law enforcement activities solely within one Member State remains a matter for individual Member States to address.[78] While the Council Framework Decision 2008/977/JHA provisions are not only "without prejudice to essential national security interests and specific intelligence activities in the field of national security"[79] which may be across EU borders[80], also exempted are the "data protection provisions of (…) Europol, Eurojust, the Schengen Information System (SIS) and the Customs Information System (CIS)".[81] Paragraph 39 of the Preamble also removes from its ambit data being processed pursuant to Council Decision 2008/615/JHA, the Prüm Decision[82], which applies (only) to all EU Member States. As has been pointed out, "it is questionable how these limitations are to work in practice".[83] In addition, for Framework Decision 2008/977 to apply, it must be foreseeable, "at the moment of the collection of personal data by a police authority" that the "data might at a later stage be used in a cross-border context".[84] Police enquiries often develop in unexpected directions, so it would appear that it is only planned transnational operations that were envisaged as being the subject matter of this Framework Decision, which are not to use any of the EU transnational policing structures. While the intention behind the Framework Decision was to develop a more comprehensive legal framework than what eventually emerged, its precursor "negotiations proved lengthy and controversial", with EU Member States making "a number of attempts to water down the text" and tabling "a number of [amending] proposals".[85] De Hert and Papakonstantinou point out that the Framework Decision "attempted to strike an admittedly difficult to find balance between instruments already in effect and their provisions". The resulting legal provisions in Framework Decision 2008/977 is such that Hijmans and Scirocco are of the view that it "does not fulfil the criteria of Article 16 TFEU", thereby placing and obligation on the EU legislators "to replace it by a new legislative instrument."[86] It is argued here that the entire data protection and data security structure needs to be reviewed.

The data protection and security regime at Europol

The agency that has led the way in dealing with law enforcement issues at the EU level is Europol. The Europol Convention 1995 was necessarily drafted against the backdrop of a legal framework on data protection, and transnational law enforcement which is now outdated, when compared with the provisions of the recent Europol Council Decision.[87] The Europol Convention had been updated by three Protocols[88], and a number of Council

[76] V. Mitsilegas, n72 above, p.559.
[77] Council Framework Decision 2008/977/JHA, n.73 above, at paragraph 18 of the Preamble.
[78] *ibid.* at paragraph 6 of the Preamble.
[79] *ibid.* at Article 1.4.
[80] *ibid.* at Article 1.4.
[81] *ibid.* at paragraph 39.
[82] Council Decision 2008/615/JHA of 23 June 2008 on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ.L 210/1.
[83] H. Hijmans and A. Scirocco, n4 above, p.1494.
[84] *ibid.*
[85] V. Mitsilegas, n72 above, p.558.
[86] H. Hijmans and A. Scirocco, n4 above, p.1519.
[87] Council Decision 2009/371/JHA establishing the European Police Office, OJ L121/37.
[88] Council Act of 30 November 2000 drawing up on the basis of Article 43(1) of the Convention on the establishment of a European Police Office (Europol Convention) of a Protocol amending Article 2 and the Annex to that Convention (2000/C 358/01) OJ C 358/1(the Money laundering protocol, in force 29th March 2007), Council Act of 28th November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, (2002/C 312/01) OJ C 312/1 (the Joint Investigations Teams Protocol, in force 29th March 2007), and the Council Act of

acts.[89] The Europol Council Decision, which moves the focus from organised crime to serious crime, thereby "broadening Europol's mandate"[90], takes into account these various updated pieces of legislation in its drafting of a new legal framework for Europol. The general EU principle of public access to documentation, as set out in Regulation (EC) No. 1049/2001[91], while enshrined in the Europol Council Decision[92], has to be understood against the backdrop of Europol data protection, data security and security classification provisions.

The key function of Europol is the processing of data for the purposes of crime prevention and enforcement, with the new Europol legal basis providing for the "intensification of data collection, analysis and exchange", which is to be allied to a "new system" for the processing of data".[93] Data protection provisions at Europol would therefore cover a very high volume of personal data which is being processed in the context of law enforcement. The use of personal data at Europol, under the Council Decision, is therefore restricted for the purposes of preventing and combating "crimes in respect of which Europol is competent, and [preventing and combating] other serious forms of crime" with Europol being empowered to use such data "only for the performance of its tasks."[94] The Council Decision does, however, increase the time limit for data storage to "three plus three years".[95] The Council Decision also envisages greater access to Europol data by national Europol units, access by outside experts to Europol analysis work files, for example US law enforcement agencies for relevant cases or operations, and access to data relevant to them, to a diverse range of other agencies and bodies,[96] to include third states and Interpol.[97]

A control mechanism has been put in place "to allow the verification of the legality of retrievals from any of its automated data files"[98] with all such requests being logged, and audited upon request[99] by Europol, its National Supervisory Bodies[100], and the Joint Supervisory Body.[101] The roles of the National and Joint Supervisory Bodies remain

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27th November 2003 drawing up, on the basis of Article 43() of the Convention on the Establishment of a European Police Office (Europol Convention), a Protocol amending that Convention, (2004/C 2/01), OJ C 2/1 (The "Danish" Protocol, in force the 18th April 2007).

[89] Council Act 1999/C 26/01, of 3 November 1998 adopting rules applicable to Europol analysis files, OJ C 26/1. Act of the Management Board of Europol of 15 October 1998 concerning the rights and obligations of liaison officers, (1999/c 26/09), OJ C 26/86, Council Act of 3 November 1998 adopting rules on the confidentiality of Europol information (1999/C 26/01) OJ C 26/10, which contains the security classifications for data, Council Act of 18 January 1999 adopting the Financial Regulation applicable to the budget of Europol (1999/C 25/01) OJ C 25/1, Council Act of 3 November 1998 laying down rules concerning the receipt of information by Europol form third parties, (1999/C 26/03), OJ C 26/17, Act of the Management Board of Europol of 15 October 1998 laying down the rules governing Europol's external relations with European Union- related bodies (1999/C 26/0) OJ C 26/89, Council Act of 3 November 1998 laying down rules governing Europol's external relations with third States and non-European Union related bodies (1999/C 26/04) OJ C 26/19, Council Act of 12 March 1999 adopting the rules governing the transmission of personal data by Europol to third States and third bodies (1999/C 88/01) OJ C 88/01, as amended, by Council Act of 28 February 2002 amending the Council Act of 12 March 1999 adopting the rules governing the transmission of perusal data by Europol to third States and third bodies (2002/C 58/02), OJ C 58/12 (which is really about onward transmission of data),

[90] V. Mitsilegas, n72 above, p.551.

[91] Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council, and Commission documents, OJ L 101/1.

[92] Council Decision 2009/371/JHA, n87 above, at Article 45.

[93] V. Mitsilegas, n72 above, p.551.

[94] Council Decision 2009/371/JHA, n87 above, at Article 19.1.

[95] V. Mitsilegas, n72 above, p.552.

[96] To include Eurojust, OLAF, Frontex, CEPOL, the European Central Bank and the European Monitoring Centre for Drug Addiction.

[97] V. Mitsilegas, n72 above, p.552.

[98] Council Decision 2009/371/JHA, n87 above, at Article 18.

[99] *ibid.*

[100] *ibid.* at Article 33.

[101] *ibid.* at Article 34.

essentially the same as those which operated under the Europol Convention 1995, with "any person" having the right to ask his or her national supervisory body to "ensure that the input or communication to Europol of data concerning him or her in any form and the consultation of the data by the Member State concerned are lawful"[102], with that right to be "exercised in accordance with the national law of the Member State in which the request is made".[103] The Joint Supervisory Body is more interested in the processes used by Europol, with their role being to "review (…) the activities of Europol" ensuring that individual rights "are not violated by the storage, processing and use of the data held by Europol".[104] The Joint Supervisory Body is also to ensure that the transfer of data to other organisations from Europol is permissible.[105] Should the Joint Supervisory Body identify any violations in "the storage, processing or use of personal data", then it will require the Director of Europol to address the issue within a set time limit.[106]

The standard of data protection continues to be those of the Council of Europe[107], rather than the standards set out in Directive 95/46/EC[108] or even Regulation 45/2001.[109] Equally, no reference is made to Council Framework Decision 2008/977/JHA[110], which one would assume must have been familiar to the drafters of the 2009 Europol Council Decision.[111] It is possible, however, that different teams were responsible for drafting various pieces of legislation, hence the lack of joined-up thinking evident from their comparative analysis. The standard rule on data protection at Europol, under the Council Decision, is that data shall only be held "for as long as is necessary" for Europol to perform its tasks[112], with data to be reviewed every three years, with "Europol [to] automatically inform the Member States three months in advance of the expiry of the time limits for reviewing the storage of data".[113]

A new development at Europol is the appointment of a data protection officer[114], who, while being a member of staff of Europol, is to act independently. He or she will "have access to all the data processed by Europol and to all Europol premises"[115], so presumably the data protection officer will have all the necessary clearances to review top secret as well as other secret, confidential and restricted materials held at Europol, as classified by Council Act of 3 November 1998[116], as amended[117], in order to properly comply with this requirement. The Europol Data Protection Officer is required, *inter alia*, to cooperate with the Joint Supervisory Body in fulfilling his tasks, and it would be expected from their joint responsibility on data protection matters, and the protection of individuals, that this relationship with the Joint Supervisory Body would be quite close. Nevertheless, the individual complaints on personal data being processed by Europol would still be directed

[102] *ibid.* at Article 33.2.
[103] *ibid.* at Article 33.2.
[104] *ibid.* at Article 34.1.
[105] *ibid.* at Article 34.1.
[106] *ibid.* at Article 34.4.
[107] *ibid.* at Article 27, which refers to Council of Europe Convention of the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 and of Recommendation No. r (87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1987.
[108] Directive 95/46/EC, n23 above.
[109] Regulation (EC) No. 45/2001, n57 above.
[110] Council Framework Decision 2008/977/JHA, n.73 above.
[111] Council Decision 2009/371/JHA, n87 above.
[112] *ibid.* at Article 20.1.
[113] *ibid.*
[114] *ibid.* at Article 28.
[115] *ibid.* at Article 28.3.
[116] Council Act of 3 November 1998, n67 above.
[117] Council Act of 5 June 2003 amending the Council Act of 3 November 1998 adopting rules on the confidentiality of Europol information, (2003) OJ C 152/01, and now, for the most part, reiterated in Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information, OJ L 332/17, which came into force on the 1st January 2010.

to the relevant National Supervisory Body. All parties entering data onto the Europol data processing systems remain responsible for ensuring, both from a data protection perspective, and law enforcement perspective, that data entered is correct, and also complies with rules on the legality of the collection of that data, as well as the rules on the "storage time limits" of that data.[118]

Data security provisions within Europol were initially set out in Article 25 of the Europol Convention, now Article 35 of the Europol Council Decision, and has been supplemented by a number of secondary legal instruments. In addition, the Europol Council Decision now expressly refers to the EU system of classified information in Article 46, requiring Europol to "apply the security principles and minimum standards set out in Council Decision 2001/264/EC[119] with regard to EU classified information, which has since been amended.[120] The issue of the confidentiality of information, with the allocation of classifications Europol 1, 2 and 3 being allocated to what both the UK and Ireland would classify as "confidential", "secret" and "top secret", was originally covered in Council Act of 3 November 1998.[121] The "confidential" classification was then sub-divided in 2003 to cover a "Europol Restricted" and a "Europol Confidential" classification level, with the new default classification to be "Europol Unclassified not for public dissemination".[122] The purpose for this re-alignment of security classifications in 2003 was in order "that they correspond as far as possible to the levels currently applied within the institutions of the European Union and to existing international standards".[123] The EU-wide classification standards, which does not include Europol, had been put in place pursuant to Council Decision 2001/264/EC,[124] and has been subsequently amended and elaborated upon.[125] In addition, Europol has developed its own security manual.[126]

Member states providing the data to Europol select the security classification appropriate for the information[127], taking into account both the need for "operational flexibility" within Europol, as well as "the classification of the information under (…) national regulations".[128] All information between 2003, and up to and including 2009, was normally given the marking "Europol Unclassified not for public dissemination" unless a classification level had been assigned to it.[129] This situation is now dealt with by ensuring that "all information processed by or through Europol" is "subject to a basic protection level within Europol and in the Member States", unless such information "is expressly marked or is clearly recognisable as being public information".[130] Higher classifications are to be "assigned (…) only where strictly necessary and for the time necessary"[131], "taking account of the detrimental effect which unauthorised access, dissemination or use of the information might have on the interests of Europol or the Member States."[132] Packages of information can be classified together, with the highest classification of an individual piece of

[118] Council Decision 2009/371/JHA, n87 above, at Article 29.1.
[119] Council Decision 2001/264/EC, n68 above.
[120] Council Decision 2004/194/EC of 10 February 2004 amending Decision 2001/264/EC adopting the Council's security regulations, OJ L 63, 28/02/2004 p. 48.
[121] Council Act of 3 November 1998, n67 above.
[122] Council Act of 5 June 2003 amending the Council Act of 3 November 1998, adopting rules on the confidentiality of Europol information, (2003) OJ C 152/01, at Article 1.2.
[123] *ibid.* at paragraph 1 of the preamble.
[124] Council Decision 2001/264/EC, n68 above.
[125] Council Decision 2004/194/EC, n120 above.
[126] Council Act of 3 November 1998, n67 above, at Article 6, and reiterated in Council Decision 2009/968/JHA of 30 November 2009 adopting the rules on the confidentiality of Europol information, OJ L 332/17, at Article 7.
[127] Council Decision 2009/968/JHA of 30 November 2009, adopting the rules on the confidentiality of Europol information, OJ L 332/17, at Article 11.1.
[128] *ibid.* at Article 11.2.
[129] Council Act of 5 June 2003, n122 above, at Article 8(1) of the 1998 Act as amended.
[130] Council Decision 2009/968/JHA, n127 above, at Article 10.1.
[131] *ibid.* at Article 10.3.
[132] *ibid.* at Article 10.4.

information in the package, applying to the package of information as a whole.[133] In addition, it is possible for a package of information to be given a higher classification than the sum of its parts.

Europol may come "to the conclusion that the choice of classification level needs changing" and will, in such a case, "inform the Member State concerned" with a view to obtaining agreement to such change.[134] In the event that agreement to the change is not forthcoming, Europol has no power to "specify, change, add or remove a classification level without such agreement".[135] If Europol manages to generate its own information, it will obtain consent from the Member State which provided the basic information as to the classification level to be applied to the information.[136] If there was no such basic information from a Member State, Europol will determine itself which security classification applies to the information.[137] Amendments of classification levels is also possible, as information gains a greater or lesser importance as operations develop, with the member state supplying the information maintaining control over its security classification.[138]

At Europol, the security of data is controlled by the Europol Security Committee, "consisting of representatives of the Member States and of Europol"[139], the Security Coordinator[140] who is "directly answerable to the Director of Europol", and security officers.[141] The Security Coordinator is to hold "security clearance to the highest level under the regulations applicable in the Member State of which the Security Coordinator is a national".[142] This security clearance level will now have to cover those levels of relevance to counter-terrorism operations. The 2009 reforms bring in provisions for a number of security officers, more than the original one, under the 1998 regulations, who are now to "be security cleared to the appropriate level required by their duties" in accordance with "the laws and regulations applicable in the Member States of which they are a national".[143] All of these structures operate within the framework set down in the security manual[144], which was adopted "by the Management Board after consultation with the Security Committee".[145] The processing of data by Europol will only be done by people who "by reason of their duties or obligations, need to be acquainted with such information or to handle it"[146] and who have obtained "an appropriate security clearance and shall further receive special training".[147] Subject to a veto by the supplying Member State,[148] an exception to the strict security clearance rules can be granted by the Security Coordinator, after consulting a security officer, and following the specified exceptions laid down in the Council Decision. This exception is limited to access to EU secret material, where their security clearance only grants them access to EU confidential material. This could be, for reason that "if, by reason of their duties or obligation, in a specific case,"[149] a particular

[133] *ibid.* at Article 10.4, paragraph 3.
[134] *ibid.* at Article 11.3.
[135] *ibid.*
[136] *ibid.* at Article 11.4.
[137] *ibid.* at Article 11.5.
[138] *ibid.* at Article 12.
[139] *ibid.* at Article 4.
[140] *ibid.* at Article 5.
[141] *ibid.* at Article 6.
[142] *ibid.* at Article 5.
[143] *ibid.* at Article 6.2.
[144] *ibid.* at Article 7.
[145] *ibid.*
[146] *ibid.* at Article 13.1.
[147] *ibid.*
[148] *ibid.* at Article 13.4.
[149] *ibid.* at Article 13.3.a.

individual needs "to have access to specific information classified up to Secret UE/EU Secret".[150]

While the new security classification system is now in place for EU activities, to include military activities, Europol continues to maintain a separate classification system pursuant to the 1998 Council Act, as amended. The requirement on Europol is to maintain at least the standards as used by the rest of the EU.[151] Presumably Europol is of the view that its standards are higher, in order to maintain a separate classification regime. The issues here are not so much the over-interconnectedness of databases, but the lack of such connections, due to different data security provisions, with intelligence, for example, collected by Frontex on trafficking in human beings by organised crime across the external border of the EU, not being shareable with organised crime police who share their intelligence via Europol. The connections between Europol and Eurojust are similarly fractured. While commercially collected data may well become available to law enforcement officers, law enforcement data is highly controlled, and will not, at least without a criminal offence having been committed by somebody legitimately in possession of such data, become available for other purposes.

At some point, interoperability of databases and inter-agency collaboration in law enforcement activities needs to be facilitated. The proposed reforms to Fontex[152], a traditional pillar I law enforcement body, will give an express but limited mandate to process personal data "related to the fight against criminal networks organising illegal immigration".[153] It will also be given its own Data Protection Officer.[154] The entirety of Frontex operations are to be under the supervision of the European Data Protection Officer[155] and operate under the EU provisions on data security, [156] rather than the Europol ones.[157] One can only ask as how effectively data can be exchanged in this emerging situation between Europol and Frontex in areas of overlapping operational competence and interest, while still meeting the requirements of data protection due to the data subject.

The changes brought in by the Lisbon Treaty should not make any significant difference to the Europol data protection and security classification system, with the exception that future updates of the Europol legal framework may well be through Regulation. Worth commenting on, however, is the ability for Europol to operate within a full data protection regime, with the appointment of an independent data protection officer, something that Eurojust was in a position to deal with some years ago, but had been problematic for the law enforcement community for so many years. If Europol is now in a position to have its own data protection officer, why then is there not a coherent unified data protection framework for all law enforcement provisions, recognising that the data protection provisions originally designed for pillar I EC activities may not be the most appropriate structure for transferral to policing activities.

[150] *ibid.*
[151] Council Decision 2001/264/EC, n68 above.
[152] Proposal for a Regulation amending Council Regulation (EC) No 2007/2004, n2 above.
[153] *ibid.* in page 4 of the introduction to the Proposal.
[154] *ibid.* in the proposed new Article 11a. at point number 15 of the proposal.
[155] *ibid.* in paragraph 25 of the introduction to the proposal.
[156] Council Decision 2001/264/EC, n68 above.
[157] Council Decision 2009/968/JHA, n127 above.

The data protection and security regime at Eurojust

At some point in an investigation, both Europol and Frontex will want to engage the services of Eurojust in their operations. Set up as the partner organisation to Europol, Eurojust was created pursuant to Council Decision 2002/187/JHA[158], and had, from its very beginning, provisions on data protection[159] and security[160], to include the provisions for its own "specially appointed Data Protection Officer, who shall be a member of the staff"[161], a provision which the Europol reforms have just provided for, and the proposed reforms to Frontex will also cover. Eurojust, which calls itself the network for investigating and prosecuting magistrates, but which also has a role for senior police officers when they are allocated the role of leading police investigations in a particular jurisdiction[162], was updated pursuant to Council Decision 2003/659/JHA.[163] This deals with its budgetary and financial provisions. Eurojust is about to be much more substantially revised pursuant to Council Decision 2009/426/JHA[164], which is to come into force "no later than 4 June 2011".[165] Much of the original provisions on data protection and data security continue unaltered by the 2009 Council Decision. The capacity for Eurojust to engage in data "collection, processing and exchange" has however "been extended quite considerably".[166] A new Article 39a has been inserted into the Eurojust legal framework, dealing with classified information, with Eurojust to adopt the "security principles and minimum standards" of the EU security classification system, as set out in Council Decision 2001/264/EC[167] discussed above, and not those being used by its partner institution, Europol. If indeed there is a difference between the EU and Europol security classification frameworks, and if Eurojust, after the coming into force of the 2009 Council Decision is to provide a 27/4 legal advice service to Europol (and possibly also to Frontex), with the role of senior investigating police officers and investigating magistrates being serviced by the Eurojust legal framework, rather than that of Europol, why then is Eurojust taking a different line on these issues than Europol? These two organisations need to work more closely together than does Eurojust with any other law enforcement framework or body. This has been recognised by the fact that Eurojust and Europol have been co-located at The Hague. In addition, both Eurojust and Europol could be involved in joint investigation teams, set up by the 2000 EU Convention on Mutual Assistance on Criminal Matters. An opportunity to align the two organisations in a more streamlined fashion would appear to have been missed in the drafting of the two 2009 Council Decisions on Europol and Eurojust.

Data protection and security issues relating to the Schengen Information System (SIS)

Cross-EU law enforcement activities are not limited to the activities of the EU's law enforcement agencies. Point to point law enforcement contact between EU Member States is facilitated by the Schengen Information System (SIS), which is also known as SIRENE. The SIS has been set up to meet the needs of both visas, asylum, etc. issues and

[158] Council Decision 2002/187/JHA, n.31 above.
[159] *ibid.* at Articles 14 to 21, and Article 24.
[160] *ibid.* at Article 22.
[161] *ibid.* at Article 17.
[162] *ibid.* at Article 2.
[163] Council Decision 2003/659/JHA of 18 June 2003 amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 245/44.
[164] Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 138/14.
[165] *ibid.* at Article 2.1.
[166] V. Mitsilegas, n72 above, at page 555.
[167] Council Decision 2001/264/EC, n68 above.

policing matters, with the UK and Ireland only using the system for policing matters, with the rest of the EU using the system for policing and visas, asylum, etc. issues.

The provisions on data protection and data security for the SIS were drafted in 1990. They are comprised in Articles 102 to 118 of the Schengen Convention, with no reference being made to data protection officers, security classifications, or many of the newer provisions dealing with data protection and data security. Reference is made in Article 119 to the 1981 Council of Europe Convention[168] and to supporting Council of Europe materials. No attempt appears to have been made over the years to update the SIS I legal framework. However, with the development of the new SIS II information system, a new legal framework has been put in place.[169] The SIS II is to come into force when "the necessary technical and legal arrangements" have been put in place.[170] While it would appear that the legal frameworks have been in place for some time, there has been some delay from a technical point of view in getting the computer system to work. If and when the SIS II formally comes into operation, data security provisions will be found in Article 10 for Member States, and Article 16 for the whole system, with data protection provisions to be found in Articles 56 to 63.

An interesting development with regard to data protection for SIS II is the use of the (commercially focused) European Data Protection Supervisor (EDPS)[171], who in conjunction with the national data protection supervisors, will "ensure coordinated supervision of SIS II."[172] There is no separate reference to security classifications in SIS II, which is also of interest, as terrorism had been added to the SIS capability.[173] Counter-terrorism information has been part of the SIS framework since 2005.[174] From an outsider's viewpoint, this would bring with it security classification issues. Presumably the new EU-wide security classification system[175] now applies to SIS I and to SIS II as and when it comes into operation. If the argument for hiving off the policing provisions from the mainstream EC Data Protection structure was because policing essentially uses different types of data in different ways from that of the commercial world, an argument that this writer is prepared to accept[176], why then is the policing part of the SIS under the control of the "commercially focused" EDPS? Has the EDPS gone through the various security clearance requirements to render an effective service to citizens on the subject of high level classified information? If the EDPS is in a position to render an effective service, why then has Europol and Eurojust been hived off into – different from each other – packages of information, to be separately monitored for data protection purposes?

