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# Dissertation

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**Europol and European Security**

Or how the agency is trying to serve its purpose

**Verfasser**

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## List of Abbreviations

9/11	The September 11, 2001 terrorist attacks
ALDE	Alliance of Liberals and Democrats for Europe
ATU	Europol's Anti Terrorism unit
BLD	Bureau de Liaison
Cats	Article 36 Committee
CBRN	Chemical, Biological, Radiological and Nuclear weapons
CFSP	Common Security and Foreign Policy
CIA	Central Intelligence Agency
CoFoE	High Level Conference on the Future of Europol
EC	Commission of the European Communities
ESC	European security committee
Coreper	Comité des représentants permanents
COTER	CFSP Working Party on Terrorism
Council	Council of the European Union
CTTF	Counter Terrorism Task Force
DNA	Deoxyribonucleic acid
EAW	European Arrest Warrant
ESC	European security committee
FD	Framework Decision
EC	European Community
ECJ	European Court of Justice
EP	European Parliament
EPP	European Public Prosecutor

ESDP	European Security and Defence Policy
EU	European Union
Eurojust	European Union's Judicial Cooperation Unit
Europol	European Police Office
Europol JSB	Europol Joint Supervisory Board
ETA	Euskadi Ta Askatasuna, Basque terrorist group
FBI	Federal Bureau of Investigation
FR	France
G5	Group of Five, includes the largest European countries: France, Germany, United Kingdom, Spain, Italy
G8	Group of Eight, includes Canada, France, Germany, Italy, Japan, United Kingdom, US, Russian Federation
Interpol	International Criminal Police Organisation
JHA	Justice and Home Affairs
JIT	Joint Investigation Teams
JSB	Joint Supervisory Board
JSC	Joint Situation Centre (see SitCen)
LEN	Law Enforcement Network
LIBE	Committee on Civil liberties and Justice and Home Affairs
MSs	Member States
NGO	Non Governmental Organisation
OC	Organised Crime
OJ	Official Journal of the European Union
PCTF	Police Chiefs Task Force
PIRA	Provisional Irish Republican Army, Irish terrorist group
SIS	Schengen Information System

SIS II	Schengen Information System II
SIS III	Treaty of Prüm
SitCen	Joint Situation Centre
Statewatch	NGO that monitors civil liberties in the EU
Sub-committee F	European Union Committee for Home Affairs of the House of Lords
Trevi	Group Terrorism, Radicalism, Extremism and Violence Group
TWG	Terrorist Working Group
UK	United Kingdom
UN	United Nations
WG	Working Group



# 1. Introduction

At Europol's home-page, the visitor is welcomed with the words:

*“Europol is the European Law Enforcement Organisation which aims at improving the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organised crime.”*

The establishment of Europol was agreed upon in the Maastricht Treaty on European Union of 7 February 1992. It started limited operations on 3 January 1994 in the form of the Europol Drugs Unit (EDU) fighting against drugs. Progressively, other important areas of criminality were added. On 1 January 2002, the mandate of Europol was extended to deal with all serious forms of international crime<sup>1</sup>. The Europol Convention was ratified by all Member States and came into force on 1 October 1998. Following a number of legal acts related to the Convention, Europol commenced its full activities on 1 July 1999. In 2009 the agency officially celebrated its 10<sup>th</sup> anniversary. On the 18 of April 2008, the EU interior ministers reached a political consensus on the “Council Decision establishing Europol” in Luxembourg. This Council Decision will replace the Europol Convention, and Europol will thus become one of the EU agencies and will be funded from the Community budget instead of contributions from the Member States.

Based on the provisions of the Europol Convention, the objectives of Europol are to improve the effectiveness of and cooperation among police authorities of EU Member States in order to prevent and combat serious international organized crime. Europol's specific areas of criminal investigation include the illicit trafficking in drugs, vehicles, and human beings, including child pornography; forgery of money; money-laundering; and terrorism. Priority is given to crimes against persons, financial crimes, and cyber crimes; when an organized criminal structure is involved and when the criminal activity involves two or more Member States of the EU.

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<sup>1</sup> such as organized robbery, swindling and fraud, computer crime, corruption, environmental crime, and other crimes specified in the Europol Convention's Annex (Europol Convention, 1995)

Similar to the structure of other international police organizations (e.g. Interpol), Europol is not an executive police force with autonomous investigative powers. Instead, Europol's activities are oriented at facilitating communications among and supporting selected activities of the police organizations in the participating states.

Europol cannot be analysed without taking the changing nature of the European Union and its cooperation in Police and Judicial Cooperation into account. Police work belongs to the core issues of state sovereignty. Until today, law enforcement authorities tend to prefer the security of established bilateral working relationships to the often cumbersome and rather new cooperation structures involving all Member States.<sup>2</sup> So how can cooperation in such a sensitive area evolve?

This Doctoral thesis aims at understanding why Europol evolved during the past decade; how its mandate is defined; how it interacts with the relevant authorities in the Member States and other international bodies; and finally to whom Europol is accountable – both from a legal and democratic perspective. During this introduction, I will give an overview of the underlying theories as well as of my working methods and assumptions.

### **1.1. Weber's bureaucratization theory**

The best way to explain current European police cooperation and Europol is to apply Max Weber's theory. Mathieu Deflem reflected on Weber's (1922) bureaucratization theories and concepts to understand the above mentioned developments. He defends that the theoretical viewpoint that the cooperation between law enforcement agencies are shaped by a historical process of bureaucratization.

Three conditions are central to this development<sup>3</sup>:

1. the structural condition of formal bureaucratic autonomy of police institutions;
2. the operational motive among police of a shared conception of crime and crime control to create transnational "expert systems"; and

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<sup>2</sup> see also Malcolm Anderson, *Counterterrorism as an Objective of European Police Cooperation*, in *European Democracies Against Terrorism*, edited by Fernando Reinares, Onati International Series in Law and Society, Dartmouth, 2000, p. 240

<sup>3</sup> *Ibid*, pp. 12–34

3. a remarkable persistence of nationality can be observed in international police work, does not clash with a police institution's relative autonomy from governmental control, because both the governments and the bureaucracies of states are legitimated in the context of national states

### 1.1.1. "Relative independence"

First, in order to accomplish cooperation across national borders, police institutions must have gained a position of relative independence from the dictates of the governments of their respective national states. Such a condition of institutional independence or formal bureaucratic autonomy allows public police institutions, though formally sanctioned by states, to autonomously plan and execute relevant strategies of crime control and order maintenance. Early efforts to organize international police cooperation in Europe in the nineteenth century, for instance, were limited in scope and operations because they were politically motivated and planned by autocratic governments.<sup>4</sup>

My Chapter on the "Historical evolution of Police and Judicial Cooperation" (chapter 2.) will argue that the first manifestations of police cooperation (TREVI group) were very informal. Later the political behaviour of Member States changed towards an institutionalisation of cooperation. This happened especially after the mid 1990s<sup>5</sup>. This is mainly due to single markets externalities on immigration, asylum and policing policies which were not to be solved by intergovernmental regulation. On the 1 May 1999, the Amsterdam Treaty committed the Council to remove "controls on persons, be they citizens of the Union or nationals of third countries, crossing internal borders" within five years of the entry into force. The Treaty also incorporated the 3000 pages of the Schengen *acquis* into the legal framework of the EU. As a result the institutions for collective decision-making such as the Trevi framework, the Schengen Accord and Justice and Home Affairs provisions of the Maastricht Treaty were established.

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<sup>4</sup> Ibid. pp. 45–65

<sup>5</sup> Simon Hix, *The Political System of the European Union*, Second Edition, Palgrave Macmillan, London 2005., pp 365

The removal of internal borders and the setting-up of surveillance of external borders (the so-called “Schengen borders”) increased leads to the phenomenon Jörg Monar identified as “distinction between outside and inside. It is the main implication of an emphasis put on internal security provided through effective law enforcement and access to justice: “It implies a fundamental distinction between a ‘safe(r) inside’ and an ‘unsafe(r) outside’ with the EU’s frontiers as the dividing line and law enforcement as the key instrument to maintain and further enhance this distinction. (...)The dynamic of exclusion which such an approach and its claim to supreme legitimacy can generate is quite obvious: People from the ‘outside’ which actually or potentially endanger the ‘safe inside’ must be kept outside or brought under appropriate control and enforcement action.”<sup>6</sup>

Simon Hix argues, that one of the central aims of the modern state is to guard and protect citizens’ rights and freedoms and that the Amsterdam Treaty commits in a similar way the EU to „maintain and develop an area of freedom, security and justice.“<sup>7</sup> The “area of freedom, security and justice”<sup>8</sup> was defined as equal access to justice for all EU citizens, cooperation between the member states’ authorities on civil matters, and the establishment of minimum common rules covering criminal acts, procedures and penalties. One of the major – perceived – threats to the security of citizens is terrorism. The establishment of the Trevi (Terrorism, Radicalism, Extremism and Violence) Group was agreed upon in 1975, after the 1972 massacre of Israeli athletes at the Munich Olympic Games,

A number of scholars claim that the fight against terrorism was a pivot element which triggered the deepening of cooperation in Justice and Home Affairs. Jörg Monar thinks that the EU had to respond<sup>9</sup> to the challenge of a terrorist attack through adequate internal security measures, participate effectively in the international front against the terrorist networks and provide credible solidarity with the United States. Already one of these tasks would have put a considerable strain on the Union’s capacity to act, but together they formed quite a formidable test for the potential and limits for the Union as an actor in fight against international terrorism. It is important to keep in mind that – even if the role of the European Union is a growing one – the Member States do not intend to give up their sovereignty in law enforcement. Police forces, judicial authorities, security and intelligence agencies and border

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<sup>6</sup> Jörg Monar, *Justice and Home Affairs in a Wider Europe: The Dynamics of Inclusion and Exclusion* in ESRC ‘One Europe or Several?’ Programme Working Paper 07/00, pp. 6

<sup>7</sup> Simon Hix, *op.cit.*, p. 344

<sup>8</sup> TEU, Title IV, Article 61

<sup>9</sup> Jörg Monar, *op.cit.*, p. 387



authorities all remain under national control; and most operational work in the field of counter-terrorism will remain the preserve of national authorities.

Malcom Anderson<sup>10</sup> questions anti-terrorist action as basis for institutionalized transnational police cooperation for various reasons: As it is usually direct towards influencing state policy it is par excellence an issue of state security. As political causes and interests are involved, government usually have widely differing perspectives on the implications and importance of particular terrorist incidents. Within the state it is already difficult enough to coordinate police and intelligence services and they often also have different interests in international cooperation. Political violence is normally linked to broadly based political movements and cannot be repressed by police action alone but requires coordinated government policies aimed at removing the underlying root causes. And finally acts of terror have a dramatic impact on public opinion but they are relatively rare compared with ordinary criminality and long periods without countries experiencing any incident weaken the day-to-day commitment of police agencies to international cooperation.

Or as Monica den Boer puts it “European security identity is still hugely fragmented, its scattered nature is reinforced even further by the weakness of supranational government and the lack of public and social legitimacy.”<sup>11</sup>

However, the events following 9/11 support the importance of the fight against terrorism not only for police cooperation at UN level, but also for the role of Europol on a European level. On the 20 September 2001, the Justice and Home Affairs Council adopted several measures to combat terrorism on the basis of proposals by Europol and the Council General-Secretariat. On the 15 November 2001 a specialized counter-terrorism unit, the Counter-Terrorism Task Force became fully operational at the Europol headquarters. This specialized unit consists of terrorism and liaison officers and seconded experts from police and intelligence services of the Member States. A year later the Task Force was incorporated into the Serious Crime Department, but became a separate entity again after the Madrid bombing in March 2004.

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<sup>10</sup> Malcolm Anderson, *op.cit.*, p. 230

<sup>11</sup> Monika den Boer, *The fight against Terrorism in the Second and Third Pillars of the Maastricht Treaty: Complement of Overlap?*, in Fernando Reinares, *European Democracies Against Terrorism*, Onati International Series in Law and Society, Dartmouth, 2000  
*op.cit.*, p. 221

The evolution of European treaties and the agreement of the diverse Justice and Home Affairs programmes must be understood as documents which reflect a harmonisation of the concept of western democracies among the Member States. They were given birth under the impression of the two world wars, agreed upon by states which committed themselves to human rights and civil liberties. Only then could police authorities gain their position of “relative independence” and freedom of being instrumentalized or abused by their respective regimes. My analysis of the treaties and their impact on Justice and Home affairs, as well as the Justice and Home Affairs programmes will show how an evolving, common understanding of a modern society paved the way for Europol.

The Lisbon Treaty as a legal document will not directly influence Europol. The “spirit” of the Treaty on the other hand, already found its echo in the Council Decision establishing Europol; which is why I did not discuss it in detail.

### **1.1.2. “Expert Systems”**

As a consequence to the “relative independence”, police agencies develop expert systems of knowledge that can be shared among fellow professionals across national boundaries. In the case of international cooperation, such knowledge systems particularly concern expertise about the course of international crime, as well as criminal developments that affect several countries at once, such as the influence of economic modernization on criminal conditions across the world.

The chapter on “Europol’s objective” (chapter 3.2.1.) explains the agencies scope with regards to crime, and also shows how it got enlarged with the Council Decision establishing Europol. From 1 of January 2010, it “shall cover organised crime, terrorism and other forms of serious crime (...) affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences.”<sup>12</sup>

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<sup>12</sup> Article 4, Council Decision establishing the European Police Office, op.cit.

My chapter on “Europol’s IT Databases” (chapter 3.5.) shows how sophisticated the means of communication actually are. They enable national police authorities to exchange data within the highest security perimeters. Additionally Europol is granted access to European databases like the Schengen Information System (SIS), the Visa Information System (VIS) and it is currently discussed to allow access to Eurodac. Based on the available information, Europol officers are able to identify pan-European trends, as well as cooperate with national police officers in fighting transnational crime-groups. Consequently it improves the “effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organised crime.”<sup>13</sup>

### **1.1.3. “Persistence of nationality”**

Third, considering the form in which international cooperation will take place, international police work will primarily remain oriented at enforcement tasks that have a distinctly local or national significance. The national persistence of international police work does not clash with a police institution’s relative autonomy from governmental control, because both the governments and the bureaucracies of states are legitimated in the context of national states. A remarkable persistence of nationality can be observed in international police work. This assumption is one of the underlying hypotheses of my work.

Especially my chapter on “Europol and the Member States” (chapter 4.6.) shows the validity of this argument. Europol does not exist in a void but actually in a rather “crowded space” dominated by national law enforcement agencies, and complemented by diverse International Police Organisations like Interpol and finally a number of European bodies. As the setup of Europol very much reflects this European reality in police cooperation I will analyse their structure in the chapter on “the institutional framework and cooperation” (chapter 4). Eurojust and Frontex are the European agencies which are most relevant for Europol. The Police Chiefs Task Force and the Joint Situation Centre are – even though they not European agencies – important as well. They all contribute to the work of Europol, and share to a

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<sup>13</sup> Europol home-page  
[www.europol.eu](http://www.europol.eu)  
Retrieved 04. September 2009

certain extend the same problems: the quality of their work depends very much on the willingness of the national law enforcement agencies to cooperate with them.

There already exists vast legislation on the obligation to communicate criminal intelligence and information with Europol and the agency draws a picture which shows how much the situation improved since its installation. Reality – however - is less rosy. Some Member States still deprive Europol of the information it needs to produce an added value for the national police agencies. It is more or less a vicious circle. Without offering added value to those – let's call them “reluctant” – Member States, it is hard for Europol to build up reputation. Without a good reputation it is nearly impossible to receive national criminal intelligence which is necessary to identify pan-European trends.

I will argue that the reluctance of national law enforcement agencies to transmit information is linked to a number of reasons. Member States prefer to cooperate bilaterally in sensitive issues. Most of them have had cooperated this way for decades, which enabled them to build up mutual trust. Feeding information into the Europol system would mean to share sensitive information with not only the European agency, but also with the rest of the European Member States. This reluctance to “broadcast” information is even easier to understand, if one remembers how unwilling police agencies are already on a national level to cooperate. Conveying this situation again to the European level, different cultures and languages even impede these circumstances.

The persistence of nationality will also be shown explicitly, when Europol's mandate and structure are analysed in chapter 3.2. “Europol's mandate” and chapter 3.3. “The crux of two separate entities at Europol”. European Member States have defined crimes differently, criminals have been treated differently, courts have been structured differently and the different law enforcement agencies have been developed very differently along historical patterns, and therefore hold differing powers and mandates. Criminals – on the other hand - have never been bound by similar constraints, but are actually rather quick to exploit them. So one could perceive Europol as a pragmatic way to respond to imbalance between internationally working crime syndicates and police forces which are pretty much bound to the soil of the state they are meant to protect.

The European answer to this situation was the setup of an expert system (as described above). But this expert system is actually not as “European” as it seems at the first glance. Everyone not specifically concerned with Europol might think that Europol is one entity, with its entire staff following the same procedures to achieve the same goal and fight international crime in Europe. There is – however - an arbitrary distinction between Europol staff on the one hand, and Liaison staff and National Units on the other hand. This basically creates two different entities, and establishes an artificial division between police officers who basically follow the same goals. By separating those two entities organisationally, Member States are able to use their National Units for the simple bilateral exchange of information, while excluding “European core” of Europol (namely the international staff in the serious crime units) from highly interesting and valid information at the same time. Member States can choose if they prefer to work in an intergovernmental manner, or if they include the (more or less) supranational part as well. My numbers clearly show that the supranational part is bypassed in the larger part of cases! As a consequence, Europol’s supranational core-business, e.g. like the publication of annual threat assessments, suffers from the lack of information. Consequently it is not able to create added value for the respective national agencies.

In 2006 the Austrian EU Presidency asked the question if “the role of Europol is to be expanded towards that of a European investigative authority with police powers”<sup>14</sup> which would then have to face differences in law and criminal procedure law.<sup>15</sup> The High Level Conference on the Future of Europol agreed generally that no full law enforcement competencies for Europol were desired and a clear description of the competences was wished for.<sup>16</sup> Its recommendations paved the way for Europol’s further development.

The opportunity for a re-design would have been provided by the advancement from the Europol Convention to the Council Decision establishing Europol. The Europol Convention was perceived to be a rather “heavy tool”<sup>17</sup> to organise Europol. Europol is based upon a Convention because at the time of its establishment the tool of a Council Decision in the

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<sup>14</sup> Press Release Karin Gastinger : *Europol and the role of justice*, Austrian Federal Ministry of Justice, 14 January 2006

<sup>15</sup> Interview with Yves Joannes, op.cit.

