

FIGHT AGAINST CRIME IN THE EUROPEAN UNION: ANALYSIS OF THE SITUATION AND PERSPECTIVES FOR THE FUTURE

§ 1. WHAT HAS BEEN DONE SO FAR?

1.1 Historical framework

The area of Justice and Home affairs (JHA)¹ has been one of the most rapidly developing fields of EU action in recent years. Although co-operation started in the 1970's with some working parties -the best known of which was the Trevi Group-, and developed later with the Schengen agreements in the later 1980's, the **Treaty of Maastricht** in 1992 was the first fundamental text to address these issues directly. This Treaty created the 3 pillars structure (within which JHA constituted the third pillar, the rules of which were mostly of intergovernmental nature, opposed to the community method used in the first pillar), encouraged the use of conventions and listed a series of matters of common interest on which co-operation was to be encouraged: terrorism, drugs and other forms of international organised crime were among them.

The mechanisms established by the Treaty of Maastricht did not prove to be effective. Although some progresses were made -like the action programs Stop and Grotius, and the signing of the Europol convention in 1995²-, there was the feeling that the legal and institutional framework had to be modified. This is precisely what the **Treaty of Amsterdam** did in 1997. It stated a general goal for these policies -"to provide citizens with a high level of security within an area of freedom, security and justice"-, and the decision-making process was improved. This Treaty also defined in a more precise way which were the fields where common action should be taken and placed some areas of competence of the former third pillar (immigration, asylum and judicial co-operation in civil matters) within the first pillar (title IV TEC). A transfer that left the 'new' third pillar (title VI TEU) the responsibility to deal with police and judicial co-operation in criminal matters, plus preventing and combating racism and xenophobia.

The **European Council of Tampere** in October 1999 was an important impulse for co-operation in the JHA field. It showed a political engagement from European leaders in order to fulfil the goals established in the Treaty of Amsterdam. Defined deadlines for action were set up, the principle of mutual recognition was enshrined as the 'cornerstone' of judicial co-operation and a scoreboard, to be published every 6 months, was created to evaluate the priorities and the rhythm of progress.

Since 1999, an important number of measures have been adopted. There is a growing awareness of the importance of co-operation in this area. On the one hand, criminality becomes global and knows no borders. On the other hand, European citizens want to be able to benefit fully from the freedom of movement and should not see the exercise of their rights undermined because of differences in their States' legal systems.

Lastly, the tragic events of **September 11 in the United States** have put security issues on the top of the political agenda. Since then, we have seen an acceleration in the pace of adoption of

¹ For the purpose of this paper, we will not consider the whole of what was formerly called "Justice and Home Affairs" area, as our aim is to focus on the security issues (police, customs and judicial co-operation in criminal matters). Asylum and immigration and judicial co-operation in civil matters will not therefore be treated here.

² However, its operations did not start until 1999.

new measures: the most relevant ones concern the European arrest warrant, the setting up of Eurojust and the common definition and sanction of terrorism.

1.2. Main realisations

1.2.1. Judicial co-operation in criminal matters

The Tampere European Council established priorities for judicial co-operation in criminal matters

- β **Approximation of criminal law.** A common Union policy in criminal matters (i.e. common definitions and sanctions for crimes) must be introduced gradually in view of the cross-border nature of crime as judicial co-operation may be compromised if there are conflicting definitions of criminal behaviour. The issue of common procedural law standards has been addressed by a framework decision³.
- β **Common definitions and sanctions** have been reached for the following cross border crimes: Fraud and counterfeiting of non-cash means of payment⁴ and Fraud and counterfeiting of the euro⁵. Moreover, proposals for framework decisions on common definition and minimum sanctions for the following crimes have been presented by the Commission and discussed in the Council, and may be formally adopted soon:
 - β Racism and xenophobia⁶
 - β Terrorism⁷
 - β Illicit drug trafficking⁸
 - β Sexual exploitation of children and child pornography⁹
 - β Trafficking in human beings¹⁰
- β **Co-ordination of judicial proceedings.** The creation of Eurojust¹¹ is the main result in this field. It is made up of national prosecutors, magistrates or police officers from each Member State and its objective is to facilitate co-operation between the national prosecuting authorities and to improve the co-ordination of criminal investigations and information exchange. Its importance has been recognised in the Treaty of Nice (art. 31).
- β **Mutual recognition.** This principle, inspired by the single market, should apply both to judgements and other decisions taken by judicial authorities. The most relevant measure here is the framework decision on the European arrest warrant¹², which establishes a procedure based on automatic recognition of judicial orders for arrest made in another Member State, thus replacing the present extradition agreements.
- β **Protection of individual rights.** Although the Charter of Fundamental Rights (which lacks yet effective enforceability) has stated several procedural principles, this sector remains