In this writer's opinion, the Council Framework Decision 2008/977/JHA[177] was a missed opportunity to develop a coherent and standardised data protection and data security classification framework for the entirety of the cross-border EU law enforcement

[168] Council of Europe Convention of the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981.
[169] Council Decision 2007/533/JHA of 12 June 2007 on the establishment, operation and use of the second generation Schengen Information System (SIS II) OJ L 205/63.
[170] *ibid.* at Article 71.3.b.
[171] *ibid.* at Article 62.
[172] *ibid.* at Article 62.1.
[173] Council Decision 2006/628/EC of 24 July 2006 fixing the date of application of Article 1(4) and (5) of Regulation (EC) No 871/2004 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism, OJ L 256, 20/09/2006 p. 15, which has since been repealed by Regulation (EC) No 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), OJ L 381/4.
[174] Council Decision 2005/211/JHA of 24 February 205 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism, OJ L 68/44.
[175] Council Decision 2001/264/EC, n68 above.
[176] De Hert, Papakonstantinou, n6 above, p.408.
[177] Council Framework Decision 2008/977/JHA, n.73 above.

framework. If that could not have been achieved, then at least Europol and Eurojust should have been better aligned, at the highest level, in order to ensure a free flow of information between the two organisations, without data protection and security classification issues having the potential, at any time, to hinder that flow of information, while still creating a coherent structure giving the necessary protection to the data subject.

Data protection and security issues relating to the Prüm Decision

The above complex and fractured framework for both data protection and data security is added to by further legal provisions such as those contained in the recently enacted Prüm Council Decision[178], which was based on the preceding Treaty of Prüm. This piece of legislation was passed in controversial circumstances, with the EDPS gaining an even more forceful voice within the EU, being in a position to issue a "detailed opinion"[179] on the development, which was enacted before the Council Framework Decision 2008/977/JHA.[180] The EDPS was very critical of the then lack of "a general rule on data protection in the third pillar".[181] Writing now, after the passing of the Council Framework Decision 2008/977/JHA, problems remain, as the Prüm Decision[182] relies on "local and possibly inconsistent data protection laws"[183], based on the Council of Europe Convention.[184] The Prüm Council Decision was drafted, primarily by Germany, and was presented in controversial circumstances "without an explanatory memorandum, an impact assessment, nor an estimate of the cost to Member States, or time for proper consultation with Member States and the European Parliament".[185] There is no surprise, therefore, that there is a gap in what needs to be a coherent legal framework for data protection and data security issues for the purposes of cross-border EU law enforcement.

Not only has no attempt been made for Framework Decision 2008/977/JHA to amend the Prüm Decision, but at paragraph 39 of the preamble, it expressly states that the Prüm Decision "should not be affected by this framework decision". An opportunity to close a gap in the protection of personal data, as identified by the EDPS, would appear to have been missed. While provision is made for the confidentiality[186] and security of processing[187] of personal data, it is interesting to note that no reference is made to security classification. This is despite the fact that the Prüm Decision also covers the "supply of information in order to prevent terrorist offences".[188] No reference is made in either Council Decision 2008/977/JHA, or its implementing decision Council Decision 2008/616/JHA[189], to data security classifications. Presumably the default provision in Council Decision 2001/264/EC with regard to the Council's security regulations would apply in this case.[190]

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[178] Council Decision 2008/615/JHA, n82 above.
[179] Kierkegaard, The Prüm decision-An uncontrolled fishing expedition in "Big Brother" Europe, 24 (2008) *Computer Law & Security Report*, 243-252, p.250.
[180] Council Framework Decision 2008/977/JHA, n.73 above.
[181] Kierkegaard, n179 above, p.250.
[182] Council Decision 2008/615/JHA, n82 above.
[183] Kierkegaard, n179 above, p.250.
[184] CoE 1981 Convention, n168 above.
[185] Kierkegaard, n179 above, p.244.
[186] Council Framework Decision 2008/977/JHA, n.73 above, at Article 21.
[187] *ibid.* at Article 22.
[188] *ibid.* at Article 16.
[189] Council Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/616/JHA on the stepping up of cross-border cooperation particularly in combating terrorism and cross-border crime, OJ L 210/12.
[190] Council Decision 2001/264/EC, n68 above.

Other provisions on data in the pre-Lisbon third pillar

There have been some efforts to develop some joined-up thinking in the area of law enforcement, with the development of a joint data protection secretariat being set up between Europol, the Customs Information System (CIS),[191] and the Schengen Information System (SIS II) in Council Decision 2000/641/JHA.[192] One could ask why this joint development was not between Europol and Eurojust, who were both located within the same legal framework, and in the same town, when organisations based in different EU legal pillars could manage to develop this secretariat. No reference is made to classified information in this Council Decision, although presumably classified information would have to be transferred between Europol, the CIS and the SIS, who, by the way, have different data security provisions, as discussed above. The role of the joint data protection secretariat is to provide support to the joint supervisory bodies of Europol, the CIS and the SIS, and to fulfil "the tasks provided for the joint supervisory bodies as laid down in the respective Rules of Procedure of those bodies".[193]

Further data exchange between the EU Member States[194] is also facilitated by Council Framework Decision 2009/315/JHA[195], which provides for the exchange of criminal record information. This document is deigned to supplement the EU Convention on Mutual Assistance in Criminal Matters 2000.[196] Reference is made[197] to the Council of Europe Convention on data processing 1981, and to "fundamental rights" as set out in the pre-Lisbon Article 6 of the TEU and the Charter of Fundamental Rights of the European Union.[198] However, as the 2000 Convention was not expressly excluded from Council Framework Decision 2008/977/JHA[199], it would appear that the default PJCCM provisions on data protection apply in this instance. Specific provisions on security classifications are not made in Council Framework Decision 2009/315/JHA, so the default EU provisions on data security classification would also appear to apply.[200] The above legal framework is added to by Council Decision 2009/316/JHA[201] which establishes a European Criminal Records Information System (ECRIS).

Council Framework Decision 2006/960/JHA is an interestingly titled document "on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union".[202] It does not, however, cover in any great detail, the subject matter of this paper. Also applicable to Norway, Iceland and Switzerland, the intention behind Council Framework Decision 2006/960/JHA was to

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[191] The CIS was set up pursuant to the Convention on the Use of Information Technology for Customs Purposes, OJ C 316/33.
[192] Council Decision 2000/641/JHA of 7 October 2000 establishing a secretariat for the joint supervisory data-protection bodies set up by the Convention on the Establishment of a European Police Office (Europol Convention), the Convention on the Use of Information Technology for Customs Purposes and the Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders (Schengen Convention) OJ L 271/1.
[193] *ibid.* at Article 1.
[194] Building on previous laws, to include Council Decision 2005/876/JHA of 21 November 2005 on the exchange of information extracted from the criminal record, OJ L 322, 9.12.2005, p.33, which are thereby repealed.
[195] Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States, OJ L 93/23.
[196] *ibid.* at Article 12.
[197] *ibid.* at paragraph 13 of the Preamble.
[198] *ibid.* at paragraph 18 of the Preamble.
[199] Council Framework Decision 2008/977/JHA, n.73 above.
[200] Council Decision 2001/264/EC, n68 above.
[201] Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA, OJ L 93/33.
[202] Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386/89.

improve cross-border communication by police like agencies across the EU, excluding the intelligence services[203], which remain outside the EU legal framework, even post-Lisbon. It does not prevent earlier or future provisions going further than the provisions of this Framework Directive.[204] While reference is made to confidentiality[205], no express mention is made to data security classification. Data protection issues are given greater coverage, with the first reference in legislation to the need to "strike [an] appropriate balance between fast and efficient law enforcement cooperation"[206] and "data protection, fundamental freedoms, human rights and individual liberties".[207] The Framework Decision is to be without prejudice to "bilateral or multilateral agreements (…) between Member States and third countries"[208] or agreements amongst EU member states on "mutual legal assistance or mutual recognition",[209] and is not to modify any rights or legal principles enshrined in the pre-Lisbon Article 6 EU.[210] What the Framework Decision does provide is that "established rules on data protection", whatever they are supposed to be, should be used when exchanging "information and intelligence provided for by this Framework Decision."[211] The only transnational laws referred to in this particular Framework Decision are those of the Council of Europe.[212] In effect, national laws on data protection are to be applied in operating the provisions of Council Framework Decision 2006/960/JHA. No reference is made to any of the other EU data protection or data security provisions when exchanging information and intelligence under this Framework Decision.

Operating as a stand-alone measure, not connected to any of the above is Council Decision 2005/671/JHA.[213] This legal document provides procedures to be followed in exchanging terrorist-related data, either via Europol or Eurojust,[214] but, again strangely, no reference is made in this document to either data protection or data security provisions. As these are the only two methods of transmission of data under this Council Decision, then the data protection and data security provisions of these two organisations, which differ in both respects, would apply, depending on the channels of communication used.

Prospects for future post-Lisbon cooperation and conclusion

Society is best served by more effective targeting of law enforcement activities, which is facilitated by improved intelligence. Intelligence is more than information, but is about targeting better available resources[215], with "policing beginning to think more strategically".[216] Intelligence should lead to "informed decision making"[217], allowing for the "targeting of offenders" as the "best way to use our scarce police resources".[218] A better streamlining of the structures facilitating the sharing of data between the law enforcements authorities across the EU, now that the relevant general principles have been conceded by national authorities, can be facilitated not only by structural innovation such as Europol and the Schengen Information System, but also through a more coherent

[203] *ibid.* at Article 2.a.
[204] Paragraph 8 of the Preamble to Council Framework Decision 2006/960/JHA.
[205] Council Framework Decision 2006/960/JHA, n202 above, at Article 9.
[206] *ibid.* at paragraph 11 of the Preamble.
[207] *ibid.* at paragraph 11 of the Preamble.
[208] *ibid.* at Article 1.2.
[209] *ibid.*
[210] *ibid.* at Article 1.7.
[211] *ibid.* at Article 8.1.
[212] *ibid.* at Article 8.2.
[213] Council Decision 2005/671/JHA of 20 September 2005 on the exchange of information and cooperation concerning terrorist offences, OJ L 253/22.
[214] *ibid.* at Article 2.1 and 2.
[215] J. Ratcliffe; *Intelligence-Led Policing*, Willan, 2008, p.179.
[216] *ibid.* at page 213.
[217] *ibid.* at page 212
[218] *ibid.* at page 63.

data security regime, married with a more coherent data protection regime, for the protection of the individual caught up in a law enforcement investigation. As stated by the EDPS, in the context of EU frontier databases, "The sheer number of these proposals and the seemingly piecemeal way in which they are put forward make it extremely difficult for the stakeholders (European and national Parliaments, data protection authorities including EDPS, civil society) to have a full overview". [219] Exactly the same can be said for the law enforcement data protection and data security structures within the EU, from the point of view of both the data subject and the law enforcement professional. The EDPS called for "evidence that there is a master plan for all these initiatives, giving a clear sense of direction".[220] In this writer's opinion, a master plan for the law enforcement data protection and data security structures also needs to be written, and is now capable of being written under the post-Lisbon Treaty framework.

Some would argue that the development of cross-EU law enforcement provisions in the absence of cross-EU criminal defence provisions is an error, with Dine pointing out that the "relationship between national criminal law, EU criminal provisions, the jurisprudence of the European Court of Human Rights and the impact of the Charter [is] likely to fuel a highly complex debate."[221] It may well be that the post-Lisbon Article 6.1 TEU upgrading the formal status of the EU Charter on Fundamental Rights 2000 to the same legal status as the Treaties, together with Article 6.2 TEU's provisions on the European Convention for the Protection of Human Rights and Fundamental Freedoms, will prove to be the green light for the ECJ to develop an effective jurisprudence in this area. That, however, is an issue for another paper.

This article has focussed on the much narrower issue of data protection and data security, both of which have already been legislated for in the area of cross-border EU law enforcement, with both showing fissures in the EU legal framework which need to be addressed. As stated by Mitsilegas, the "proliferation of data collection mechanisms" [222] has "not been accompanied by a coherent framework for the protection of personal data and privacy".[223] The different drafting teams, over different time periods, have established hard fought for principles, against the background of the difficult legal tools that were available in the pre-Lisbon third pillar. With the decanting of the third pillar into the post-Lisbon unitary EU pillar, the possibility of streamlining the legal framework in this area becomes a reality. As Mitsilegas has pointed out, "the aim of reaching a coherent data protection legal framework for the exchange of information in criminal matters is far from being achieved".[224] Similar issues arise with regard to data security classifications.

Over time a variety of principles appear to have been accepted, to include the need for data protection supervision of active policing data, as evidenced by the provisions in the Europol Council Decision. This now appears to be feasible, despite the high levels of security classification necessary at times. Any excuses for not now providing such protection to the balance of cross-border active policing data exchange will no longer

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[219] Preliminary Comments of the European Data Protection Supervisor on: - Communication from the Commission to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions, "Preparing the next steps in border management in the European Union", COM (2008) 69 final – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Examining the creation of a European Border Surveillance System (EUROSUR)", COM (2008) 68 final; - Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Report on the evaluation and future development of the FRONTEX Agency", COM(2008) 67 final, available at: http://www.edps.europa.eu/EDPSWEB/edps/pid/1

[220] *ibid.*

[221] J. Dine, n43 above, p.270.

[222] V. Mitsilegas, n72 above, p.557.

[223] *ibid.* at page 557/558.

[224] *ibid.* at page 559.

hold. The issue of whether this data protection should be provided at the national level, as is the case with the Prüm Council Decision, [225] or at the supra-national level, as with Europol, Eurojust, Frontex and the SIS, also needs to be resolved.

In addition, differences in data protection and security classification regimes between the key institutions of Europol and Eurojust no longer appear to be justified. If both institutions are to operate in a high security classification regime, married to a robust data protection framework, and both readily exchange data between themselves, then differences in regimes at the two, co-located, institutions must be inexcusable. The details of their various provisions are to be found in classified security manuals. What appears to the outside observer, however, is that different regimes operate. It can only be presumed that differences will then arise in their two security manuals, which in due course, may well give rise to problems in exchanging data, the prevention and pursuit of criminals, and the prevention of terrorism. This cannot be allowed to happen if we are truly in the business of building an Area of Freedom, Security and Justice. Newspaper headlines have followed previous failures of law enforcement and intelligence communities to share intelligence due to underlying structural failures. In particular, in the US post-9/11 a "National Criminal Intelligence Sharing Plan" had to be drafted to overcome "key problems with information and intelligence sharing across the US".[226] Anticipated problems across the EU, as well as within each of our Member States, should be avoided.

Not only is the potential for law enforcement hindered by the fractures in the EU legal framework analysed above, but the role of both the data security and data protection supervisory bodies are compromised when some parts of the data relevant to a particular investigation fall outside their area of supervision. In particular, the Joint Data Protection Secretariat set up pursuant to Decision 2000/641/JHA[227], while encompassing Europol, the CIS and the SIS, has the glaring omission of Eurojust, the organisation which co-ordinates the role of investigating magistrates/senior investigating police officers. In addition, the EDPS has been given some role in this area, but not for all law enforcement data protection issues. In this writer's view, either the EDPS should be given the entirety of the data protection role in law enforcement matters, assuming that he and his team have the necessary security clearance to deal with high-level security classified data, such as counter-terrorism data, or the entirety of the data protection supervision role in law enforcement should be given to one such person or body to deal with, separate from the commercially focused EDPS. In addition, organisations such as Europol cannot operate in a vacuum. Files need to be transferred or shared with Eurojust as investigations develop and the issue of cross-border prosecutions and arrests come to the fore. Equally, Frontex, Eurojust and Europol will also find that they have shared interests in investigating and prosecuting criminals involved in human trafficking and illegal immigrant smuggling into the EU. Their different data protection and data security regimes, as some point out, are going to pose a problem.

Post-Lisbon the opportunity arises to revisit the variety of documents reviewed in this article, which have different histories and different authors under the auspices of the Council, with should benefit of the joined-up thinking which can be normally found within the Commission. The splitting of the old Justice and Home Affairs portfolio into two departments within the Commission, post-Lisbon, the Justice, Fundamental Rights and Citizenship Directorate-General, and the new Home Affairs Directorate-General, should allow the latter some space to focus on these issues. They should be in a position to develop a more coherent and less fragmented legal framework, using the more efficient legal tools now available in this policy area, namely regulations and directives. While the

[225] Council Decision 2008/615/JHA, n82 above.
[226] J. Ratcliffe, n215 above, p.122.
[227] Council Decision 2000/641/JHA, n192 above.

discourse in the more commercially focused debate on data protection may well be issues of privacy, the more fundamental issues of effective, and better targeted, law enforcement and the protection of individual rights in the course of law enforcement activity are key to the debate in this area.

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Eurojust's Fledgling Counterterrorism Role

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Abstract

The article offers an analysis of Eurojust's contributions to the European Union counterterrorism policy and questions whether all EU Member States fully support the strengthening of Eurojust's role in the fight against terrorism. The allegations concerning the existence of an inter-agency rivalry between Europol and Eurojust in the area of counterterrorism are also analyzed. Finally, the article provides an assessment of the possible impacts of the 2008 Council Decision on the Strengthening of Eurojust and the Lisbon Treaty provisions for possible establishment of a European Public Prosecutor's Office from Eurojust when it comes to EU's counterterrorism efforts.

Keywords

Eurojust; Europol; European Union; Terrorism; Counterterrorism; Judicial cooperation; Criminal matters

THIS ARTICLE OFFERS AN ANALYSIS OF EUROJUST'S CONTRIBUTIONS TO THE EUROPEAN Union (EU) counterterrorism policy. Building on criteria for assessing value-added of EU agencies identified in the intelligence studies literature, it is argued that Eurojust currently does not offer genuine value-added in the fight against terrorism by producing something that the EU Member States (MSs) are either unwilling or unable to produce on their own. Moreover, the official EU documents, internal reports, secondary sources, as well as interviews with practitioners suggest that it is questionable whether all EU MSs fully support the strengthening of Eurojust's role in the fight against terrorism. This is largely due to the persisting differences in national legal standards, the absence of genuine pro-integration thinking in the area of criminal justice, and the lack of trust from national agencies. On the other hand, however, some of these constraints are diminishing over time, as Eurojust's contributions to the fight against terrorism are incrementally taken into account by national counterterrorism experts and practitioners. Similarly, it appears that the initial inter-agency rivalry between Europol and Eurojust in the area of counterterrorism has largely been surmounted. The Council also tried to remedy several important shortcomings in its December 2008 Decision on the strengthening of Eurojust, particularly regarding the clarification, and to some extent expansion, of the powers of Eurojust national representatives. In consequence, Eurojust is currently better positioned to support national counterterrorism efforts in a number of important areas.

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This article proceeds as follows. A succinct overview of the origins of judicial cooperation in criminal matters and the actual creation of Eurojust is offered in the first section, followed by brief accounts of Eurojust's original mandate and its post-9/11 counterterrorism role. Section four reviews Eurojust's current counterterrorism activities. The alleged inter-agency rivalry between Europol and Eurojust is analysed in section five. Sections six and seven review the current and the potential value-added of Eurojust in the area of counterterrorism, respectively. The concluding section offers some thoughts on the possible impact of the 2008 Council Decision on the Strengthening of Eurojust and the Lisbon Treaty provisions for the possible establishment of a European Public Prosecutor's Office from Eurojust when it comes to EU's counterterrorism efforts.

Origins of judicial cooperation in criminal matters and the creation of Eurojust

The origins of major judicial cooperation initiatives at the EU level, especially in the field of criminal justice, are relatively recent. The founding treaties of the then European Communities did not contain any specific cooperation in criminal justice matters. Over time, both internal and external factors led to the establishment and gradual deepening of European criminal justice institutions (Vlastnik 2008: 35-36), but when contrasted with police cooperation under the TREVI framework (Peek 1994: 201), judicial cooperation clearly lagged behind. It was only in the early 1990s that the continuing progress in police cooperation resulting in the creation of Europol prompted many judicial and political actors in EU MSs to express their concerns about the establishment of "a Europe of the polices devoid of complementary judicial system" (Megie 2007: 67). In particular, there was a fear that "Europol has been developing outside of any judicial control", which also led to the increased emphasis on the need for the defence of individual rights (French Office of Plans, cited in Megie 2007: 68). These concerns were also shared by the DG Justice, Liberty and Security (DG JLS) at the European Commission, which tried to use them to further assert its previously limited role and powers in the field of security.

The Commission and the EU MSs did not, however, agree on how to address these concerns. Specifically, many MSs, as well as the Secretariat General of the Council, were determined to prevent a further strengthening of the Commission's, and to a certain extent of the European Parliament's, assertiveness in the sphere of judicial cooperation in criminal affairs. This clash of interests manifested itself in the failure of the Corpus Juris Project and the European Chief Public Prosecutor, which had the support of the Commission, but was blocked by the Council. Instead, several other actions and initiatives were approved, all less supranationalist in nature. In 1998, the European Judicial Network (EJN) was created after two years of preparation.[1] The entry into force of the Treaty of Amsterdam in May 1999, with its emphasis on the creation of an Area of Freedom, Security and Justice, added further impetus to judicial cooperation in criminal matters. Nevertheless, it is important to note that, according to some experts, "the decision to create Eurojust was a political response to the proposition for the European Chief Public Prosecutor made by DG JLS" (Megie 2007: 75) that must "be interpreted as an affirmation of the intergovernmental logic in the field of judicial cooperation in criminal affairs" (Bigo 2007: 16).

The actual political decision to establish a European Judicial Cooperation Unit was made by the Tampere JHA Council in October 1999, which called for the creation of a Eurojust unit composed of national prosecutors, magistrates or police officers of equivalent competence from each MS by the end of 2001. In 2000, a Provisional Judicial Cooperation

[1] EJN is essentially a decentralised information sharing network connecting EU lawyers and judges working on criminal cases. It is composed of Contact Points of the Member States, as well as the European Commission and a Secretariat based in the Hague. (European Judicial Network 2009)

Unit (Pro-Eurojust) was created. Formally, however, Eurojust was only created by means of a Council Decision on 28 February 2002 (Council Decision 2002), thus becoming the first permanent network of judicial authorities to be established anywhere in the world. The Treaty of Nice, which entered into force in February 2003, provided an explicit treaty basis for this new EU agency, thereby confirming its role as one of the key players in the criminal justice cooperation field within the territory of the EU.

Eurojust's original mandate

When it comes to the analysis of Eurojust's mandate, it is important to bear in mind its "double nature" (Vlastnik 2008: 37). On the one hand, Eurojust is essentially a high-level team of senior magistrates, prosecutors, judges and other legal experts, who are seconded from every EU Member State.[2] They may be assisted by one or more person(s) when carrying out their powers.[3] Both the national representatives and their assistant(s) remain subjected to their national law. According to the original 2002 Council Decision, EU MSs were also free to determine from which national body the national representative will come from[4], which powers they will keep within their jurisdiction, what their term of office will be and what salary they will earn. Nevertheless, once the December 2008 Council Decision on the Strengthening of Eurojust is implemented by all EU MSs[5], all national representatives will be assisted by one deputy and by another person as an assistant. Acting on behalf of Eurojust, they will be entitled to ask national authorities to take special investigative measures and/or any other measure justified for the purposes of the investigation or prosecution. In order to create an equivalent level of powers for national representatives, the 2008 Decision also contains provisions to regulate the powers conferred on national representations in their capacity as national authorities, specifying that they shall be at a minimum granted the power to receive, transmit, facilitate, follow up and provide supplementary information in relation to the execution of requests for judicial cooperation. Nevertheless, even with these new provisions in place, it is still possible to speak of the national feature of Eurojust.

On the other hand, the national representatives together form the College of Eurojust, which functions as a management board of Eurojust and can be described as "a collective organ of European character deciding in principle by majority vote" (Vlastnik 2008: 37). The main advantage of having all national experts in one building lies in the instant accessibility of information and expertise – the individual team members know the legal systems and practical arrangements of their home countries inside out, and they can consult other team members at any time. This enables them to put any cases referred to Eurojust into an EU context and "more easily spot any patterns or trends in EU crime than colleagues in their home countries" (Commission 2004a). Moreover, Eurojust is the only point where the national criminal records of all MSs come together – each national member of the College of Eurojust has both the access to national criminal records of his/her MS and is empowered to exchange information with other members of the College (Müller-Wille 2004: 26). Last, but not least, Eurojust also enables direct contact between judges, so that, for example, a judge in Greece can ask a judge in France to issue an order against a suspect living in France (Bensahel 2003: 41).

[2] There are also liaison magistrates from three non-EU countries: Croatia, Norway, and the United States.
[3] As of 2008, fifteen Member States had appointed deputies and/or other assistants to support their national member (Eurojust 2009).
[4] According to the data provided in the 2008 Eurojust Annual Report, the majority of national members are prosecutors (Eurojust 2009).
[5] If necessary, the MSs must bring their national law into conformity with the Decision by 4 June 2011 (Council Decision 2008).