<sup>16</sup> Presidency to Article 36 Committee, *Chairman’s Summary of the High Level Conference on the Future of Europol (23 and 24 February 2006)*, Council of the European Union, Doc. No. 7868/06, Brussels, 29 March 2006, p. 5

<sup>17</sup> Interview with Yves Joannes, DG Justice Liberté et Sécurité, European Commission, Brussels, 22. March 2006

Third Pillar simply did not exist.<sup>18</sup> Every Protocol needs to be ratified by every single national parliament. This serves on one hand as a scrutiny tool for the national parliaments, but also slows down the process significantly on the other hand. Therefore, on 5<sup>th</sup> of January 2007 the Commission tabled a Proposal for a Council Decision establishing the European Police Office.<sup>19</sup> Negotiations on the proposal lasted a year and a political agreement was reached on 18 April 2008. On the 18 of June 2008 the Council decided on the “Council Decision establishing the European Police Office (Europol)”<sup>20</sup> which will apply from 1 January 2010.

Europol however is still a relatively young institution. And it was equipped with a tool which should enable its officers to get closer to their core business and hunt down criminals: the Joint Investigation Teams (JIT). Europol officials may participate in a support capacity in Joint Investigation Teams and may - within the limits provided for by the law of the Member State where the joint investigation team operates - assist in all activities and exchange information with all members of the Joint Investigation Team. They shall however not take part in any coercive measures. Being considered as cumbersome and expensive, perception of them seems to have changed during the years. Eurojust National Members also being enabled to participate in JITs provides another asset for the multinational investigation teams. If cognition of the teams continues to improve, they could prove to be the door opener for intensified cooperation on all levels.

The Council Decision brought a significant change with regards to the funding of the budget. Europol will no longer be financed by Member States contributions, but by Community funds. The Council and the European Parliament will be the “budgetary authorities” which will grant especially the latter more influence. Another novelty facilitates the election of the Director. The appointment, done by the Council of Ministers, currently requires unanimity, but from 1 January 2010 new rules will allow a decision with a two-thirds majority. This makes it unlikely that the struggle for a new Director for Europol will stay as fierce it was so far. From 2005 to 2006 Europol was for several months without a Director, as the Justice and Home Affairs Council was not able agree on this topic. Almost the same happened again in spring 2009, until it was agreed upon Rob Wainwright, the British candidate.

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<sup>18</sup> OFFICIAL of the Council Secretariat, Brugge, 18 March 2003

<sup>19</sup> Proposal for a Council Decision establishing the European Police Office (EUROPOL) - consolidated text, Doc. No. 6427/08, Brussels, 14 March 2008

<sup>20</sup> Council Decision establishing the European Police Office (Europol), Doc. No. 8706/08, Brussels, 24 June 2008

## **1.2. European Integration Theory**

As Europol also needs to be understood as a phenomenon of European integration, I briefly illustrate the two major theoretical concepts of European integration theory. They are suited to explain European Integration, the evolvement of the Justice and Home Affairs policy area in general, and the creation of Europol in special: Neofunctionalism and Intergovernmentalism. Both of them seem valid to understand the process Europol went through; especially as the agency did not develop in a linear, stringent manner, but was subject to various “ups and downs”. In the following you will find a rough overview of the two theories.

But let me start by defining the term of European integration. For Ernst Haas integration is not a condition, but a process<sup>21</sup> in which “political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states”<sup>22</sup> This definition includes a social process – the shifting of loyalties – as well as a political process which includes negotiation and decision-making about the construction of new political institutions above the participating Member States with a direct say in at least a part of the member states' affairs.<sup>23</sup>

Diez and Wiener distinguish between “integration theory” which means the field of theorizing the process and outcome of European integration and the term “theoretical approaches” when referring to the individual abstract reflections on European integration.

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<sup>21</sup> Ernst B. Haas, *The Uniting of Europe, Political, social, and economic forces, 1958 - 1968*, University of Notre Dame Press, 2004, p. 11

<sup>22</sup> Ibid.

<sup>23</sup> Thomas Diez and Antje Wiener, *European integration theory, The mosaic of integration theory*, Oxford Press, 2<sup>nd</sup> Edition, 2009, p. 2

### **1.3. Neofunctionalism**

Neofunctionalism seeks to explain the move away from the anarchic state system and towards supranational institution-building by identifying particular societal and market patterns as pushing for elite behaviour towards common market building:

“States, instead of struggling for power, are expected to defend their preferences and to cooperate when cooperation is deemed necessary for their realization. State preferences are seen as resulting from changing domestic competitions for influence; there is no fixed and knowable national interest. Preferences of political actors are formulated on the basis of the values held; they, in turn, determine an actor's sense of interest. In short, Neofunctionalism carried the assumptions of democratic pluralism over into policy formulations relating to international matters by disaggregating the state into its actor-components:”<sup>24</sup>

So-called “low-politics” areas were seen to be functionally interconnected with other policy areas, and have the potential for “spilling over” into them. First this would happen to areas closely related to market policy, but ultimately it would also touch upon other areas (functional spill over):

“Originally, Neofunctionalism assumed that integration would proceed quasi-automatically as demands for additional central services intensified because the central institutions proved unable to satisfy the demands of their new clients. Thus, activities associated with sector integrated initially would “spill over” into neighbouring sectors not yet integrated, but now becoming the focus of demands for more integration.”<sup>25</sup> Neofunctionalism also introduced a stronger emphasis on actors with an interest in further integration, especially the “secretariat” of the regional organization (as the Commission). Even though Member States remain important actors in the process, they do not exclusively determine the direction and extent of subsequent change. Schmitter rather thinks that regional bureaucrats in league with a shifting set of self-organized interests and passions seek to exploit the above mentioned “spill-overs” and “unintended consequences” that occur when states agree to assign some degree of supra-

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<sup>24</sup> Ernst B. Haas, *op.cit.*, p. xiv

<sup>25</sup> *Ibid.*, p. xv



national responsibility for accomplishing a limited task and then discover that satisfying that function has external effects upon other of their interdependent activities.<sup>26</sup>

Spillover can be broken down into more specific subcategories<sup>27</sup>, as

- Functional spillover, which implies that if states integrate one sector of their economies, the impossibility of isolating one economic sector from another will lead to the integration of other sectors
- Technical spillover implies that disparities in standards will lead different states to rise (or sink) to the level of the state with the strictest (or most lax) regulations.
- Political spillover is based on the argument that once different functional sectors become integrated, different interest groups – such as corporate lobbies and trade unions – will increasingly switch their attention from trying to influence national governments to trying to influence the new regional executive which will encourage their attention to win more influence for itself.

But as the process of integrating Europe seemed to stop around the mid 1970s, the validity of the functional approach was put into question. Moravcsik criticised neofunctionalism for the “optimistic notion” that integration was automatically self-reinforcing and would evolve smoothly to a federal union without triggering fundamental distributive or ideological conflicts. He thought that integration was still heavily dependent on unanimous consensus among governments, and governments did not always privilege regional over global multilateral cooperation, and that neofunctionalism could say little about basic causes of national demands for integration or interstate agreements to achieve it.<sup>28</sup>

Schmitter<sup>29</sup> introduced new variations on the theme of spillover, like spillover (an increase in the scope of the functions carried out by an IO), build-up (an increase in the authority or power of an IO without a corresponding increase in the number of areas in which it is

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<sup>26</sup> Philippe C. Schmitter, *Neo-Neofunctionalism*, in Thomas Diez and Antje Wiener, op.cit, p. 46

<sup>27</sup> Stephen George, *Politics and Policy in the European Community*, 3<sup>rd</sup> edition, Oxford, Oxford University Press, 1998, p. 23

<sup>28</sup> Andrew Moravcsik, *The choice for Europe*, Cornell Studies in Political Economy, 1998, p 14 - 17

<sup>29</sup> Philippe C. Schmitter, *A Revised Theory of Regional Integration*, in Leon N. Lindberg and Stuart A. Scheingold, *Regional Integration: Theory and Research*, Cambridge, MA. Harvard University Press, 1971

involved), retrenchment (an increase in the level of joint arbitration between or among Member States at the expense of the power of the IO), and finally the spillback (a reduction in both the breadth and depth of the authority of an IO)

### **1.3.1. Intergovernmentalism**

For one of the most prominent theorists of liberal intergovernmentalism (LI), Andrew Moravscik, the set-up of the EC – and consequently the EU – was shaped by more than the convergence of national preferences in the face of economic change. There were important distributional conflicts which were resolved through hard interstate bargaining, in which credible threats to veto proposals, to withhold financial side-payments, and to form alternative alliances excluding recalcitrant governments carried the day. The outcomes reflected the relative power of states or patterns of asymmetrical interdependence. To secure these bargains, governments eventually delegated and pooled sovereignty in international institutions for the express purpose of committing one another to cooperate. This transfer of sovereignty takes place, where potential joint gains are large but efforts to secure compliance by foreign governments through decentralized or domestic means are likely to be ineffective.<sup>30</sup>

According to Moravscik, governments simply cooperate when induced or constrained to do so by economic self-interest, relative power, and strategically imposed commitments. It is normal for them to do so.

This leads to an important conclusion for the research field of Justice and Home Affairs. Moravscik does not think that the EU suffers no more than any existing nation state government from a democratic deficit. Checks and balances between the EU institutions, “indirect democratic control via national governments and the increasing powers of the European Parliament are sufficient to ensure that EU policy-making is – in nearly all cases, clean, transparent, effective and politically responsive to the demands of European citizens.”<sup>31</sup> One chapter of my thesis is devoted to the question of democratic legitimacy and accountability of Europol.

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<sup>30</sup> Andrew Moravscik, *The choice for Europe*, op.cit, p 3-8

<sup>31</sup> Andrew Moravscik, *In Defence of the Democratic Deficit: Reassessing Legitimacy in the European Union*, *Journal of Common Market Studies*, 40(4), 603-24

#### **1.4. Accountability of Europol**

One of the key questions concerning police forces as well as European institutions concerns accountability and legitimacy. The concept of legitimacy refers to the acceptability of a social or political order. For an institution to be legitimate, it has to rest on the passive support (at a minimum) of the people whom its policies affect. This acceptance has both a normative and a sociological meaning. To be normatively legitimate, the right of an institution to make publicly binding decisions has to be justified by some objective means (e.g., its practices can meet a set of standards that has been agreed upon). In a sociological sense, an institution is legitimate when it is accepted as appropriate and worthy of being obeyed by those affected by its policies. Since Fritz Scharpf's contribution, it has become frequent practice among students of legitimacy to further differentiate between input and output legitimacy.<sup>32</sup> According to a common – although not universally adopted – definition, input legitimacy is concerned with the participatory quality of the decision-making process leading to rules and laws, whereas output legitimacy refers to the perceived efficiency of these rules and laws.<sup>33</sup>

It is impossible to analyse the situation Europol finds itself in, without deconstructing the developments in the third pillar. This policy area works on an intergovernmental basis, with decisions met in unanimity, and limited influence of the European institutions like the Commission, the European Parliament or the European Court of Justice. I will argue that from input legitimacy point of view, the situation is far from perfect. One on hand National Parliaments lack possibilities to influence or control developments in the third pillar; the European Parliament on the other hand is yet to be vested to compensate this lack of democratic control.

This larger picture is reflected by the specific situation of Europol. Europol is currently accountable to the Council of Ministers for Justice and Home Affairs. The Council is responsible for the guidance and control of Europol. It appoints the Director and the Deputy Directors and approves the budget. The Council of Ministers contains representatives from all Member States, and the requirement for unanimous decisions helps ensure a democratic

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<sup>32</sup> Fritz W. Scharpf, *Governing in Europe: Effective and Democratic?* Oxford: Oxford University Press, 1999

<sup>33</sup> Thomas Risse, *Transnational Governance and Legitimacy*, in Benz, A. and Papadopoulos, Y. (eds.) *Governance and Democracy*. London: Routledge, 2006, p. 185

control of Europol. The Europol Management Board comprises of one representative from each Member State and of the Commission and has the main role in steering the day-to-day work of (Article 28). The Member States' authorities are therefore informed in great detail about Europol's functioning through their representatives in the Management Board where decisions are taken by unanimity.

With regards to the operational accountability of Europol and its officers, the specific mandate of the agency has to be kept in mind. My argument is that so far Europol has only a relatively limited function compared with the wide range of functions entrusted to "normal" police forces in the Member States as it yields no executive powers.

I developed the idea for this dissertation while I was writing my Master Thesis on "Europol and Counter-Terrorism" and realized that the situation Europol finds itself in is by far more complex and multi-layered than one would believe at a first glance. Some of the chapters therefore draw on my Master Thesis.

My thesis will mainly make use of documents published by the European institutions, and secondary literature like scientific books or articles concerned with the topic. Expert interviews will provide a valuable insight on the agencies work, while news coverage will provide supplementing information. Existing (scarce) literature on Europol either approaches the topic from a criminological perspective or examines the legal basis. As a political scientist I found it highly interesting to go beyond these questions and examine which process lead to this legal basis, and find out how well it is actually implemented. Especially my work for the Austrian Ministry of Foreign Affairs, in the unit of Justice and Home Affairs helped me understanding European police cooperation. Frankly spoken I was rather surprised to realise during my studies, that my understanding of the comprehensive and sophisticated European reply to organised crime turned out to be not quite as ambitious as I expected.

I still remember very vividly one interview with a high-ranking Europol official who I dared to ask the naive question for the role of Europol in the European architecture for inner security. He immediately started to grumble at me that such a concept would only exist on

paper, while national police authorities prefer not to show any indication of actually following this idea. It was one of these moments, in which I had to realise how distant written law and its application could actually be. And at the same time this small anecdote shows the area of tension and ambiguity that makes European Justice and Home Affairs such an interesting field of research. I would like to thank all of the people who ready to share their time and experience with me, and who gave me valuable insights into this topic. I would ask the reader to accept their wish to keep their names private for obvious reasons.

## **2. Historical evolution of Police and Judicial Cooperation**

### **2.1. The emergence of Trevi**

Already at a Council of Ministers meeting in Rome in December 1975<sup>34</sup>, the installation of a special working group to combat terrorism in the EC was agreed upon.<sup>35</sup> This was mainly triggered by the failure of the German authorities to imprison effectively those responsible for the 1972 massacre of Israeli athletes at the Munich Olympic Games.<sup>36</sup> In 1976, the EC Interior Ministers agreed that in future the Interior Ministers should be accompanied by senior police and security service officials at EC meetings.

In 1976 the Terrorism, Radicalism, Extremism and Violence (Trevi)<sup>37</sup> group was set up by the European Council as a forum for cooperation between interior ministries and police agencies. Its work was based on intergovernmental cooperation between the 12 participating states, excluded the main EC institutions like the Commission or the European Parliament and was not made formally part of the EU institutions.

#### **2.1.1. The five working groups**

Five working groups were set up within the Trevi framework: Trevi 1 was composed by agents of national intelligence agencies and responsible for measures to combat terrorism. Trevi 2 focused on scientific and technical knowledge and police training. Trevi 3 was set up to deal with security procedures for civilian air travel, and redefined in 1985 to look at organised crime at a strategic, tactical & technical level and drug trafficking. Trevi 4 was concerned with safety and security at nuclear installations. Finally Trevi 5 dealt with

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34 "The Trevi Group was set up in response to the proposal: adopted at the Rome European Council in November 1975, that Ministers of the Interior or Justice (depending on each Member State's constitutional arrangements), should meet to discuss matters coming within their competence, in particular with regard to law and order" *Meetings of the Ministers Responsible For Migration, Summaries and Communiqués*, October 1986 – June 1993, Bull. EC 11- 1975 , point 1104 (Other business)

<http://www.coursehero.com/file/5182659/immigrationministers/> Retrieved 03. September 2009

35 Fenton Bresler, *Interpol der Kampf gegen das internationale Verbrechen von den Anfängen bis heute*, Wiener Verlag, Humberg, 1993, p. 160

36 Malcolm Anderson, op.cit., p. 229

37 The informal version links Trevi with the group's first chairman, A. R. Fontein and the fountain in Rome, where it first met

contingency measures to deal with emergencies, like disasters, fire prevention and fire fighting.

The working groups reported to the Trevi Senior Officials group, who then presented those reports to the annual meetings of the Trevi Ministers (the Interior Ministers). The Trevi Troika was comprised of three sets of senior officials from the current EC Presidency, the last Presidency and the next one. Trevi's main purpose was to exchange information about terrorist activities, the security aspect of air traffic systems, nuclear plants and other vulnerable targets as well as the development of tactics and equipment to fight terrorism.<sup>38</sup> Some of these tools are still in use today, like the "black list" which is used by the EU to name terrorists or terrorist groups. This "black list" was originally used to exchange information to refuse the right of entry to undesired people.<sup>39</sup>

As the EC did at this time not have any mandate to cover questions of internal security, Trevi was working outside the traditional EC structures in a very informal manner. As mentioned above, it was a multinational body within the EC, but not part of any EC structure. The European Commission did not exert any significant influence, to co-ordinate and enhance police cooperation in specific matters of common interest and against common threats.<sup>40</sup> Nor was the European Parliament involved into the meetings.

### **2.1.2. From Trevi to strategic Europol planning unit**

In the mid of the eighties, Trevi involved into a strategic planning unit for the future police and justice cooperation within the EU. This was linked to a series of terrorist attacks in France<sup>41</sup>, Karachi and Istanbul which lead to an emergency meeting of Trevi Ministers in London in September 1986. At this meeting, the Ministers also took note of the progress made in implementing the decisions taken by the Trevi Group 1 to strengthen liaison between police forces and experts in counter-terrorism and agreed to step up cooperation in liaison

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<sup>38</sup> Simon Hix, *op.cit.*, p. 356

<sup>39</sup> Kirstyn Inglis, Andrea Ott, *The Constitution for Europe and an Enlarging Union: Unity in Diversity?*, Europa Law Publishing, Groningen 2005., p. 210

<sup>40</sup> Rachel Woodward, *Establishing Europol*, *op.cit.*, pp. 7-33

<sup>41</sup> France was hit by Algerian GIA militants by ten bombs targeted public squares and the transportation system. <http://www.thefreelibrary.com/Terror+and+the+Fifth+Republic-a0140923681> Retrieved 23. May 2006

with the so called Pompidou group<sup>42</sup> “on the prevention of drug abuse, the rehabilitation of drug addicts, aid to producer countries to combat the cultivation of toxic products the strengthening of controls at external frontiers and liaison between the departments responsible for controlling drug traffic.”<sup>43</sup>

It was at the same meeting, that the Commission pointed out that the Schengen Area – in which citizens of the Schengen country are able to move freely – would make a new security concept for the EU Member States and Schengen countries necessary. Therefore the Commission “welcomed the clear link made by Ministers between concern about public order and the Single European Act 2 and achievement of the area without frontiers by 1992”<sup>44</sup> and it “agreed that the abolition of internal frontiers must go hand in hand with stricter controls at external frontiers and that the working group s remit should be coordinated with the measures needed to achieve the area without frontiers.”<sup>45</sup>

In 1989 two new working groups were installed: Trevi III focused on drugs and organised crime. As a consequence to the abolition of border controls, Trevi 92 was set up to specifically deal with "policing and security implications of the Single European Market" and to improve cooperation to "compensate for the consequent losses to security and law enforcement".<sup>46</sup> And even though its scope expanded, the board was again not included into the EC structures, and was as well not supervised by national parliaments.