³ Framework decision 2001/220/JHA, OJ 2001 L 082

⁴ Framework decision 2001/413/JHA, OJ 2001 L 149

⁵ Framework decision 2000/383/JHA, OJ 2000 L 140

⁶ COM (2001) 664, OJ 2002 C 075E

⁷ COM (2001) 521, OJ 2001 C 332E

⁸ COM (2001) 259, OJ 2001 C 304E

⁹ COM (2000) 854 (02), not published in the OJ

¹⁰ COM (2000) 854 (01), not published in the OJ

¹¹ Council decision 2002/187/JHA, OJ 2002 L 063

¹² COM (2001) 522, OJ 2001 C 332E

poorly developed. The Commission has published in 2002 a Consultation Paper on procedural safeguards for suspects and defendants in criminal proceedings¹³.

1.2.2. Police co-operation

Europol is the European law enforcement organisation whose objective is to improve the effectiveness and co-operation of the law enforcement authorities in Member States to prevent terrorism, unlawful drug trafficking and money laundering related to it, trafficking in persons, counterfeiting of the euro, and other forms of serious international organised crime.

The establishment of Europol was agreed in the Treaty of Maastricht. Based in The Hague, it started limited operations in January 1994 in the form of the Europol Drugs Unit (EDU) fighting against drugs. Progressively other important areas of criminality were added. The Europol Convention¹⁴ was ratified by all Member States and came into force on 1 October 1998. Following a number of legal acts related to the Convention, it commenced its full activities on 1 July 1999. Europol is mentioned in articles 29 and 30 of the Treaty on European Union.

Other measures have been adopted in this field. The **European Police College**¹⁵ will train policemen and other law enforcement personnel to work and operate in a European context. The **OISIN**¹⁶ programme stimulates co-operation between law enforcement personnel and familiarises them with the legal systems and the law enforcement practices in other Member States.

1.2.3. Visa policy, external borders

In 1985, Germany, France and the Benelux countries signed the **Schengen Agreement** on an intergovernmental basis, implemented by a **Convention**¹⁷ in 1990. They were to introduce, from 1995 on, freedom of movement for all citizens of the European Communities within the Schengen area, and common procedures for visa, immigration and asylum issues. A protocol attached to the Treaty of Amsterdam integrated the Schengen acquis¹⁸ into the European Union framework. The United Kingdom and Ireland do not participate in the Schengen area and retain, among others, their right to carry out controls on persons at frontiers; Denmark has specific provisions. An association agreement¹⁹ has been concluded with Norway and Iceland making it possible for them to participate in the Schengen area.

Some of the most relevant measures adopted within the Schengen framework are: the abolition of checks at the common borders; the harmonisation of the conditions of entry and visas for short-term stay; the definition of common rules concerning the country responsible for the evaluation of an asylum demand; and the creation of the Schengen Information System (SIS), which allows policemen and consular agents to get information about wanted people and objects.

¹³ http://www.europa.eu.int/comm/justice_home/unit/penal/consult_paper_proc_safeguards_en.htm

¹⁴ Convention based on article K3 of the TEU on the establishment of Europol. OJ 1995 C 316.

¹⁵ Council decision 2000/820/JHA, OJ 2000 L 336.

¹⁶ Council decision 2001/513/JHA, OJ 2001 L 186

¹⁷ Convention implementing the Schengen Agreement, OJ 2000 L 239

¹⁸ The Acquis includes the Schengen Agreement, its implementing Convention, the Accession Protocols of Italy, Spain, Portugal, Greece, Austria, Denmark, Sweden and Finland and the Decisions and declarations of the Schengen executive committee.

¹⁹ OJ 1999 L 176

§ 2. WHICH OBSTACLES HINDER THE DEVELOPMENT OF CO-OPERATION?

2.1. The limitations imposed by the Treaties

Although the Treaty of Amsterdam brought important improvements to the decision making process of the third pillar, this process is still far from being an ideal mean to co-operate and advance in this area. The rhythm of adoption of important measures is slow, and this is due to different reasons.