According to its official web-page (Eurojust 2007a), Eurojust's key functions include the following:

1) Stimulate and improve the co-ordination of investigations and prosecutions between competent authorities in the Member States;
2) Improve co-operation between the competent authorities of the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests;
3) Support the competent authorities of the Member States in order to render their investigations and prosecutions more effective when dealing with cross-border crime.

More specifically, the primary task of Eurojust is to provide "immediate legal advice and assistance in cross-border cases to the investigators, prosecutors and judges in different EU Member States" (Eurojust 2007a). It can also handle letters rogatory, which ask for information, or enquiries to be carried out by the authorities in another country, and direct them to the appropriate authorities for action; assist and cooperate with OLAF, the EU's anti-fraud organisation,[6] in cases affecting the EU's financial interests; recommend certain steps to national authorities to take, "such as to initiate and/or coordinate investigations or to set up investigation teams" (Commission 2004a). On its own, however, Eurojust has no legal authority to launch or execute investigations and it cannot impose any penalties if its requests are not complied with – although it may publish details of failures to comply in its annual report. Instead, it relies on a system of lateral links among its members, which are based on the idea that "cross-border issues such as terrorism and organised crime require increased cooperation among judicial authorities" (Bensahel 2003: 41).

Eurojust's counterterrorism mandate

According to the first President of Eurojust (Kennedy 2007: 60), countering terrorism "has been a priority for Eurojust since it was established as a provisional unit on the 1st of March of 2001." The first operational meeting dealing with counterterrorism issues under the auspices of the then still Pro-Eurojust indeed pre-dates the 9/11 events. It took place in June 2001, when seven EU MSs met to discuss the issue of extremist Islamic terrorism. According to the current Chair of the Counter-Terrorism Team of Eurojust (Coninsx 2009), it was "a very difficult meeting" due to the lack of trust among the participating national representatives. Their willingness to share information on what in many cases were still on-going criminal investigations was rather low, although there was a generally accepted need to "discuss, coordinate and cooperate." Ultimately, however, the meeting led to the arrests of several suspects in Spain in August 2001, setting an important precedent that EU-level judicial cooperation is able to deliver tangible practical results.

As in other areas of EU's counterterrorism efforts, the 9/11 terrorist attacks represented a wake-up call and revealed the need for much closer cooperation and information-sharing in the area of criminal justice (Bures 2006; Spence 2007). The Council immediately asked Eurojust to convene strategic level meetings of representatives of all EU MSs. The first of these occurred in October 2001 and it became apparent that "a lot of things were missing" and that "there was no uniform approach to counterterrorism related issues" among EU MSs. As in the pre-9/11 meeting, it was also evident that counterterrorism was still perceived as a national security issue and it was therefore "extremely difficult to make professionals work together" because they felt that sharing information on on-going criminal investigation amounts to a breach of professional secrecy and, as such, "it is

[6] OLAF can be regarded as a collector of data that is forwarded to national authorities to initiate and/or support criminal proceedings. On its own, however, OLAF does not run any criminal investigations.

absolutely not possible" (Coninsx 2009). After a series of similar meetings in late 2001, where the same problems had been encountered, Eurojust representatives "detected the need for uniform legislation, better information flows, and a clear approach to terrorism and counterterrorism" (Coninsx 2009), which were all subsequently reported to the Council, Commission and the European Parliament, and thus contributed to the formulation of the aforementioned February 2002 Council Decision that formally established Eurojust proper (Council Decision 2002).

Since 2002, according to the Chair of the Counter-Terrorism Team of Eurojust and the Eurojust annual reports, Eurojust has been convening counterterrorism meetings at three levels. At the operational level, the national counterterrorism magistrates focus on the on-going criminal investigations (Eurojust 2009: 16). At the tactical level, Eurojust representatives decided to push the MSs towards the sharing of best practices regarding their own national counterterrorism experiences with different kinds of terrorist groups and the mapping out of the potential linkages between these nationally-based terrorist groups.[7] A special questionnaire was sent out to MSs prior to the first series of the tactical meetings so that the specialised national magistrates were then able to come to Eurojust to really share meaningful information. At the strategic level, Eurojust convenes an annual meeting where national representatives are reminded about their duty to share all information regarding on-going criminal investigations with Eurojust.[8] In cases where information has not been forthcoming, explanations are requested from national representatives. These range "from no relevant information to be shared due to the lack of on-going, terrorism-related investigations, to the lack of interest in the European level and the persisting reluctance to share." Apart from putting "gentle pressure" on the MSs to fulfill their obligations towards Eurojust, the strategic level meetings are also used by Eurojust representatives to show the MSs representatives "what Eurojust had been doing with the received information and what value-added was provided in the fight against terrorism" (Coninsx 2009).

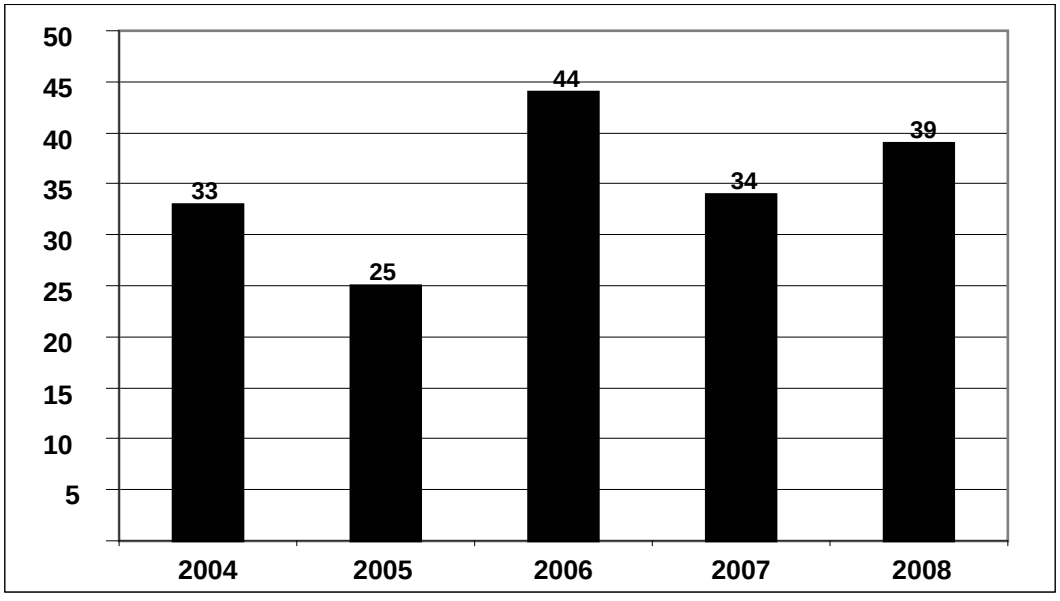
In the aftermath of the March 2004 Madrid terrorist attacks, the Eurojust College decided to create a special Counter-terrorism Team and a scoreboard to keep track of the progress achieved in major counterterrorism initiatives. The rationale behind these steps was to further improve networking to the point where Eurojust's counterterrorism role would eventually progress "from purely reactive coordination efforts to more proactive and preventative contributions in the fight against terrorism" (Coninsx 2009). The Counterterrorism Team was also put in charge of enhancing the links with other EU institutions (especially, but not only, with Europol and the EU's Counterterrorism Coordinator), as well as non-EU bodies (including the Council of Europe, the UN) and third countries. Eurojust also pushed for the establishment of the Case Management System (CMS), an EU-wide judicial database that contains information on all investigations and prosecutions reported to Eurojust. A proposal to further enhance the capacity of the CMS with regard to information on convictions was tabled in 2007 and another legal database on terrorism giving an up-dated overview of the available national, European and international legal documents on terrorism was set up in the same year (Eurojust 2008: 56, 61). Most recently, there has been a more targeted attention to specific forms of terrorism (such as cyberterrorism and terrorism involving the use of, and focus on, nuclear, biological and chemical materials) and counterterrorism (such as the fight against terrorist finances) (Eurojust 2009: 23).

[7] In 2007, for example, a tactical meeting brought 19 Member States, third States and Europol together to discuss an ethno-nationalistic separatist terrorist group (Eurojust 2008: 27).
[8] In 2007, for example, the focus of the strategic meeting was on the implementation of the JHA Council Decision of 20 September 2005 on information exchange (Eurojust 2008: 27).

Eurojust's counterterrorism activities

As of early 2010, Eurojust is still a relatively young organisation attempting to establish its own procedures and mechanisms for cooperation. Nevertheless, a number of provisional observations can made about its workload and value-added in the fight against terrorism from the data published in its annual reports. Although the number of terrorism-related cases referred to the College remains rather small compared to other major types of criminal activity (such as drug-trafficking, or crimes against property and public goods), it has been steady over the past years (see Chart I). There has been an increase in the number of cases involving financing of terrorism, which appears to confirm the findings of a recent analysis that public prosecutors have started to coordinate on a voluntary basis via Eurojust, including in the field of combating terrorist finances (John Howell & Co 2007: 31). Moreover, many cases are increasingly referred to Eurojust at an early stage of investigation, thus saving resources for those fighting international crime and terrorism. Eurojust has also increased the analytical capacity of the Case Management Analysts by recruiting seven assistants. Thus far, Eurojust's analysts have supported fourteen complex operational cases involving co-ordination and produced strategic analysis on the basis of statistical data from the CMS (Eurojust 2008: 56). While it is difficult to compile evidence and statistics on cases where Eurojust's input contributed to tangible counterterrorism outcomes – such as arrests and/or convictions – the recent annual reports do provide information about several such cases. Based on this evidence, one may argue that Eurojust is increasingly fulfilling its key role: enhancing the development of EU-wide cooperation on criminal justice cases.

Figure 1: Evolution of terrorism cases at Eurojust, 2004-2008



Source: Eurojust 2009: 23.

More pessimistically, however, a number of high-profile EU reports have criticised the slow progress in implementing the relevant EU decisions, as well as the persistent lack of tangible results in the area of judicial cooperation at the EU level. For example, a report drawn up by the EU Council's security experts following the March 2004 terrorist attacks in Madrid claimed that EU MSs adopted "a minimalist approach to Eurojust" and criticised several of them for paying lip-service to this important EU agency (Dempsey 2007: 6). Another report by the European Commission pointed out that even as of mid-2004, two MSs had yet to establish their national contact points to exchange information on

terrorism with Eurojust, which had prevented this agency from pursuing its envisaged coordination functions throughout the entire territory of the EU (Commission 2004b). Moreover, some MSs apparently do not use Eurojust for cross-border cases, thus *de facto* restricting its usefulness (Coninsx 2009) and, as argued in detail in the next section, cooperation with Europol in the area of counterterrorism has not always been perfect either.

In the aftermath of the 2004 Madrid and the 2005 London terrorist attacks, Eurojust representatives "insisted on the establishment of a network of national counterterrorism correspondents who were obliged to provide information on on-going investigations in all stages", including interviews, arrests, pre-trial detentions (Coninsx 2009). This kind of information is different from that collected by police agencies (who focus on information about telephone numbers, identity cards numbers, card plates, etc.), but the two are naturally complementary and, when consolidated, can significantly facilitate counterterrorism cooperation. Eurojust's requests were acted upon in September 2005, when a Council Decision (2005: Article 2.2) obliged the EU MSs to appoint one national correspondent who should collate "all relevant information concerning prosecutions and convictions for terrorist offences" and forward it to Eurojust. In practice, however, even as of 2008, only ten Member States provided Eurojust with the required information. Moreover, although Eurojust confirmed that the contributions "were of better quality compared to 2006 with a much higher level of detail", it was not always possible to compare the findings due to differences in the data contributed to Eurojust for 2006 and 2007 (Europol 2008: 9).

Eurojust's own Annual Reports (2008; 2009) have also raised a number of critiques and concerns, including the following:

1) The speed and level of implementation of the 2002 Eurojust Decision has been uneven among EU Member States.
2) The support given by Member States to their National Members has been uneven. As late as 2006, the Polish and Lithuanian National Members have not even been able to establish a permanent residence in Eurojust headquarters in the Hague.
3) There are more cases which could and should be referred to Eurojust, whose capacity to deal with casework is not being fully exploited.
4) A number of crucial and practical JHA instruments, such as the Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States and its Protocol of 16 October 2001 on mutual co-operation in banking information, as well as the Council Framework Decision of 22 July 2003 on the execution of orders freezing property or evidence, have not yet been implemented in several Member States, thus preventing Eurojust from fulfilling its role in the co-ordination of investigations and prosecutions.
5) Very few Member States provide Eurojust with data concerning terrorist offences, as prescribed in the Council Decision of 20 September 2005.
6) A 2007 survey among all National Members showed that a vast majority have casework which is not registered in Eurojust's Case Management System, and almost two-thirds do not have statistics on this unregistered casework.

The annual reports also revealed a potentially useful, though thus far under-utilised mechanism formally falling under Eurojust's watch – the Joint Investigations Teams (JITs). Available evidence suggests that despite the creation of an informal Network of National Experts on Joint Investigation Teams in July 2005, only a few MSs have actually set up JITs in practice. A survey of all National Members conducted by Eurojust in 2008, for example, showed that very few MSs have even formally recommended the setting up of a JIT. It also revealed that JITs have not been considered necessary by concerned MSs because they found other forms of cooperation sufficiently effective. A few National Members have also

referred to the lack of implementation of the Council Decision on JITs at the domestic level (Eurojust 2008: 57-59).

Critical remarks concerning the (non-)use of Eurojust by EU MSs can also be found in a number of non-EU reports and analyses. A report by the UK House of Commons (2007: para. 152), for example, stated that "Eurojust's capacity is limited by some Member States' unwillingness to use it fully." The Centre for European Policy Studies (cited in UK House of Commons 2007: para. 152) pointed out that Eurojust itself says that it has the capability and possibility to go further but it cannot work when no cases are referred to it: "Apart from the 500 additional cases arising in 2005, it [Eurojust] says that it had the capability and capacity to deal with more but it is not able on its own to instigate this work." This has been confirmed by Eurojust's representatives interviewed for a French study, who argued that their institution "can only become perennial and produce concrete outcomes provided national judges resort to it" (Megie 2007: 82-3). However, other interviews conducted with French, Belgian, Dutch and Italian magistrates showed that the majority of them remain, albeit for different reasons, 'alien' to European issues. This is partly due to the obstacles related to cognitive issues (*e.g.* language, knowledge of foreign legal systems ,etc.), but as in the case of police and intelligence cooperation, it is also explicable by the occupational culture of magistrates and judges where personal and informal relations remain the preferred mode of action when dealing with a transnational affair (Megie 2007: 83).

Some observers have also criticised the configuration of Eurojust's College: it is nearly entirely composed of national prosecutors, *e.g.* magistrates from the respective MSs accusatory authorities. This has allegedly led to a problematic dominance of the intelligence-led rationale within Eurojust because the main role of the magistrates is to assist the police in transforming the collected data into legally compelling evidence that can be used in a court of law:

> Prosecutors are *de facto* involved in the intelligence approach to threats as opposed to an approach focusing on the rights of the defence. At the European level, we are hence witnessing a dual judicial subfield: one mainly linked to prosecutors and very close to accusatory authorities of the Member States and a second more marginalised one focusing on the accusation than on procedural rights and especially the rights of the defence (Bigo *et al.* 2007: 40).

Such remarks testify to the presence of occasional tensions between justice and security (Balzacq and Carrera 2006; Guild and Geyer 2008). In addition, they also reveal that the new Stockholm Programme's suggestion that the 2008 Council Decision together with the Lisbon Treaty offer "an opportunity for the further development of EUROJUST in the coming years, including in relation to initiation of [criminal] investigations" (Council 2009: 24), may be problematic because there are only few investigative officers at Eurojust at the moment.

Eurojust-Europol cooperation in counterterrorim: an inter-agency rivalry?

In the past few years, significant efforts have been devoted to developing a working relationship between Eurojust and Europol, including the EU's police cooperation agency already established in 1994[9] on counterterrorism issues.[10] The problem is that, while officially strengthening cooperation with Europol has been Eurojust's objective from the outset, the practical relations between the two agencies have been rather complicated. Already the negotiations preceding the signing of a cooperation agreement aimed at

[9] For a good introduction into Europol's history and functions, see Occhipinti 2003.
[10] For a detailed analysis of Europol's counterterrorism role, see Bures 2008.

enhancing the exchange of strategic and operational information and the coordination of activities in 2004 were rather difficult, primarily because of Europol management board's reluctance to meet some of Eurojust's data sharing requests. In this regard, according to the Chair of the Counter-Terrorism Team of Eurojust (Coninsx 2009), Europol's strict data-protection regime initially proved to be a major obstacle for information sharing between the two agencies:

> At some of the initial meetings, we would have a national judge complaining "how come Europol is not giving the information? I am the owner of the information and I gave the permission to include it in the Analytical Working File, so how come we cannot share it today with my colleagues?" So the owner of the information gave the permission to the policeman to include the information in one of the [Europol's] Analytical Working Files, but, at the meeting with Eurojust, Europol officials said "we cannot talk about this." So it was leading to absolute stupid, hallucinate things. This is something we [at Eurojust] cannot accept.

Legally, these complications were often due to the strict legal conditions that the onward transmission of data from Europol to third parties must meet, and the fact that Member States 'own' the information that they transfer to Europol (Argomaniz 2008: 186). In practice, however, the problem was also that some of the big MSs (especially France, Italy and Germany) were quite concerned about Eurojust's access to Europol's Analytical Working Files (AWFs) because of their intelligence information input in them (Coninsx 2009). In 2005, Eurojust adopted its own Rules of Procedure on the Processing and Protection of Personal Data, which stressed the right to privacy and data protection, and principles of lawfulness and fairness, proportionality and necessity of processing of all personal data (Eurojust 2005). As in the case of Europol's data protection regime, this has been welcomed by some and criticised by others. The critics have argued that:

> The increase in the powers of Europol and Eurojust to receive, process and exchange personal data is symptomatic of a broader and growing trend in EU criminal law towards the maximisation of the collection, access and exchange of personal data. (...) However, this proliferation of data collection mechanisms (...) has not been accompanied by a coherent framework for the protection of personal data and privacy. Up until recently, there was no horizontal EU legal instrument in force governing data protection or privacy in the third pillar (Mitsilegas 2009: 557-558).

Following the adoption of the 2008 Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters and the entry into force of the Lisbon treaty, data protection in the former third EU pillar has indeed been significantly improved. Nevertheless, as one senior Council official (2008) put it, the opposite view is that:

> Data protection is indeed important but seems to cause extraordinary difficulties in data exchange between EU agencies to no obvious purpose. It is currently to the extent that the EU agencies and institutions have to conclude data protection agreements to share data with each other. One would assume that as in the national governments, there is a standard set of rules and procedures that all national agencies adhere to, which allows them to freely exchange data between each other, bearing in mind the purpose for which the data was collected. This does not seem to exist at the European level and huge amount of effort has to be put just into sorting out the ways how EU institution can exchange data.

It is beyond the scope of this article to resolve this justice and/or/versus security debate, which has been subjected to several book-length analyses (Balzacq and Carrera 2006; Guild and Geyer 2008). What matters for the current discussion, however, is that although many of the initial complications in information sharing between Europol and Eurojust were resolved, the overall progress has not been smooth. In the area of access to Europol's

AWFs, for example, significant advances were made only in the past couple of years. The so-called Danish Protocol amended the Europol Convention in order to create the possibility for Europol to invite experts from third states or third bodies to be associated with the activities of its analytical groups already in 2003, but a Europol-Eurojust joint working party on AWFs was only established in 2007 with the mandate to examine legal and practical difficulties of Eurojust's involvement in these working files. Eurojust eventually became associated with the first six AWFs in June 2007 and several of its analysts were appointed as experts on judicial co-operation (Eurojust 2008: 47-48). In 2008, a secure communication link was established to facilitate the exchange of information between Eurojust and Europol, and Eurojust became associated with a further six Europol AWFs, bringing the total number of associations to twelve. This development is encouraging, but it would be beneficial for Eurojust to become associated with all Europol AWFs in view of enhancing effective cooperation in all areas (Eurojust 2009: 41). This was confirmed by the EU Counterterrorism Coordinator in his testimony in front of the British House of Lords European Union Committee (2007: para 181): "Professor de Kerchove, looking at the counter-terrorism aspect, thought that in that field it made sense that Eurojust should get access, if not to 100 per cent of the AWFs on Islamic terrorism, at least to the main findings, and that conversely Eurojust should feed information to the AWFs."

Eurojust's annual reports further indicate that it has provided Europol with information for the Terrorism Trend and Situation Report (TESAT), the CTTF Glossary on terrorist organisations, and the Organised Crime Threat Assessment. Eurojust's contributions to the aforementioned Europol's products was also confirmed by the Chair of the Counter-Terrorism Team of Eurojust, although she also admitted that Eurojust beganto contribute to the Europol's annual TESAT report only in 2006, providing data on judgments (including both convictions and acquittals), appeals, types of terrorist activities, and profiles of convicted terrorists (Coninsx 2009). Moreover, as highlighted in Table 1, the overall increases in data exchange are relatively recent and the data flows have been, at least from Europol's perspective, rather imbalanced. On the other hand, it should be noted that since 2007 Eurojust publishes its own Terrorism Convictions Monitor (TCM), which "goes far beyond the information available in TESAT reports in that it provides detailed judicial analyses of terrorism related criminal investigations and judgments" (Coninsx 2009). It is, however, only available to the judicial authorities upon request.

Table 1: Exchange of Information between Eurojust and Europol in 2004 and 2005

	2004	**2005**
Requests sent by Europol to Eurojust	0	1
Answers received by Europol from Eurojust	0	1
Requests received by Europol to Eurojust	8	64
Answers sent by Europol to Eurojust	4	52
Total	**12**	**118**

Source: Bigo et al. 2009.
Note: The table represents Europol's perspective.

Some experts have argued that difficulties in Europol-Eurojust cooperation run much deeper than the aforementioned information sharing complications suggest. They point out that some interviews with Eurojust and Europol officials have revealed that formal relations between the two EU agencies have in fact often been used "as a tool of inter-institutional surveillance" (interviews with Eurojust and Europol Officials, 2005-2006, cited in Bigo *et al.* 2007: 24). Bigo *et al.* (2007: 16-17, 24, 38-39) have even hinted towards the existence of an inter-agency rivalry in the early years of this century, which allegedly culminated in the move of Eurojust headquarters from Brussels to the Hague, where Europol headquarters have been located since its creation.[11] The interviews conducted for this research project with both Eurojust and Europol officials indicate that although "some really stupid problems were initially encountered" (Coninsx 2009), these were allegedly more of a personal, rather than institutional, nature (Europol Official 2009). The current relations have been described as "very good" and "flawless" by the heads of units in charge of counterterrorism at both Eurojust and Europol, respectively. This may be due to the fact that in 2005 a special Eurojust team dedicated to cooperation with Europol was created to "temper the ongoing struggles between different professional sectors and built trust between them" (Bigo *et al.* 2007: 24). As a result, unless prohibited due to remaining data-protection differences, Europol currently invites Eurojust officials to relevant counterterrorism meetings, and vice versa, Europol representatives are invited to Eurojust's meetings.

In 2006, both organisations also cooperated on a project to provide a guide on Member States' legislation regarding the setting-up of the Joint Investigative Teams and followed this with a number of expert meetings in 2007 (Eurojust 2007b: 28-34). The fivefold increase in the number of cases dealt with by Eurojust involving Europol (from six cases in 2006 to 30 in 2008) indicates that Europol-Eurojust cooperation has rapidly accelerated in the last few years (Eurojust 2009: 19), although "the potential for further progress is constrained, as shown by the lengthy negotiations of their cooperation agreement, by their differences in institutional structure and legal basis"[12] (Argomaniz 2008: 187). Thus, as a November 2007 discussion paper from the EU Counterterrorism Coordinator emphasised (cited in Argomaniz 2008: 187), further structural links should be created so that Eurojust can fully benefit from Europol's analytical capacity without duplicating tasks. A greater involvement of the EU Counterterrorism Coordinator was also suggested as a possible way to remedy the remaining data-protection issues that prevent unrestricted information exchange between the two EU agencies (Coninsx 2009).