At a Council meeting of the Trevi Ministers in Den Haag in December 1991, it was agreed to setup Europol as central agency for the exchange of data among the Member States. It was decided that Europol should focus on transnational crime, and that it should fight illicit drug trafficking. From the very beginning it was made clear, that the field of operation could be enlarged in the future.<sup>47</sup> Furthermore the Trevi ministers discussed the “Action Programme

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<sup>42</sup> The Pompidou Group is a multidisciplinary co-operation forum to prevent drug abuse and illicit trafficking in drugs, set up in 1971 and incorporated into the Council of Europe in 1980

<sup>43</sup> Informal Meeting of the Ministers responsible for Immigration, Counter-Terrorism and Drugs, London, 20. October 1986, Reproduced from the Bulletin of the European Communities, No. 10, 1986, pp. 75-78 in *Meetings of the Ministers responsible for Immigration, Summaries and Communiques*, op.cit., p. 3

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Briefing note on Trevi prepared by MS18 (the European Unit in the Metropolitan Police) dated 26.2.90; Home Affairs Select Committee, 363-I, p.xxi, cited Trevi, Europol and the European state by Tony Bunyan in *Statewatching the new Europe*, 1993,

<http://www.statewatch.org/news/handbook-Trevi.pdf>, Retrieved 28.April 2008

<sup>47</sup> “Les ministres ont décidé de la création d’Europol. Ils ont approuvé un rapport qui esquisse les contours d’une organisation policière européenne (Europol) devant faciliter au niveau central la coordination et l’échange des



1992” to fight terrorism with regard of the single market which was to be achieved with the 1<sup>st</sup> of January 1993.<sup>48</sup>

### **2.1.3. Germany’s pressing for a European FBI**

Already in the late 80s, a number of police chiefs in the Member States put forward the idea of a European-style FBI. It was Trevi’s work, that formed the base upon which the German proposal for the creation of Europol was formed. In May 1991 in Edinburgh, the German Chancellor Kohl stated that in his view cooperation between internal security forces and judicial authorities - as a component the Political Union - was “vital and overdue”, and an essential accompaniment to the establishment of the Single European Market. He argued for a European police force “(...) that would be able to operate without let or hindrance in all the Community countries in important matters such as the fight against drug barons or organized international crime.”<sup>49</sup>

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données criminelles entre les Etats membres. Ce rapport a été élaboré à la requête du Conseil européen et sera transmis à ce dernier lors de sa réunion à Maastricht.

L’objectif d’Europol est de rassembler et d’analyser les données relatives à la criminalité transfrontalière, y compris la criminalité dépassent les frontières de la Communauté. Les ministres ont approuvé la proposition de créer une Unité Europol sur les stupéfiants en tant qu’étape initiale de l’établissement d’Europol. Cette unité devrait recueillir auprès des Etats membres et analyser au niveau européen les informations de haut intérêt pour la lutte contre le trafic des stupéfiants.

Cette étape est à mettre en relation avec la mise en œuvre d’une décision antérieure des ministres TREVI visant à la création d’une Unité européenne des renseignements en matière de stupéfiants (UERS). Le champ d’activités pourra donc être élargi étape par étape à d’autres formes de criminalité organisée. Il faudra alors concevoir des critères plus précis à cet effet.“

Meeting Ministers for Immigration and Trevi, 2 and 3 December 1991 in The Hague, by the Commissie Van de Europese Gemeenschappen, Bureau in Nederland, in Meetings of the *Ministers responsible for Immigration, Summaries and Communiques*, op.cit, p.34

<sup>48</sup> “Outre l’évaluation habituelle de la menace terroriste en Europe, les ministres ont discuté de l’état d’avancement des activités convenues dans le Programme D’Action 1992. Ce programme, établie à Dublin en juin 1990, comprend un certain nombre de mesures spécifiques visant à élargir la coopération existant entre les Etats membres dans le domaine de la lutte contre le terrorisme et le trafic des stupéfiants ainsi que celle en matière de criminalité organisée. Le Programme d’Action a été élaboré dans le contexte de l’abolition des frontières intérieures au 1<sup>er</sup> janvier 1993.

Les ministres ont également décidé de désigner dans les Etats membres des organes de contact dans le domaine du maintien de l’ordre public avec lesquels il sera possible de prendre contact assez rapidement si de désordres publics spécifiques prennent une dimension internationale. Les Ministres ont souligné à cet égard le droit fondamental de manifester.“ *Ibid.*, p.34

<sup>49</sup> Helmut Kohl, *Our Future in Europe*, Konrad Adenauer Stiftung and Europa Institute, Edinburgh, 1991, p. 16, quoted in Rachel Woodward, *Establishing Europol*, op.cit., p. 6

Germany was already at that time fostering Europol much more than other countries.<sup>50</sup> The creation of an EC-level policing body was formally put forward by the German delegation to the European Council meeting in Luxembourg in June 1991. Rachel Woodward claimed, that some Member States at the European Council were reported to have expressed surprise at the proposals as Helmut Kohl was even advocating for a European FBI. But this might also have been part of Kohl's political strategy: by taking quite an extreme position in advocating a European FBI, and in using surprise tactics, the German delegation scored an advantage against other Member States which were more reluctant about this idea.<sup>51</sup>

The Ministers accepted the proposal insofar as they asked for a detailed study of the potential for Europol to be undertaken and submitted to ministers before the 1991 Maastricht Council meeting.<sup>52</sup> A two phase programme was envisaged for a gradual development of Europol functions: First relay station for exchange of information and experience were to be installed until 31.12.1992. Then, in the second phase, powers to act also within the member States would be granted. The Commission and individual Member States were envisaged to be granted the right of initiative.<sup>53</sup> Furthermore it was agreed, that relevant Ministers would come forward with concrete proposals for setting up Europol and adopt appropriate preparatory and transitional measures in Maastricht in December 1991.

#### **2.1.4. Trevi “Ad Hoc Group on Europol”**

The work on the establishment of Europol was being carried out under the auspices of Trevi. The above mentioned report of the Trevi Ministers on Europol at their meeting in Maastricht on 3 December 1991 set out the purpose of Europol as “a central organisation to facilitate the

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<sup>50</sup> “Trevi, for instance, is important in this context. Germany seems to be adopting a more positive attitude than we are to Europol, believing that it can be used as a positive force to combat international drug crimes in particular. My impression is that Germany wants Europol to have a dedicated operational arm dealing with international drug traffickers ; Britain, by contrast, seems to be dragging its feet. We say that we do not mind it having a role as an international intelligence gathering service--but no more. We should emulate the German approach to Europol.” Barry Sheerman, House of Commons Hansard Debates for 23 Jun 1992, Column 203 <http://www.publications.parliament.uk/pa/cm199293/cmhansrd/1992-06-23/Debate-1.html> Retrieved on 3. September 2009

<sup>51</sup> Rachel Woodward, *Establishing Europol*, op.cit., p. 7

<sup>52</sup> “Treaty commitment to full establishment of a Central European Criminal Investigation Office (...) by 31.12.1993 at the latest. Details to be laid down by unanimous decision of the Council” Conclusions of the Luxembourg European Council (28 and 29 June 1991), ANNEX 1, Future Common Action on Home Affairs and Judicial Policy, 1991, p 20

<sup>53</sup> Ibid.

exchange and coordination of criminal information, and the development of intelligence between member States in respect of crime extending across the borders of Member States, whether originating outside Europe or not.”<sup>54</sup> It was agreed that, as a first step, a Europol drugs unit would be set up to facilitate the co-ordination of information and intelligence on drugs misuse and trafficking in member states.<sup>55</sup>

The Ad Hoc Group on Europol (Ad Hoc Group) – charged with this task - set up in June 1992 and took over part of Trevi 92 and Trevi III’s work. At this time it was far from clear in which direction Europol should develop into. Another issue was cooperation with Interpol, and how it should be conducted.<sup>56</sup> Even if most of the country agreed that the Police Office should function as a platform to exchange information, the pace went too fast for some Member States like Great Britain.<sup>57</sup>

The Ad Hoc Group eventually drafted the text of the Ministerial agreement on Europol which was agreed upon on 1 December 1992. The Ministerial agreement was intended to legitimise Europol until a Convention had been signed and then agreed upon in each country’s parliament. Progress on Europol was proving slow for the 12 Member States which was mainly due to the unanimity procedure. Even though the Member States agreed on a common goal – the setting up of Europol – many issues remained to be discussed; like where should the headquarters be located or to which nationality should the Director have, to name just a few.<sup>58</sup>

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<sup>54</sup> The development of Europol, report from the Trevi Ministers to the European Council in Maastricht, December 1991, quoted in Tony Buyan, *Trevi, Europol and the European state*, op.cit, p. 6

<sup>55</sup> Peter Lloyd, *House of Commons Hansard Debates for 23 Jan 1992*, op.cit Column 320

<sup>56</sup> “I assure the hon. Member for Sedgefield that there is no question of Europol cutting across Interpol. That is the plain view of the vast majority of European Community members. However, we see a case for a criminal intelligence gathering operation between the 12 Member States, aimed at international organised crime, primarily drug trafficking.” Kenneth Clarke, *House of Commons Hansard Debates for 15 Mar 1993*, Column 1116,

<http://www.publications.parliament.uk/pa/cm199293/cmhansrd/1993-03-15/Debate-14.html>

Retrieved on 3. September 2009

<sup>57</sup> “The important task is not to add another European body for information exchange, but to concentrate our efforts on focusing and enhancing the existing co-operation. It is far from clear which of those tasks Europol is primarily meant to undertake. It would be right for the Home Secretary at this stage to say a word or two about Europol. It must be said that its beginnings have been rather inauspicious. There were disagreements over its location and when it was to become operational. Interpol has proposed to incorporate it within its own European secretariat, as a part of Interpol which will have separate functions. It will, in some senses, be a separate bureau but it will nevertheless still be under the aegis of Interpol.”, Tony Blair, *House of Commons Hansard Debates for 27 Jan 1993*, Column 1100,

<http://www.publications.parliament.uk/pa/cm200506/cmhansrd/vo060126/debtext/60126-27.htm>

Retrieved on 3. September 2009

<sup>58</sup> “Progress on Europol is still proving irritably slow for all 12 Member States. The delay illustrates the dangers of proceeding by unanimity. All 12 Member States want Europol, all want to begin with a drug information unit



**Figure 1 Trevi organigram** <sup>59</sup>

This top-down approach (consent by the Ministers, who charge the bureaucracy) is why Mathieu Deflem thinks that Europol is distinctively different from other international police organisations. It was not formed from the bottom-up by police professionals but was the result of a top-down decision by the political and legislative bodies of the European Union. The activities of Europol are therefore more distinctly legally framed and bound to certain well-defined areas of investigation. He therefore defines Europol not a supranational police force but as an international cooperative network that coordinates the activities of national police institutions in the various EU Member States via a central headquarters.<sup>60</sup>

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and all want Europol to start on 1 January 1993. We managed to reach agreement on the nationality of the director-general, but we failed to reach a unanimous conclusion about where the headquarters should be located. So scrupulous are the protections built into the procedure to satisfy sensitive Members of Parliament here and in other Parliaments who are concerned that sovereignty might be given away that until all 12 Member States agree on where the extremely important organisation should be located and until all 12 Ministers have given their consent, returned to their Parliaments and received approval, the organisation cannot be set up. If that process does not underline the extent of the security to protect our sovereignty and reassure those concerned about Community competence, few other factors will.“, Kenneth Clarke, *House of Commons Hansard Debates for 15 Mar 1993*, Column 1116, *op.cit.*

<sup>59</sup> Johannes Peek 'International Police Cooperation Within Justified Political and Judicial Frameworks: Five Thesis on TREVI' in Jörg Monar & Roger Morgan (eds.) 'The Third Pillar of the European Union', European Interuniversity Press, Brussels 1994, pp201-207

<sup>60</sup> Mathieu Deflem, *Europol and the Policing of International Terrorism: Counter- Terrorism in a Global Perspective*, Justice Quarterly Volume 23 Number 3, September 2006, p. 340

### **2.1.5. Legal Background**

Trevi's work was mainly based on two documents: the "Palma Document" (Madrid, June 1989), the "Declaration of Trevi Group Ministers" (Paris, December 1989). The "Programme of Action" (June 1990) and the Coordinators report on the progress on the Palma Document (Edinburgh, 1992) reflected on the first two documents.

The "Palma document" was drafted by the Coordinators Group and agreed upon at the EC Council meeting in Madrid in 1989. It was based on the instruction of the Rhodes European Council to propose measures for linking the free movement of persons and security together once controls at the internal borders had been abolished in 1988. In 1989 the same group put forward a proposal for a work programme: the "Palma document". It advocated for a more coordinated approach to the different aspects of cooperation on Justice and Home Affairs. The European Council, feeling that free movement of persons was a priority for 1992, endorsed that document's conclusions and instructed the coordinators' Group, at the instigation of the General Affairs Council, "to spare effort to ensure that the programme of work proposed in the Palma document was completed as planned."<sup>61</sup> With this document, Trevi's work was for the first time put in the overall context of the emerging policies on policing, law, immigration and asylum, and legal systems which underpin the European state.

The Declaration of Trevi Ministers, agreed in 1989, spoke of the 'new requirements' with the creation of a "European area without internal borders" and the need to cooperate on: fighting terrorism, international crime, narcotics and illegal trafficking of every sort“

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<sup>61</sup> Europa, Rapid Press Release, DOC/89/1, from 27/06/1989,  
<http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/89/1&format=HTML&aged=1&language=EN&guiLanguage=en>  
Retrieved 28.April 2008

## **2.2. Justice and Home Affairs in the Maastricht Treaty**

Cooperation in Justice and Home Affairs was incorporated as matters of common interest in Article K, Title VI of the Maastricht Treaty. Willy Bruggeman thinks that putting the Third Pillar in place was a painstaking task. This was due to a number of reasons, such as the principle of sovereignty, national (often different) penal laws and the fact that provisions for international co-operation originate mainly from the 1950s.<sup>62</sup> The treaty was signed on 7<sup>th</sup> February 1992, in Maastricht and entered into force on 1<sup>st</sup> November 1993 during the Delors Commission. It led to the creation of the European Union and introduced the three pillars: The European Communities pillar, the Common Foreign and Security Policy (CFSP pillar) and the Justice and Home Affairs pillar.

Rachel Woodward sees the Treaty's importance to European police cooperation in its horizontal coordination of customs, policing, judicial and immigration issues, which until then had been dealt with by separate groups and agreements at the intergovernmental level. The new policy area established a legislative and administrative framework for Europol and formalized much of the work of Trevi.<sup>63</sup>

Title VI, Article K.1. introduced the following areas as matters of common interest:

1. asylum policy;
2. rules governing the crossing by persons of the external borders of the Member States and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries:
  - a) conditions of entry and movement by nationals of third countries on the territory of Member States;
  - b) conditions of residence by nationals of third countries on the territory of Member States, including family reunion and access to employment;

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<sup>62</sup> Willy Bruggeman, *Europol and the fight against organised crime in the EU*, EPC Issue paper 6, 21-11-2001 <http://www.epc.eu/en/ce.asp?TYP=CE&LV=177&see=y&t=42&PG=CE/EN/detail&l=3&AI=138>  
Retrieved 03. June 2008

<sup>63</sup> Rachel Woodward, *Establishing Europol*, op.cit., p. 15

- c) combating unauthorized immigration, residence and work by nationals of third countries on the territory of Member States;
- 4. combating drug addiction in so far as this is not covered by 7 to 9;
- 5. combating fraud on an international scale in so far as this is not covered by 7 to 9;
- 6. judicial cooperation in civil matters;
- 7. judicial cooperation in criminal matters;
- 8. customs cooperation;

Para 9 finally defined police cooperation as “preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol).“

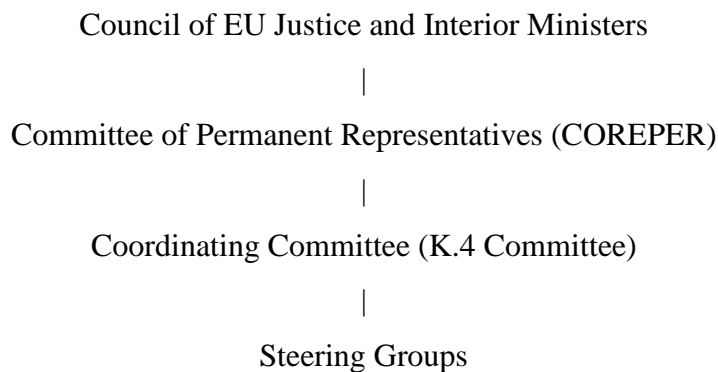
Europol was the first organisation to be created within the Third Pillar, under which the police and customs were able co-operate for the purposes of preventing and combating the listed crimes. A supplementary declaration appended to the Treaty referred to support, analysis of national prevention programmes, training and research and development (more below).

### **2.2.1. From Trevi to Cats**

By the Maastricht Treaty, Trevi was integrated into the EU structure under the new name “Co-ordination Committee for Justice and Internal Affairs (K-4)” Later the group was named “Cats” after the French acronym for “Comité de l'Article Trente-Six” under the Treaty of the European Union.

Its functions expanded to regulation proposals over law enforcement and intelligence issues, including the interception of communications, information databases and privacy. The Coordinating Committee was accountable to the Committee of Permanent Representatives (Coreper) and to the Council of Ministers of Justice and Home Affairs (JHA Council). Three steering groups reported to the Coordinating Committee: the Immigration and Asylum Group; the Security, Police and Customs Cooperation Group; and the Judicial Cooperation Group. The preparatory work was done in these working groups. Monica den Boer claims, that the new structure had established a central form of coordination, but “it has also introduced more

bureaucracy and more levels of decision-making, thereby turning the rate of progress into a relatively slow one.”<sup>64</sup>



### **2.2.2. Declaration on Police Cooperation**

The Declaration on police cooperation, which is appended to the Maastricht Treaty, stated that the Member States were willing to envisage the adoption of practical measures and the exchange of information and experience in the following functions:

- support for national criminal investigation and security authorities, in particular in the coordination of investigations and search operations;
- creation of data bases;
- central analysis and assessment of information in order to take stock of the situation and identify investigative approaches;
- collection and analysis of national prevention programmes for forwarding to Member States and for drawing up Europe-wide prevention strategies;
- measures relating to further training, research, forensic matters and criminal records departments.