- β **The obligation to act unanimously** (art. 34.2. TEU) in order to adopt measures within title VI of the TEU is too broad an exception to the general rule of qualified majority voting in the Council. For JHA matters transferred to the first pillar, unanimity has been foreseen for a period of 5 years, after which majority voting should be adopted as the general rule (art. 67 TEC). Nothing like this exists in the police and criminal judicial co-operation.
- β **Framework decisions** for the purpose of approximation of the laws and regulations of the Member States have no direct effect nowadays (art. 34.2.b. in fine TEU). So if a Member State does not implement the measure within the established period of time, and taking into account the fact that there is no way to force it to do it, the enforcement of the concerned measure will remain impossible. This kind of situation should not be accepted.
- β There exists the possibility for a Member State, arguing 'important and stated reasons of national policy', to block **closer co-operation** between other Member states if the former opposes the granting of an authorisation by qualified majority (art. 40.2.TEU). It is nonsense. This is not a logical measure as measures adopted within the closer co-operation framework will not be opposable to the Member States, which do not participate in such a co-operation.
- β The European Union as such lacks **legal personality**. The European Community (first pillar), however, has it (art. 281 TEC). External action in security issues may be rendered difficult by this lack of personality.
- β The role of the **European Parliament** is very limited. It must be consulted by the Council before the adoption of certain measures (art. 39.1. TEU), but its opinions are not binding. This consultative role is clearly insufficient in an area affecting so closely citizen's rights. Moreover, the fact that penal legislation is being adopted by the Council without real input from any elected assembly, at national or European level, may result in a breach of the Legality principle of the penal law.
- β The jurisdiction of the **European Court of Justice** is far from being complete in matters affecting title VI of the TEU. Article 35 establishes several limitations, like the possibility for a Member State to refuse jurisdiction of the Court to give preliminary rulings on the validity and interpretation of framework decisions and decisions; and the impossibility for the Court to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State.
- β **The pillar structure**, which may have been useful in the past, it is becoming an obstacle for the necessary interaction between different policies at the European level. The consistency of Community and PJC (Police and Judicial Co-operation) policies must be guaranteed. For example, should drugs issues fall into the net of health policy (Community) or crime (PJC) ?

Besides, it is sometimes difficult to determine which is the right legal basis for a certain measure, and this leads to long and useless debates when choosing it (e.g. does the Community have the competence to dictate penal law? Or does that competence exclusively belong to the Union?). This problem leads us to look at the link between Union and Community: if the pillars disappear, the Community's existence will become redundant.

22. Lack of operational capacity

Several new bodies (Europol, Eurojust, the European task force of police chiefs) have been created in the past years in order to fight crime within the Union, but they lack operational capacity. However, police is an executive function. Thus the limitation of Europol's capacity to organise operational actions (art. 30 § 2 TEU) is a serious one. This is in fact a police authority, which has no direct police instrument.

Eurojust has not yet even reached that level. It is not an institution in itself. This is a heavier impediment for it to reach its goals. It also increases the general unbalance between police and justice co-operation.

23. Criminalisation of the immigration problem

One of the big mistakes of the Treaty of Maastricht was to place immigration and security issues under the same title, so that they constituted one single 'package' of competence. Ever since, this has led to confusion and misunderstandings concerning the objectives of the JHA policies. The Treaty of Amsterdam tried to solve this problem by transferring immigration and asylum issues to the first pillar. However, the wrong dynamic (the one saying that immigration equals crime) was already established and it has proved difficult to modify it.

Illegal or excessive immigration may enhance criminality and pose a threat to internal security. But immigration is a much broader subject, which cannot be reduced to a security issue. It has social, economic and cultural connotations that must be addressed from a non-security point of view. Treating immigrants as potential criminals -as some European and national policies seem to do- does only aggravate the problem of immigration by frightening the native population and by complicating the integration of the newcomers.

24. Co-operation in justice matters is being outweighed by police co-operation

The Union's preference has gone so far for repressive rules, which naturally concern police forces rather than judges. One of the reasons for this may be that, while co-operation in police matters within the framework of the Community/Union started in the 1970s with the Trevi group, judicial co-operation was not discussed in Community/Union forums until much later. For a long time, the Council of Europe was the only organisation where subjects like extradition and mutual legal assistance were addressed.