Eurojust's current value-added in the area of counterterrorism

Despite the billions spent annually on counterterrorism, we still lack an adequate performance evaluation baseline to assess what 'works' and why. To some extent, this is due to the methodological difficulties of finding the right proxy indicators that would complement the readily available, yet inherently limited quantitative criteria (such as the number of arrests, requests for assistance or amounts of frozen terrorist money) that do not shed much light on the actual effects of counterterrorism measures on specific groups and individuals (Bigo *et al.* 2006; Guild and Geyer 2008). Moreover, as discussed above, Eurojust has a double nature due to its composition of seconded high-level national

[11] It should also be noted, however, that the two buildings are not in the same part of the city, which is a fact that many have regretted. As of early 2010, Europol has allegedly outgrown its existing building and thus is due to move to a new building on a new site that should be within a walking distance from the current Eurojust building. Nevertheless, the top representatives of Eurojust and Europol, as well as the EU Counterterrorism Coordinator, have agreed that the two agencies should ideally be located under one roof in the same building. Cited in UK House of Lords 2008b: para 183.6.

[12] It should be noted that Europol's legal basis has become similar to that of Eurojust on January 1, 2010, when Europol became an official EU agency (see Bures 2008: 511-512).

experts who together form a College, whose key job is to support, not replace, the competent authorities of the MSs. As a consequence, there are serious methodological issues when it comes to evaluating the contributions of Eurojust to the fight against terrorism and only few studies have attempted to do so thus far. One of these exceptions is a recent study by Jiri Vlastnik (2008: 38), who argued that it is possible to identify two principal Eurojust missions that also provide value-added in the fight against terrorism. The first – trust promotion – is a rather informal, yet as discussed below, perhaps the most crucial Eurojust function in the long-run because it represents an indispensable pre-condition for cross-border cooperation in criminal justice. In contrast, the second Eurojust's key contribution – prosecution facilitation – is based on a formal division of powers, which is based on national and EU law foundations.

In the context of the EU, Vlastník (2008: 38) has identified four sources of mistrust that Eurojust ought to help overcome in the medium- to long-term: 1) lack of knowledge (of relevant legal regulations, national institutions and their representatives, as well as foreign cultures, languages and practices in other EU MSs); 2) different legal standards; 3) bad experience; and 4) traditional conservatism. In the first area, Eurojust was designed from its inception to promote trust among the representatives of EU MSs by working as a permanent and centralised College of national representatives. In addition, Eurojust has also tried to overcome mistrust by educational means, *e.g.* by convening seminars, meetings and conferences on various criminal justice topics, including counterterrorism (see above). The second problem of different legal standards stems from the fact that there are currently at least thirty different legal systems in the EU, which translates into 30 different rules for gathering evidence, arrests, trial processes and penalties.[13] Thus, even the basic Eurojust's functions of legal co-operation and coordination can themselves represent a daunting challenge. Moreover, even a good knowledge of existing legal standards in EU MSs can be a source of mistrust, provided that some of these standards that are crucial for criminal justice (*e.g.* protection of basic human rights such as the right for fair trial, the principle *nullum crimen sine lege*,[14] personal data protection etc.) differ to the extent that some are deemed insufficient. According to Vlastnik (2008: 40), "this shows well the interdependence of the three grounds of EU criminal justice cooperation – mutual recognition principle, institutional cooperation and harmonisation of national laws". Of these three, Eurojust has attempted to address only some of the institutional cooperation issues with the other, formerly EU's third pillar, bodies and agencies. However, as has been highlighted in the discussion of Eurojust-Europol cooperation in the area of counterterrorism, even here progress has been piecemeal.

Criminal justice cooperation can also be hindered by past bad experiences, including police and judicial malpractice, corruption, information leakages, bureaucracy, or non-reciprocity. According to Vlastnik (2008: 40), "Eurojust has a double role here – (a) to be 'a good' experience for national organs referring cases to it and (b) to remove causes of bad behaviour on national level". Regarding the former, apart from being a role model in terms of not engaging in the above-mentioned malpractices, the original idea was that Eurojust would help the national agencies by focusing on the most complicated multilateral cases. In practice, however, in line with its role-model strategy, Eurojust has not refused to deal even with the more mundane operational cases, which actually comprise the vast majority of its workload.[15] Regarding the latter, personal contact-building and "public pressure that Eurojust may exert upon foreign national authorities through the threat of a public

[13] Although there are currently only 27 Member States in the EU, in the UK there are different legal systems in Scotland, England and Wales, and Northern Ireland.
[14] No punishment for an act which has not been previously and unambiguously declared criminal.
[15] In 2008, for example, 1153 of the newly opened cases dealt with operational issues, while only 40 cases were registered "to provide support to and expertise on general topics related to each legal system or judicial questions or practicalities not involving the operational work of the College". In 2007, the ratio was 1081:20. (Eurojust 2008: 13; Eurojust 2009: 11-12).

critique in the Annual Report" are Eurojust's key contributions (Vlastnik 2008: 40), although it appears that the name and shame approach has been used only sparingly as a measure of last resort.

Finally, when it comes to the problem of traditional conservatism of law-enforcement and criminal justice authorities, it is to a large extent based on the first three categories of mistrust. However, as Vlastnik (2008: 41) noted, it can also be gradually removed provided the existence of "a clear definition of common values and priorities of both the EU and Member States." Unfortunately, in the area of counterterrorism, such a consensus is clearly missing at the moment due to the persisting differences in the national perceptions of the nature and salience of terrorist threat across the EU MSs (Bures 2010; Monar 2007). Moreover, as the Chair of the Counter-Terrorism Team of Eurojust noted (Coninsx 2009), there is a lack of consensus on the larger criminal justice priorities as such:

> What is the top priority in European criminal policy today? You can see that events are influencing our activity and it is very difficult to have a European approach when you have not decided what is the European priority, what is the European criminal policy and what do we really need – what is really bothering the citizen in Europe? Is it organized theft, is it money laundering, or is it terrorism?

While Eurojust on its own cannot ensure that either common values or clear priorities emerge, its unique, 'double nature' architecture allows it to both keep criminal law powers at the national level and to profit from the physical cumulation of these powers in one place. In addition, this arrangement also "certainly promotes trust of other national organs, as their national member is 'one of them'", whereas other European bodies are often considered as "rather strange, distant and incredible" (Vlastnik 2008: 41).

Can Eurojust provide more genuine value-added in the area of counterterrorism?

Setting the standard of evaluation far higher than the aforementioned Vlastnik's analysis, Bjorn Müller-Wille's study of Europol's intelligence role (2004: 33) suggested that an EU agency may offer genuine added value only if:

1) It produces something that can, is or will not be produced at the national level;
2) The responsibility for a certain form of intelligence product is transferred to the European level, *i.e.* if the European unit can relieve national authorities.

As discussed above, at the moment, Eurojust does not meet either of these two "genuine value-added" criteria. There are, nevertheless, some areas where Eurojust has the potential for such value-added. Perhaps most importantly, this includes prosecution facilitation, the second key area where Eurojust's 'double nature' has to be taken into account. When it comes to the powers of national members of Eurojust within their home jurisdictions, Bigo *et al.* (2007: 24) have pointed out that the relations between Eurojust and the individual MSs have been highly asymmetric in general, because the latter have been completely free in their nomination of the national correspondents to Eurojust and, as discussed above, they also determine both the terms of their mandate and wages. Thus, despite the fact that already the original 2002 Council Decision specified a minimum definition of a common standard of national member powers[16], in practice they have thus far varied quite considerably, reflecting the differences among MSs criminal justice systems: "Whereas a majority of national members dispose of prosecutorial powers (even if these

[16] It stipulated that a Eurojust national member a) "shall have access to the information contained in the national criminal records or in any other register of his Member State in the same way as stipulated by his national law and b) "may contact the competent authorities of his Member State directly" (Council Decision 2002: art. 9).

powers differ very much as well), others serve only as transmission channels for mutual legal assistance" (Vlastnik 2008: 42).

The Council tried to remedy some of these shortcomings in its December 2008 Decision on the Strengthening of Eurojust, which was adopted "with the purpose to enhance the operational capabilities of Eurojust, increase the exchange of information between the interested parties, facilitate and strengthen cooperation between national authorities and Eurojust, and strengthen and establish relationships with partners and third States" (Eurojust 2010). The Decision introduces a number of significant changes, in particular with regard to the clarification and to some extent expansion of the powers of Eurojust members. Thus, once its provisions are implemented by the MSs, all national members of Eurojust should be granted minimum powers to receive, transmit, facilitate, follow up and provide supplementary information in relation to the execution of requests for judicial cooperation. In addition:

> They shall be entitled to exercise, subject to agreement with the competent national authority, the following powers: issuing and executing requests for judicial cooperation, ordering in their Member States investigative measures considered necessary at coordination meetings organised by Eurojust, and authorising and coordinating controlled deliveries in their Member States. In urgent cases, where it is not possible to identify or to contact the competent national authority in a timely manner, the National Members are also entitled to authorise and coordinate controlled deliveries and execute requests. When the granting of powers exercised in agreement with a competent national authority or in urgent cases is contrary to constitutional rules or fundamental aspects of the national criminal justice system, the National Member shall be at least competent to submit a proposal to the national authority competent for the carrying out of those powers (Eurojust 2008: 47-48).

Although this increase of the minimum standard of national member's powers does not reduce national sovereignty because these powers are still national, rather than European in their origin, it was nonetheless for a long time perceived as controversial by several MSs (Vlastnik 2008: 43-44). Moreover, although the new Eurojust Decision refrained from introducing changes with regard to the mandatory character of Eurojust's requests to national authorities to initiate investigations and prosecutions, its potential impact on state sovereignty and the relationship between the EU and the national level in judicial co-operation in criminal matters should not be underestimated:

> The detailed provisions on the powers of national members of Eurojust under their national law may transform this relationship. Union law would make Member States confer on their Eurojust national members a series of powers which must be "equivalent" to the powers of national officials, potentially transforming the relationship between national law and Union law and increasing the impact of Union structures on domestic criminal justice systems. The emphasis on national law as the basis for powers of Eurojust national members and the insertion of exceptions to these powers based on the need to preserve domestic constitutional and criminal justice systems reflects Member States' unease with this prospect (Mitsilegas 2009: 557).

In this light, it is not surprising that the 2008 Council Decision did not address the second source of Eurojust power which is of European origin, *i.e.* the powers of the College. The only new provision concerns cases of disagreement among national members as to which jurisdiction should prosecute, where the College will newly be asked act as a "broker" and issue "a written non-binding opinion on how the case should be solved" (Mitsilegas 2009: 555). Even in these cases however, Eurojust College will have to continue with its current tasks of coordinating, recommending and supporting nature, without having the recourse to any enforcement or sanctions mechanism, apart from the occasional naming and shaming of the most flagrant laggards in its Annual Report. The only area where the remit

of Eurojust has been extended quite considerably is the collection, processing and exchange of personal data, including the establishment of the Case Management System, index, and temporary work files.

It is also important to note that the European Commission and some EU Member States have been strongly supportive of even further strengthening Eurojust's role in the area of counterterrorism. The *European Commission Action Paper in Response to the Terrorist Attacks on Madrid* (2004), for example, suggested that

> Eurojust should be given a stronger role in the fight against terrorism. The Council should give it a clear mandate to coordinate the activities of national prosecuting authorities across the Union in relation to terrorism. We should open an urgent debate about giving Eurojust an initiating role in this regard too. Presently, Member States may, provided they come forward with a justification, refuse to pursue an investigation requested by Eurojust. This should be abrogated, at least when Eurojust's request would relate to investigations on terrorism.

Similarly, article 85 of the recently ratified Reform Treaty stipulates that Eurojust's mission "shall be to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a prosecution on common bases, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol." The Treaty also brings Eurojust under the control of the European Court of Justice (ECJ) and the European Parliament, and the Council is now empowered to adopt regulations to determine Eurojust's structure, operation, field of action and tasks, including:

1. The initiation of criminal investigations, as well as proposing the initiation of prosecutions;
2. The coordination of such investigations and prosecutions;
3. The strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

Eurojust representatives suggested that, while these substantive Treaty of Lisbon provisions were unlikely to affect its operations to any great extent, the procedural changes (the move to qualified majority voting and co-decision, the greater role for the Commission, and the extended jurisdiction of the ECJ) would "have a significant impact on Eurojust's structure and operations in the medium and longer terms" (UK House of Lords 2008a: para 6.190). The Chair of the Counter-Terrorism Team of Eurojust specifically noted that "the Lisbon Treaty will help because then we will have to have together with Europol a more integrated approach and the trans-pillar approach will no longer be possible. The effect will be huge and we will be forced to have a more integrated approach" (UK House of Lords 2008a: para 6.190).

Similarly, it is important to note that the Reform Treaty kept the provision for possible establishment of a European Public Prosecutor's (EPP) Office from Eurojust, which was already resuscitated in article III-274 of the stillborn Constitutional Treaty. If it is ever created, the EPP's Office would be "a judicial body with direct enforcement authority, responsible for investigating, prosecuting and bringing to judgment offences against the Union's financial interests" (Carrera and Geyer 2007: 4). In this respect, it would exercise the functions of prosecutor directly in the competent courts of the MSs. Moreover, while the term "offences against the Union's financial interests" is already quite broad, there will also be the possibility to extend the powers of this body to include "serious crimes having a cross-border dimension". A fully fledged European Public Prosecutor's Office responsible for investigating and bringing to trial all serious cross-border crime throughout the EU would therefore represent "a quite fundamentally new and powerful actor in the area of

judicial cooperation in the EU" (Carrera and Geyer 2007: 4). As such, the new EPP's office would most likely meet at least some of the intelligence studies' criteria for genuine value-added.

While the proposal for a European Public Prosecutor is not new, it is the first time that the structure for implementing this idea has been included in the Treaties, which makes it more likely that this post may be created one day At the same time, however, it is worth noting that article 86 merely provides a basis for a possible future regulation to be adopted by consensus by all EU Member States. However, as discussed above, the very idea of an EPP has been so controversial that it is unlikely to garner the necessary unanimous support among MSs in the foreseeable future. It is therefore more likely that any future EPP would have to be created under the enhanced cooperation provisions provided by the Lisbon Treaty (UK House of Lords 2008a: para 12.89). It is also important to note that, at present, the debate about the EPP does not focus on counterterrorism issues, but rather on anti-fraud issues, though according to the personal opinion of the Chair of the Counter-Terrorism Team of Eurojust this may change "if there is a major terrorist attack tomorrow. Then the need for an EPP also in counterterrorism-related issues would be felt very strongly" (Coninsx 2009).

Finally, when confronted with the discussion about Eurojust's value-added in the fight against terrorism, the current Chair of the Counter-Terrorism Team specifically mentioned two areas of concern (Coninsx 2009). The first concerns the persisting lack of human resources:

> [I would like] to have more human resources and more possibilities to create a real team because nowadays I am chairing a team based on voluntary inputs. Most of the team members work only part-time on counterterrorism and have to follow other teams as well. I am also doing this together with my other work and this is not the way we should be dealing with this. If it is really a priority, than prioritise it. Now it is based on the good work of people who are doing this as an extra.

The second, and "the most important message," concerned "the real need for an integrated approach" to counterterrorism (not only) at the EU level: "It is never a police thing only, or an intelligence thing only, it is together – police, intelligence and judicial. And if you separate these three, you are lost. Because yes, Europol is very active, Eurojust starts to be active and SitCen is extremely active, but it is not about being active or complacent, but about working together." This confirms that even at the EU level, talking about coordination is one thing, and the willingness to be coordinated and work together in a truly integrated manner is often quite another thing. However, it is precisely in the area of coordination where Eurojust's counterterrorism activities could offer genuine value-added. It is therefore also important to note that, according to the Chair of the Counter-Terrorism Team of Eurojust (Coninsx 2009), due to the work of her unit, the powers of Eurojust were strengthened in other areas as well:

> The quite revealing thing is that what we established under the frame of terrorism is now being transposed into other areas, including an obligatory information stream. This is a good point because it shows that European policy-makers at the Council level have found it worthwhile to take what has been achieved in counterterrorism and transpose it into other areas.

Thus, it appears that some of the aforementioned changes introduced by the 2008 Council Decision may not have been introduced without the work Eurojust had done in the area of counterterrorism. Interestingly, this also suggests that, while initially – after the 9/11 and 3/11 terrorist attacks – some politicians may have used the windows of opportunity to push through multi-purpose pieces of anti-crime legislation under the rubric of counterterrorism (Den Boer and Monar 2002: 14), Eurojust's counterterrorism best

practices are being used as a model for adjusting the more general anti-crime legislation. If this indeed turns out to be a long-term trend, Eurojust's counterterrorism efforts could provide genuine value-added that goes well beyond their original purpose.

Conclusion: Eurojust's fledgling counterterrorism role

Overall, it remains debatable as to whether all EU MSs fully support the strengthening of Eurojust's role in the fight against terrorism. On the one hand, the uneven utilisation of Eurojust reflects the deeper and older differences concerning judicial cooperation at the EU level, with countries such as Belgium, Italy, Portugal, Spain and France considered to be committed and countries such as the UK and some of the 'new' MSs being rather reluctant to the idea of enhancing cooperation in criminal justice at the supranational level. These divisions were already present at the time of Eurojust's creation, when the project laying out its current legal foundations that was jointly proposed by France, Sweden, Portugal and Belgium competed with another one coming from Germany[17], with the UK opposing both proposals for the fear of a "too far reaching European judicial cooperation in criminal affairs" (Bigo *et al.* 2007: 17). While the UK was ultimately appeased with the nomination of a British prosecutor as President of the College of Eurojust, the old cleavages have yet to fully disappear. This also appears to be the case when it comes to Eurojust's counterterrorism role in particular, where, even in the case of Islamist extremist terrorism, it is still "the same eight, nine or ten MSs having a lot of experience and interest in sharing information" with Eurojust (Coninsx 2009). As discussed above, this is at least partly due to the different terrorist threat perceptions across the EU, which was also confirmed by the Chair of the Counter-Terrorism Team of Eurojust (Coninsx 2009):

> But then we have different forms of terrorism and there we see that other countries are coming in the picture. So it is different from phenomenon to phenomenon. (…) The new countries like Bulgaria simply do not have any terrorist activity. (…) If you have some experience, you are more attracted to sharing information with organisations like Europol and Eurojust because you are also sharing it with other countries. If you are not really concerned by these problems, you come to the meetings, but you do not have a problem.

Eurojust is attempting to remedy this problem by ensuring that all MSs have "a full overview of activities to show that today you are not affected, but tomorrow you might be, so please be alert" (Coninsx 2009), but in the absence of a genuine independent EU terrorist threat assessment, this is bound to remain a rather difficult endeavour.

On the other hand, the relative under-utilisation of Eurojust is sometimes also due to the more general shortcomings of inter-agency cooperation in the former EU's third pillar. The first, and arguably most important one, is the persisting lack of trust. As one Europol official noted:

> We rarely collaborate with Eurojust. Last time we invited a judge of Eurojust and he hasn't said anything. He has taken notes but has not given any information. He hasn't been very useful for us, but he certainly collected information. (…) If we know and trust each other, the exchange will be much easier. (Interview with a Europol Official 2004, cited in Megie 2007: 93)

This was also confirmed by the President of Eurojust (Kennedy 2004: 62), who stated that the lack of confidence and trust is "something that Eurojust comes up against and it is part of our role to remove this block – that concern of the investigator or prosecutor that sharing information means losing control over that information". The problem is that the frequent change of personnel seconded from the EU MSs to EU security agencies makes

[17] Germany preferred the model of the Europol liason officers for Eurojust (see Mangenot 2006: 34-62).

the development of long-term relations rather difficult. In the case of Eurojust's counterterrorism team, the situation is further complicated by the fact that the majority of its members work on counterterrorism issues only part-time.

The second general shortcoming is due to the differences in national police and judicial systems that significantly influence the perceptions of the 'proper' relations between judges and policemen. Consequentially, as another Europol official stated, "depending on the country, we do not have the same kind of relation with judges. The Italian and Dutch judges are often authoritarian with the policemen of their country. But they cannot behave in the same fashion with other European policemen" (Interview with a Europol Official 2004, cited in Megie 2007: 93). More generally, the shortcomings of national counterterrorism structures in some MSs can also represent serious complications to Eurojust's counterterrorism activities. In 2006, for example, Eurojust organised a coordination meeting to ensure the prompt implementation of several urgent letters rogatory in a case related to the financing of terrorism opened by the Belgian judicial authorities and with links to Italy due to money transfers.[18] The main obstacle identified in this case was the lack of a central anti-terrorism authority in Italy to which to address urgent requests for assistance. The solution proposed during the coordination meeting in 2006 – sending the same letters rogatory to all potentially competent authorities – ultimately proved unsatisfactory, because a conflict of territorial jurisdiction arose and consequently the Italian Supreme Court became involved, which led to a two-year delay in this urgent procedure (Eurojust 2009: 31).

These shortcomings are an important reminder that the most daunting challenges to Eurojust's counterterrorism role are still due to the persisting limitations regarding some MSs' will and/or capacity to duly implement and fully utilise existing EU counterterrorism institutions and mechanisms. The EU is ultimately its Member States, without whose wholehearted support even the most elaborate and innovative counterterrorism mechanisms remain useless. As the Chair of the Counter-Terrorism Team at Eurojust (Coninsx 2009) put it:

> Every year we remind MSs of their obligation to send information to Eurojust, not to please us but for their own sake, because the sooner they inform us about on-going investigations, applications of EAW, cases of mutual legal assistance in cases of terrorism, the sooner we can detect links with other countries and maybe have a more pro-active approach in coordination. Now we are waiting for requests from Member States, and so we are depending on the good will of Member States.

Because of the dependence on MSs' good will, Eurojust's potential for value-added in counterterrorism has not been fully exploited yet. This was admitted by the President of Eurojust, who told the British Members of Parliament that "initially, we found that countries were reluctant to co-operate with us because they felt that we were an unnecessary link in the chain" (cited in UK House of Commons 2007: para 152). However, he also emphasised that this negative picture has begun to change. "As time has gone on and we have been able to demonstrate the added value we can bring by bringing people together … it has meant that we have been able to build trust and confidence amongst the various specialist investigators particularly" (cited in UK House of Commons 2007: para 107). This was confirmed in the interview with the current Chair of the Counter-Terrorism Team of Eurojust (Coninsx 2009):

> We see that things are evolving. If that would not be the case, I would quit, I am not that motivated. If you do not see progress, if you do not see that MSs want to see the

[18] Two main defendants (one was arrested in June 2006 and the other fled to Pakistan) were accused of setting up illegal trafficking of phone cards, the profits of which were supposed to be directed towards several terrorist groups in Pakistan.

> added value of the organisation, I mean we are not organising the meetings for the pleasure of keeping everybody busy. That is not at stake and we cannot accept that everybody is sitting there as an observer.

Thus, it is possible that over time Eurojust will succeed in convincing the MSs and the relevant national judicial authorities that it can be trusted even in the highly sensitive area of counterterrorism. How long this process of trust-building will take, and whether it will really succeed, remains to be seen.

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Policing in Europe: An Ethnographic Approach to Understanding the Nature of Cooperation and the Gap between Policy and Practice

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Abstract

Over the last two decades, there have been significant developments concerning transnational police and judicial cooperation, with the creation of relatively new tools of cooperation such as the European Judicial Network, the Centres for Police and Customs Cooperation, Europol and Eurojust. However, cooperation at the level of negotiations means nothing if these structures, agencies and networks are not appropriately translated into practice in the field. Therefore, this article aims to explore the gap between policies agreed at a macro-level and the work undertaken in practice within the context of police and judicial cooperation in Europe. In particular, it will examine a variety of factors arising from the empirical research undertaken in four European countries and relevant institutions, which comprise of, amongst others, the political priorities and influence and the need to adapt the law to practice.

Keywords

Europol; Police and judicial cooperation; Eurojust; Centres for Police and Customs Cooperation; European Union

THE THEMES OF POLICE AND JUSTICE HAVE ALWAYS BEEN A SOURCE OF ANIMATED discussion and debate whether they involve the public, academics, practitioners or politicians. Over the last two decades, there have been significant developments concerning transnational police and justice cooperation. This has been given an extra lift after the 9/11 attacks of 2001, along with the more recent bombings in Madrid in 2004 and London in 2005. These events have allowed many initiatives, which had previously encountered many difficulties in their development because of legal challenges, to see the light and be implemented in practice. Some striking examples of the progress made are Europol, the European Judicial Network (EJN) and Eurojust. However, the creation and development of new agencies, agreements and structures at a European level have received inadequate empirical attention. Indeed, the body of academic work on police and judicial cooperation in Europe is mostly descriptive, dealing with emerging legislation and/or organisational structures, or considering policing studies that deal with one national structure, but with little empirical evidence underpinning it. Consequently, this article aims to provide an on-the-ground assessment of the situation of European police and judicial cooperation in order to allow better awareness for future developments at national and global level.