The Declaration finished by stating that “Member States agree to consider on the basis of a report, during 1994 at the latest, whether the scope of such cooperation should be extended.” It committed the Member States to explore ways of coordinating their national investigation

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<sup>64</sup> Monica den Boer, *Justice and Home Affairs Cooperation in the European Union: Current Issues*, <http://aei.pitt.edu/798/01/3.htm>, Retrieved 05.May 2008



and search operations which have an international dimension, and enabled them to create new data bases and to provide a central analytical facility for planning criminal investigations. According to Bruggeman<sup>65</sup> the Declaration did in fact “not extend to executive powers by a long shot.”

Interestingly enough, it was the European Parliament remarking that “Europol's remit should not only include combating drug trafficking but the whole field of organized crime, including economic crime and crime against property and that in the future, in addition to combating drugs, it should primarily concentrate on organized international financial and fiscal crime and combating crimes against the EC, such as subsidies fraud, an area in which Europol should have exclusive responsibility”<sup>66</sup>

### **2.2.3. Commission allowed to join, EP kept outside**

Article K.4 enforced the role of the Commission, which “shall be fully associated with the work in the areas referred to in this Title.” But even if its powers were still far from those under the First Pillar, it (together with the Presidency) was now supposed to regularly inform the European Parliament of discussions about Justice and Home Affairs matters (Article K.6) and, more importantly, was given the right of initiative in the policy area.

The role of the European Parliament improved slightly with Article 6 of the Maastricht Treaty: “The European Parliament receives the right to ask questions of the Council or make recommendations to it. Each year, it shall hold a debate on the progress made in implementation of the areas referred to in this Title.” But these new provisions did not give the European Parliament an effective mean of democratic control in Justice and Home Affairs matters. This was mainly due to the intergovernmental nature of cooperation. Furthermore the European Parliament could not force the Commission or the Presidency to inform it, which is an essential precondition for effective control available in time.<sup>67</sup> The European Parliament heavily criticized the intergovernmental approach and its disadvantages as “a democratic

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<sup>65</sup> Willy Bruggeman, *Europol and the fight against organised crime in the EU*, op.cit.

<sup>66</sup> European Parliament, Report of the Committee on Civil Liberties and Internal Affairs on Europol, 26 November 1992

<sup>67</sup> Joerg Monar, *Democratic control of Justice and Home Affairs: The European Parliament and the National Parliaments*, in Roland Bieber and Joerg Monar (Eds.), *Justice and Home Affairs in the European Union. The Development of the Third Pillar*, op.cit., p. 246 and 247

deficit, disruption of relations between the Community Institutions and disruption of relations between citizens and national authorities and whereas it impedes proper parliamentary and judicial supervision”<sup>68</sup> A point which will be further discussed below.

#### **2.2.4. Accountability in the Maastricht Treaty**

Before that, neither the European Commission nor the European Parliament was involved in the Trevi structure. As Trevi was “played” strictly intergovernmental<sup>69</sup>, the line of accountability was the Council of Ministers structure. It was seen as a forum for discussion and co-operation between the Member States and preferred to be kept outside the European framework. This was also shown in a discussion in the British House of Commons, where the Secretary of State for Foreign and Commonwealth Affairs, Douglas Hurd, insisted on the responsibilities of national legislators: “The point I am trying to make in this part of my speech and, indeed, in our negotiations is that it is perfectly possible and often better for that kind of European working together to be based on co-operation between Governments, and therefore based on responsibility to national Parliaments, rather than under the structure of the Treaty of Rome.”<sup>70</sup>

The various working parties set up over the years were working separately and drafting their reports for ministers sitting in different combinations. In fact neither the European Parliament nor the national Parliaments were to exercise any control over the measures taken in that context, owing to the very nature of the cooperation itself. It was criticised, that the deliberations of Trevi and its Working Groups might even be beyond the reach of democratic questioning and debate, and only determined by state officials, police officers, security and intelligence agencies. These state officials were to present their reports to their Ministers, who

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<sup>68</sup> European Parliament, Report of the Committee on Civil Liberties and Internal Affairs on Europol, 26 November 1992

<sup>69</sup> “We co-operate on a totally intergovernmental basis over the issue of policing, and have done for a long time. The Trevi meetings have been conducted for a long time. The most important part of the Trevi process is the operational level and the co-operation that must develop between 12 police services in a community such as the European Community.” Kenneth Clarke, *House of Commons Hansard Debates for 15 Mar 1993*, Column 1116, op.cit.

<sup>70</sup> Douglas Hurd, *House of Commons Hansard Debates for 21 Nov 1991*, Column 443  
<http://www.publications.parliament.uk/pa/cm199192/cmhansrd/1991-12-18/Orals-1.html>  
Retrieved 3. September 2009

– in turn –reported to the governments. Afterwards national parliaments may have been– or may have not been – informed, depending on each country’s practice.

This was defended and downplayed by the British Home Secretary:

*“It does not need any safeguards. You have to remember what Trevi is. Trevi is merely a gathering together of the Ministers of the Interior of the EC countries to give, hopefully, political impetus to various plans or closer policing co-operation. That is all it is. It is not an executive body. Therefore, accountability is from the individual Ministers of the Interior to their own governments, and there is no need for the body as a whole to be thought of as responsible to any other organisation.”<sup>71</sup>*

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<sup>71</sup> Douglas Hurd, *Practical Police Cooperation in the European Community*, Home Affairs Select Committee, 1989-90, HC 363-II, pp 162-163

### **2.3. The “Area of Freedom, Security and Justice” in the Treaty of Amsterdam**

With the entry into force of the Treaty of Amsterdam, on the 1<sup>st</sup> of May 1999, the cooperation in the fields of Justice and Home Affairs was re-organised, setting as its objective the establishment of an area of freedom, security and justice. This new integration objective was strengthened through the introduction of a range of new policy objectives, the communitarisation of large parts of the former ‘Third Pillar’, the incorporation of the Schengen acquis, and improved judicial control.

This was followed by the finalisation of new and more effective working structures within the Council of the European Union and the decision of the Commission to set up a new Directorate-General for Justice and Home Affairs. The European Council in Tampere, in October 1999, provided for a significant set of new guidelines for the areas of asylum and migration, judicial cooperation and the fight against cross-border crime.

#### **2.3.1. Goals set by the Treaty**

Title VI of the Treaty of Maastricht was replaced by the new wording of an “area of freedom, security and justice”:

*“Without prejudice to the powers of the European Community, the Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial co-operation in criminal matters and by preventing and combating racism and xenophobia.”<sup>72</sup>*

This objective was to be achieved by combating crime, terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud by enhancing cooperation in this field. “Closer co-operation between police forces,

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<sup>72</sup> Article K1, Treaty of Amsterdam

customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol) (...), closer co-operation between judicial and other competent authorities of the Member States (and) approximation, where necessary, of rules on criminal matters in the Member States”<sup>73</sup> where named as the means to achieve this goal.

### **2.3.2. Police Cooperation under the Amsterdam Treaty**

Article K2 (1) listed the common actions in the field of police co-operation:<sup>74</sup>

- operational co-operation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;
- the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data;
- co-operation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research;
- the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.

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<sup>73</sup> Ibid.

<sup>74</sup> Article K2, Treaty of Amsterdam

## **2.4.           Implementing JHA concepts with Action Plans**

Article 2 of the Treaty of Amsterdam referred rather vaguely to the assurance of the free movement of persons and “appropriate measures” with respect to external border controls, asylum, immigration and the prevention and combating of crime. Later on, the “Action Plan on how best to implement the provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice”<sup>75</sup> of December 1998 was adopted on the basis of a Commission Communication.<sup>76</sup>

This division of labour is symptomatic for the European Union: Treaties provided guiding principles in Justice and Home affairs, the real “substance” – especially with regard to Europol – was created by EU Action Plans and Programs, like the Vienna Action Plan, the Tampere Program or the Hague Program.

There is no specific chapter for the Treaty of Nice, as it brought no changes for Europol.<sup>77</sup> The Treaty of Lisbon will also not be dealt with. The Irish “No” at the referendum in June 2008 makes the future of the Lisbon Treaty and its provisions on Justice and Home Affairs more than unclear. Later chapters will specifically deal only with certain aspects of the Treaty, and the changes they might have brought.

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<sup>75</sup> Para B 14 of this Action Plan was devoted to the reference the Treaty made to Europol. It underlined, that the Treaty recognised the essential and central role Europol will play, and that it was therefore important to start to work on the implementation of these measures as soon as possible. These developments were to build on the 'acquis' of the Europol Drugs Unit which, as a precursor for the future Europol, had gained experience in areas like information exchange, technical and operational support, threat analyses and situation reports. OJ No. C 19/1 of 23.1.1999

<sup>76</sup> Communication from the Commission, *Towards an area of freedom, security and justice* COM(1998) 459, Brussels, 14.07. 1998

<sup>77</sup> Europol is actually only mentioned once in relation with Eurojust: “The Council shall encourage cooperation through Eurojust by promoting support by Eurojust for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking account, in particular, of analyses carried out by Europol”, Article 31 (2), Treaty of Nice

## 2.4.1. Vienna Action Plan

The Vienna Action Plan of 1998 defined the “area of freedom” not only as an opportunity for the free movement of persons (according to the Schengen model) but also as an obligation to protecting fundamental rights and combating all forms of discrimination. Respect for private life and, in particular, the protection of personal data, was identified as a pivo element.<sup>78</sup> The concept of an “area of security” includes combating crime, in particular terrorism, trade in human beings, crimes against children, drug trafficking, arms trafficking, corruption and fraud.<sup>79</sup> The area of justice was understood to guarantee European citizens equal access to justice and to promote cooperation between the judicial authorities. On civil matters, judicial cooperation was aimed at simplifying the environment of European citizens. On criminal matters, it was to strengthen the coordination of prosecution and provide a common sense of justice by defining minimum common rules for criminal acts, procedures and penalties.<sup>80</sup>

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<sup>78</sup> “A wider concept of freedom: The wider concept of freedom embodied in the Treaty of Amsterdam aims to give freedom” a meaning beyond free movement of people across internal borders. It is also freedom to live in ,a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power (nationally, at the level of the Union and beyond) to combat and contain those who seek to deny or abuse that freedom. Freedom must also be complemented by the full range of fundamental human rights, including protection from any form of discrimination.”, *Ibid.* p.5

<sup>79</sup> “The full benefits of any area of freedom will never be enjoyed unless they are exercised in an area where people can feel safe and secure. Looking at the new Treaty it is clear that the agreed aim is not to create a European Security area in the sense of a common territory where uniform detection and investigation procedures would be applicable to all law enforcement agencies in Europe in the handling of security matters. Nor do the new provisions affect the exercise of the responsibilities incumbent upon Member States to maintain law and order and safeguard internal security.

Amsterdam rather provides an institutional framework to develop common action among the Member States in the in dissociable fields of police cooperation and judicial cooperation in criminal matters. The declared objective is to prevent and combat crime at the appropriate level, ‘organised or otherwise, in particular terrorism trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud’ “, *Ibid.*, p 7

<sup>80</sup> “Judicial systems within the European Union have developed gradually and over a very long period of time. An independent and well-functioning judiciary is one of the backbones of our shared tradition of Rule of Law. As historic experiences vary among Member States, it is hardly surprising that judicial systems differ substantially both in terms of material content and procedural rules. But we cannot escape the fact that the obstacles and difficulties this creates are hard for Union residents to understand, especially when they are supposed to enjoy a frontier-free area, now also an area of freedom, security and justice, in which to move freely and live their lives. This also applies to firms operating in a single market.(...)

It is in the framework of the consolidation of an area of freedom, security and justice that the concept of public order appears as a common denominator in a society based on democracy and the rule of law. With the entry into force of the Amsterdam Treaty, this concept which' has hitherto been determined principally by ,each individual Member State will also have to be assessed in terms of the new European area. Independently of the responsibilities of Member States ft)r maintaining public order, we will gradually have to shape a "European public order" based on an assessment of shared fundamental interests.” *Ibid.*, pp. 9

But the Vienna Action Plan was still somehow reluctant on the topic of police cooperation. It even stated that the Amsterdam Treaty - although aimed at developing common action in the fields of police and criminal justice cooperation and offering enhanced security to Union citizens - did not pursue the intention to create a 'European security area' in the sense of uniform detection and investigation procedures. And it provided that the Member States responsibilities to maintain law and order should not be affected by the new provisions of the Amsterdam Treaty.

## **2.4.2. Tampere Programme**

The goal of constructing an "Area of Freedom, Security and Justice" across the Union was agreed at the Tampere EU Summit of 1999. The Tampere programme was a five-year agenda that came to an end in 2004. It understood the area of freedom, security and justice as something that "can be enjoyed in conditions of security and justice accessible to all"<sup>81</sup> in which "criminals must find no ways of exploiting differences in the judicial systems of Member States"<sup>82</sup> and "people have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime."<sup>83</sup>

Article 2 (2) focused at the co-operation through Europol and set a number of goals to be achieved within a period of five years after the date of entry into force of the Treaty of Amsterdam:<sup>84</sup>

- enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity;
- adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and co-ordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime;

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<sup>81</sup> Tampere Conclusions, Council document SN 200/99, Para 2

<sup>82</sup> Ibid. Para 5

<sup>83</sup> Ibid. Para 6

<sup>84</sup> Article K2, Treaty of Amsterdam



- promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close co-operation with Europol;
- establish a research, documentation and statistical network on cross-border crime.

And for the first time, the Commissions Communication “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”<sup>85</sup> raised a very important question regarding the legal framework of Europol:

Should it be changed “to make it (Europol) truly operational and convert it into a Union agency, financed from the Community budget”? The Communication supported this idea by mentioning that “there will have to be greater democratic and judicial control of its (Europol’s) activities to correspond to this greater effectiveness.”<sup>86</sup>

### **2.4.3. The Hague Programme**

When the Tampere Programme ran out in 2004 (it had been tied to the so-called “transitional period” provided for by the Amsterdam Treaty which ended in April 2004) there was therefore a general feeling that a successor programme was needed.

Therefore the Commission proposed a follow-up programme, which was intensely discussed under the Dutch Presidency. After considerable changes to the original proposals, the Council agreed on the programme on the 5<sup>th</sup> November 2004 and named it after the Dutch capital. The main novelty of The Hague Programme was the emphasis on “operational” measures. It explicitly stated, that one of its aims was to “fight organised cross-border crime and repress the threat of terrorism, to realise the potential of Europol and Eurojust, (and) to carry further the mutual recognition of judicial decisions (...)”<sup>87</sup>

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<sup>85</sup> Communication from the Commission to the Council and the European Parliament, *Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations*, COM(2004) 401 final, Brussels, 2.6.2004

<sup>86</sup> Ibid. p. 14

<sup>87</sup> The Hague Program, 14292/1/04 REV 1, ANNEX I, Presidency Conclusions, Brussels, 4/5 November 2004, p. 12

### 2.4.3.1.

### Principle of availability

The Hague Programme aimed in particular at boosting operational co-operation between national law enforcement agencies with regard to the principle of availability. This principle meant that

*“throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement of ongoing investigations in that State.”<sup>88</sup>*

The principle of availability was subject to the following key conditions:

- the exchange may only take place in order that legal tasks may be performed;
- the integrity of the data to be exchanged must be guaranteed;
- the need to protect sources of information and to secure the confidentiality of the data at all stages of the exchange, and subsequently;
- common standards for access to the data and common technical standards must be applied;
- supervision of respect for data protection, and appropriate control prior to and after the exchange must be ensured;
- individuals must be protected from abuse of data and have the right to seek correction of incorrect data.

On-line access for Europol should be granted (as well as reciprocal access) to national databases and central EU databases such as the SIS. The principle of availability was to be applied from 1 January 2008. In order to meet the deadline, the Commission tabled a proposal for a third pillar legal instrument.<sup>89</sup> Allowing Europol to obtain information under the principle of availability within the scope of its mandate would boost its effectiveness.<sup>90</sup> And it

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<sup>88</sup> “(...) which means that, The Hague Programm, op.cit. p. 27

<sup>89</sup> Proposal for a Council Framework Decision *on the exchange of information under the principle of availability*, Commission, COM(2005) 490 final, Brussels, 12 December 2005

<sup>90</sup> *Ibid.*, p. 4

would provide a standardised procedure at EU level to request and obtain information and allow direct information exchange between authorities without the intervention of National Units or contact points<sup>91</sup> via online access to electronic databases.<sup>92</sup>

The Commission's proposal limited the grounds for refusal of provision of information:<sup>93</sup>

- (a) to avoid jeopardising the success of an on-going investigation;
- (b) to protect a source of information of the physical integrity of a natural person;
- (c) to protect the confidentiality of information at any stage of processing;
- (d) to protect the fundamental rights and freedoms of persons whose data are processed under this Framework Decision

Article 6 asked the Member States to “ensure that information shall be provided to equivalent competent authorities of other Member States and Europol, under the conditions set out in this Framework Decision, in so far as these authorities need this information to fulfil their lawful tasks for the prevention, detection or investigation of criminal offences.”

The Member States tabled a counter-proposal, the Prüm Initiative, which is still under discussion. An agreement was signed on 27 May 2005 by Germany, Spain, France, Luxembourg, Netherlands, Austria, and Belgium at Prüm (Germany). This agreement was based on the above discussed principle of availability. It could enable the participants to exchange all data regarding DNA, fingerprint and Vehicle Registration Data of concerned persons and to cooperate against terrorism. This treaty is becoming known as the Schengen III Agreement. Certain provisions were adopted into EU law for all EU states Members in June 2008, as Council Decision with its provisions falling under the third pillar of the EU<sup>94</sup>. Some authors even wonder whether the Prüm Initiative is in fact a realisation of the principle of availability as envisaged by The Hague Programme<sup>95</sup>. Europol, however, is not mentioned once in the proposal while it seems as if The Hague Programme wanted Europol to profit from the principle of availability and is accordingly involved in the Commission's proposal.