25. The focus of action is on repressive rules, while citizen's rights are left behind

Action of the Union seems to rely more on the 'sword' approach of penal law rather than on its 'shield' function. Indeed, penal measures usually can be considered as 'sword' measures when

their main goal is to stop crime; on the other hand, 'shield' measures are needed to protect citizen's rights and balance the excesses that may be committed when applying the 'sword' rules.

A clear example of the above is the lack of standards at a European level for procedural rights. Sanctions and definitions have been harmonised for several crimes, but too little has been done concerning the protection of the defendant in criminal proceedings. These procedural rights include, among others, the right to get legal advise, the right not to declare oneself guilty, and the right to appeal. The recently agreed European arrest warrant has also been criticised for not granting enough protection against an excessive or irregular request from a Member State.

§ 3. WHAT CAN BE DONE TO IMPROVE INTERNAL SECURITY IN THE UNION?

In December 2001, the Laeken Declaration established discussion guidelines for the future reform of the European Union. Many questions have been raised and will need to be addressed by the Convention and the ensuing IGC. Among those questions, the issue of internal security has been mentioned. The declaration states that *'there have been frequent public calls for a greater EU role in justice and security, action against cross-border crime, control of migration flows and reception of asylum seekers and refugees from far-flung war zones.'*²⁰ and that *'European citizens (...) are calling for concrete results in terms of (...) less crime'* Some lines after these statements, the question *'Do we want to adopt a more integrated approach to police and criminal law co-operation?'* is the only one we will find about the security subject.

The Declaration seems therefore to ask for closer co-operation and more action in this field, but it does not actually give any guidelines about how this improved security policy should be reshaped. It is thus useless to look for new ideas in the Declaration.

More should be done, and in a better way, but how? The following lines are devoted to give some possible answers to that crucial question.

3.1. Modification of the Treaties

As we have seen in section 2.1., there are several institutional elements that need to be modified in order to enhance co-operation in security issues. The revision of the Treaties by the IGC in 2004 should be the opportunity to carry out the necessary reforms.

First of all, **the pillar system must be abolished**. This does not necessarily mean that security issues will be treated exactly in the same way as more 'classical' fields of Community competence (e.g. trade, competition or environment). It would however entail an **increased use of majority voting** and the relegation of unanimity to exceptional cases. Police and judicial co-operation in criminal matters will become thus a recognised Community competence shared with Member States, and the 'Community' method will be the general rule in the decision making process.

The present **catalogue of legal instruments** in the third pillar (common positions, framework decisions, etc.) should be put in line with the existing forms of Community action (regulations, directives, etc.) in a search for coherence. Framework decisions would thus become directives, with direct effect.

The European Parliament (EP) can no longer be a minor player in this field. When fundamental rights are at stake, as it is the case with security issues and fight against crime, there is an unavoidable need for a more democratic approach. **The role of the EP should then be upgraded** through the systematic use of the co-decision procedure (art. 251 TEC).

The same reasons apply for an **increase of the competence of the Court of Justice**, which should reach the same jurisdiction as for other fields of action of the Community. There is no justification for a diminished competence in security issues. Member States, which fail to fulfil their obligations, should be taken before the Court of Justice, as they are when, for example,

²⁰ The usual mistake of placing security and immigration issues together is here again.

they fail to implement a directive. This being said, it must be realised that the development of a dynamic European action against crime will provoke a tremendous increase in European judicial procedures. There is thus a need to simplify the existing procedures and also to increase the judicial authorities dealing with the interpretation of European rules.

Finally, the use of **closer co-operation** should be encouraged between Member States by not allowing a non co-operating Member State to block co-operation between other Members²¹.

There is a need to **strengthen the accountability of the new structures created**. Otherwise, the disordered development of various structures runs the risk of increasing the feeling of democratic deficit. There is consequently a need to co-ordinate the information about all concerned activities inside the Commission, with a much stronger control of the European Parliament.

3.2. The Charter of Fundamental Rights

The Charter of Fundamental Rights (the 'Charter') was proclaimed in December 2000 at the Nice European Council. It is not legally binding yet, but it has been increasingly mentioned as containing general principles of Community Law. One of the issues raised by the Laeken declaration was the possible inclusion of the Charter in the basic treaty (or constitution) to be prepared by the next IGC. This will fill a gap in the Union's legal system, as we lack nowadays a defined catalogue of rules protecting fundamental rights at the EU level.