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The findings presented in this article are part of a more comprehensive ethnographic study[1], which focuses on the current levels and efficiency of instruments of cooperation at bilateral and multilateral level, so that the European puzzle can be completed as fully as possible. The functional and operational interconnection of the various institutions and practitioners involved in police and judicial cooperation were studied in France, Luxembourg, Spain and the United Kingdom, and in two border areas, the French-Spanish Catalonian border and the Anglo-French border at Folkestone. The selection of these cases has allowed for an analysis of the levels of involvement in matters of cooperation, the resources made available and the divergent priorities at political level from the point of view of a variety of legal systems and countries. Furthermore, as the relatively new tools of cooperation - namely the European Judicial Network (EJN), the Centres for Police and Customs Cooperation (CPCCs), Europol and Eurojust - affect in one way or another the national work of police and justice, comparisons in the implementation and use of these new tools in the different countries is another point worth of investigation. If practitioners lack information on the various instruments available for cooperation, and if governments do not provide 'translation' in the field of the initiatives adopted at macro-level, cooperation cannot be fully achieved.

The aim of this ethnographic approach is to provide an in-depth study of the situation in practice, facilitating the examination and close-up view of the actions of the groups and institutions studied, as well as "to witness backstage behaviour" (Punch 1979: 18). Face-to-face interviews[2] with police officers, civil servants, prosecutors and liaison magistrates from the various countries studied, members of Europol and Eurojust, as well as officials from the Council of the European Union have been conducted alongside periods of observation (such as at border areas and in CPCCs) and internships[3] undertaken at relevant institutions (such as Europol and the Council of the Judiciary in Madrid), many of which have never been studied in this way before.

This article offers findings on the existing identified gaps and the impact that they can have on practices and cooperation. Furthermore, it will show that the gap between policies/decisions agreed at the macro-level and the work undertaken in practice is very wide. It is worth emphasising that the study and systems/instruments will be described at the point the relevant empirical work was undertaken, taking into account that the interviews started in December 2002 and ended in June 2006, with the observations also taking place between these dates. It is important that the description and analysis of the legal instruments and the legal basis of the institutions should be in line with the empirical work in order for the study to be relevant and provide an overall picture of the situation. Hence, legal initiatives mentioned in this article relate to the situation as in 2006, whilst more recent changes are not addressed in detail. However, where possible, relevant updates have been provided as there have been significant developments since the work was concluded, especially the ratification of the Lisbon Treaty.

At what level does cooperation occur?

In order to categorise the various levels of police cooperation, this article will use the framework proposed by Benyon (1996), which identifies three different levels, the macro-, meso- and micro-levels. From one end to the other, the micro-level mainly involves

[1] See Guille (2009) for the complete study and findings.
[2] The interviews were undertaken between 2002 and 2006. Further update information was given by telephone, at conferences and by e-mail until October 2008. The total number of formal interviews undertaken amounts to 87, to which must be added the numerous informal discussions, phone conversations, informal discussions at conferences and, most importantly, invaluable informal discussions during fieldwork and during the observations.
[3] The various observations and internships undertaken began in August 2003 and ended in August 2005.

practitioners in the field at the 'lower' end, whilst the macro-level, located at the 'top' end, refers to the political level and constitutional matters. In-between these two levels, we can find the meso-level, which includes for example operational procedures and structures such as Europol, Schengen and networks of liaison officers. These three levels can all overlap and are interrelated, with the meso-level being a key stage in enabling interaction between the political aspects and the practitioners in the field (Guille 2010b).

Nogala (2001: 142) states that "cooperation has become a buzz-word" in the policing field. However, there is often little consideration as to the type of cooperation that is being considered - cooperation at macro-, meso- or micro-level? Cooperation at the level of legal negotiations means nothing without the day-to-day work of officers in the field. Therefore, these three levels need to be taken into account and it is necessary to examine how they inter-relate. This is also the rationale of the study on an empirical basis, in being able to highlight gaps between theory (macro-level) and practice (meso-and micro-levels), which is another theme running through the research as a whole. In their study more than a decade ago, Anderson *et al.* (1995: 2) found that "political considerations are bound to differ from practical operational police concerns", but the situation seems to have remained the same, with little having been done to fill the gap. At the moment, the gap between the "governmental bureaucracy" (Gallagher 1998: 119) and practical and operational needs is seen as becoming increasingly wide. In consequence, practitioners prefer to choose the difficulties involved in overcoming cultural, linguistic and procedural differences and make direct contacts with colleagues, and in doing so adapting the law to practice. We must address the obstacles that hinder cooperation and more importantly question the needs of police and justice cooperation in practice.

On the one hand, there are tools such as Europol with many guidelines and rules, whereas, on the other hand, there are instruments such as Schengen (and the Schengen Information System (SIS)), the CPCCs and the liaison magistrates about which little is written. Why do we have some tools that have a complicated structure, but malfunction with regard to cooperation, and other tools that have less legislation, but work much better? It is partly related to the needs that are required in the field versus the priorities at a formal level, which do not always correspond to these needs.

It is not always the instruments that contain the most rules or have the highest political support that are the most popular and useful. For example, Schengen has been identified by all interviewees as the tool most often used by police officers. Interestingly, there has always been a SIRENE manual[4] on how to use the Schengen Information System, but the many officers interviewed working in SIRENE offices across the various countries did not seem to be aware of its existence. Indeed, Schengen was always seen as having no written guide or regulation as to its use, without undermining its good function and use. Furthermore, a link could also be made with the adaptation of the texts and needs in the field, which is a point specifically emphasised when referring to the CPCCs below. Indeed, texts are being signed, but do not correspond to the needs in the field. As a result, law enforcement officers have to adapt them to what is required for action. On the other hand, in the liaison magistrates' case, there are agreements that are laid down on paper, such as those concerning the bilateral exchange of liaison magistrates. However, no specific regulation is given for their operation, which leads, as in the previous case, the practitioners to adapt the available tool to their needs with the difference being in that case that the liaison magistrates have to act in a 'blurred' framework as the agreement does not provide any details on how the liaison magistrates should act in practice. Are we therefore in a situation where the gap between practice and politics is getting wider? Are

[4] The latest legislation is, *inter alia*, 2008/334/JHA: Commission Decision of 4 March 2008 adopting the SIRENE Manual and other implementing measures for the second generation Schengen Information System (SIS II), OJ L 123, p.39.

the tools with the least restrictive regulations the most used and efficient because officers can interpret them according to their needs, unlike Europol for example which does not work well, but has a detailed Convention?[5] Is it worth following a 'bottom-up' scheme through which what is required is developed informally, and once proven efficient is given legal support? Bottom-up strategies seem to offer an effective way of creating efficient tools for cooperation, but at the same time have to follow a lengthy and difficult path in order to work, especially when starting off (as they generally start on an informal basis) since for criminal matters a legal basis is required for judicial purposes. However, the more comprehensive study that was undertaken refers to at least two examples of bottom-up strategies that have been successful.[6] These last themes bring some reflection on intermediate solutions that are needed to improve the cooperation framework. However, this is a decision for politicians and one that depends on the level of priorities each government invests in aspects of criminal cooperation.

This research shows that there is a gap between central and political levels (macro-level) and the work of the officers in the field (micro-level), which confirms the findings of Sheptycki (2002b), Reiner (1997), Ashworth (1998) and Anderson *et al.* (1995). It should be emphasised that when the research refers to effective cooperation, it refers to cooperation in conjunction with the users (such as the police). This problem needs consideration as there has been an inaccurate assumption that the macro-level and the practitioners in the field have the same aims. Political effectiveness is a completely different matter[7], and one that this article does not explore. Returning to the 'gap' issue, the legal architecture and political considerations act in a sphere that does not usually meet the requirements necessary for smooth cooperation at the practical level.

Political influence

First, it was commented by interviewees from a variety of institutions and countries that the agreements in relation to cooperation signed at the central level are generally too broad and not specific enough, which results in the necessity for further documents to be agreed. As this example shows, it is important to note that it is not sufficient to have agreements as practical details are as much important and need to be sorted out. Agreements are signed at ministerial level and then progress to other ministries for implementation without involving any practitioners in the process, which explains the gap between the macro- and micro-levels, as the macro-level does not know how the process works in practice. Another similar point can be raised with regard to Spain. Because of the complex system of cohabitation between the two national police forces and the various autonomous forces, Spain created a system of coordination within the State Secretariat for Security for the two national forces. The police coordination model that the Spanish state has developed in order to improve cooperation amongst the different police forces is theoretically good, but has not shown any benefit, as was commented by several Spanish senior practitioners. The coordination body is composed of representatives from the macro-level, which means that the culture is not police-based, but 'politically' driven, with a culture and impetus of the civil service and the government rather than operational policing. The same situation applies to the Ministry of Justice in Spain (which also acts as the Central Authority[8]), as interviewees indicated that no magistrates actually work within the Ministry of Justice in Spain (Guille 2010b), which results in practical difficulties in

[5] It must be noted that the Europol Convention has, since 1 January 2010, been replaced by the Council Decision of 6 April 2009 establishing the European Police Office (EUROPOL), OJ L 121 p.37.
[6] See Sheptycki (2002b) and Gallagher (1998) for the European Liaison Unit and Maguer (2004) for the French-German border and French-German CPCC.
[7] Such as rushing to sign conventions or treaties to show the reaction of politicians to public feelings.
[8] Central body responsible for international matters at national level such as mutual legal assistance (as cited in Guille 2010b: 66).

making contact with practitioners from the judiciary when required. The Central Authority in the UK (UKCA, located within the Home Office) can also be mentioned in that context. Indeed, interviewees explained that the Home Office only employs administrators and therefore excludes practitioners from decision and negotiation processes. Another example is the National Criminal Intelligence Service (NCIS),[9] which had its activities moving away from real-time needs in the field as it was considerably involved in information exchange with MI5.[10] Furthermore, NCIS was mainly composed of civilians who were authorised to deal with crime-related matters and who were responsible for telling senior officers in the field what needed to be done. As one can understand and as was gathered by the interviews undertaken, NCIS was, as a consequence of this situation, poorly viewed by other agencies, such as the European Liaison Unit in Folkestone or local police forces. Therefore, the practitioners' motivation for contact and cooperation with NCIS was generally absent in the UK. One of the conclusions provided for such a development for this organisation was the UK's pragmatic approach, which can be illustrated here by the fact that civilians cost less for the state than police officers. Also, effort was put into making the European Arrest Warrant work as early as possible, since it is far cheaper than traditional lengthy extradition procedures. This is linked to a point that the article will come onto later in relation to the priorities a government focuses on and how they are implemented. The hierarchy here is being perceived as more important than relations with the operational world. As Anderson *et al.* (1995) noted, the negotiation level is unfortunately increasingly removed from practical needs.

Europol must also be mentioned in the context of political influence. Before tackling the over-present political factor related to Europol, it is essential to provide basic background information about Europol, as well as its power and relationship, and then discuss its governance to understand the overall picture. Europol is an EU law enforcement organisation. It began its full activities in July 1999 and was based on the Europol Convention of 26 July 1995.[11] Europol is a central unit that gathers competent authorities of all the Member States of the European Union under a single roof, with the aim of improving police cooperation in order to prevent and combat terrorism, unlawful drug trafficking and other serious forms of international crime. It supports the police forces of the various Member States, but does not replace them. It does this by gathering and analysing information about international organised crime alongside its main missions, which are the exchange of data, realisation of analysis, technical assistance and training. It delivers intelligence products, such as threat and risk assessments, situation reports, intelligence bulletins and policy reports, as well as operational products including operations reports, answers to requests, analytical reports, expertise, Joint Investigation Teams (JIT) and practical reports.

It is worth noting that three protocols have amended the Europol Convention, in 2000, 2002, and 2003. The first protocol, extending Europol's mandate to cover money laundering, entered into force in March 2007, as did the second protocol which strengthened Europol's powers in assisting the Member States by enabling it in particular to coordinate joint investigation teams (Article 3A of the Protocol[12]). The third protocol

[9] NCIS no longer exists since 1 April 2006, when it ceased its activities and was integrated within the Serious Organised Crime Agency (SOCA). The information given on NCIS is also likely to happen with SOCA, though it cannot be ensured. As a consequence, the situation described might not be the case anymore with SOCA.
[10] Interview with a foreign liaison officer in 2006; see also Sheptycki (2002c).
[11] Council Act of 26 July 1995, based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office (Europol Convention), OJ C 316 of 27 November 1995, 2-32. It must be noted that the Europol Convention has been replaced since 1 January 2010 by the Council Decision of 6 April 2009 establishing the European Police Office (EUROPOL), OJ L 121 p.37.
[12] Council Act of 28 November 2002 drawing up a Protocol amending the Convention on the establishment of a European Police Office (Europol Convention) and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, OJ C 312/1 of 16 December 2002.

amending the Europol Convention (the Danish Protocol of 27 November 2003[13]) covers overall changes (such as allowing direct contact between competent authorities and Europol as stipulated in Article 4.2. or authorising the Director of Europol to open an Analytical Work File without prior approval of the Joint Supervisory Board (JSB) and Management Board (MB), Article 12.1.). This came into effect on 18 April 2007. In view of the 'old' legal framework by which Europol was ruled - the Europol Convention -, updates had to be made for it to be more 'fit for purpose'. A further recent important change in amending Europol's legal framework has been the replacement of the Europol Convention on 1 January 2010 by the Council Decision of 6 April 2009 establishing the European Police Office (EUROPOL), as a result of the ratification of the Lisbon Treaty.

Europol is an organisation comprising a Management Board (MB), a Director, a Financial Controller and a Financial Committee, and is controlled by an independent Joint Supervisory Body (JSB), designed to ensure that the rights of data subjects are not violated. Europol is accountable to the Justice and Home Affairs (JHA) Council. The latter is responsible for the guidance and global control of Europol (Isaac 2002) and took decisions on the basis of unanimity until the Treaty of Lisbon entered into force, which was intended to ensure democratic control of Europol, but this could be a real hurdle to moving forward. Police accountability has always been achieved through national parliaments, as policing is an activity that is completely embedded in sovereign states. Until recently, control mechanisms were kept at the national level. However, this accountability model based on national sovereignty has been significantly affected by transnational policing; the conventional methods of governance are no longer sufficient (Bruggeman 2002; den Boer 2002; Loader 2002; Walker 2002; Sheptycki 2002a; Arnull and Wincott 2002; Harlow 2002). Therefore, the common scholarly claim urges for new suitable mechanisms at supranational level to ensure proper accountability. Europol offers a 'multiple' form of accountability as set out in the work of Day and Klein (1987: 105), as it has various lines of accountability. Its internal accountability is simply organised as a bureaucratic hierarchy. However, its other types of accountabilities are more complex. Control in Europol has been problematic in every sense. First, Europol, being an intergovernmental structure, has suffered from a lack of political accountability. Each Member State was represented by its governing body and their actions - and through them those of Europol - could only be scrutinised by the 27 different national parliaments, where each had their own interests. Indeed, the domains dealt with in Europol are strongly linked to sovereignty, where the prerogative of each country lies. This aspect made negotiations and decisions complex as unanimity was required for any decision to be taken.[14] Too many parties were involved, which led to a number of issues relating to the decision-making process, the number of languages used and the political priorities of the various countries, which in turn is an issue closely linked to the will that each country is prepared to show and invest in the cooperation process (and in Europol), as will be discussed later in this article.

The main point on which all scholars agree in relation to Europol is that it has lacked democratic control (den Boer 2002; Sheptycki 2002a; Bruggeman 2002; Monar 2001; Anderson *et al.* 1995; Walker 2002). Indeed, the Commission and the Parliament were only given minimal roles such as being an observer during the Management Board's meetings and being consulted when the Convention[15] needed to be amended, respectively. This is far from the traditional roles that the two most important Community institutions usually have. However, this situation does not mean that there is no political influence, and this will be discussed in detail later. Another concern is the immunity protocols applied to Europol's officials, which are highly controversial and seen as overvalued and

[13] Council Act drawing up, on the basis of Article 43(1) of the Convention on the establishment of a European Police Office (Europol Convention), a Protocol amending that Convention, OJ C 2 of 6 January 2004, 1-12.
[14] This unanimity decision-making process no longer exists following the ratification of the Lisbon Treaty.
[15] Article 34 of the Convention.

overestimated, as was stated by Jürgen Storbeck, former director of Europol, at a conference on 'The Future of Europol' in April 2007. Having Europol officials enjoy immunity for their actions could indeed lead to deficits in operational accountability such as judicial control if Europol were to be given operational powers (Guille 2010b).

Solutions to some of these issues could include relying more on the Management Board and have fewer than ten representatives, which would simplify procedures and cut delays in decision-making. With regard to the immunity protocols, the legal framework should be revised. Furthermore, the Chairman of the Europol Working Party added at the above mentioned 2007 conference that parliamentary control could change dramatically if Europol were 'communautarised' (which has happened when the Lisbon Treaty entered into force on 1 December 2009 as Europol became a European Agency). Therefore, under Lisbon now, qualified majority voting in the EU Council applies and decisions no longer have to be taken unanimously. Another change introduced by the Lisbon Treaty is that the European Parliament and the Court of Justice are given greater roles in scrutinising Europol's activities and setting its annual budget, therefore increasing democratic and judicial control, as mentioned in Guille (2010b). As these changes are still too recent, we will have to wait and see in the future the extent to which the impact of the Lisbon Treaty will address the issues of accountability in practice. Another solution for increased and efficient accountability might be the creation of an external monitoring body or supranational body (Elgie and Jones 2002[16]; Guille 2010b; Loriot 2005), which would be specifically linked to the judicial control aspect. However, the differences of judicial systems between the common and civil law countries and therefore the perceptions of the Member States have to be born in mind if such a body were to materialise.

Returning to the central theme, Europol has been referred to by several practitioners, as being 'a child of politics'. Informants in Anderson *et al.* (1995: 77) also said that "Europol was not looked at from a professional point of view, but was played as a political card". Most of the people interviewed agreed that Europol is far too political. One major issue concerns the Management Board (MB). It is only political with no chiefs of police represented. Indeed, the MB mostly comprises Ministers of the Interior or equivalent, for each country. Therefore, the problem in Europol is that the MB has little understanding of policing and subsequently the needs of the organisation. Another issue that must be noted as regards the MB is the large number of members, namely 60[17], a number impossible to manage efficiently. Both issues lead to a waste of time and money. The approach to change should be incremental and could start by including chiefs of police within the MB. The role of the MB could then be redefined, such as whether it should represent Europol as an instrument of cooperation for police forces or whether it should represent the Member States along with their own political priorities.

With regard to Europol's work, there are many different priorities and objectives. For example, at the beginning of Europol, the Spanish priority was to integrate terrorism within the mandate of the organisation, a point on which the other countries did not agree. Different countries have different political priorities, which has an impact on the seriousness with which the Member States undertake certain functions depending on their interest (Harlow 2002). Another example of serious crime dealt with in Europol is drug trafficking, and there is no common legislation between EU countries to combat drug trafficking for the moment as was explained in the April 2007 ERA Conference on 'The Future of Europol'. Legislations vary amongst countries from flexibility to zero tolerance. In some countries certain quantities are seen as negligible and in others not, which can result

[16] Cited in Menon and Weatherill (2002: 119).
[17] Data given by the Chairman of the Europol Working Party at the conference on 'The Future of Europol' in Trier organised by ERA in April 2007.

in tensions between countries in Europol when files on such matters have to be dealt with. The attitude depends on political orders given at the top level.

The political factor is also present in the recruitment process. It was mentioned several times by senior officers that any change of government in one country often implies a change of police officers seconded to Europol. Other law enforcement officer interviewees from Spain and France confirmed that appointments are very political; they are 'digit appointments'[18], in the sense that they are autocratically made decisions where someone is 'fingered' or 'volunteered' to go. Generally, these matters are based on similar political views between the government and the seconded Europol Liaison Officers (ELOs) or Europol staff, or because the officer appointed is not wanted in his or her country. All interviewees agreed on the fact that seconded officers, whether Europol officers or ELOs, are 'forgotten' in their own country and therefore end up being cut off from their 'community', as argued in Bartkowiak and Jaccoud (2008).

Interestingly, Davies (2001: 194) states that "the key issue in agency independence is the extent to which the agency's work is politically sensitive". The case of Europol illustrates this point very well, as its work affects one of the most sensitive domains of a country's sovereignty. The question is whether we want Europol as a political or as an 'operational' body. Political requirements are different from those in the field. We need to know what is required from Europol. At the moment, all the decisions made at MB level have taken little account of the needs required in the field by agents. Europol is reactive rather than pro-active. It depends upon Member States being willing to use it, and for this it needs to be perceived as a useful and trustworthy mechanism in order to be fed with information. As Monar (2006: 503) illustrates, Europol, like Eurojust, is "heavily dependent on the provision of sufficient data from the respective national authorities as they only have very limited possibilities - and indeed capacities - to collect data of their own". However, governments want Europol to deal more with analysis than with operational matters (without giving proof of its usefulness), as an analytic instrument of cooperation to the Member States, which results in it failing to reach its objectives.[19]

The Europol Counter-Terrorism Director in 2007 explained that after the terrorist attacks of 11 September 2001, there was much political pressure on Europol to find agreements on information exchange with third countries and bodies, and that responses Europol received from prospective partners included that it would be difficult to enter into cooperation agreements because Europol's model of cooperation was too complicated and too much politics were involved. Practitioners had to be able to pick up the telephone and exchange information without wondering about the accumulation of agreements that do not include practical action provisions. It was even mentioned that strategic reports often happen to be politically influenced. Again, the gap between the political priorities and practical needs is too wide. If there is a will to make this type of institution work, there must be a sufficient level of linkage between political priorities and policing work.

Political priorities

Another central point involving political factors involves the priorities of governments.[20] If policies and instruments of cooperation are agreed at central or European level, but governments do not provide follow-up and do not invest in such activities, operational

[18] Quotation from an informal discussion when working at Europol in 2003 and from a speech at a conference on 'The Future of Europol' in 2007 given by one of the former directors of Europol.
[19] This use of Europol as a centre for analysis is in line with the increasing use of analysis and civilian analysts in domestic policing, particularly in the UK.
[20] This point is further argued in Guille (2009).

work is not possible (Gerspacher 2005; Benyon 1996; Rhinard, Ekengren and Boin 2006). It has been observed on the French-Spanish border that there was, generally speaking, no proper resources given to officers in the field, especially when one takes into account the high volume of work the officers deal with at the border. Computers were outdated, with networks frequently breaking down, on the Spanish and French side for the national police forces, and were totally non-existent for the *guardia civil,* a situation which contradicts the 2003 Schengen Evaluation for Spain undertaken at governmental level. In addition, inappropriate means of communication were provided, whereas Article 44 of the second Schengen Convention[21] specifically states that appropriate means of telecommunication should be installed in border regions in order to facilitate police and customs cooperation. For example, as explained in Guille (2009), the issue of the telephone lines in the French-Spanish CPCC (located at the border on French territory) was significant as each police force had their own telephone lines, but all of them were French numbers, even for the Spanish authorities. The obstacle is clear as most of the police stations in Spain cannot dial out to international numbers, and are therefore unable to contact the CPCC - a major obstacle for enhanced cooperation. An important point to stress here is that of the telephone lines in the French-German CPCC (located on German soil) as each country was given national lines, for example, the French forces on German territory could be contacted by local French police stations as they had French numbers. Why does this difference exist? It is not due to its more strategic location, as the French-Spanish border is historically a strategic crossing point for trans-border crime such as tobacco smuggling, drug trafficking and illegal immigration. The key element in that case is governmental political priorities to invest in resources in relation to the political image they need to project. Whereas on the French-German border investment is needed to project a good image, on the French-Spanish border minimum standards seemed sufficient as the image is conveyed through the high volume of work. There is, generally speaking, a lack of will from the governments to improve the situation with regard to such major issues. More training in order to have specialised agents, more awareness about which instruments are available, appropriate means for action and common priorities are key elements to improving police and justice cooperation and to show the support governments provide to allow their national authorities to become adequately involved in the entire process.

Guille (2010b) agrees with the work of Elsen (2007) and Mogini (2001) arguing that instead of creating further instruments of cooperation, the Member States should learn to use in their daily work those that already exist. Many agreements have been developed at the macro-level and imposed from the top down without allowing field officers to trust them and therefore use them efficiently[22], as no communication link existed between the macro- and micro-levels. As a consequence, this enforced top-down situation often involves practitioners taking parallel paths of action, which spread into an informal world (Sheptycki 2002b; Guille 2009, 2010b).