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<sup>91</sup> Ibid., p. 3

<sup>92</sup> Ibid. Article 9

<sup>93</sup> Ibid., p. 20, Article 14 (1)

<sup>94</sup> e.g. Council Decision on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 2008/615/JHA of 23 June 2008; and Council Decision on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, 2008/616/JHA, of 23 June 2008

<sup>95</sup> Florian Geyer, *Taking Stock: Databases and Systems of Information Exchange in the Area of Freedom, Security and Justice*, CEPS challenge Research Paper No. 9, May 2008, p 10

#### 2.4.3.2.

#### Police cooperation in the Hague

##### Programme

With regard of the fight against terrorism, The Hague Declaration asked again for enhanced use of Europol and Eurojust and re-emphasised the importance of Europol in the field of police cooperation. It urged the Member States to enable Europol in cooperation with Eurojust to play a key role in the fight against serious cross-border crime and terrorism by<sup>96</sup>

- ratifying and effectively implementing the necessary legal instruments by the end of 2004<sup>97</sup>;
- providing all necessary high quality information to Europol in good time;
- encouraging good cooperation between their competent national authorities and Europol.

Furthermore it asked Europol to replace its “crime situation reports” by yearly “threat assessments” on serious forms of organised crime, based on information provided by the Member States and input from Eurojust and the Police Chiefs Task Force from the 1<sup>st</sup> January 2006. These “threat assessments” should be used by the Council to establish yearly strategic priorities, which serve as guidelines for further action and could be seen as a next step towards intelligence-led law enforcement at EU level.

Europol was by the Member States designated as central office of the union for euro counterfeits within the meaning of the Geneva Convention of 1929. And The Hague Declaration asked Europol and Eurojust to encourage the use of – and the participation in – Member States joint investigation teams (JIT). As experience in the Member States with JITs was limited, each Member States was supposed to designate a national expert. This establishment was also supposed to encourage the use of such teams and the exchange of experience on best practice.

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<sup>96</sup> *The Hague Program*, op.cit., p. 31

<sup>97</sup> Europol Protocols: the Protocol amending Article 2 and the Annex to the Europol Convention of 30 November 2000, OJ C 358 13.12.2000, p. 1, the Protocol on the privileges and immunities of Europol, the members of its organs, its Deputy Directors and its members of 28 November 2002 OJ C 312 16.12.2002, p.1 and the Protocol amending the Europol Convention of 27 November 2003, OJ C 2 6.1.2004, p. 3. The Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States, OJ C 197, 12.7.2000, p. 1 and its accompanying Protocol of 16 October 2001 OJ C 326, 21.11.2001, p. 2 and Framework Decision 2002/465/JHA of 13 June 2002 on Joint Investigation Teams, OJ L 162, 20.6.2002, p. 1.

### **2.4.3.3.**

### **Cooperation with Eurojust**

The Hague Programme mentioned that effective combating of cross-border crime and terrorism requires the cooperation and coordination of investigations, and – if possible – concentrated prosecutions by Eurojust in cooperation with Europol.

Therefore it urged the Member States to

- effectively implement the Council Decision on Eurojust by the end of 2004<sup>98</sup> with special attention to the judicial powers to be conferred upon their national members; and
- ensure full cooperation between their competent national authorities and Eurojust.

But while asking Eurojust to make maximum use of the cooperation agreement with Europol and continue cooperation with the European Judicial Network and other relevant partners, its role was cut down significantly. The establishment of a European Public Prosecutor's Office, which was mentioned as an objective in earlier drafts, was removed entirely from the final version of the Programme.

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<sup>98</sup> Council Decision setting up Eurojust with a view to reinforcing the fight against serious crime .of 28 February 2002, 2002/187/JHA, OJ L 63, 6.3.2002, pages 1-3

## **2.5. Conclusion**

As we have seen in this chapter, it took a relatively long time span until Europol became operationally in 1999. Police cooperation was until then based on informal gatherings and ad-hoc working groups. The legal precondition for the agency was the establishment of the third pillar which was done by the Maastricht Treaty.

Member States realised that organised crime could not be faced by one State on its own; that terrorism and drugs posed a threat too serious to be faced by one single player. As a consequence, they installed an expert system to cope with the problems. But the cumbersome slowness in which Europol was created, and the reluctance with which its additional protocols were ratified in the parliaments of the Member States also indicate a certain reluctance to grant the agency too much powers.. In the end it was Germany, with Chancellor Kohl, who strived for the agency. Europol was forged on the anvil of “Realpolitik”. The opposing ideas of the European Union were reflected by Europol and its convention.

As I will explain in the next chapter, the set-up of Europol is quiet complex. The agency actually consists of two different bodies: the “European” part with international staff and the other, intergovernmental part with the Liaison Office network and national units. This factual separation allows the Member States to either fully use Europol and its resources to tackle crime; or to actually bypass the international staffers by simply using the Liaison Office network to exchange information only bilaterally.

### **3. Europol – The European Police Office**

The political framework of Europol as a body within the structures of the EU creates certain opportunities that other international police organizations lack. As Europol's mandate is legally specified, the organization has a clearly defined and limited field of operations. Other international police organizations – e.g. like Interpol - have often experienced problems in coming to terms among the many participating police agencies about the proper boundaries of their law enforcement objectives and activities, because the legal systems and police traditions of countries vary considerably.<sup>99</sup>

Should Europol now purely be used as an organisation gathering, analysing and distributing information? Should it, in addition to an Intelligence Agency, also be an operational coordinator and a platform for new initiatives? Do the Member States want Europol to deal with serious crime only, or should it also take upon all law enforcement tasks, such as public order? And do the Member States want Europol to be a mainly police organisation or should other services such as customs and intelligence services also be included?<sup>100</sup> Those questions were also posed when a possible re-organisation of Europol was discussed along with the need for a new legal basis for the agency.

#### **3.1. From Convention to Council Decision**

From 12 to 14 January 2006, at the Justice and Home Affairs Informal Ministerial Meeting, the Austrian Presidency proposed to hold a discussion on the framework and objectives for the further development of Europol. A “High Level Conference on the Future of Europol”, held in Vienna on 23 and 24 February 2006, aimed at continuing the discussion held at the Informal JHA Council. The role of Europol in the Area of Freedom, Security and Justice;

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<sup>99</sup> Mathieu Deflem, (2006). *Global rule of law or global rule of law enforcement? International police cooperation and counter-terrorism*, The Annals of the American Academy of Political and Social Science, 603, 2006, pp. 240–251

<sup>100</sup> Based on Ellen de Geest, *Friends of the Presidency: Future of Europol*, Room document Friends of Presidency, Federale Politie Belgium to Austrian Presidency of the Friends of the Presidency concerning the Future of Europol, CGI-EDG/2006/0320-01, Meeting of 16th March 2006

Europol's operational work from the starting days in 1999 until today and beyond; and the potential value of cooperation via Europol was discussed.<sup>101</sup>

It was agreed that Europol needs better access to information – especially with regards to the principle of availability – and even the creation of a system to make Member States visible which do not supply information was discussed.<sup>102</sup>

The reluctance of some Member States to share information was linked to the difference in legal background that “still creates certain problems with regard to mutual confidence and trust. Some information is still not supplied to Europol because the potential providers in the Member States do not know what will happen with that information at Europol.”<sup>103</sup>

Surprisingly enough, the “High Level Conference on the Future of Europol” agreed that the present legal framework allows for sufficient parliamentary control and that democratic supervision was hence guaranteed. It is characteristic that the conference which was initiated by the European Council still works strictly in the conceptual framework of intergovernmentalism.

The high level conference agreed that “*a careful* (emphasis added) widening of the mandate would be in the interest of all Europol stakeholders.”<sup>104</sup> The widening should enable Europol to become “more operational” meaning that it could more directly support joint investigation teams and deal with crimes of a particular European nature such as trafficking in human beings or counterfeiting of the Euro.<sup>105</sup> Some countries think that Europol should not focus on organised crime<sup>106</sup> but towards transborder serious crime.<sup>107</sup> However the enlargement of Europol, or a deepening of its mandate, does not necessarily contradict each other, as the process could be carried out simultaneously.

The “High Level Conference on the Future of Europol” identified cooperation with third States and International Organisations as an issue of particular relevance. The modalities for

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<sup>101</sup> Presidency to Article 36 Committee, Chairman's Summary of the High Level Conference on the Future of Europol (23 and 24 February 2006), Council of the European Union, Doc. No. 7868/06, Brussels, 29 March 2006

<sup>102</sup> Ibid. p. 4

<sup>103</sup> Ibid.

<sup>104</sup> Ibid, p. 3

<sup>105</sup> Ibid.

<sup>106</sup> Finland thinks e.g. that the mandate of Europol should cover all forms of serious international crime, see Ministry of the Interior, Finland, *Finland's comments on the options paper*, Helsinki, 24 March 2006

<sup>107</sup> Presidency to Article 36 Committee, op.cit., p. 4



Europol to enter into structured cooperation with third parties would clearly need improvement. Like the need to find a way to enable Europol to exchange information also with countries, that do not have the same data protection standards as those that are applicable within the EU.<sup>108</sup> Peter Gridling would have wished that Europol would be faster in making agreements with international partners.<sup>109</sup>

As a consequence of the “High Level Conference on the Future of Europol” in February 2006, a “Friends of the Presidency Group” was set up to prepare a options paper on the future development of Europol. In March and April 2006 three meetings of a “Friends of the Presidency” working group at the Council took place to work on the options paper. This report<sup>110</sup> was discussed on 1–2 June 2006 by the JHA Council, which concluded that work should begin on considering whether and how to replace the Europol Convention by a Council Decision. On 5<sup>th</sup> of January 2007 the Commission tabled a Proposal for a Council Decision establishing the European Police Office.<sup>111</sup> Negotiations on the proposal lasted a year and a political agreement was reached on the 18<sup>th</sup> of April 2008. On the 24<sup>th</sup> of June 2008 the “Council Decision establishing the European Police Office (Europol)”<sup>112</sup> was published in the Official Journal, which will apply from 1 January 2010.

Peter Storr is the International Director at the Home Office and the United Kingdom member of the Article 36 Committee (United Kingdom was also a member of the Friends of the Presidency Group). In a report to the House of Lords, he gave evidence, that “the way in which Europol was originally structured was inflexible and rather bureaucratic. It meant that if there were new developments, new crime trends and new mandates for Europol, it became a rather cumbersome process for Europol to be able to change its priorities in order to take these on board.” He did not want to over-sell the Council Decision but thought that the changes were in the right direction: “They are modest changes and they reflect the fact that there are different approaches among Member States as to how Europol should be run and governed.”<sup>113</sup>

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<sup>108</sup> Presidency to Article 36 Committee, *op.cit.*, p. 3

<sup>109</sup> Peter Gridling, Head of Anti Terrorism Unit, Europol, Den Haag, 10 March 2006

<sup>110</sup> Friends of the Presidency's report to the Future of Europol, Brussels, Doc. No. 9184/1/0619, Brussels, 19 May 2006

<sup>111</sup> Proposal for a Council Decision establishing the European Police Office (EUROPOL) - consolidated text, Doc. No. 6427/08, Brussels, 14 March 2008

<sup>112</sup> Council Decision establishing the European Police Office (Europol), Doc. No. 8706/08, Brussels, 24 June 2008

<sup>113</sup> Peter Storr, quoted in *EUROPOL: coordinating the fight against serious and organised crime*, Report with Evidence of the HOUSE OF LORDS European Union Committee, 29th Report of Session 2007–08, p. 14

This perception was also shared by the authors of the House of Lords report on Europol. They think that “his caution is justified, since the changes are indeed modest—in our view, too modest.” They claimed that the transition from the Convention to the Decision was an opportunity for making important changes to the constitution and working of Europol which was not used.<sup>114</sup>

At the informal meeting of Ministers of Interior and Immigration in Dresden in January 2007, an informal Group at ministerial level with the objective to consider the future of the European area of justice, freedom and security was created. The findings and recommendations of the “Future Group” were meant to be an important contribution and a source of inspiration for the European Commission's proposal for the next multi-annual programme in the field of Justice and Home Affairs.<sup>115</sup>

In its executive summary the “Future Group” concluded that “Europol is to function as close partner and focal point for national police forces at the European level. Improving data transfers from Member States to Europol is necessary if it is to become a genuine information platform for Member States. (...) Furthermore, Europol should be, within its legal framework, increasingly used and expanded into a competence centre for technical and coordinative support.”<sup>116</sup>

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<sup>114</sup> Ibid.

<sup>115</sup> *Freedom, Security, Privacy – European Home Affairs in an open world*, Report of the Informal High Level advisory Group on the Future of European Home Affairs Policy („The Future Group“), June 2008

<sup>116</sup> Ibid. Para 7

### **3.2.            *Europol's mandate***

According to Mathieu Deflem, Europol has four main functions<sup>117</sup>:

- a) the facilitation of information exchange among the Europol Liaison Officers
- b) the supply of operational analysis in support of relevant police operations conducted by the member states;
- c) the drawing up of strategic reports ( threat assessments), and crime analyses on the basis of information supplied by police of the Member States or generated at Europol headquarters; and
- d) the offering of technical support for police investigations conducted in the EU Member States.

In reality Europol's work is framed by a formal set of documents that lays out the organization's functions and structure. And it relies on formal agreements of cooperation with the various participating police institutions, the Member States governments and formally maintains external agreements with non-EU states. This setup also poses certain restrictions to the organization's structure and capabilities as it was shown in 2004, when the contract of Europol's first Director, Jürgen Storbeck, had expired, and it took the Council of Ministers 9 months to agree on a successor.

The Council Decision establishing Europol brought an extension of Europol's mandate so that it may support Member State investigations into serious crimes that are not necessarily thought to be carried out by organised gangs. However this extension is limited by the requirement that any such investigation must at least two Member States and thus be cross border in nature.

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<sup>117</sup> Mathieu Deflem, *Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective*, Justice Quarterly Volume 23 Number 3, p.:336-359, September 2006, p. 342

### **3.2.1. Europol's objective**

According to Article 2 of the Europol Convention, the objective of Europol is to improve the effectiveness and cooperation of the competent authorities<sup>118</sup> in the Member States in preventing and combating serious international crime, where there are factual indications or reasonable grounds for believing that:

- an organised criminal structure is involved, and
- two or more Member States are affected in a way that requires a common approach by the Member States (owing to the scale, significance and consequences of the offences concerned)

The Convention defines the following forms of crime as serious international crime, and therefore within Europol's sphere of competence:

- Crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property,
- Unlawful drug trafficking
- illegal money-laundering activities,
- trafficking in nuclear and radioactive substances,
- illegal immigrant smuggling,
- trade in human beings,
- motor vehicle crime and
- the forms of crime listed in the Annex<sup>119</sup> or specific manifestations thereof.

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<sup>118</sup> "For the purposes of this Convention, "competent authorities" means all public bodies existing in the Member States, which are responsible under national law for preventing and combating criminal offences." Article 2 replaced by the 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 (2004/C 2/01), Council Act of 27 November 2003 (Official Journal 002, 06/01/2004, p. 0003)

<sup>119</sup> "Against life, limb or personal freedom:

- murder, grievous bodily injury
- illicit trade in human organs and tissue
- kidnapping, illegal restraint and hostage-taking
- racism and xenophobia

Against property or public goods including fraud:

- organized robbery
- illicit trafficking in cultural goods, including antiquities and works of art

The Council can lay down the priorities for Europol in respect of combating and prevention of serious international crime within its mandate on proposal from the Management Board.

The new framework decision moves away from this exhaustive listing of crimes, and uses a more global objective of Europol.<sup>120</sup> Europol's competence “shall cover organised crime, terrorism and other forms of serious crime (...) affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences.”<sup>121</sup>

### **3.2.2. Europol's tasks**

Article 3 of the Europol convention describes the principal tasks of Europol:

1. to facilitate the exchange of information between the Member States;
2. to obtain, collate and analyse information and intelligence;
3. to notify the competent authorities of the Member States without delay via the National Units referred to in Article 4 of information concerning them and of any connections identified between criminal offences;
4. to aid investigations in the Member States by forwarding all relevant information to the national units;
5. to maintain a computerized system of collected information containing

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- swindling and fraud<sup>62</sup>
  - racketeering and extortion
  - counterfeiting and product piracy
  - forgery of administrative documents and trafficking therein
  - forgery of money and means of payment
  - computer crime
  - corruption

Illegal trading and harm to the environment:

- illicit trafficking in arms, ammunition and explosives
- illicit trafficking in endangered animal species
- illicit trafficking in endangered plant species and varieties
- environmental crime

– illicit trafficking in hormonal substances and other growth promoters”, Annex of the Europol Convention

<sup>120</sup> Article 3, The objective of Europol shall be to support and strengthen action by the competent authorities of the Member States and their mutual cooperation in preventing and combating organised crime, terrorism and other forms of serious crime affecting two or more Member States”, Council Decision establishing the European Police Office, op.cit.

<sup>121</sup> Article 4, Council Decision establishing the European Police Office, op.cit.

6. to participate in a support capacity in joint investigation teams
7. to ask the competent authorities of the Member States concerned to conduct or coordinate investigations in specific cases

Europol is supposed to improve the cooperation and effectiveness of the competent authorities in the Member States through National Units on one hand. On the other hand it should develop specialist knowledge of the investigative procedure of the Member States; provide advice on these investigations; provide strategic intelligence for operations at national level, and prepare general situation reports.<sup>122</sup> To achieve these goals, Europol is able to receive, store, process and give meaning to personal data and intelligence forwarded by law enforcement agencies in the Member States, providing both strategy assessments and operational support to ongoing investigations. These strategic assessments are directed to the Council, the Police Chiefs Task Force and law enforcement decision makers in the Member States.<sup>123</sup>

Operational analysis is aimed at improving the understanding of the composition, structure, modus operandi and networking of crime groups. It is supposed to help the investigation teams in the Member States to achieve better coordination, to identify new lines of investigation and to collect essential material for the dismantling and further prevention of International criminal networks.

Furthermore Europol may assist the Member States through advice and research

- in the training of members of Member States competent authorities, and
- organisation and equipment of these authorities
- crime prevention methods, and
- technical and forensic police methods and investigative procedures<sup>124</sup>.

And finally Europol acts as the European Union contact point in its contacts with third States and organisations for the suppression of counterfeit euro currency.<sup>125</sup>

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<sup>122</sup> Article 3 (2) Europol Convention

<sup>123</sup> Antonio Saccone, *Combating International Crime in an Enlarging European Union: What is the Role of Europol?* Lecture in the International Seminar for Experts “Combating Terrorism and International Organised Crime in the European Union – The Hague Programme and the Role of Europol and Eurojust”, organised by the Cicero Foundation in the series ‘Great Debates’ Paris, 14 and 15 December 2006, p. 7

<sup>124</sup> Article 3(3) replaced by the Council Act of 27 November 2003 (Official Journal 002, 06/01/2004, p. 0004)

<sup>125</sup> Article 3(4) amended by the Council Act of 27 November 2003 (Official Journal 002, 06/01/2004, p. 0004)

### **3.2.3. Requests by Europol to initiate criminal investigations**

The formulation of the Europol Convention of this topic leaves room for interpretation:

“Member States should deal with any request from Europol to initiate, conduct or coordinate investigations in specific cases and should give such requests due consideration. Europol should be informed whether the requested investigation will be initiated.”<sup>126</sup> If the Member States competent authorities decide not to comply with the request, they need to inform Europol of their decision and of the reason for it, unless:<sup>127</sup>

- Doing so would harm essential national security interests; or
- Doing so would jeopardise the success of investigations under way or the safety of individuals.