The respect of fundamental rights is closely linked to the creation of an area of freedom, security and justice. European Union's security measures have often been criticised for focusing on repression without much consideration of citizen's rights. The inclusion of the Charter (and of a mechanism of effective supervision of its application) in a treaty/constitution would become a serious guarantee for European citizens' freedoms and would certainly help strike a better balance between security and freedom. The action of the Union would necessarily have to respect the principles of the Charter. Measures not respecting them would be quashed by the European Court of Justice.

3.3. The need to take subsidiarity into consideration

Another important question raised by the Laeken declaration concerns the distribution of competence between the Union and the Member States. The area of internal security had long been an exclusive competence of the States. In recent years we have seen a transfer of competence towards the Union, which shares it with the States.

²¹ The Treaty of Nice (not yet in force), offers a solution to this problem, as it provides in new article 40a that *"The authorisation referred to in paragraph 1 (to establish closer co-operation) shall be granted, in compliance with Articles 43 to 45, by the Council, acting by a qualified majority, on a proposal from the Commission or on the initiative of at least eight Member States, and after consulting the European Parliament. The votes of the members of the Council shall be weighted in accordance with Article 205(2) of the Treaty establishing the European Community.*

A member of the Council may request that the matter be referred to the European Council. After that matter has been raised before the European Council, the Council may act in accordance with the first subparagraph of this paragraph"

The possibility for a Member State to block closer co-operation is thus minimised.

It is necessary to respect the subsidiarity principle and act at the appropriate level. For example, preventing small crime is something that can be better done at the local level; action of the Union should thus just facilitate exchange of experiences and ideas and promote better practices.

3.4. The need for a European Law Institute and codification

To facilitate the scholarly work of preparing qualitatively sound European legislation in tune with diverse national legal traditions, there is a need for a permanent European institution to undertake the essential legal research into the different national legal systems, a European Law Institute. This is especially true for the tasks of harmonising penal and procedural law, but it also applies to all other fields of law. This Institute would also serve as a generator of ideas based on long-term vision, unconstrained by legislative periods.

This Institute could also be responsible for future codification. As an increased number of penal definitions and sanctions are being harmonised at the European level, we will soon reach the moment when a European Criminal Code and a European Code of Criminal Procedure become necessary. The latter should eventually define the responsible institutions, the rules of procedure, defendants' rights, and provide criteria for the choice of the forum.

3.5. Improved implementation of the adopted measures

For a long time, conventions were one of the main ways used for co-operation in security issues. They are instruments of International Law, and are not governed by European Community Law rules. Schengen and Interpol are examples of this type of conventions. However, many of them have not been ratified by all Member States. This hinders their implementation and is a waste of time: after long negotiations an agreement is attained, just to be left unimplemented afterwards. It is also one of the reasons why the use of conventions should be kept to a minimum in the future.

Even when ratification is not needed, problems may arise. For example, there is no way to force a Member State to implement a framework decision (which, besides, lacks direct effect). The Commission cannot request the ECJ to act, and a dispute between Member States will only reach the Court after a long settlement procedure in the Council.

3.6. Enlargement: implementation of the acquis and border controls

If we want the enlargement to become a success, the implementation of certain parts of the acquis in security issues should be postponed. Many of the Candidate States do not have yet the right infrastructure to fully co-operate in police and judicial matters. The most obvious example of this is the mutual recognition and the measure that better embodies it: the European arrest warrant. It is a fact that judicial bodies in Candidate States are not as clear and accountable as their counterparts in present Member States. The principle of mutual recognition is based on trust, and trust towards new Members must still grow. Human and financial aid should be provided so that they can catch up. But the whole system of mutual recognition risks to fail if applied to States whose systems are not trusted.

On the other hand, an important element of the internal security of the Union is going to change radically after the enlargement: the external borders. Countries like Germany and Austria will have to dismantle almost all their customs controls (exception made for Switzerland). Borders will move eastwards, precisely towards an area (Ukraine, Moldova; the Balkans) that is seen as a centre for smuggling, drugs trafficking, corruption, etc. Policing the new external borders will demand supplementary efforts: personnel and/or funds should be transferred from areas, which have lost their 'border' status and where they are not needed anymore. In any case, training of guards and customs officers should be given priority. The creation of an integrated European borders force should be contemplated.

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