Beyond mandates: adapting the law to practice

A strong sense of 'mission' is part of the occupational culture of police officers (Sheptycki 1997; Reiner 1997; Skolnick 1966; Holdaway 1983) and we cannot therefore expect them to stay still. Despite the existence of problems at the macro-level, police officers were generally willing and prepared to work cooperatively. As several of the interviewees explained, which was also in line with the findings of the interviews carried out by Anderson *et al.* (1995) and Santiago (2000), police officers are prepared to do anything

[21] Convention implementing the Schengen Agreement of 14 June 1985 between the Government of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, OJ L239, 22 September 2000, pp.19-62.
[22] See Guille (2009) and Guille (2010a) for further details.

even when certain rules need to be bypassed, in order to get a response to solve problems. This is where one can see the gap between decisions made by rule-makers and what needs to be done by officers in practice. Rule-makers are usually far from understanding the realities of police work, but expect high 'results' imposing rules of law restricting police action. As a result, as we cannot expect the law enforcement forces to operate with "their hands tied behind their backs" (Ashworth 1998: 79), these rules are not always followed faithfully. Indeed, several officers explained that they often need to 'adapt the law in practice' in order to work efficiently. Some illustrative examples are taken from the observations undertaken in the field, as well as in the structures of cooperation such as CPCCs and Europol.

At the French-Spanish border, under the Schengen Convention, controls and police checks can only be occasional and last for a limited period of time. However, this was not applied in practice when the observation took place. It was very common to find police forces undertaking controls every day for several hours when it is, in fact, not allowed. When the situation was questioned during informal discussions, in particular what they thought about this point, police officers always stated that they needed to adapt the law to practice, since if they relied on legislation alone they would not be allowed to take any action. The gap between practice and policies/politics is very wide and almost all police cooperation and data exchange are discussed in relation to specific incidents, as the practices that they adopt are not stipulated in policies, legislations and/or manuals. According to the interviewees, the main issue concerns the exchange of information, in particular whether the information exchange has a legal basis and whether the information exchanged will be valid for inclusion in a judicial file. These questions have been asked by many officers, for example, when they are not sure if information going through the CPCC can be included in a judicial investigation file. A senior police officer in the French-German CPCC stated that ultimately it all depends on individual interpretation of the law. On the one hand, there is no clear prohibition of exchanging information[23], but on the other it is stated that the only legal mean to exchange information for inclusion in a judicial file has to be made through international *commissions rogatoires*[24], otherwise the file could be rejected as invalid. However, he added that many exchanges are not made through these *commissions rogatoires*, with the specific exception of very complex and important investigations where no risk could be taken. If the data involved a small piece of information, nobody would question its origins and therefore police officers would do it that way instead of using more formal channels. It is, for example, very common to receive information such as a telephone number for a specific person through a colleague, which will appear in the judicial file. This information then enables the officers to proceed with the investigation and, ultimately, nobody questions how the phone number has been provided. Another police officer also said: "Let's admit that some information is not received 'formally'. But, who am I to make the observation and tell the senior officers who have worked that way for years that they need to change? If the needs exist, there is a lack in the texts". The senior police officer from the French-German CPCC added that the question was whether governments want police officers to take action or not and go further in the investigations.

[23] Information here does not refer to intelligence information, but to evidence that will be included in a judicial file. It is important to note that the Hague Programme, which was the work programme for the area of Justice and Home Affairs, contained measures to strengthen the exchange of information with the principle of 'availability', which requires forces in one country to cooperate with intelligence gathering in another country, when requested to do so, but also to offer intelligence even when not requested to do so. The Stockholm Programme, which has succeeded to the Hague Programme, is the new work programme in the area of Justice and Home Affairs and was adopted on 11 December 2009 (the Hague Programme has now expired). It will define the framework for EU police and customs cooperation, rescue services, criminal and civil law cooperation, asylum, migration and visa policy for the period 2010–2014.

[24] The term refers to a request addressed by a judicial authority in country A to a judicial authority or equivalent in country B to request that the authorities of country B proceed with certain actions, such as a house search in relation to a criminal investigation that country A is undertaking.

Officers in another country have also admitted that they had searched cars without having any judicial authorisation (although this is the procedure in their country), but it had to be done as suspicion of finding illegal narcotics was strong. If drugs were to be found in such circumstances, the police officers concerned would have to take special care as to how their report is written; otherwise, judicial proceedings would not be authorised. Such findings on how law is adapted in practice on a regular basis are original as they are not usually reported in the literature and were of utmost importance in this research in order to analyse what happens in reality. These 'informal' actions from police officers were regarded as necessary in many cases. However, they are not to be applauded as they can easily infringe data protection laws[25] for example. More attention should be paid to enabling legal action which would allow suspects to have their rights respected. However, at the moment, the infringements are inevitable as no initiative is being taken at the macro-level to correct the situation.

Work methods are also adapted in formal structures for cooperation. CPCCs have been created with the aim of facilitating cooperation and supporting field officers only in the region that is stipulated in each of the CPCC agreements. However, there is an extensive network of CPCCs that has developed as CPCCs have proved their worth in the field. Therefore, if the Spanish authorities need some information from their Italian counterparts, they will often go through the French authorities in the French-Spanish CPCC. Those in turn will contact their French colleagues in the French-Italian CPCC, who will then ask their Italian counterparts. Other countries which do not have CPCCs also use this network to get relevant information (for example, Andorra and the UK). This is a process of support for foreign colleagues, which should not occur according to stipulations in the texts. However, interestingly, it has been confirmed in the course of this research project that, although central authorities were not pleased with this increasingly important networking system of information exchange through CPCCs, the high volume of exchanges demonstrated that this network of CPCCs responded to real needs, and therefore the central level informally allowed this information exchange to take place to a certain extent. This highlights well the bottom-up style of formalisation that can occur, driving the micro-level towards the macro-level in order to match the requirements of fieldwork (Gallagher 1998; Maguer 2004; Sheptycki 2002b).

Gerspacher (2005) and Santiago (2001) have both demonstrated in their research that Europol needs to act beyond its mandate to be able to work more efficiently and gain trust from the national police forces of the Member States. The findings of the empirical research in this article confirm that this is the case. Theory, as stipulated in the Europol Convention, revealed that the rules that had to be followed in order to exchange information were not appropriate for the police officers' pragmatic and realistic approach. Often, direct contacts were allowed between police officers at national level and Europol without the involvement of the Europol liaison officers and/or the Europol National Units (ENUs) as required.[26] Furthermore, Europol liaison officers of some Member States allowed Europol to be used as a channel through which international *commission rogatoires* could transit, which is also something that is not in Europol's remit. A similar issue occurred within Eurojust, which, this research project revealed, has also often been involved in bilateral cases dealing with mutual legal assistance matters instead of multilateral complex cases. Also, it is of importance to note that, for example, the UK is one of the countries that specifically uses Europol for bilateral exchanges (such as checking vehicle registration numbers), whereas Europol was not created with that objective in mind. The UK's attitude

[25] Legal provisions on data protection have recently been made more robust by Council Framework Decision 2008/977/JHA, OJ 2008 L350/60.
[26] It is worth mentioning that this point was made before the Danish Protocol entered into force in April 2007, which amends the Europol Convention and covers overall changes, such as allowing direct contact between competent authorities and Europol as stipulated in Article 4.2.

in that context is to adapt the instrument (Europol) to its needs. This probably happens because the UK is not a full Schengen member and has no CPCCs and therefore has less bilateral agreements and structures of cooperation, compared to other European countries, in order to be able to exchange information. British officers would therefore decide to go through Europol contacting their colleagues[27] rather than have to go through their central agency (NCIS[28]), which would take even more time and which is historically not entirely trusted in the UK, as it is considered by officers as being too political and having very different objectives from the police forces, as seen above.

The most important question Member States have to ask themselves concerns the future that they want for Europol. Do they want an instrument which is merely another post box for simple real-time information or do they want to go further? The first idealistic proposal for Europol has still not been reached and the main impression is that Europol is not being used to its full capacity. Why is this so? The political factor anchored within Europol and the reality of the needs in the field are definitely creating a gap which is too wide to allow trust and better cooperation. The macro- and meso-levels need to take into account the micro-level, so that appropriate action can be taken. However, this matter can only be resolved by the macro-level admitting that there is too much political input within the institution and that a better balance needs to be found with fieldwork considerations. Nevertheless, it is unlikely that the situation will improve. Since the observation period in 2003 and the updated informal discussions revolving around Europol in 2007, a few developments have occurred - and some, such as the Lisbon Treaty, might have quite an important impact. However, according to the updates received from some contacts used in the more comprehensive research, not much has changed at the moment, and definitely not Europol's important political dimension.

Conclusion

Overall, it does not seem that, over the years, the existing gap between the macro- and micro-levels that characterises Europol has been tackled. Even worse, this situation does not seem to worry the macro-level. As has been discussed in Guille (2010a), Schengen, the CPCCs, the ELU and the bilateral liaison magistrates are the instruments that have been recognised by practitioners as the most satisfactory with regard to matching needs, efficiency, and usefulness. They are also less politically controlled than other instruments. Equally, Schengen has been agreed on at macro-level and has a SIRENE manual describing its practical operation, but with which practitioners do not seem to be familiar. The bilateral liaison magistrates are in a unique position regulated by bilateral agreements, but once more, no formal rule in relation to their role in practice (exchange of information, relation with foreign national magistrates, etc.) is stipulated anywhere, in contrast to Europol whose functioning is detailed in its Convention.[29] There has been too much focus on legality and structure and too little on practice (uniforms to be worn in a foreign country, status of the officer working in a structure based on the other side of the border, etc.). Formal structures are always about information exchange, but no emphasis is given to the practical needs.

In addition to the aim of getting information quickly and efficiently, it is necessary that the legal side be addressed in the right proportion; otherwise, some significant efforts could be wasted. For example, a judicial file could be rejected for not containing judicially valid evidence and data. In that context, the CPCCs seem to be an interesting intermediate solution between the macro/meso- and micro-level for cross-border activities and

[27] Since the Danish Protocol of 2007 mentioned earlier, direct contact is now allowed.
[28] NCIS no longer exists; it has been integrated within SOCA since 1 April 2006.
[29] As mentioned earlier, the Europol Convention has now been replaced by the Council Decision of 6 April 2009.

cooperation. There are clearly discrepancies between real needs at borders (ELU/CPCC) and national level interests (Europol, Eurojust, international *commissions rogatoires*, etc.). This situation may be due to the fact that, at the border, needs are more obvious and made tangible. There are more specialised practitioners working at the border for different types of criminality (immigration, petty thefts, drug trafficking, etc.) and foreign practitioners know each other, with better understanding of the needs required. Most importantly, the field officers working in the CPCCs give information to other field officers and are therefore seen as being at the same level, whereas central levels are seen as bureaucrats who do not understand real work in practice.

Politicians must learn from experience. It is not the most regulated and complicated structure that yields most cooperation. Some instruments with less restrictive regulations can achieve more as they are more accessible and flexible to everyone. As Massé (1999) argues, sometimes the least organised system is the most efficient one. There is a lack of push from politicians to translate instruments into practice and address questions that matter in the field.

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The Role of the Regulated Sector in the UK Anti-Money Laundering Framework: Pushing the Boundaries of the Private Police

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Abstract

This article argues that the conceptualisation of private police in current academic literature requires expansion to accommodate the role of the regulated sector in the Anti- Money Laundering (AML) framework. Firstly, it evaluates the literature on 'private police' and argues that its current parameters are too narrow to accommodate the 'policing' role of the regulated sector. Secondly, it lays out the legislative framework that has developed to deal with the problem of money laundering. Thirdly, it contextualises the role of the regulated sector, examining the domestic inter-agency policing relationships within the suspicious activity regime as operationalised in Scotland. Finally, it takes a closer look at how the courts have interpreted the 'failure to report offence' under s330 of the Proceeds of Crime Act (POCA) 2002 and its consequential effect on the engagement of the regulated sector with the SARs regime.

Keywords

Money laundering; Policing; Private police; Proceeds of crime

ON 5 MAY 2010, THE CROWN OFFICE AND PROCURATOR FISCAL SERVICE IN SCOTLAND reported that the "[b]iggest ever proceeds of crime case nets $10 million for Scottish communities". This announcement came at the end of a civil recovery case that was passed to the Civil Recovery Unit in 2008.[1] The Civil Recovery Unit is responsible for the implementation of civil recovery and cash forfeiture in Scotland under Part 5 of the Proceeds of Crime Act 2002. In 2004, Moscow-based businessman Anatoly Kazachkov came to the attention of the police following a Suspicious Activity Report made by a bank within the regulated sector concerning a bank transfer of $10 million from Hungary to Scotland. The Scottish police, working together with the Russian authorities, were able to trace the source of funds finding evidence of false documentation and stolen identities en route. A restraint order was obtained under the Proceeds of Crime Act 2002. In 2010, following the lengthy court proceedings, the funds were released to the Crown Office.[2]

This case highlights the vital contribution that the regulated sector can make to policing investigations. However, the academic literature neglects the significant policing role of the regulated sector. Following an exploration of the literature and the legislative

[1] Crown Office & Procurator Fiscal Service (2010). 'Biggest ever proceeds of crime case nets $10 million for Scottish communities', News release, COPFS, May. Available at http://www.copfs.gov.uk/News/Latest (accessed on 17 June 2010).
[2] *ibid.*

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framework, this article seeks to contextualise the policing contribution of the regulated sector within the Anti-Money Laundering (AML) regime as operationalised in Scotland, demonstrating the need for an expansion of the concept of 'private police'.

Private police

The majority of literature which discusses those involved in private policing focuses on the increasing use of private security firms.[3] They argue that an increasing number of public, commercial and voluntary bodies are involved in delivering policing services.[4] For example, privatised spaces (shopping centres, airports, etc.) rely on private security firms to deliver policing services within their boundaries.

Where the literature discusses regulatory roles of private institutions, it tends to fall specifically into the regulatory literature where regulatory responsibilities are examined, as opposed to policing literature which deals with legal, political and social aspects of social control.[5] Significantly, there has been very little research looking at the role of private forms of regulation in tackling economic crime; rather, it tends to look at health and safety obligations and the environmental regulatory responsibilities.[6] Where the literature looks at the regulatory responsibilities in the economic crime context, it tends to evaluate the economic burden that is placed on the regulated institutions as opposed to their active policing contributions.[7]

Harvey focuses on the costs incurred by the regulated sector in complying with its obligations.[8] She analyses how much it costs for the regulated sector to implement the required measures at length. She recognises that there is a gap in the academic literature for work quantifying 'benefit' to society. However, she does not undertake this task. Furthermore, while she acknowledges that the regulated sector considers that they are "unpaid policemen" and that they have "inside knowledge", she does not explore this policing role nor appreciate its significance. It is important because the regulated sector is in a position to connect the public police to transactional information at an earlier stage in the commission of money laundering. Sproat has criticised Harvey's methodology.[9] He analyses costs from both the regulated sector and the public sector perspectives and

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[3] Loader, I. (1999) 'Consumer Culture and the Commodification of Policing and Security', *Sociology*, 33, pp. 373-392; Brodeur, J.P. and Shearing, C. (2005). 'Configuring Security and Justice', *European Journal of Criminology*, 2 (4), pp. 379-406; Crawford, A., Lister, S., Blackburn, S. and Burnett, J. (2005). *Plural Policing: The Mixed Economy of Visible Patrols in England and Wales*, Bristol: Policy Press; Crawford, A. (2006). 'Networked Governance and the Post-regulatory State?: Steering, Rowing and Anchoring the Provision of Policing and Security', *Theoretical Criminology*, 10, pp. 449-479; Vaughan, B. (2007). 'The Provision of Policing and the Problem of Pluralism', *Theoretical Criminology*, 11, pp. 347-363; Johnston, L. (2007). 'The Trajectory of 'Private Policing', in Henry, A. and Smith, D., *Transformations of Policing*. Aldershot: Ashgate, pp. 25-49.

[4] Loader, I. (1999) 'Consumer Culture and the Commodification of Policing and Security', *Sociology*, 33, pp. 373-392.

[5] Shearing, C. D. (1993). 'A Constitutive Conception of Regulation', in Grabosky, P and Braithwaite, J (eds), *Business Regulation and Australia's Future*, Canberra: Australian Institute of Criminology; Gill, P. (2002). 'Policing and Regulation: What is the Difference?' *Social Legal Studies*, 11, pp. 523-546.

[6] Williams, J. (2005). 'Reflections on the Private versus Public Policing of Economic Crime', *Brit.J.Criminol*, 45, pp. 316-336 at p317. For an environmental example, see Abbot, C. (2009). 'The Regulatory Enforcement and Sanctions Act 2008', *Env L Rev*, 11(1), pp. 38-45, which looks at the role of Local Authorities in enforcing environmental health obligations.

[7] Harvey, J. (2004). 'Compliance and Reporting Issues Arising for Financial Institutions from Money Laundering Regulations: A Preliminary Cost Benefit Study', *Journal of Money Laundering Control*, 7(4), pp. 333-346; Harvey, J. (2005). 'An Evaluation of Money Laundering Policies', *Journal of Money Laundering Control*, 8 (4), pp. 339-345; Sproat, P. (2007). 'The New Policing of Assets and the New Assets of Policing: A Tentative Financial Cost-benefit Analysis of the UK's Anti-money Laundering and Asset Recovery Regime', *Journal of Money Laundering Control*, 10 (3), pp. 277-299.

[8] *ibid.*

[9] Sproat, n7 above.

acknowledges where the data is merely indicative or secondary, and in this respect insulates his methodology from critique. He goes on to attempt to analyse the 'benefit', but concludes that the regime is still bedding down. In his later work, Sproat spends more time quantifying the benefits of the AML framework.[10] Through a myriad of methodological disclaimers, he finds that the system does not pay for itself. The analysis does not attempt to provide a qualitative appraisal of the 'benefit'. Sproat argues that those who support the AML framework are likely to argue that 'benefit' extends beyond the costs and into the realms of punitive rewards. Neither Harvey nor Sproat highlight the material contribution that the regulated sector is able to make to the policing of money laundering. Similarly, they do not acknowledge the position of power in which the regulated sector is, given its access to customer/client information.

Sheptycki defines private policing simply as "contract based" policing.[11] However, it is argued here that this interpretation is too narrow and that the AML framework has imposed on the regulated sector legislative responsibilities of a policing character. Academic literature must bring policing and regulation together since the AML obligations placed on the regulated sector means that its members enter into the policing arena and play a fundamental role in supporting the public police in their investigations. These obligations move the regulated sector from a simple compliance role into that of private police.

The problem of money laundering

The first articulation of a collective 'money laundering' concept appeared in the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. Money laundering was initially perceived as mainly linked to drug-trafficking. Through discussions at the G7 summit in 1989, when the Financial Action Task Force (FATF) was established, its conceptualisation as a threat to the international economy came to the fore.[12] Money laundering was acknowledged as a major global threat to the financial markets. The establishment of the FATF harnessed the commitment of 16 members (which included the European Commission) to band together in their attempts to draft national and international policies tackling money laundering.[13]

The remit of FATF laid down in its 2008-2012 revised mandate is to work to ensure that its 40 Recommendations on Money Laundering and nine Recommendations on Terrorist Financing are recognised globally.[14] FATF will continue to focus on three main areas of activity; standard setting, ensuring effective compliance with those standards and identifying money laundering and terrorist financing threats. FATF highlights jurisdictions that have significant deficiencies in their AML and combating financing of terrorism regimes, and these are to be categorised as 'high-risk jurisdictions'. FATF will identify systemic money laundering and terrorist financing threats through the typologies process

[10] Sproat, P. (2009). 'To What Extent is the UK's Anti-money Laundering and Asset Recovery Regime Used against Organised Crime?', *Journal of Money Laundering Control*, 12 (2), pp. 134-150; Sproat, P. (2009). 'Payback Time? To What Extent has the New Policing of Assets Provided New Assets for Policing?', *Journal of Money Laundering Control*, 12 (4), pp. 392-405

[11] Sheptycki, J. (2002). 'Accountability Across the Policing Field: Towards a General Cartography of Accountability for Post-modern Policing', *Policing & Society*, Special Issue on Police Accountability in Europe (Guest Editor Monica den Boer), 12 (4), pp. 323-338.

[12] Contained in the Economic Declaration Released by the Summit of the Arch, July 16, 1989. Also see Mitsilegas, V. and Gilmore, B. (2007). 'The EU Legislative Framework against Money Laundering and Terrorist Finance: A Critical Analysis in the Light of Evolving Global Standards', *I.C.L.Q*, 56 (1), pp. 119-140.

[13] This membership has now increased to 34 members. See http://www.fatf-gafi.org/pages/0,3417,en_32250379_32236836_1_1_1_1_1,00.html (accessed 18 June 2010).

[14] Initially, the FATF drafted 40 Recommendations which dealt with money laundering. In 2001, the remit of the FATF was expanded to include tackling terrorist financing; consequently, they drafted 8 further Recommendations. In 2003, the FATF revised all Recommendations and added a 9th Recommendation.

where they gather and disseminate information on methods, trends and techniques. FATF will support the development of national threat assessments and will regularly publish a global threat assessment. Lastly, and perhaps most significantly, FATF will look to new emerging threats. It acknowledges that globalisation brings with it new risks and the central consideration internationally must be to protect the integrity of the financial system. Looking to their 40 Recommendations, 'risk' terminology permeates, yet there is no definition or interpretative guidance given in the document. From June 2007 to October 2009 (and presumably to be periodically revised), FATF issued separate guidance on the risk-based approach which was sector specific. The guidance aims to:

1) Support the development of a common understanding of what the risk-based approach involves.
2) Outline the high-level principles involved in applying the risk-based approach.
3) Indicate good practice in the design and implementation of an effective risk-based approach.[15]

Countries which are seeking to institute an appropriate risk-based system must understand the risk that they are tackling. They must have information available to them that allows them to assess the risk appropriately or, in other words, "they must understand the actual and potential money laundering and terrorist financing risk."[16]

The participation of the European Commission, together with numerous Member States in the FATF, helped to push forward legislative provisions in the European Communities (now EU). In 1991, building on the FATF 40 Recommendations which were first published in 1990, the European Union produced the First Money Laundering Directive on prevention of the use of the financial system for the purpose of money laundering[17]. Ten years later, in 2001 the Second Money Laundering Directive was introduced.[18] This Directive extended the offences covered by the First Directive, extended the range of professions covered and established the requirement for the establishment of a Financial Intelligent Unit within each Member State who would be responsible for administering the suspicious activity regime. The Third Money Laundering Directive was issued in 2005 and came into force in 2007[19]. It incorporated the 2003 revisions of the FATF Recommendations, extended the scope of the Directive to cover any transaction linked to terrorist financing, instituted customer due diligence measures, enhanced diligence measures in respect of politically exposed persons and established penalties for failing to report suspicious activity.

The Proceeds of Crime Act (POCA) 2002, together with the Money Laundering Regulations of 2007, lays down the criminal and regulatory sanctions that deal with money laundering transposing the European provisions into the UK framework. They determine what activities are included in the crime of 'money laundering' and the consequential provisions that facilitate its investigation and prosecution. The POCA 2002 Explanatory Notes (at n6) describe money laundering as "the process by which the proceeds of crime are converted into assets which appear to have legitimate origin." In other words some kind of criminal activity has taken place which has resulted in a material benefit. To ensure this benefit can be used without detection by law enforcement authorities, it must be disguised in such a way that it is no longer connected to its original source. In achieving untraceable funds, those businesses which deal with financial interests are the most at risk of exploitation. The

[15] Paraphrased from the FATF website, available at http://www.fatf-gafi.org/document/63/0,3343,en_32250379_32236920_44513535_1_1_1_1,00.html (accessed on 17 June 2010).
[16] De Koker, L. (2009). 'Identifying and Managing Low Money Laundering Risk: Perspectives on FATF's Risk-based Guidance', *Journal of Financial Crime*, 16 (4), pp. 334-352 at p. 337.
[17] 91/308/EEC
[18] 2001/97/EC
[19] 2005/60/EC

association between money laundering and low level criminality through serious organised crime, taken together with the potential risk to the economy, moved anti-money laundering procedures up the political agenda.

Moves to highlight how money laundering relates to criminality, with an emphasis placed on how much it impacts daily life, have been embraced by both policing and political bodies in an attempt to harness the necessary public support to drive forward criminalisation. For example, the UK Threat Assessment of Organised Crime (2009/10) published by the Serious Organised Crime Agency (SOCA), highlights the link between money laundering and organised crime explaining that "most organised criminal activity is directly or indirectly aimed at making money and therefore criminal finances and profits underpin organised crime."[20] Similarly, "Letting Our Communities Flourish: A Strategy for Tackling Organised Crime in Scotland" published by the Scottish Government in 2009 was at pains to highlight how far the tentacles of organised crime reach and emphasised criminals' reliance on money laundering activities to sustain their empires. The breadth of criminal activity and the variety of environments exploited by criminals has forced the traditional public police to diversify and pluralise, thereby embracing the regulated sector.