Europol also needs to inform Eurojust of a request to initiate criminal investigations.<sup>128</sup>

The Council Decision establishing Europol did not change in this respect, which still enables the Member States to simply deny a request made by Europol without explaining the reasons in depth. The fact that Europol does not have any real means to order national police agencies to act again shows the limited competences of the European agency.

### **3.2.4. Annual Publications by Europol**

As one of the aims of Europol is to provide criminal intelligence the agency publishes different reports. The two most important annual reports are the “European Organised Crime Threat Assessment (OCTA)” and “EU Terrorism Situation and Trend Report (TE-SAT)”.

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<sup>126</sup> Article 3b (1), Europol Convention

<sup>127</sup> Article 3b (2), Europol Convention

<sup>128</sup> Article 3b inserted by the Council Act 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 of 28 November 2002, 2002/C 312/01, (Official Journal 312, 16/12/2002, p. 0002)

### 3.2.4.1.

### OCTA Report

The OCTA covers the EU as well as countries which a direct influence on the Member States. It is based on a multi-source approach, including law enforcement and non-law enforcement contributions, which include various European agencies as well as the private sector. The OCTA tries to close the gap between strategic findings and operational activities. It aims at identifying the highest priorities, which should then be effectively tackled with the appropriate law enforcement instruments.

OCTA reports on issues like the “General assessment of the Organised Crime groups”, “Criminal markets” or the “The Organised Crime landscape”<sup>129</sup>. In 2008 the third OCTA was presented in order to “to provide a forward looking approach to fight organised crime in a more proactive than re-active manner (and) allows the EU to develop complementary measures to countering organised crime, linking those at the ministerial and political levels with those of practitioners and law enforcement agencies who operate at the front line.”<sup>130</sup> As Director Max-Peter Ratzel underlines, the „OCTA marks a new approach to the way in which Europol and the Member States operate and it is a first step to a change of paradigm in policing” as well as it “already had a significant impact on the law enforcement community throughout Europe in terms of practices and priorities.”<sup>131</sup>

How glorious these words may sound, OCTA was also heavy criticised. Petrus van Duyne for example points out that even though according to Europol OCTA is an example of a core product of intelligence led policing and one of Europol top priorities, “one becomes curious at the meaning of ‘intelligence based policing,’ (and) the reader can at any rate deduce that in this case the phrase ‘intelligence led’ does not mean: ‘evidence based’”<sup>132</sup> His reasoning is draws on the fact, that the information on which OCTA is build is transmitted by the Member States on the basis of a questionnaire. During his research he was neither able receive one of the replies (which would still be arguable) nor a blank questionnaire itself. Furthermore Van Duyne underlines that there is in fact no “secret” OCTA version vis-à-vis the “public” OCTA version which one is able to download from the Europol website. Those who have read national “secret” threat assessment reports know that in many cases these reports produce

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<sup>129</sup> See OCTA 2007 and OCTA 2008, Europol

<sup>130</sup> Max-Peter Ratzel, OCTA 2008, Europol, p. 5

<sup>131</sup> Ibid.

<sup>132</sup> Petrus C. van Duyne, *OCTA 2006: the unfulfilled promise*, Trends Organ Crime 10, 2007, pp 126



“much ado about nothing”. An uninformed reader of the “public” OCTA version would however assume that there are many secrets hidden in “secret” version. Well, this is apparently not the case. Again, one could have the impression that Europol is investing much time and effort into PR and marketing.<sup>133</sup>

Max-Peter Ratzel nevertheless defends the effort made for the OCTA. According to him, it was the first time for Member States to be tasked to collect data centrally. Some of them did not even have any central data collection plan, so Europol provided them with a data collection plan. The feedback received was quite different from Member State to Member State: the smallest feedback was one page; the largest more than 300 pages, and everything in between. About ten different languages were offered, and Europol had to translate them. Based on the Organised Crime Threat Assessment in 2006 and later on in 2007, the Council took conclusions on the priorities to be followed at the European and national level.<sup>134</sup> And his point of view is supported by the British Home Office, which thinks that there are indications that OCTA is developing a momentum, which is likely to be due in part to the improving intelligence gathering and analytical capabilities within Member States, and as a result of the growing realisation of the benefits of the OCTA.<sup>135</sup>

### **3.2.4.2. EU Terrorism Situation and Trend Report**

The TE-SAT 2007 was the fifth edition of the EU Terrorism Situation and Trend Report, but constitutes also the very first “Europol TE-SAT”, as it was the first TE-SAT produced after the Council of the European Union delegated to Europol the power to approve the final version of the report.<sup>136</sup> The formal change was accompanied by a methodological Reorientation and a widening of the data collection to enhance the quality of the report and to make it a better awareness tool for decision makers.

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<sup>133</sup> This impression is supported by the comments of a former Europol official, who indicated that the quality of OCTA was perceived to very low even within Europol, Interview with former Europol official, Vienna, 4<sup>th</sup> December 2008

<sup>134</sup> Max-Peter Ratzel, House of Lords, Select Committee on European Union Minutes of Evidence, Examination of Witnesses (Question 176), 24 June 2008

<sup>135</sup> Memorandum by the Home Office, Minutes of Evidence, TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION, (SUB-COMMITTEE F), WEDNESDAY 21 MAY 2008

<sup>136</sup> “Europol's Proposal for the New TE-SAT”, General Secretariat, Doc. No. 8196/2/06 REV 2, Brussels, 18 May 2006

TE-SAT include (subject to the limitation on the use of classified information):<sup>137</sup>

- Open sources;
- EU and Member States' reporting related to the phenomenon of terrorism (such as various documents produced by the TWG, the SITCEN, the CTG, Eurojust and the Commission);
- Europol's own information including strategic output from the relevant AWFs; and
- Information provided to Europol by Third States and Organisations.

TE-SAT is a situation report which describes the outward manifestations of terrorism i.e. terrorist attacks and activities. It does not attempt to analyse the root causes of terrorism as well as it does not assess the impact or effectiveness of counter-terrorism policies and law enforcement measures taken. It aims at providing an overview of the situation in the EU instead of describing the situation in single Member States as it was the case in earlier editions of the TE-SAT. It is based mainly on information contributed by the Member States, resulting from criminal investigations into terrorism offences. TE-SAT provides information on “Islamist Terrorism”, “Ethno-Nationalist and Separatist Terrorism”, “Left-Wing and Anarchist Terrorism”, and “Right-Wing Terrorism”.<sup>138</sup>

Max-Peter Ratzel describes TE-SAT a forward-looking document: “Its aim is not only to describe the situation in the European Union regarding terrorism and related phenomena, but also to identify trends.” His confession, that “as an annual product, the TE-SAT is still in its infancy (and that) awareness in the Member States about the importance of such a tool is growing” indicates that TE-SAT is facing similar problems as OCTA, even though the “contributions for TE-SAT 2008 have increased significantly in quantity and quality.”<sup>139</sup>

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<sup>137</sup> Ibid.

<sup>138</sup> TE-SAT 2007, Europol

<sup>139</sup> Max-Peter Ratzel, TE-SAT 2008, p. 5

### 3.3. *The crux of two separate entities at Europol*

In December 2007 the total number of personnel working at Europol was 592. This includes 421 Europol staff and 114 Europol Liaison Officers appointed by the Europol National Units of the EU Member States and other states and organisations with cooperation agreements with Europol. 57 persons were working at Europol in other categories (seconded and national experts, trainees and contractors).<sup>140</sup>

Personnel working at Europol headquarter may be sorted into two categories: Europol staff, and staff working in the National Units and the Liaison Officers Network.



**Figure 2 Personnel working at Europol, December 2007<sup>141</sup>**

The interesting aspect is that the Liaison Officers Network and its work – which in fact constitutes a complete separate body from Europol – are very often mistaken for Europol headquarter itself. “Europol itself can be seen either as the headquarters (...) or it can be seen

<sup>140</sup> Europol Annual Report 2007, p. 42

<sup>141</sup> Ibid.

in a wider understanding as representing all competent authorities in the Member States.”<sup>142</sup> Press news referring to Europol’s achievements in the fight against organized crime, actually report about the work done by the Liaison Officers Network. One could even assume that is not too interested in clarifying this misunderstanding.<sup>143</sup> This artificial separation poses however one of the key problems of Europol: Member States are able to use the Liaison Officers Network and the National Units as a simple communication channel between each other (very much like Interpol already has been working for decades). To transfer this information, they do not need to include Europol officers themselves.

According to the House of Lords Report on Europol, up to 80 % of the information is exchanged outside the formal system by bilateral engagement. Europol is deprived of a huge amount of intelligence data which is of concern for it. This leaves not only Europol as one of the losers; but also includes all the others Member States not party to these bilateral or multilateral exchanges, since they have no access to the information through Europol, or are able to contribute to it. Their inability to contribute may also be detrimental to the Member States involved in the exchanges.<sup>144</sup>

Designing Europol in a different way, for example like Eurojust, could help avoiding this problem. Eurojust is composed of 27 National Members, one seconded from each member state in accordance with its legal system being a prosecutor, judge or police officer of equivalent competence. All of these National Members are represented in the so-called College of Eurojust. This body meets the decisions for the judicial agency, and its support teams (see figure).

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<sup>142</sup> Max-Peter Ratzel, House of Lords, Select Committee on European Union Minutes of Evidence, Examination of Witnesses (Question 167), TUESDAY 24 JUNE 2008

<sup>143</sup> A former Europol official claimed, that Europol is actually quite happy about this misunderstanding, as it helps to improve the image of the agency, Interview with former Europol official, Vienna, 4<sup>th</sup> December 2008

<sup>144</sup> House of Lords, *EUROPOL: coordinating the fight against serious and organised crime*, Report with Evidence, Ordered to be printed 28 October 2008 and published 12 November 2008, Published by the Authority of the House of Lords, Report with Evidence of the House of Lords European Union Committee, 29th Report of Session 2007–08, pp. 22



**Figure 3 Eurojust College Teams Structure<sup>145</sup>**

This structure is much simpler than the one Europol uses. This way the National Members are the liaison officers of their home countries as well as the representatives of the EU agency. Hugo Brady even proposes to merge Europol and Eurojust to form a single European law-enforcement co-ordination body, incorporating also the police chiefs' task force. According to him, a single body could underpin a uniform level of co-operation across the EU whatever the national law enforcement structures and would also prevent duplication in intelligence-gathering and analysis and ensure better follow-through from investigation to prosecution in cross-border cases.<sup>146</sup> As Police officers in some countries and public prosecutors in other countries have very similar competences, this idea will definitely need more consideration in the future.

### **3.3.1. Europol Staff**

Staff at headquarters is usually recruited from police professionals from existing national police and intelligence agencies, with the implication that Europol can operate only within the

<sup>145</sup> [http://www.eurojust.europa.eu/coll\\_org\\_struc.htm](http://www.eurojust.europa.eu/coll_org_struc.htm) 26.01.2009

<sup>146</sup> Hugo Brady, *Europol and the European Criminal Intelligence Model: A Non-state Response to Organised Crime*, Area: Europe – Security & Defence. ARI 126/2007, 1/12/2007, p. 5

context of an existing professional culture of policing. The main problem of Europol staff is, that Member States only provide information voluntary, and the level of involvement from the various National Units in Europol varies greatly from one country to the next. Very often the level of cooperation between Europol and different police agencies changes with the recruitment of a new Europol officer. If a project team is headed by – let's say a French police officer – the flow of information between Europol and France is made a lot easier. While the absence of a Greek team member, might impede cooperation with the Greek police authorities. The level of participation with Europol also depends on the level of expertise a certain police agency in Member States possesses in a certain topic. The Russian Mafia poses a bigger problem in some Member States than in others.

### **3.3.2. National Units & Liaison officers network**

Europol has a liaison bureau network operating on its premises at The Hague with a bureau for each of the 27 EU Member States, as well as offices representing those countries and international organisations with which Europol has co-operation agreements. Europol headquarter also provides room for the exchange of communication and information exchange among the participating agencies via their National Units, like e.g. Interpol. Participating agencies need not contact one another directly but can route information via The Hague to be passed on to all other member agencies. Bilateral communication simply happens by crossing the floor and contacting the National Units of other Member States.

#### **3.3.2.1. National Units**

Each Member States designates a National Unit who acts as the only liaison body between Europol and the competent national authorities<sup>147</sup>. Direct contacts between designated competent authorities and Europol may be allowed under conditions determined by the Member States in question, including prior involvement of the National Unit.

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<sup>147</sup> Article 4(1), Europol Convention

The relationship between Europol and the National Unit is governed by national law and the relevant national constitutional requirements.<sup>148</sup> The Member States need to ensure, that National Units are able to fulfil their tasks and have access to relevant national data. National Units need to:<sup>149</sup>

1. supply Europol on their own initiative with the information and intelligence necessary for it to carry out its tasks;
2. respond to Europol's requests for information, intelligence and advice;
3. keep information and intelligence up to date;
4. evaluate information and intelligence in accordance with national law for the competent authorities and transmit this material to them;
5. issue requests for advice, information, intelligence and analysis to Europol;
6. supply Europol with information for storage in the computerized system; and to
7. ensure compliance with the law in every exchange of information between themselves and Europol.

The National Units are not obliged to supply information and intelligence, if this could turn out to be:<sup>150</sup>

1. harming essential national security interests;
2. jeopardizing the success of a current investigation or the safety of individuals;
3. or involving information pertaining to organizations or specific intelligence activities in the field of State security.

Furthermore the costs incurred by the National Units for communications with Europol must be borne by the MSs<sup>151</sup>, and the Heads of National Units must meet on a regular basis to assist Europol.<sup>152</sup>

Article 8 of the Council Decision establishing Europol introduces the “head of the national unit” (HENU). The heads of the national units shall meet on a regular basis to assist Europol in improving Europol’s operational effectiveness and encourage commitment from Member

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<sup>148</sup> Article 4(2) replaced by the Council Act of 27 November 2003, op.cit. p. 4

<sup>149</sup> Article 4(4), Europol Convention

<sup>150</sup> Article 4(5), Europol Convention

<sup>151</sup> Article 4(6), Europol Convention

<sup>152</sup> Article 4(7) replaced by the Council Act of 27 November 2002, op.cit, p.3

States; evaluate the reports and analyses drafted by Europol and develop measures in order to help to implement their findings; and provide support in the establishment of joint investigation teams.<sup>153</sup> The Austrian Ministry of the Interior considers this new legislation to strengthen the national units,<sup>154</sup> if such an empowerment of the Member States will help to solve above explained bi-body problem could hardly be imagined.

### **3.3.2.2. Liaison Officers Network**

Europol hosts an institutional, permanent and structured network of liaison officers linked to the network of National Units in all Member States. This network consists of nearly 100 Liaison Officers who link their national authorities and Europol and allow a fast exchange of information at European level, focussing on trans-national investigations for a limited typology of crimes of serious nature. The liaison officer's network allows bilateral as well as multilateral cooperation and is the only channel for the provision of data to Europol's projects.<sup>155</sup>

Each National Unit needs to second at least one liaison officer to Europol,<sup>156</sup> who represents the national interests within Europol.<sup>157</sup> He ensures the exchange of information between the National Unit and Europol<sup>158</sup> and enjoys the privileges and immunities necessary for the performance of his/her tasks.<sup>159</sup> The network is supplemented by the presence of liaison officers from 9 countries that have signed an agreement for the exchange of personal data with Europol such as Norway, Switzerland and the US.

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<sup>153</sup> Article 8 (7), Council Decision establishing Europol, op.cit.

<sup>154</sup> Europol: Rob Wainwright ist neuer Europol-Direktor, Artikel Nr.: 5406 vom Mittwoch, 15. April 2009, [http://www.bmi.gv.at/bmireader/articlepages/artikel\\_smallpics.aspx?id=45416D307677444C782B6B3D&textversion=0&inctop=](http://www.bmi.gv.at/bmireader/articlepages/artikel_smallpics.aspx?id=45416D307677444C782B6B3D&textversion=0&inctop=) Retrieved 02.October 2009

<sup>155</sup> Antonio Saccone, *Combating International Crime in an Enlarging European Union: What is the Role of Europol?* Lecture in the International Seminar for Expert. op.cit. , p. 6

<sup>156</sup> Article 5(1), Europol Convention

<sup>157</sup> Article 5(2), Europol Convention

<sup>158</sup> Article 5(3), Europol Convention

<sup>159</sup> Article 5(8), Europol Convention



### **3.3.3. Further Problems entailing**

Another problem with this factual bi-body is the data protection rules. The JSB is concerned only with data held and used by Europol. Data used on Europol's premises for bilateral exchanges belong to the Member States involved and not to Europol. They are therefore not subject to Europol's rules on data protection, or to supervision by the JSB. Instead are subject to the data protection rules of the Member States.

Likewise, all the data on Europol's databases come from the Member States. Until they are inputted into Europol's databases they are the sole responsibility of the Member States, and even after they have been inputted the Member State retains a responsibility.<sup>160</sup>

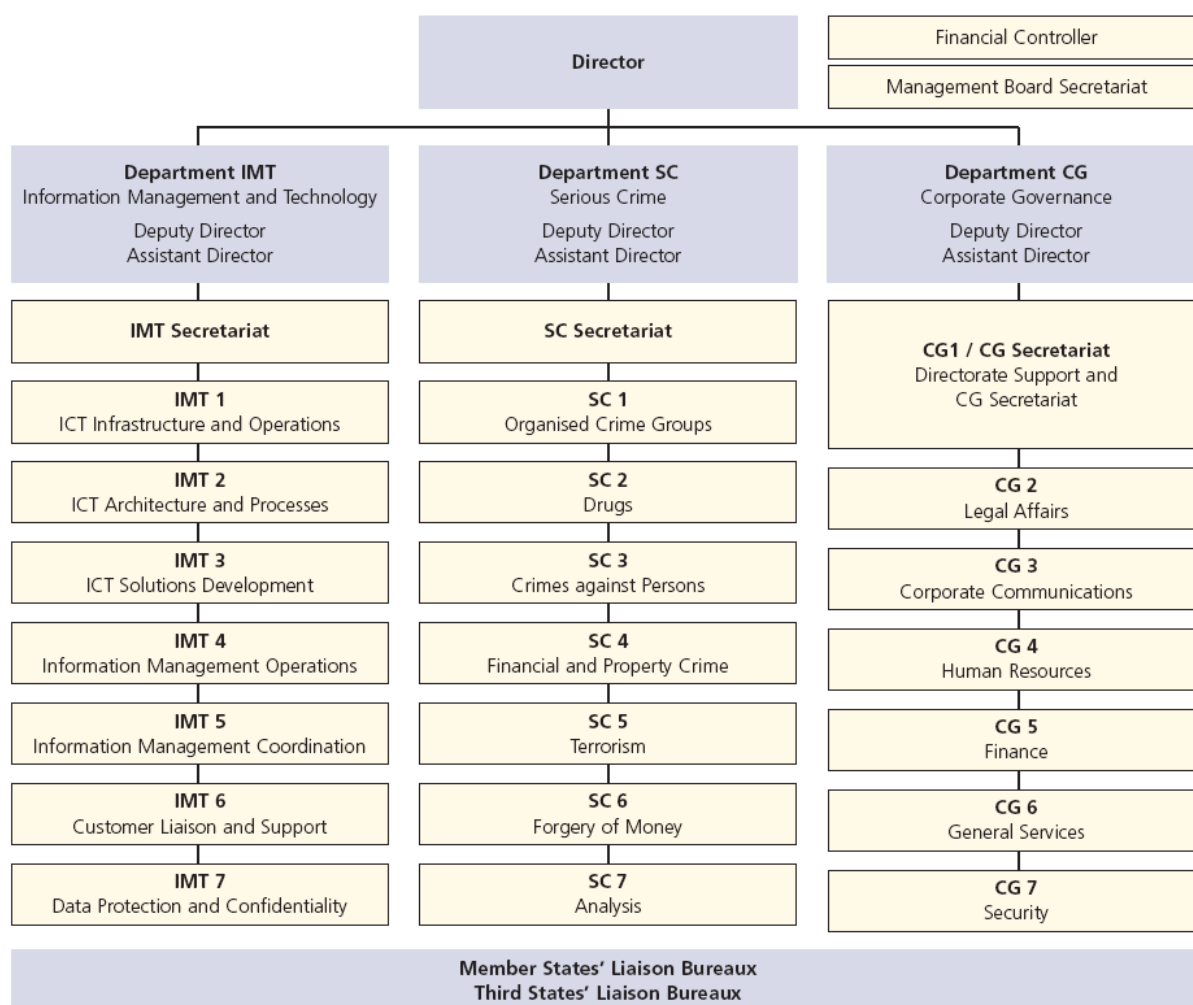
A data protection regime which neglects the bulk of information exchanged, does not really earn the remit of such a name. This issue will also be discussed in the chapter on data protection.

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<sup>160</sup> House of Lords, *EUROPOL: coordinating the fight against serious and organised crime*, op.cit. p. 57

### 3.4. *Administering and funding Europol*

Europol – which has its own legal personality<sup>161</sup> – is constituted and administered by a number of bodies, namely the Management Board, the Director, the Financial Controller and the Financial Committee.<sup>162</sup>



**Figure 4 Organisational chart of the Europol Headquarters<sup>163</sup>**

<sup>161</sup> Article 26, Europol Convention

<sup>162</sup> Article 27, Europol Convention

<sup>163</sup> Europol Annual Report 2007, p. 10

### 3.4.1. The Management Board

Management Board is composed of one representative of each Member State (each member has one vote) and the European Commission who only has an observer status. It meets at least twice a year.<sup>164</sup> Its duties include helping to determine Europol's priorities, unanimously determining the rights and obligations of liaison officers, laying down data-processing rules, preparing rules for work files, and examining problems brought to its attention by the Joint Supervisory Body.

Each year the Management Board unanimously adopts a general report on Europol's activities during the previous year and a report on Europol's future activities which take the Member States' operational requirements for Europol into account. These reports are submitted to the Council to take note and endorse, and also send to the European Parliament for information.<sup>165</sup> The Management Board is chaired by the representative of the Member State holding the Presidency of the Council.<sup>166</sup>

The Council Decision Establishing Europol introduced a new function in the management board: the Chairperson and the Deputy Chairperson. They are selected by and from within the group of three Member States – who jointly prepare the Council's eighteen-month programme (the “Troika”). They serve during this eighteen-month period corresponding to a Council programme, and act no longer as representatives of their Member States in the Management Board.<sup>167</sup>

This amendment was strongly opposed by the to the House of Lords report. It does not see any logical connection between the nationality of the person best qualified to be Chairman of the Management Board and the identity of the Member States holding the Troika Presidency: “there is no reason why the other members of the Management Board should be excluded from the selection of their Chairman; and the length of three Presidencies should be irrelevant to the term of office. (...) We regard it simply as a missed opportunity.”<sup>168</sup> Instead they recommend that the Decision should be amended before its entry into force to adopt for

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<sup>164</sup> Article 28 (9), Europol Convention

<sup>165</sup> Article 28(10), Europol Convention, replaced by the Council Act of 27 November 2003 (Official Journal 002, 06/01/2004, p. 0007)

<sup>166</sup> Article 28 (6), Europol Convention

<sup>167</sup> Article 37, Council Decision establishing Europol

<sup>168</sup> House of Lords, *EUROPOL: coordinating the fight against serious and organised crime*, op.cit., p. 41

Europol a system identical to that of Frontex: a Chairman of the Management Board elected by and from among his colleagues for a term of two years, renewable once. The report further recommends that the dates of appointment of the Chairman and Director should be such as to give several months of overlap between their respective terms of office.<sup>169</sup>

### **3.4.2. The Director**

Europol is headed by a Director.<sup>170</sup> He is appointed by the Council of the European Union (acting unanimously) - after obtaining the opinion of the Management Board - for a four-year period renewable once.<sup>171</sup> He is assisted by three Deputy Directors appointed by the Council of the European Union for a four-year period renewable once. Their tasks are determined by the Director.<sup>172</sup>

The Director's responsibilities include<sup>173</sup>

1. performance of the tasks assigned to Europol;
2. day-to-day administration;
3. personnel management;
4. proper preparation and implementation of the Management Board's decisions;
5. preparing the draft budget, draft establishment plan and draft five-year financing plan and implementing Europol's budget;
6. on a regular basis, updating the Management Board on the implementation of the priorities in respect of the combating and prevention of the forms of serious international crime within its mandate;<sup>174</sup>
7. all other tasks assigned to him in this Convention or by the Management Board.<sup>175</sup>

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<sup>169</sup> Ibid.

<sup>170</sup> Article 29 (5), Europol Convention

<sup>171</sup> Article 29 (1), Europol Convention, amended by the Council Act of 27 November 2003 (Official Journal 002, 06/01/2004, p. 0008)

<sup>172</sup> Article 29 (2), Europol Convention

<sup>173</sup> Article 29 (3), Europol Convention

<sup>174</sup> Article 29 (3) point 6, Europol Convention, replaced by the Council Act of 27 November 2003, op.cit., p. 7

<sup>175</sup> Article 29 (3) point 7, Ibid.

The Director is accountable to the Management Board<sup>176</sup> and he and his Deputy Directors may be dismissed by a decision of the Council by a two-thirds majority of the Member States, after having obtained the opinion of the Management Board.<sup>177</sup>

Europol's Directorate is appointed by the EU Council of Ministers for Justice and Home Affairs in unanimity. As the appointment is a political decision, it proved to be a hard finding in the past. In 2004, the Council of Ministers was unable to appoint a new Director for more than half a year. In July of 2004, the renewal of Storbeck's contract was opposed by France, while Germany staunchly backed the renewal almost up to the last minute. As a result, Storbeck was finally informed that he had to leave only a few days before the end of his contract and Europol had to be headed by an interim director from July onwards.

While Mariano Simancas of Spain served as Interim Director, four countries (Spain, Italy, Germany, and France) each proposed their own candidate for the vacancy and no new Director could be agreed upon until February 2005, when the German Max-Peter Ratzel was finally appointed and chosen over France's Gilles Leclair, Spain's Mariano Simancas and Italy's Emanuele Marotta.<sup>178</sup>

On the 24<sup>th</sup> of February 2005, the Justice and Home Affairs Council decided to appoint Mr Max Peter Ratzel as Director of Europol for a period of four years. He took up his position as Director on the 16<sup>th</sup> of April 2005. His appointment finally broke a deadlock among the 25 EU Member States, who could not agree on a new director for Europol. Four countries (Spain, Italy, Germany, and France) each proposed their own candidate for the vacancy, and it took more than a year to find a compromise. The matter was eventually resolved by a 'gentlemen's agreement' in which only a simple majority was needed.

This dispute happening while the 2004 terrorist bombings in Madrid killed 191 people and wounded more than 1,800 clearly shows the shortcomings of international cooperation when nationalist sentiments and political concerns drive the agenda, rather than considerations of expertise in matters of law enforcement. "A rather poor reward for years of dedicated work for the institution", as Jörg Monar puts it.<sup>179</sup>

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<sup>176</sup> Article 29 (6), Europol Convention

<sup>177</sup> Article 29 (6), Europol Convention, amended by the Council Act of 27 November 2003, op.cit, p. 8

<sup>178</sup> Press Article: *Justice and Home Affairs Council: Germany gets the Job at Europol*, European Report, 26. February 05

<sup>179</sup> Jörg Monar, Justice and Home Affairs, JCMS 2005 Volume 43. Annual Review p. 140

Another row among Member States over the appointment of the next director of Europol in spring 2009 again almost prevented the finding of a new candidate. Most countries were backing a UK candidate, Rob Wainwright, but Hungary, supported by some new member states, insisted on its candidate, Ferenc Banfi.

The disagreement was so deep, particularly following a sharp exchange of views at a Council of Ministers meeting that it seemed possible that a finalisation of the appointment would only be possible after a change in the voting rules. The appointment currently requires unanimity, but from 1 January 2010, new rules will allow a decision with a two-thirds majority.

The Czech EU presidency was keen to obtain agreement at the meeting of justice ministers on 6 April – despite doubts among some member states about Czech neutrality. Ivan Langer, the Czech interior minister, signed a letter endorsing the Hungarian candidate before the start of the Czech presidency, although a spokesman later insisted that Langer took no position on the matter in the Council. “We are definitely neutral, we just want to get a deal,” said a statement from the presidency. The Council's legal service has also declared that the selection process was fair and correct, following complaints over a lack of transparency.<sup>180</sup>

Eventually the Member States agreed on Rob Wainwright at the justice ministers meeting. He is a 41-year-old, managed police co-operation with other countries at the UK's Serious Organised Crime Agency (SOCA), which investigates organised crime and targets the proceeds from it. He also headed the UK's contact bureau for Europol and Interpol and was previously the UK's representative on the Europol management board. He was ranked first in order of merit among the candidates by the Europol management board. Ferenc Banfi – the Hungarian candidate – headed the EU's border assistance mission to Moldova and Ukraine (Eubam). Mariano Simancas Carrión, a Spaniard and Europol's current deputy director, was the third candidate on the short-list.<sup>181</sup>

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<sup>180</sup> European Voice, *Row over Europol top job intensifies*, by Judith Crosbie, 26.03.2009  
<http://www.europeanvoice.com/article/imported/row-over-europol-top-job-intensifies/64396.aspx>  
Retrieved 02. October 2009

<sup>181</sup> European Voice, *Briton tipped for Europol top job*, by Judith Crosbie, 25.02.2009  
<http://www.europeanvoice.com/article/2009/02/briton-tipped-for-europol-top-job/64081.aspx>  
Retrieved 02. October 2009

As explained above, the Council Decision establishing Europol will bring a shift from unanimity to a decision with a two-thirds majority. This should enable a faster procedure from now on.

### 3.4.3. The Budget

Europol's budget is so far financed by Member States contributions. Each Member States financial contribution is determined according to the proportion of its gross national product to the sum total of the gross national products of the Member States for the year preceding the year in which the budget is drawn up.<sup>182</sup> The draft budget and budget implementation are examined by the Council of the European Union.

The budget for 2007 was €70.35 million. Of this, €2.46 million was covered by a contribution from the host state the Netherlands (referred to as “part C” in the next table). The remaining amount of €67.89 million was covered by the Member States. €64.86 million of the budget was called up.<sup>183</sup>

Financial year	Adopted budget	Called-up budget	Implemented budget
2000	28,446,000	28,446,000	26,699,581
2001	36,611,800	36,611,800	35,573,298
2002	53,164,000	53,164,000	48,126,845
2003	57,833,859	57,833,859	53,409,311
2004	58,759,000	58,759,000	47,812,128
2005	63,472,610	60,220,610	51,346,913
2006	63,550,000	60,810,000	52,591,623
2007	67,894,000	64,864,000	58,940,367

**Figure 5 Development of the Europol budget from 2000 to 2007 (excl. part C, host state)<sup>184</sup>**

<sup>182</sup> Article 35 (2), Europol Convention

<sup>183</sup> Annual Report 2007, Europol, p. 42

<sup>184</sup> Ibid.

The Council Decision establishing Europol brought a significant change with regards to funding. Europol will no longer be financed by Member States contributions, but by Community funds: “The revenues of Europol shall consist, without prejudice to other types of income, of a subsidy from the Community entered in the general budget of the European Union (Commission section) as from the date of application of this Decision.”<sup>185</sup> This means, that with 2010, the influence on Europol will shift significantly away from the Member States and bring in another European player who has been desperately waiting for this change: the European Parliament. The Council Decision therefore states explicitly, that “the financing of Europol shall be subject to an agreement by the European Parliament and the Council (hereinafter referred to as ‘the budgetary authority’).”<sup>186</sup>

For the period 2010-2013, an amount of EUR 334 million is allocated to Europol in accordance with its latest five-year financial plan.

#### **3.4.4. Privileges and Immunities**

Since Europol is not yet a Community body and its staff are not staff of the Community, their privileges and immunities are dealt within the Protocol on the Privileges and Immunities of Europol, the Members of its Organs, the Deputy Directors and employees of Europol from 19 June 1997.<sup>187</sup>

All of them, as well as liaison officers seconded from the Member States and their families, enjoy certain privileges and immunities.<sup>188</sup> Article 15 of the Protocol provides that the staff members of Europol enjoy immunity from suit and legal process in respect of acts, including words written or spoken, done by them in the exercise of their official functions.

It provides for two exceptions:

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<sup>185</sup> Article 42, Council Decision establishing Europol

<sup>186</sup> Ibid.

<sup>187</sup> Protocol drawn up, on the basis of Article K.3 of the Treaty on European Union and Article 41 (3) of the Europol Convention, on the privileges and immunities of Europol, the members of its organs, the deputy directors and employees of Europol, Official Journal C 221 , 19/07/1997 P. 0002 - 0010

<sup>188</sup> Article 41 (1), Europol Convention



- either the privilege or immunity of staff members is waived by the Director, or
- it is waived in respect of civil liability in the case of damage arising from a road traffic accident caused by staff members.

It was amended to create exceptions in relation to official acts required to be undertaken in fulfilment of the tasks set out in Article 3a of the Europol Convention regarding the participation of Europol officials in Joint Investigation Teams as required by Article 2 of this Protocol<sup>189</sup> (see chapter JIT).

From 1 January 2010 – with the entry into force of the Council Decision establishing Europol – the Protocol on the Privileges and Immunities of the European Communities will apply directly to Europol, its Director, Deputy Directors and staff and supersede the regulation of the Europol Convention. A specific area of concern was linked to the immunity of Europol officers who work with Joint Investigation Teams. This issue will be dealt with in the relating chapter on Joint Investigation Teams.

### 3.4.5. Cooperation agreements

Europol also engages in cooperation agreements at an institutional and nation state level. Europol maintains relations with countries outside the European Union.

Operational agreements		Strategic agreements	
States	Organisations	States	Organisations
Australia*	Eurojust	Albania	European Anti-Fraud Office
Canada*	Interpol*	Bosnia and Herzegovina	European Central Bank
Croatia		Colombia*	European Commission
Iceland*		Moldova	European Monitoring Centre for Drugs and Drug Addiction
Norway*		Russian Federation	European Police College
Switzerland*		Turkey	United Nations Office on Drugs and Crime
USA*			World Customs Organisation

**Figure 6 Overview of cooperation agreements in place as of 31 December 2007<sup>190</sup>**

<sup>189</sup> 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 312/2, 16.12.2002

<sup>190</sup> Europol Annual Report 2007, p. 49, \* Countries and organisations that have liaison officers at Europol headquarters

As of 31 December 2007, Europol was ratifying or negotiating cooperation agreements with the Former Yugoslav Republic of Macedonia (strategic), Liechtenstein (operational), Monaco (operational), Montenegro (strategic), Serbia (strategic), Ukraine (strategic), and Frontex (strategic).<sup>191</sup>

Even if Europol's cooperation agreements have to be approved by the EU Justice and Home Affairs Ministers, they are initiated at the request of Europol's Management Board. Europol's agreements with other police organizations have distinct implications in terms of the organization's autonomy as an international police body. Mathieu Deflem thinks that Europol is acting as an international organization in the EU, as the independent structure of international cooperation (at the bureaucratic level of police institutions) indicates. Furthermore the interlinking of multiple international police organizations is also accomplished by overlapping memberships in their respective leadership structures.<sup>192</sup>

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<sup>191</sup> Ibid.

<sup>192</sup> Assistant Commissioner of the Irish National Police Service also acts as representative on the Europol Management Board, the Police Chiefs Task Force, and the Club of Berne

### **3.5.           *Europol's IT Database***

To perform its tasks, Europol maintains an IT database. The National Units are responsible for security measures concerning data-processing equipment, and for carrying out checks on the storage and deletion of data files. This database is not allowed to be linked to other automated processing systems, except for the systems of the National Units.

It is made up of three components:

1. the Europol IT information system (EIT)

It serves as a reference check of suspects in investigations on serious crime and terrorism in the EU and only stores information strictly necessary for the cross-checking of targets and crime events. It also keeps track of the authorities that are investigating in order to identify the need for coordination and develop a common approach to targets. The IT database represents the largest database on organised crime groups available to law enforcement agencies in the EU.

2. the analysis system for the work files (AWFs)

The work files are stored in the analysis system whose purpose is the reception, storage, processing and analysis of all kind of information and intelligence gathered during criminal investigations. The system has a limited access and provides an exhaustive audit log for the data protection authority.

3. and the index system.<sup>193</sup>

The index system is aimed at querying the presence of entities stored in the analysis system. It is accessible to Europol staff and liaison officers and gives a “hit or no-hit” result.