The public police and the regulated sector

Reiner argues that "anyone living in modern society has this intuitive notion of what the police are".[21] However, when one tries to articulate a definition of the police, the debate is not so much concerned with what the police are, as it is with what they do – be that what they actually do, or what they should do.[22] The definitions narrated here are focused on facilitating an understanding of the role that the public police play in the AML framework so that this can be contrasted and reconciled with the role of the private police.

The public police are organisations established in connection with the state to assist in the maintenance of order and the prevention of crime.[23] In relation to AML in particular, there are a number of policing agencies involved in the implementation and enforcement of the UK framework. They appear on the surface to be hierarchical. However, their roles overlap and intertwine as they attempt to snare money launderers. These roles and responsibilities 'in action' demonstrate that despite the inter-dependence of policing agencies, there remains a definitive line between the private and public police. The current portrayal of the private police in academic literature does not accommodate the role of the regulated sector or professional bodies (in their capacity as supervisory authorities) in the AML framework.

In Scotland, responsibility for law and order generally lies with the Scottish Executive and Scottish Parliament under The Police (Scotland) Act 1967. However, certain matters are reserved to the UK Parliament at Westminster, including national security, terrorism, firearms, drugs and specifically the financial markets and money laundering as detailed in The Scotland Act 1998 Schedule 5. Consequently, the policing arrangements in respect of AML operations in Scotland are administered on the basis of UK wide legislation.[24]

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[20] SOCA. (2010). 'The UK Threat Assessment of Organised Crime 2009/10', p. 8. Available at http://www.soca.gov.uk/threats.
[21] Reiner, R. (2000). *The Politics of the Police*. Oxford: Oxford University Press, UK, 3rd Ed., p. 1.
[22] Bayley, D. H. (2005). 'What Do the Police Do?', in T. Newburn (ed.), *Police: Key Readings*. Cullompton: Willan, pp. 141-148.
[23] Sheptycki, n11 above; Reiner, n21 above.
[24] It should be noted that moves are being made to try and devolve the policing of drugs detailed in 'Letting Our Communities Flourish - One Year On: A Strategy for Tackling Organised Crime in Scotland' published by the Scottish Government in 2010.

The most significant policing agency within the UK AML framework is the Serious Organised Crime Agency (SOCA). SOCA was set up under the Serious Organised Crime and Police Act 2005 (SOCPA 2005). SOCA is a hybrid agency, which subsumed the National Crime Squad and the National Criminal Intelligence Service and in addition, certain responsibilities of Her Majesty's Revenue and Customs (HMRC) in relation to drug trafficking, and Her Majesty's Immigration Service (HMIS) in relation to human trafficking.[25] SOCA is significant because it contains the UK Financial Intelligence Unit (UK FIU) which is responsible for administering the suspicious activity regime across the whole of the UK. As noted above, the Third Money Laundering Directive laid down a requirement on Member States to establish a national Financial Intelligence Unit (FIU), if they had not already done so. To all intents and purposes, the UK had a national financial intelligence unit in the form of the Financial Intelligence Division of the National Criminal Intelligence Service (NCIS). However, when SOCA was established in 2006, it took over the responsibilities of NCIS and consequently the UK FIU.[26] In accordance with Article 29 of the Third Money Laundering Directive, which determined that a national FIU should be responsible for collecting, analysing, and disseminating suspicious transactions reports, SOCA is now responsible for administering the UK Suspicious Activity Reports (SARs) regime.

Section 2 SOCPA 2005 lays down SOCA's functions to include the prevention and detection of serious organised crime and to contribute to its reduction and the mitigation of its consequences. Its functions are expanded further into the realm of crime in general under section 3. Neither 'serious organised crime' nor 'crime' is defined in the Act. Nevertheless, it does lay down a requirement for the Secretary of State to set strategic priorities (in consultation with SOCA and Scottish Ministers), and under s61 there is a list of offences which fall within SOCA's remit, including but not limited to, those specified in Schedule 4 POCA 2002 Lifestyle offences: Scotland. Taken together, these provide some guidance as to what is considered serious organised crime and crime more generally of interest to SOCA. Although SOCA is a key player in the UK AML framework as a whole, it has particular restrictions placed on how it interacts with the Scottish public police. In terms of section 22 SOCPA 2005, SOCA can only carry out activities in Scotland in relation to an offence which it suspects has, or is being, committed, if it has the agreement of the Lord Advocate. Indeed, despite SOCA being established in 2006, SOCA's 2010-2011 Annual Plan narrates the first stand-alone investigation in Scotland which took place over the course of 2009 and 2010.[27]

In Scotland, there are eight territorial public police forces, which cover different geographical areas.[28] Within each territorial force, there is a Financial Intelligence Unit (FIU), and this department deals most closely with anti-money laundering. In addition, there is the Scottish Drug Enforcement Agency (SDEA), which was established in April 2001. SDEA was renamed the Scottish Crime and Drug Enforcement Agency (SCDEA) by the Police, Public Order and Criminal Justice (Scotland) Act in 2006. SCDEA's functions are laid down in section 2(2) as: preventing and detecting serious organised crime; contributing to the reduction of such crime in other ways and to the mitigation of its consequences; and gathering, storing and analysing information relevant to the prevention, detection, investigation or prosecution of offences; or the reduction of crime

[25] Harfield, C. (2006). 'SOCA: A Paradigm Shift in British Policing', *Brit. J. Criminol*, 46, pp. 743-761; Fitzpatrick, D. (2005). 'Advising the Serious Organised Crime Agency: The Role of the Specialist Prosecutors', *Journal of Financial Crime*, 12 (3), pp. 251-263; Fitzpatrick, D. (2006). 'Crime Fighting in the Twenty-first Century? A Practitioner's Assessment of the Serious Organised Crime and Police Act 2005', *Journal of Money Laundering Control*, 9 (2), pp. 129-140; Leong, A. (2007). 'Anti-money Laundering Measures in the UK: A Review of Recent Legislation and FSA's Risk-based Approach', *Co. Law*, 28 (2), pp. 35-42.
[26] International Monetary Fund. (2004). 'Financial intelligence Units: An Overview', Washington D.C., p. 29.
[27] SOCA Annual Plan 2010-2011, p. 14.
[28] Donnelly, D. and Scott, K. (2005). *Policing Scotland*. Cullompton: Willan.

in other ways or the mitigation of its consequences.[29] This provision mirrors the remit of SOCA. SCDEA's strategic priorities are laid down by the Scottish Government under section 13 and are disseminated through SCDEA's Annual Plan in accordance with section 14. The 2010-2011 Annual Plan (which forms part of a larger five-year Strategic Plan 2010-2015) details their priorities to include: the identification of criminal assets for restraint under the Proceeds of Crime Act 2002; to make it more difficult for serious organised crime groups to obtain the *services of specialists* to protect and launder illegal gains, and specifically to engage with the *business sector* and assist *legitimate businesses* in protecting themselves from serious organised crime [emphasis added]. Following two reports issued in 2000, the HM Inspectorate of Constabulary Report on the Confiscation of Criminal Assets in Scotland "Making Crime Pay" and "Recovering the Proceeds of Crime" Report by the UK Cabinet Office's Performance and Innovation Unit, the Association of Chief Police Officers of Scotland (ACPOS) Crime Standing Committee set up a Multi-Agency Working Group to consider the issues raised. The reports highlighted that financial investigation was being sidelined both in respect of resourcing and usage. Reflecting on the reports, the Multi-Agency Working Group concluded that the way forward was the establishment of a Scottish Multi-Agency Financial Investigation Unit/Money laundering Unit.[30] Consequently, in September 2001 the Scottish Money Laundering Unit (SMLU) was established within SCDEA.

The SMLU contains staff from SCDEA, HMRC, and the Department of Work and Pensions (DWP). Its functions are to identify assets gained through illegal activity, such as drug trafficking and serious and organised crime, and to make these assets available to the courts for confiscation, to target those involved in laundering criminal assets, to provide high quality financial intelligence, to service the needs of SDEA (which became SCDEA) Operations and Intelligence Groups, and to provide assistance to Scottish Police forces in respect of financial investigation.[31] Subsequently, the SMLU became the single point of contact for the Scottish police service in the administration of suspicious financial activity disclosed to SOCA by institutions within the regulated sector.[32] While there is a striking similarity with the functions of SOCA, it is intended that SOCA and SCDEA engage in partnership rather than duplication, and this is borne out operationally through a Partnership Agreement between the agencies.[33] SOCPA 2005 sections 23 to 25 lay down a number of provisions which provide a legislative basis for such agreements. This mutual assistance can be at the request of either agency. These provisions are not limited to these two agencies and would provide a legislative basis for any Scottish force to request assistance (or to be approached for assistance by SOCA).

There are additional public police forces, such as the Civil Nuclear Constabulary and the British Transport Police, that have a UK wide jurisdiction and consequently play a role in Scottish policing. Moreover, the Security Service, MI5, works with SOCA in tackling serious crime. SOCPA 2005 amended the Security Services Act 1989 to clarify the role of MI5, specifying that MI5 should act in support of the activities of SOCA. It is difficult to assess how this relationship functions since both MI5 and SOCA are, due the sensitivity of their areas of work, not subject to the Freedom of Information Act 2000 or its counterpart the Freedom of Information (Scotland) Act 2002, and as far as we can ascertain there is no academic literature on the subject. Similarly, MI6, the UK's external intelligence service, could potentially police in the anti-money laundering arena, since they are mandated under the Intelligence Services Act 1994 section 1 to act in support of the prevention or detection of serious crime. While acknowledging that both MI5 and MI6 may have a role in

[29] Paraphrased from s2(2) Police, Public Order and Criminal Justice (Scotland) Act 2006.
[30] SDEA Annual Report 2000-2001, p. 15.
[31] SDEA Annual Report 2001-2002, p. 18.
[32] SDEA Annual Report 2002-2003, p. 9.
[33] SCDEA Annual Report 2005-2006, p. 7.

the overarching policing of money laundering, the focus of this article is on the public/private policing nexus. This is best illustrated by focusing on the SARs regime, and in this respect as these agencies do not have a direct role they will be put to one side.

The private police involved in the AML framework are those who fall within the regulated sector detailed in POCA 2002 Schedule 9 Part 1, including banking institutions, businesses providing investment services, accountants, tax advisors, estate agents, auctioneers, casinos and many more. Straddling the gap between the public and private police in this arena are those defined as "supervisory authorities" under Reg. 23 Money Laundering Regulations (MLR) 2007 and "designated authority" under Reg. 36. Supervisory authorities laid down in Reg. 23 include the Financial Services Authority, the Office of Fair Trading, professional bodies (listed in Schedule 3 MLR 2007), the Commissioners of HMRC, the Gambling Commission, the Department of Enterprise, Trade and Investment (DETI) of Northern Ireland and the Secretary of State who is the designated supervisory authority for insolvency practitioners authorised by him under section 393 of the Insolvency Act 1986. Of these supervisory authorities, the FSA, OFT, HMRC and DETI are also designated authorities under Reg. 36.[34]

Reg. 24 sets out that it is the responsibility of the supervisory authority to monitor supervisees. The supervisory authority must take appropriate measures to secure their compliance and, where it comes to the attention of the supervisor that a person may have engaged in money laundering, they must report this to SOCA. The remit of designated authorities goes further. They are given more specific enforcement powers under Part 5 including: the power to require information (Reg. 37), power of entry without a warrant (in limited circumstances under Reg. 38), and power to enter premises with a warrant (Reg. 39). All designated authorities have the power to impose civil penalties where certain regulations have not been complied with under Reg. 42. All violations liable to civil penalties under Reg. 42 are also criminal offences in terms of Reg. 45, with the minor exception of Reg. 11(1d), which requires "a relevant person to consider whether he is required to make a disclosure under Part 7 of the Proceeds of Crime Act 2002 or Part 3 of the Terrorism Act 2000". Presumably, this has not been made a criminal offence since to prove or disprove consideration would be extremely difficult and the issue can be adequately dealt with through the civil penalties under Reg. 42. Reg 46 sets out that the designated authorities, with the exception of the FSA, are able to institute prosecution proceedings in England, Wales and Northern Ireland. However, they do not have jurisdiction in Scotland. It is for the Procurator Fiscal within the Crown Office and Procurator Fiscal Service to decide whether to proceed with a prosecution in Scotland.

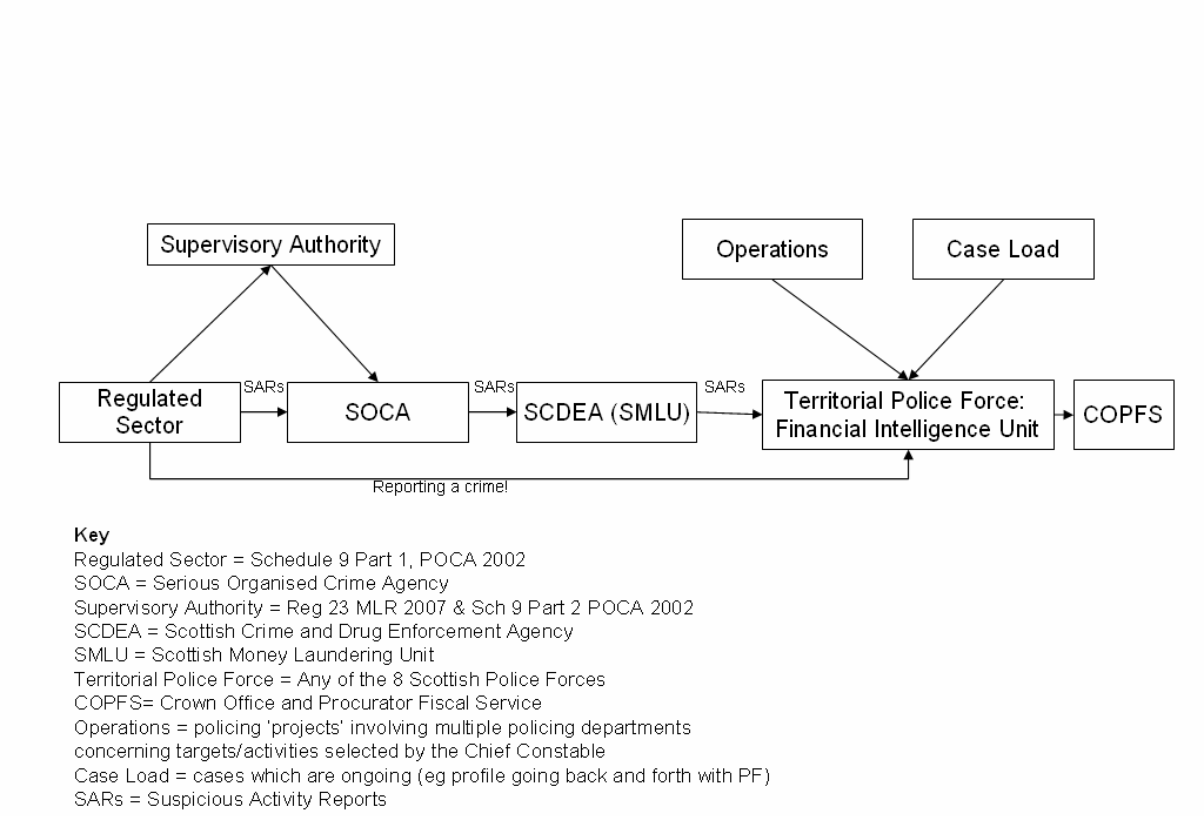
It appears that the majority of these authorities, supervisory or designated, fall within the definition of public police. They are established in connection with the state and following the provisions of MLR 2007 and POCA 2002 have been placed in a role which entails the maintenance of order and the prevention of crime. For example, the FSA was established by the Financial Services and Markets Act (FSMA) 2000. While theoretically an independent body receiving no government funding, their objectives have been set by FSMA 2000, specifically including reducing the extent to which it is possible for a business to be used for a purpose connected with financial crime. Similarly, HMRC was established by the Commissioners for Revenue and Customs Act 2005. HMRC subsumed the functions of the Inland Revenue and Customs and Excise under s5 of the 2005 Act. In exercising these functions, HMRC are in the position of gathering information which could potentially lead to the discovery of criminal activity ranging from fraud and tax evasion to money laundering. Furthermore, through their responsibilities and powers given by both POCA

[34] Hynes, P. Furlong, R. and Rudolf, N. (2009), *International Money Laundering and Terrorist Financing: A UK Perspective*. London: Sweet and Maxwell, p. 26.

2002 and MLR 2007, they are in a position to investigate and prosecute in England, Wales, and Northern Ireland. Although, as noted above, they would have to refer matters to the Crown Office and Procurator Fiscal Service in Scotland.[35] However, it is worthy of note that the professional bodies listed in Sch. 3 that fall into the category of supervisory authorities, vary in modes of establishment, funding arrangements and accountability.[36] Unfortunately, further examination of these 22 institutions is beyond the scope of this article. Figure 1 provides a visual representation of how the public police and regulated sector interact in the SARs regime.

Figure 1: Basic UK AML structure

Figure drawn by the author on the basis of the relevant legislative provisions and the SCDEA annual reports



The regulated sector has a duty to report any activity where it is suspected that an individual is engaged in money laundering.[37] SARs are passed internally to the nominated officer, universally referred to as the Money Laundering Reporting Officer (MLRO), who is obliged to determine whether it is required to make a report. If the MLRO is satisfied that a report requires to be made, it is made to the SOCA. An individual can also report directly to a person authorised for such purposes by the Director General of SOCA. Also, where suspicion is raised in relation to a particular transaction, the regulated sector has a duty to seek consent before proceeding.[38] Once the initial request for consent has been made, the hands of the regulated institution are tied. Consent can be inferred when the period of

[35] POCA 2002, s2C and MLR 2007, Reg. 46.
[36] The professional bodies listed in MLR 2007 Sch. 3 correspond to those listed in POCA 2002 Sch. 9 Part 2.
[37] POCA 2002 s330.
[38] POCA 2002 s327, s328 and s329.

seven days has passed since the report was made and no notice of refusal has been received.[39] Where the reporting institution receives notice that consent is refused, they will be able to act once a moratorium period of 31 days has passed. SOCA collates relevant SARs which are accessible through a database window by territorial forces.[40] The territorial forces can view SARs that have been allocated to them by SOCA. In addition, the SCDEA (SMLU) can see SARs allocated to all the Scottish territorial forces. SCDEA will sift these reports and run further checks to identify those of most interest. It has been estimated that SCDEA receives about 8,000 SARs per year.[41] They put together parcels of the information they have collected and highlight the relevant reports to the appropriate territorial FIU. The FIU then decides whether or not the SAR requires action or provides intelligence of such significance as to warrant entry on the Scottish Intelligence Database (SID). Increasing the amount of intelligence that can be taken from a SAR is a key priority of SOCA identified in Part 3 of their SARs Annual Report 2009. 'Intelligence' here is a piece of information which has been interpreted and analysed as potentially relevant to an investigation of criminal activity and consequently may inform future action.[42] The SID database is accessible by all Scottish territorial forces.

FIUs will have ongoing caseloads where they are trying to compile (or refine) financial profiles intending to seek restraint or confiscation. In doing this, they may have to call upon the regulated sector to supply further information. If the regulated sector refuses to disclose the information, the FIU can have recourse to the investigatory powers available under Part 8 POCA 2002. Chapter 3 deals with the Scottish provisions, which include production orders and search warrants, and, of more significance to the regulated sector, customer information orders and account monitoring orders. While maintaining their own caseload, FIUs participate in ongoing force operations. These are projects that involve multiple policing departments. They focus on specific targets or activities that are selected by the Chief Constable.[43] The officer in charge of a particular operation would contact the FIU to see what intelligence they are able to contribute. Mainstreaming financial intelligence within force operations facilitates identification of assets for restraint at an earlier stage and is of increasing importance in implementing POCA 2002.[44] In effect, the FIU looks at SID in a new light. This new focus may draw their attention to a previously unassuming SAR. The operation has made the SAR of more significance and it may be appropriate for the FIU to investigate the SAR anew, again approaching the regulated sector for further information.

The public police in Scotland have invested in the development of their FIUs with the support of the Scottish Government as part of "Letting Our Communities Flourish: A Strategy for Tackling Organised Crime in Scotland" noted earlier. Lothian and Borders, Tayside and Strathclyde police forces received a share of the money that has been recovered from criminals. This money has been used to recruit 19 financial investigators. The individual police forces had to decide whether to recruit police officers or civilian financial investigators. In making their decision they will have been conscious of the constant pressure to provide 'best value'[45] while adopting effective strategies to tackle

[39] POCA 2002 s335(2).
[40] Leong, A. n25 above.
[41] HM Inspectorate of Constabulary for Scotland (HMICS) and the Inspectorate of Prosecution in Scotland (IPS).(2009). Joint Thematic Report on the Proceeds of Crime Act 2002, p. 34.
[42] Innes, M, Fielding, N. and Cope, N. (2005). 'The Appliance of Science?' The Theory and Practice of Crime intelligence Analysis', *Brit. J. Criminol*, 45 (1) pp. 37-57.
[43] Donnelly, D. and Scott, K. n28 above, p. 17.
[44] HMICS & IPS. (2009). Joint Thematic Report on the Proceeds of Crime Act 2002, p. 23; Murray, K. (2010). 'Dismantling Organised Crime Groups Through Enforcement of the POCA Money Laundering Offences', *Journal of Money Laundering Control*, 13 (1), pp. 7-14.
[45] Although the concept of 'best value' first originated under the Labour government in an attempt to sweep away the competitive compulsory tender that had been adopted by the Conservative government and geared towards Councils, it has now become firmly entrenched in public police management. See Martin, S. (2000).

money laundering. The ability of the FIUs to influence operational and strategic choices depends on their internal authority structure and how it is impacted by the acknowledged command and control structure of the public police.[46] Civilian staff are at the bottom of the internal authority structure; consequently, increasing the number of civilian staff is unlikely to improve the ability of the FIUs to influence operational or strategic choices. There are limits on the role civilian staff are able to play within FIUs. Civilian staff in Scotland cannot execute investigative orders, such as production orders or search warrants, since this requires a police officer.[47] Nevertheless, civilian staff provide a cheaper alternative to police officers. In addition, as they often come from external agencies, frequently as members of the regulated sector, they are trained in specialist skills such as accounting and insolvency, which is of particular assistance. Moreover, their experience in the regulated sector means that they bring with them the ability to understand the burden placed on the regulated sector and are able to foster relationships of trust. Rhodes argues that in the field of policing it is the "shared values and norms [that] are the glue which holds the complex set of relationships together; trust is essential for co-operative behaviour".[48] This is particularly crucial given the sensitive nature of the material that is shared between the public and private police in their attempts to tackle money laundering. Such knowledge exchange is also available to the regulated sector through the recruitment of ex-police officers as compliance officers, and this has been found to be advantageous in fostering relationships of trust between public and private institutions.[49]

In addition to reporting responsibilities under POCA 2002, the regulated sector has obligations under MLR 2007. Reg. 5 requires that those in the regulated sector undertake customer due diligence measures which are known as the 'know your client' obligations. They have a duty to verify the identity of customers or beneficial owners and also to be aware of the nature of their clients' business. They must monitor this relationship on an ongoing basis (Reg. 8). The obligation is geared towards enabling members of the regulated sector to spot transactions which are out of the ordinary and thereby placing them in a position where they have a duty to report.[50] Moreover, under Part 3, they must keep records of this information, adopt appropriate procedures and train their staff. In fulfilling these regulations, the regulated sector undertakes crucial collection of intelligence, and they are responsible for connecting this intelligence to the public police through their use of SARs. Does the access of the regulated sector to customer/client information (which may later prove to have intelligence value) shift the balance of power from the state to the regulated sector? SARs put them in a position to materially control

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1mplementing 'Best Value': Local Public Services in Transition', *Public Administration,* 78 (1), pp. 209–227. This is evidenced both north and south of the border in the Scottish Policing Performance Framework and ACPOS National Procurement Strategy.

[46] HMICS & IPS, n44 above, p. 14. It is for the Chief Constable to make operational decisions taking on board the pressures on available resources. In making such decisions, the Chief Constable will receive advice from senior officers. It was acknowledged in the HMICS & IPS report that FIUs in Scotland do not have the requisite representation to highlight the potential of the department and secure appropriate resources. However, with the recent appointment of ACPOS Proceeds of Crime Champions this is likely to improve. The role of the ACPOS Champions is to mainstream the use of POCA 2002. As it is the FIU who currently have the most expertise, it is likely they will be instrumental is supporting the ACPOS Champions. See 'New POCA 'Champions' to disrupt serious and organised crime' COPFS Press Release. Available at: http://www.copfs.gov.uk/News/Releases/2010/03/30103126 (accessed on 20 June 2010).

[47] Investigative Orders under the Proceeds of Crime Act 2002, Code of Practice Issued under s410 of the Proceeds of Crime Act 2002.

[48] Rhodes, R.A.W. (2007). 'Understanding Governance: Ten Years On', *Organization Studies*, 28 (8), pp. 1243-1264 at p1246.

[49] Verhage, A. (2009a). 'Compliance and AML in Belgium: A Booming Sector with Growing Pains', *Journal of Money Laundering Control*, 12 (2), pp. 113-133; Verhage, A. (2009b). 'The Anti Money Laundering Complex: Power Pantomime or Potential Playoff?', in J. Shapland and P. Ponsaers (eds), *The Informal Economy and Connections with Organised Crime.* The Hague: BJu Legal Publishers; Favarel-Garrigues, G., Godefroy, T. and Lascouomes, P. (2008). 'Sentinels in the Banking Industry: Private Actors and the Fight against Money Laundering in France', *Brit. J. Criminol*, 48 (1), pp. 1-19.

[50] Harvey, J. n7 above; Leong, A. n25 above.

their policing contribution. S330(2) POCA 2002 accommodates a subjective test of 'suspicion'; consequently, they can choose whether or not to make a SAR. In deciding what constitutes suspicious activity, they are effectively deciding what should be brought to the attention of the state and what should remain a private matter.[51] They are able to balance the interests of the state against private interests.

There are two prongs to the private interests of the regulated sector: those of the institution itself and those of its clients and customers. Each influences the engagement of the regulated sector with the AML regime in the UK. As highlighted previously, where suspicion has been raised in relation to a particular transaction, members of the regulated sector have a duty to seek consent before proceeding.[52] While they may be called upon to justify their actions to clients, they must be wary lest they fall foul of the "tipping off" offence and face criminal sanctions.[53] The precariousness of the position of the regulated sector has been exacerbated by the recent English civil case of *Shah v HSBC Private Bank Ltd.*[54] In this case Mr Shah, along with his wife, sought damages from HSBC for their failure to carry out transactions in accordance with his instructions, breaching their duty towards them. Several transactions were instructed by Mr Shah at different intervals. These transactions were placed on hold while HSBC complied with their statutory obligations. A number of disclosures were made and responded to by SOCA. There were four transactions in total in respect to which HSBC refused to act until they had received consent. Mr Shah claimed that the effective freezing of the Shahs' assets caused a cascade of events resulting in the Reserve Bank of Zimbabwe seizing his assets over which they had control, totalling $307.5million. HSBCs mounted a defence claiming that they has suspected that the transactions constituted money laundering, and consequently as they had made an authorised disclosure in accordance with s338 POCA 2002, they were unable to act earlier than they did because to do so would be illegal. The action proceeded to a summary judgement, which found in favour of HSBC on the grounds that since Mr Shah was not challenging the good faith of the bank, there was no real prospect of Mr Shah establishing that there had been a breach of duty by the bank. Mr Shah appealed on this basis that his claim should not have been dismissed at such an early juncture.

Mr Shah's case was largely based on the fact that HSBC had failed to carry out his instructions promptly and that, in raising the defence that they suspected Mr Shah of being involved in money laundering, they should be required to adduce evidence of their suspicion. In affirming *R v Da Silva*, [55] the Court found that, while there is no requirement for 'suspicion' to be "firmly grounded and targeted on specific facts" or based on "reasonable grounds", the fact that 'suspicion' has arisen must be open to proof, since to allow the defence of a suspicion of money laundering without any challenge would "in effect, be giving carte blanche to every bank to decline to execute their customer's instructions without any court investigation."[56] The judgment delivered by Lord Justice Longmore highlights that the court appreciated that POCA 2002 has placed banks in an "unenviable position", balancing the threat of criminal sanction against the threat of civil action by their clients. Nevertheless, Lord Justice Longmore emphasised at paragraph 32 that:

[51] Marshall, P. (2010). 'Does Shah v HSBC Private Bank Ltd Make the Anti-money Laundering Consent Regime Unworkable?,'*Butterworth Journal of International Banking and Financial Law*, 25 (5), pp. 287-290. For further discussion of the interplay between the subjective and objective tests present in POCA 2002 s330, see Swinton, K. (2007). 'When Do You Suspect it is Reasonable to Disclose?', *Scottish Law Gazette*, 75 (2), pp. 52-54.
[52] POCA 2002 s328(2)(a) and s329(2)(a).
[53] POCA 2002 s333A.
[54] [2010] EWCA Civ 31.
[55] [2007] 1 WLR 303.
[56] [2010] EWCA Civ 31 para 30.

> it cannot be right that proper litigation should be summarily dismissed without appropriate inquiry of any kind. The normal procedures of the court are not to be side-stepped merely because Parliament has enacted stringent measures to inhibit the notorious evil of money-laundering, unless there is express statutory provision to that effect.

This makes it abundantly clear that the court will not insulate the regulated sector from challenge simply because they have been given a statutory duty to assist in tackling money laundering. If they were to be afforded such privilege, the court would expect this to be specifically included in the legislative provision. Building on *R v Da Silva,* [57] this case emphasised the potential for actions for damages against regulated institutions where SARs have been made resulting in a delay in the execution of clients' instructions. While the Court acknowledges that these institutions are in a difficult position, it is emphasised that the burden remains theirs to carry. Nevertheless, rather than this case alarming the regulated sector, it should provide additional impetus to engage with a 'risk-based' approach establishing appropriate practices and procedures. In doing so, members of the regulated sector will not only be meeting their statutory obligations, but they will be arming themselves with sufficient evidence to rebut civil claims from clients.

The point has yet to receive judicial attention in Scotland. However, looking in particular to the case of *Mohammad Ahmad v HMA,*[58] also known as the 'Makkah Travel case', it appears that the Scottish courts are likely to follow the decision in *Shah v HSBC Private Bank Ltd* [59](should it be brought to their attention). This case was a criminal appeal against conviction on a number of counts, including a failure to make a disclosure contrary to s330 POCA 2002. In this case, Mr Ahmad has been engaged in a business that is part of the regulated sector, Makkah Travel Ltd. The business acted as a travel agent and also as a money transmission bureau, administering transfers of money from Asian clients employed in the UK to family members in Pakistan. It came to the attention of HM Customs that there were some misgivings as to the legitimacy of the company's business. It was when cash was paid into the bank by Makkah Travel that the bank reported suspicious activity. No reports had been made by Makkah Travel in relation to the funds they had received or the transactions that they were being requested to implement. HM Customs consequently set up a surveillance operation, which founded the Crowns original case. It appeared that the accused had received a large amount of cash delivered in holdalls on numerous occasions from a Mr Gurie (who was a co-accused in respect of other charges). Mr Gurie was later acquitted on all charges. It was argued for the appellant that a proper construction of s330 required the Crown to prove that the money laundering allegedly known or suspected was indeed taking place, and since Mr Guthrie was acquitted it would be inconsistent for the jury to return a verdict which relied on the appellant's apparent failure to report activity which had, in reality, been found not to have taken place. However, the Court rejected this argument, explaining that it was based on a misunderstanding of the relevant section. Lord Kingarth further explained that s330(2) did not state that money laundering must be taking place for suspicion to be raised, rather "[a]s a matter of language it is obvious that a person may suspect that something is taking place, albeit it later turns out that his suspicion is ill-founded."[60] The emphasis here appears to lie firmly on the regulated institution to report any suspicious activity at the first opportunity. Lord Kingarth highlights that the purpose of the section is to prevent money laundering and to assist investigatory authorities, not to encourage those in the regulated sector to undertake the investigation themselves.

[57] [2007] 1 WLR 303.
[58] [2009] HCJAC 60(HCJ).
[59] [2010] EWCA Civ 31.
[60] [2009] HCJAC 60(HCJ) para 30.

While this case deals with the obligation for institutions to submit a SAR report in the first instance, the Shah case deals with duties owed to the client in respect of such a report once lodged. These cases illustrate the potentially conflicting interests that the regulated sector is seeking to balance. Both cases focus on the nature of the 'suspicion', agreeing that, while it may be necessary to found suspicion on relevant facts, it is not necessary to prove that a criminal act has taken place. It seems likely that, should an action for damages be raised in Scotland where a defence of lodging a SAR is put forward, the court would follow *Shah*. They would compel the regulated institution to evidence their 'suspicion' but not go so far as to demand that they prove that such suspicion was 'well-founded'.

Conclusion

It has been argued that there is a need for a re-conceptualisation of the 'private police' to accommodate the role of the regulated sector in the AML framework. However, it is acknowledged that further research is required into the role of professional bodies as supervisory authorities under MLR 2007 to fully explore where the line can be drawn between public and private police. Nevertheless, it has been demonstrated that the implementation of AML measures by the regulated sector increases the amount of intelligence available to policing agencies and thereby assists the public police in making appropriate operational choices. By making an initial SAR, the regulated sector is proactively driving policing investigation. Similarly, by supplying further information to the public police, they are supporting the public police investigations reactively. The role of the regulated sector is utilised by the public police as they are fundamentally tied together in their collation and dissemination of intelligence in AML operations.

While it may be the case that the public police are able to force the hands of the regulated sector to co-operate through criminal sanctions under POCA 2002 and MLR 2007, it is equally or perhaps more significant that the public police rely on the regulated sector to highlight investigation potential and to collate such information that may become a significant intelligence resource retrospectively. While the regulated sector may be required to undertake activities characteristic of policing, they remain restrained by their responsibilities to private interests as was demonstrated in *Shah v HSBC Private Bank Ltd*.[61] Since the regulated sector are given a degree of flexibility and are able to balance their own and client interests, this means that they remain 'private' police rather than being subsumed into the state directed public police. Accordingly, the academic literature must adapt its conceptualisation of the 'private police' to reflect the role of the regulated sector in the AML framework.

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[61] [2010] EWCA Civ 31.

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Book Review

Wolfram Kaiser, Brigitte Leucht & Morten Rasmussen, eds (2009) *The History of the European Union: Origins of a Trans- and Supranational Polity, 1950-72*

Abingdon: Routledge

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Until recently, academic literature on the origins of the now European Union (EU) has focused almost exclusively on the role of individual countries, national governments and domestic actors in the process of European integration. Even more acute has been a seemingly inherent and steadfast refusal by both political scientists and contemporary historians to allow for any form of collaboration between the two fields, remaining as they do isolated in both working practices and methodological outlook.

This recent offering can be seen as part of growing trend to eschew what the editors describe as this "endemic intellectual disease" (p. 4). In reaffirming their respective revisionist credentials, the contributors to this volume examine supra- and transnational development of the EU in an historical perspective. However, rather than relying on traditional historical practices which the authors see as narrow, and to correct some of the failings they see in the works of Haas (1968), Lipgens (1982) and Milward (1984; 1992), this book takes as its foundations two key ways to reconceptualise the history of the EU. Firstly, the authors explore the creation of a "transnational political society" formed from cross-border networks - whether formalised cooperation of parties and pressure groups through to informal business and media networks - within the political space created from the nascent supranational Community (p. 4). Secondly, they work to conceptualise the EU as a unique multi-level political system involving myriad actors that combine in the complex and institutionalised maze of European-level government. Above all, the editors call for a change to empirical studies so that they are situated in theory-driven analytical frameworks (p. 9).

The book is logically structured, with two 'conceptual' chapters that form the basis of research. Kaiser shows how early networks performed a number of important functions, reconceptualising postwar integration "as the slow emergence of a multilevel polity" (p. 27). Rasmussen continues, concluding that only through consideration of five empirical questions originating from institutional analysis can contemporary historians understand the wider supranational environment in which Member States were operating (p. 50).

These ground the following eight empirical articles, based on four broad themes. Two look at American-German interstate negotiations in developing the European Coal and Steel

Community (ECSC) anti-trust laws in the first instance, and the 1969 Hague summit as the apogee of transnational Anglo-Franco-German journalist networks in the second, as examples of supranational policy-making and networking within a European and Atlantic sphere. These are followed by case studies of where transnational automobile and social democratic networks became agenda-setting and socialising forums on a transnational level. Chapters eight and nine tell the story of the active role the nascent supranational organisations took to develop and strengthen the Community's policies and image. The two case studies concentrate on the Directorate General IV on competition and the creation of a Community press agency, both of which saw the institutions develop a dynamic policy dependent on a Member State led or controlled initiative. Finally, there are examinations of the complex horizontal and vertical decision-making process. Knudsen refocuses the influence of the European Parliament as an agenda setter in the development of the Community's own budget resources. This is followed by Ludlow's particularly convincing article which looks at Coreper as a key group that has helped streamline decision-making processes in the Community on the one hand, while also remaining the last bastion of national interests on the other. The overarching emphasis, aptly described by Warleigh-Lack in the final chapter, is the essential need for interdisciplinary cooperation between historians and political scientists, a message to both historians and political scientists to collaborate in order to achieve "theoretically informed, source-rich and analytical" research (p. 206).

From the outset the editors make the rather bold statement that they "promise fundamentally to transform the way we conceive of national history and European policy-making" (p. 4). Certainly the book is impressive in a number of respects. The source-based chapters are mostly well researched, wide-ranging and comprehensive accounts, each lending themselves to the overarching theme of the book: the need for "cross-fertilisation of political scientists and historians" (pp. 213-4). All of these are set within an impressive chronological period from the ECSC of the early 1950s through until the first enlargement in 1973.

Yet the extent to which the book *fundamentally* transforms our conception is questionable. To take Steinnes' chapter on Anglo-Nordic socialist networks, there can be drawbacks from denouncing so strongly state-centric research (pp. 93-4). For example, Steinnes makes considerable use of a meeting between premiers Wilson and Krag in April 1965 which seemed to suggest an impending British application (p. 95). However, had Steinnes consulted the British archives, or appreciated more recent work on Wilson's turn towards membership such as the recent monograph by Parr (2006), it would have been clear that there were several other events after this date in which Wilson continued to guard against an opening of negotiations. This is indicative not of a failure of Steinnes' research, which is essential to our understanding of the entry negotiations, but rather how research of the type in this book should be treated not as a fundamental correction to state-centric literature, but rather as a useful supplement to the national approaches. Moreover, the insistence of future interdisciplinary research while lucidly carried throughout, fails to take advantage of the situation by calling for greater collaboration *within* disciplines rather than simply *between* disciplines. This is too easily brushed over (pp. 208-9), which takes the bite out of an otherwise much needed argument.

Some of the chapters can at times be a difficult read, surprising for a book that aims to fundamentally transform academic outlook. Notwithstanding this or the comments above, the book is of intrinsic interest to students and specialists in all areas of the EU, and valuable to historians and political scientists alike. Indeed the *leitmotif* of the need for academic cohesiveness in a truly comparative and theoretically grounded framework proves a vital lesson on how all future research in the field should be conducted. It is

perhaps this more than anything that makes *The History of the European Union* a seminal piece in the undoubtedly crowded library of European integration literature.

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Book Review

Aleks Szczerbiak & Paul Taggart (2008)

Opposing Europe? The Comparative Party Politics of Euroscepticism

Oxford: Oxford University Press

Grahame Fallon
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It may seem commonplace in many United Kingdom circles to regard Euroscepticism as part of a purely British debate, following the unwillingness of the UK to join the European Economic Community in 1957 and the semi-detached and often fraught relationship that has existed between the UK and its European partners since the UK finally joined the then European Communities in 1973. Mrs Thatcher's celebrated Bruges speech, together with the unwillingness of successive governments to pool or sacrifice sovereignty by joining the European Monetary Union and 'Schengenland' have symbolised the continuing importance of the Eurosceptic strand in British party politics. This phenomenon is today by no means confined to single issue, Eurosceptic parties, since the longstanding tradition of ambivalence towards Europe remains a major influence on the politics and politics of the Conservative, Labour and even the Liberal Democrat parties.

Modern party political diffidence or antipathy towards the European Union (EU) extends far beyond the UK, with the result that Euroscepticism has greatly influenced the political debate of all current Member States. The continuing enlargement of the EU, together with the dramatic growth in the scale and scope of the EU's policies since the 1980s and the shift in the policy-making focus from the national to the EU level (in areas including economic, social, environmental, justice, security and foreign policies) has made European integration an increasingly prominent target for criticism and outright hostility on the part of citizens in a growing range of EU Member States, together with many of the political parties that represent them. Party-based Euroscepticism has seized on growing popular concerns about the EU's perceived 'democratic deficit', and the growing distance between Europe's citizens and its political elites, to advance its own cause, thus presenting an increasingly powerful challenge to the European integration project and to the prospects of further broadening and deepening in the EU context.

Against this background, the recent proliferation of academic studies that focus on the Eurosceptic issue and cause has been timely, although the issue of party-based Euroscepticism has perhaps not received the full degree of attention that it merits. Szczerbiak and Taggart make a good contribution to overcoming this deficiency, however, in a recently published collection of essays, following on from their earlier case study-based contribution to scholarly understanding of Euroscepticism in party systems across Europe and the resultant exploration of the broad parameters of Euroscepticism in Europe's party systems. The second volume in their series seeks to build on this earlier

'mapping exercise' by developing a comparative and theoretical research agenda for the party politics of Euroscepticism on a pan-European scale. A collection of ten essays is offered as a means to this end, examining the nature and development of Euroscepticism at the party level in the EU as a whole, and in a range of existing EU member, candidate and non-member states.

Szczerbiak and Taggart provide a useful, scene-setting introduction to the overall volume, beginning with a conceptualisation of Euroscepticism in European party systems, based on the conventional distinction between principled or 'hard' opposition to European integration (leading parties to advocate withdrawal from EU membership), and to 'soft' Euroscepticism (leading to qualified opposition to the EU, based on the belief that its policies or development run counter to the perceived 'national interest'). There is now a need to develop a more nuanced conceptualisation of Euroscepticism as the authors acknowledge, however, and this theme is taken up by Katz in a later chapter of the volume, where a revised definition and classification scheme is developed and evaluated.

The other contributors to the volume go on to explore the measurement and the causes of Euroscepticism in the party system context, focusing on the effects of institutional structures, the roles of ideology and strategy and the impact of transnational party cooperation in the latter case. Party-based Euroscepticism is examined in comparative terms, focusing on the similarities and contrasts that exist at the national level between Western and Eastern Europe, together with Euroscepticism in the EU and national parliaments and amongst Europe's sub-national elites. The relationship between public opposition to the European integration project, voting (and non-voting) behaviour, and the development of support for Eurosceptic parties and their policy agenda is also explored. The editors conclude by suggesting a potentially valuable future research agenda for scholars of Euroscepticism in the party political context, highlighting the development of a broader and more comprehensive typology of Eurosceptic perspectives, the impact of government involvement on Eurosceptic parties, the comparison of different generations of new Member States, sub-national party systems and local and national activists, and the salience of Europe to party agendas and election outcomes as being issues worthy of further research attention.

Taken together, the essays included in this volume provide a range of comprehensive and valuable insights into the current impact of Euroscepticism on Europe's political parties, party systems and on the domestic politics of European integration. The essays also provide useful lessons regarding the interaction of domestic with pan-European politics in both the Western and Eastern European contexts, and into the impact of Euroscepticism at the party level for the future of the European integration project. Overall, therefore, this is a very useful and innovative volume, which goes a long way towards providing a definitive review of a vital and rapidly developing issue in European politics. This said, the book is clearly aimed at scholars with advanced knowledge of the subject. It is therefore most likely to find a place on the bookshelves of university libraries, academics and research students.

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Book Review

Helen Keller & Alec Stone Sweet (2008)

A Europe of Rights: The Impact of the ECHR on National Legal Systems

Oxford: Oxford University Press

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The European Convention on Human Rights (ECHR) is an example globally of the possibilities for the creation of a regional human rights body capable of enforcement. The European Court of Human Rights (ECtHR) is at the centre of the ECHR enforcement mechanism. However, it is currently in a situation of crisis, overwhelmed by applications with a backlog running into the tens of thousands. This has begun to result in a paralysis of the enforcement mechanism and highlights how the architecture of the ECtHR was not intended for the large number of individual applications that it is currently receiving. The controversial Protocol 14 intends to alleviate some of the pressure on the Court by altering the admissibility criteria. It is for individual Member States to fully implement the Convention into domestic law. As such, national courts should be the court of first instance in which the infringement of an individual's rights should be adjudicated. The Court was intended to adjudicate on interstate cases and on areas of contention within the Convention. It is important to understand how the ECHR has been adopted into national legal systems and what variables influence or prevent its enforcement in Member States. In identifying these variables it might become possible to find a means to alleviate the caseload of the Court and increase compliance by Member States with the Convention. This edited text by Keller and Stone Sweet offers the first rigorous and expansive comparative examination of this question.

The volume has nine substantive chapters, each analysing two states and their "reception of the ECHR". Reception is defined by Keller and Stone Sweet as "through what mechanisms national officials confront, make use of, and resist or give agency to the convention rights" (p. 4). In total, 18 Member States are examined with comparative chapters on the UK and Ireland and Russia and Ukraine, for example.

The methodology of the research takes the effectiveness of the ECHR in domestic law as the dependent variable and the ECtHR jurisprudence as the independent variable. The idea is that the Strasbourg Court's decisions put pressure on national officials to adopt and implement domestic legislation in conformity with the ECHR, whereas numerous factors contingent on individual state practice influence the reception of these decisions and constitute intermediate variables. By focusing on these intermediate variables, each chapter aims to examine their influence on the dependent variable of ECHR effectiveness. For consistency and for comparative necessity, each chapter of the edited volume examines the same questions.

The substantive chapters offer a dense and insightful examination of states' reactions to the ECHR. This includes an examination of states' participation in drafting, ratifying, applying and incorporating the Convention domestically. By examining these different aspects, each chapter looks at the historical expectations and practices that shaped states' willingness to incorporate the ECHR into domestic law. This can be seen in the chapter on the UK and Ireland in which the ECHR had the status of an international Convention in the UK. As such it had no immediate validity in UK law and individuals had to seek recourse at the ECtHR for any infringement of their rights. In Ireland, on the other hand, the Constitution had created a strong domestic constitutional rights tradition and little debate on the ECHR incorporation into domestic law occurred. This began to change with acceptance of EU legal supremacy in the UK and the 1998 Belfast agreement for Ireland.

The chapters only briefly examine media, scholarship and public education focusing primarily on judicial and legal practices. However, this results in a lack of analysis on cultural differences and understandings of the Convention's rights based on national contingent historical practices. The contention here is that there are broader social processes that affect the 'effectiveness' of the ECHR than simply the questions and analysis undertaken within this project. This said the chapters are rigorous, offering an unrivalled level of explanation. Perhaps the most significant contribution that this study can provide is possible remedies to the crisis currently faced by the ECtHR. The suggestion is firstly for increased burden-sharing in protecting and promoting human rights by the various committees and commissions of the Council of Europe (CoE). Alongside this would be the creation of CoE offices in states that have a high frequency of judgments against them in the ECtHR. These offices could advise applicants on admissibility criteria. Keller and Stone Sweet also suggest the increased role that domestic courts should exercise under Article 13 of the ECHR: alongside this is the proposition that national courts could be involved in determining reparations and just satisfaction. Finally is the suggestion of allowing the ECtHR to use rule 104 of the Rules of the Court to amend its own procedures. This would facilitate expediency in changing Court procedures rather than relying on ratification of additional protocols to the ECHR. Some of the suggestions are similar to the report by the 'Group of Wise Persons' on reforming the Court. One of the major hurdles is maintaining consistency in judgements and preventing regional differences in understandings of admissibility criteria and different levels of reparations if this was undertaken by national courts.

Keller and Stone Sweet offer a number of interesting interjections into the possibility of reforming the Court and strengthening human rights protection within Europe. This text offers an important contribution supported by a diligent and well-founded research methodology. This text should not simply be the preserve of lawyers and academics focusing on the ECHR, as it outlines the ability of an international regime to shape domestic law and politics. As such, a broader community involving regime theorists, European scholars and International Relations academics should examine more thoroughly this research. A well-rounded scholarly achievement - the only hope is that practitioners and policy makers take heed of its recommendations and solve the crisis at the ECtHR.

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