The Council Decision establishing Europol enables the agency to add new systems for processing personal data to the main systems already established and used by the European Police Office (notably IS and AWFs). This could refer, for example, to new databases on terrorist groups or child pornography sites. For these new tools, the Council, after consulting

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<sup>193</sup> Article 6, Europol Convention

the European Parliament, would determine the conditions on data access, usage and storage.<sup>194</sup>

### **3.5.1. The information system**

Europol maintains a computerized information system, into which the National Units and liaison officers directly input data in compliance with their national procedures. The Europol Information System (IS) provides a general information exchange service, as opposed to the specificity of the Analytical Work Files. It is available to all Member States through their Liaison Officers and the Europol National Units. It is used to store personal information about people who, under the national law of that country, are suspected of having committed a crime or having taken part in a crime for which Europol has competence, or where there are serious grounds to believe they will commit such crimes.

Europol also directly inputs data supplied by third States and third bodies, which is then accessible by National Units, liaison officers, the Director, the Deputy Directors and empowered Europol officials.<sup>195</sup>

At the end of 2007 the IS held 62,260 data objects an increase of 80% over the year. A majority of the data held on the IS relates to Euro counterfeiting. The significant increase was largely due to the introduction of so-called automatic data loaders. At the moment only five countries are using the automated loading system - Germany and the Netherlands; and last year Denmark; Spain and Belgium started using auto-loaders.<sup>196</sup>

The data relates to<sup>197</sup>

1. persons who, in accordance with the national law of the Member State concerned, are suspected of having committed or having taken part in a criminal offence for which Europol is competent under Article 2, or who have been convicted of such an offence;

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<sup>194</sup> Article 10 (2), Council Decision establishing Europol

<sup>195</sup> Article 7, Europol Convention

<sup>196</sup> Memorandum by the Home Office, Minutes of Evidence, TAKEN BEFORE THE SELECT COMMITTEE ON THE EUROPEAN UNION, (SUB-COMMITTEE F), WEDNESDAY 21 MAY 2008

<sup>197</sup> Article 8 (1), Europol Convention

2. persons who there are serious grounds under national law for believing will commit criminal offences for which Europol is competent under Article 2.

The data may include details like surname, maiden name, given names and any alias or assumed name; date and place of birth; nationality; sex; and where necessary, other characteristics likely to assist in identification.<sup>198</sup>

In addition, there can be more data inputted:<sup>199</sup>

1. criminal offences, alleged crimes and when and where they were committed;
2. means which were or may be used to commit the crimes;
3. departments handling the case and their filing references;
4. suspected membership of a criminal organization;
5. convictions, where they relate to criminal offences for which Europol is competent under Article 2.

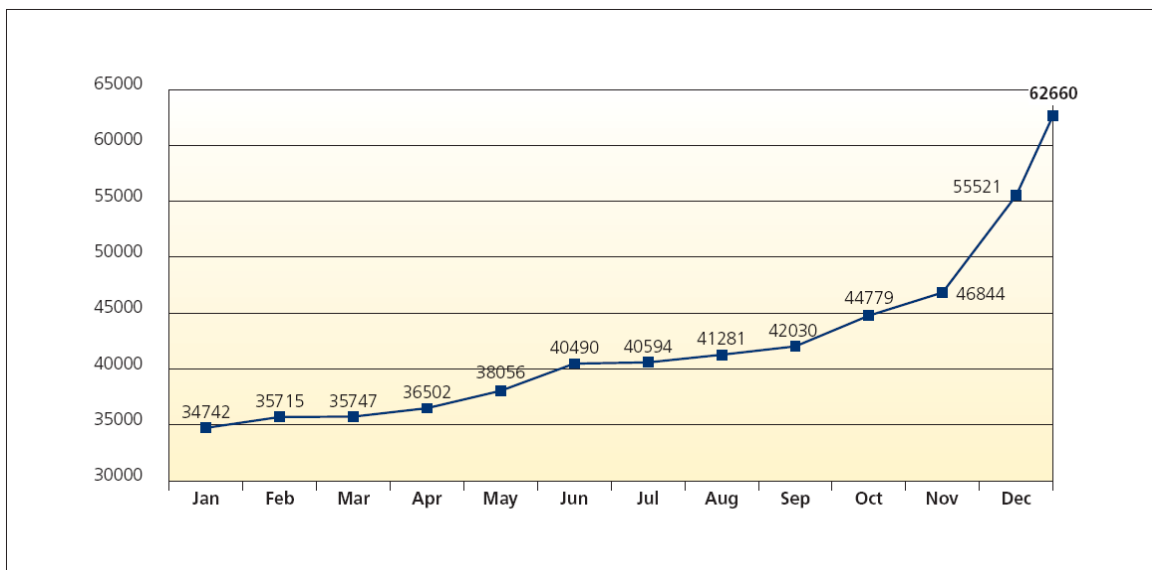
In 2007 136,784 searches were performed in the Information System and, at the end of 1997, it contained 62,660 objects. The figures show a significant increase, mainly due to the use of automatic data loaders. Following Germany (November 2005) and the Netherlands (September 2006), three other Member States started to upload data automatically in 2007: Denmark (March 2007), Spain (November 2007) and Belgium (December 2007):<sup>200</sup>

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<sup>198</sup> Article 8 (2), Europol Convention

<sup>199</sup> Which might be linked to persons or may also not yet contain any reference to persons, Article 9 (3), Europol Convention

<sup>200</sup> Europol Annual Report 2007, p. 34



**Figure 7 Monthly progression of the Information System content in 2007<sup>201</sup>**

Only the unit which entered the data may modify, correct or delete such data. The responsibility for the permissibility of retrieval from, input into and modifications within the information system lies with the responsible unit who must be identifiable.<sup>202</sup> Other competent authorities may also query the information system, but the results of the query will only indicate whether the requested data is available in the information system. Further information may then be obtained via the national unit.<sup>203</sup>

A new provision brought by the Council Decision establishing Europol concerns access to IS data. As explained above, Article 7 of the Convention provided that the national units could consult these data, but only in the case of need for a specific enquiry and only via the liaison officers. Article 11 of the Council Decision allows the national units full and direct access to all the information available in the IS.<sup>204</sup>

<sup>201</sup> Ibid.

<sup>202</sup> Article 9 (3), Europol Convention

<sup>203</sup> Article 9 (4), Europol Convention

<sup>204</sup> The sentence „Direct access by the national units to the information system in respect of the persons referred to in Article 8(1), point 2 shall be restricted solely to the details of identity listed in Article 8(2). If needed for a specific enquiry, the full range of data shall be accessible them via the liaison officers.“ was not transferred into the new legislation

### **3.5.2. The analysis work files (AWF)**

Analysis Work Files can hold factual hard data but also soft data. They can be dedicated to specific crime phenomena, to an ethnic approach, or to a regional approach. Unlike the information system, where all the Member States are duty bound to participate, it is up to the individual Member State to explain and declare their willingness and readiness to participate in up to all Analysis Work Files. To very specific Analysis Work File only three or four or five Member States but not all 27 Member States may participate. In 2008 there were two Analysis Work Files dealing with terrorism issues, one dealing with money laundering, one dealing with counterfeiting of products and the counterfeiting of money, one dealing with trafficking in human beings, and another one dealing with illegal migration and with eastern European organised criminals.<sup>205</sup>

Files opened for the purposes of analysis with the aim of helping a criminal investigation concern:<sup>206</sup>

1. persons who, under the national law of a Member State, are suspected of having committed or having taken part in a criminal offence for which Europol is competent or who have been convicted of such an offence;<sup>207</sup>
2. persons who might be called on to testify in investigations in connection with the offences under consideration or in subsequent criminal proceedings;
3. persons who have been the victims of one of the offences under consideration or with regard to whom certain facts give reason for believing that they could be the victims of such an offence;
4. contacts and associates, and
5. persons who can provide information on the criminal offences under consideration.

The file may not be retained for a period of more than three years. Before this period has expired, Europol reviews the need for the continuation of the file. When it is strictly necessary

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<sup>205</sup> Max-Peter Ratzel, House of Lords, Select Committee on European Union Minutes of Evidence, Examination of Witnesses (Question 167), TUESDAY 24 JUNE 2008

<sup>206</sup> Article 10 (1), Europol Convention

<sup>207</sup> as referred to in Article 8(1), Europol Convention

for the purpose of the file, the Director of Europol may order the continuation of the file for a new period of three years.<sup>208</sup>

By using AWF, the Member States communicate via Europol as a platform for a safe and well regulated sharing of criminal information and intelligence on ongoing cases for the purpose of analysis. The data is either provided for a specific project created on request of a Member States or as a result of analysis carried out at Europol. The feasibility of the project and the legality of its aim and objectives are subject to the opinion of the JSB and the authorisation of the Management Board of Europol. According to Antonio Saccone, the first years the AWF framework suffered from lack of awareness, inexperience and an obvious sense of scepticism and mistrust deriving from the fact that it was an untested tool. He thinks however, that nowadays Europol AWFs are fully functional and represent one of the ways in which concrete and practical help is given to criminal investigations of law enforcement in the Member States.<sup>209</sup>

In 2007, Europol dealt with a total of 16 AWFs operational projects:

Crime area	Number of operational projects (AWFs) in 2007
Drugs trafficking	3
Crimes against persons	3
Financial and property crime	2
Organised crime groups	4
Terrorism	2
Forgery of money	2
<b>Total</b>	<b>16</b>

**Figure 8 Number of operational projects (AWFs) in 2007<sup>210</sup>**

<sup>208</sup> Article 12(4), Europol Convention

<sup>209</sup> Antonio Saccone, *Combating International Crime in an Enlarging European Union: What is the Role of Europol?* Lecture in the International Seminar for Experts. op.cit , pp. 8

<sup>210</sup> Europol Annual Report 2007, p. 28



The opening of such an AWF is linked to the establishment of an analysis group, including analysts and other Europol officials designated by the Europol Directorate and liaison officers and/or experts of the Member States supplying the information or concerned by the analysis.<sup>211</sup> Access to the working files is strictly limited to the participants of the analysis group under the principle of “need to know and right to know”, and only analysts are authorised to enter or modify data.<sup>212</sup>

Europol may also request, that other entities forward relevant information to it, and might accept information provided by those groups and bodies (the European Communities and bodies governed by public law established under the Treaties establishing those Communities; other bodies governed by public law established in the framework of the European Union; bodies which are based on an agreement between two or more Member States of the European Union; third States; International Organizations and their subordinate bodies governed by public law; other bodies governed by public law which are based on an agreement between two or more States; and the International Criminal Police Organization) on their own initiative. The Council - acting unanimously and after consulting the Management Board - draws up the rules for this information exchange.<sup>213</sup>

Europol may also invite experts of these groups and bodies when,<sup>214</sup>

1. an agreement is in force between Europol and the third State or third body, which contains appropriate provisions on the exchange of information, including the transmission of personal data, as well as on the confidentiality of exchanged information;
2. the association of the experts of the third State or third body is in the interest of the Member States;
3. the third State or third body is directly concerned by the analysis work; and
4. all participants of the analysis group agree on the association of the experts of the third State or third body with the activities of the analysis group.

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<sup>211</sup> Article 10 (2), Europol Convention

<sup>212</sup> Article 10(2) first point replaced by the Council Act of 27 November 2003, *op.cit.*, p. 5

<sup>213</sup> Article 10(4), *Ibid.*

<sup>214</sup> Article 10(9), Europol Convention

### **3.5.3. The Index System**

As access to the working files is very restricted, Europol also created an Index System. The Director, Deputy Directors and duly empowered officials of Europol and liaison officers have the right to consult the index system, to find out if the working files contain data concerning their MS<sup>215</sup>. The access for liaison officers is created in a “hit or no-hit” way, that allows to find out whether or not an item of information is stored, without establishing connections or further conclusions regarding the content of the files.

### **3.5.4. Data Protection & Security**

Data protection and security are crucial for an agency that handles sensitive data concerning private citizens throughout the European Union. My analysis distinguishes between the technical part (data security) and the wider concept of data protection.

Data security relates to the “protection of data from accidental or intentional but unauthorized modification, destruction or disclosure through the use of physical security, administrative controls, logical controls, and other safeguards to limit accessibility.”<sup>216</sup>

Data protection entails more than physical access prevention. “Data-processing systems are designed to serve man; whereas they must, whatever the nationality or residence of natural persons, respect their fundamental rights and freedoms, notably the right to privacy, and contribute to economic and social progress, trade expansion and the well-being of individuals”<sup>217</sup> therefore Member States “shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.”<sup>218</sup> With regards to Europol data protection is linked to the installation of supervisory authorities (Joint Supervisory Board, Data Protection Officer) as well as the

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<sup>215</sup> Article 11, Europol Convention

<sup>216</sup> Government Information Exchange, Social Security Online,  
<http://www.ssa.gov/gix/definitions.html>

Retrieved 02. October 2009

<sup>217</sup> Para 2, 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 Official Journal L 281 , 23/11/1995 P. 0031 - 0050

<sup>218</sup> Article 1, Ibid.

creating a query opportunity for individuals who wish to access data relating to them stored at Europol.

### **3.5.4.1. Data Security**

Europol is committed to a very high data protection standard. Europol and each Member States processing data at Europol need to:<sup>219</sup>

- deny unauthorized persons access to data processing equipment used for processing personal data (equipment access control);
- prevent the unauthorized reading, copying, modification or removal of data media (data media control);
- prevent the unauthorized input of data and the unauthorized inspection, modification or deletion of stored personal data (storage control);
- prevent the use of automated data processing systems by unauthorized persons using data communication equipment (user control);
- ensure that persons authorized to use an automated data processing system only have access to the data covered by their access authorization (data access control);
- ensure that it is possible to verify and establish to which bodies personal data may be transmitted using data communication equipment (communication control);
- ensure that it is subsequently possible to verify and establish which personal data have been input into automated data or processing systems and when and by whom the data were input (input control);
- prevent unauthorized reading, copying, modification or deletion of personal data during transfers of personal data or during transportation of data media (transport control);
- ensure that installed systems may, in case of interruption, be immediately restored (recovery);
- ensure that the functions of the system perform without fault, that the appearance of faults in the functions is immediately reported (reliability) and that stored data cannot be corrupted by means of a malfunctioning of the system (integrity).

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<sup>219</sup> Article 25, Europol Convention

Oral evidence given at different occasions by Europol staff, only confirms the high importance of data security for the agency. During interviews, Europol officer expressed more than once their surprise concerning the perceived over-proportionality of IT staff at Europol headquarters.

#### **3.5.4.1. Access for Individuals**

Individuals wishing to access data relating to them which have been stored at Europol may make a request to that effect free of charge to the national competent authority in the Member State of their choice.<sup>220</sup> The competent authority refers the matter to Europol and informs the enquirer that Europol will reply to them directly.

Individuals have the right to ask Europol to correct or delete incorrect data concerning them.<sup>221</sup> If data that are incorrect or contravene this Convention have been passed directly to Europol by a Member State, it must correct or delete them in collaboration with Europol.<sup>222</sup> Europol informs requesters that the data concerning them have been corrected or deleted. If they are not satisfied with Europol's reply or have received no reply within three months, they may refer the matter to the joint supervisory body.<sup>223</sup> Individuals also have the right to ask their national supervisory body to check that the data concerning them were input, transmitted and consulted in accordance with the law.<sup>224</sup> This right is exercised in accordance with the national law of the Member State in which the application was made.<sup>225</sup>

The request might only be refused, to<sup>226</sup>

- 1) enable Europol to fulfil its duties properly;
- 2) protect security and public order in the Member States or to prevent crime;
- 3) protect the rights and freedoms of third parties,

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<sup>220</sup> Article 19 (1), Europol Convention

<sup>221</sup> Article 20 (1), Europol Convention

<sup>222</sup> Article 20 (4), Europol Convention

<sup>223</sup> Article 20 (4), Europol Convention

<sup>224</sup> Article 19, Right of access: "1. Any individual wishing to exercise his right of access to data relating to him which have been stored within Europol or to have such data checked may make a request to that effect free of charge to the national competent authority in any Member State he wishes, and that authority shall refer it to Europol without delay and inform the enquirer that Europol will reply to him directly.

<sup>225</sup> Article 19 (7), Europol Convention

<sup>226</sup> Article 19 (3), Europol Convention

Europol however needs to inform the enquirer that he may appeal to the Joint Supervisory Body if he is not satisfied with the decision.<sup>227</sup> The person requesting, may also refer the matter to the Joint Supervisory Body if there has been no response to his request within the time limit of three months.<sup>228</sup>

#### **3.5.4.2. The Joint Supervisory Board**

According to Article 23 of the Europol Convention, each Member States has to designate a national supervisory body, which monitors independently – in accordance with its respective national law – the permissibility of the input, the retrieval and any communication to Europol of personal data by the Member States concerned. Therefore the supervisory body has access to the National Unit or the liaison officers' premises to the data entered by the Member States into the information system and into the index system.

To review the activities of Europol and ensure that the rights of the individual are not violated by the storage, processing and utilization of the data held the position of an independent Joint Supervisory Body was set up by Article 24. This body is also responsible of monitoring the permissibility of the transmission of data originating from Europol.

The Joint Supervisory Body is composed of one or two members of the national supervisory bodies (one vote per MS) and draws up activity reports at regular intervals, which are forwarded to the European Parliament and the Council, after the Europol management Board had the opportunity to deliver an opinion which is attached to the reports.<sup>229</sup>

Europol must assist the Joint Supervisory Body<sup>230</sup>, especially by

- a) supplying the information it requests, give it access to all documents and paper files as well as access to the data stored in the system; and
- b) allow it free access at any time to all its premises;
- c) carry out the joint supervisory body's decisions on appeals

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<sup>227</sup> Article 19 (6), Europol Convention

<sup>228</sup> Article 19 (3), Europol Convention

<sup>229</sup> Article 24(6) amended by the Council Act of 27 November 2003 (Official Journal 002, 06/01/2004, p. 0006)

<sup>230</sup> Article 24 (2), Europol Convention

If the Joint Supervisory Body notes and violations of the Convention in the storage, processing or utilization of personal data, it can make a complaint to the Director of Europol, and ask him to reply within a certain time limit. In the case of any difficulties, the Joint Supervisory Body can also refer the matter to the Management Board.<sup>231</sup>

### **3.5.4.3. Data Protection Officer**

The Council Decision establishing Europol includes one provision which is a distinct improvement on the Convention. It foresees the installation of a Data Protection Officer who is put on a statutory basis as an independent member of staff responsible for ensuring compliance with the data protection provisions of the Decision.<sup>232</sup>

The Data Protection Officer will be a member of the staff and be appointed by Management Board (on the proposal of the Director). Next to the above explained function, the Data Protection Officer shall also ensure that a written record of the transmission and receipt of personal data is kept; that data subjects are informed of their rights under the Decision at their request; cooperate with Europol staff responsible for procedures, training and advice on data processing; cooperate with the Joint Supervisory Body; prepare an annual report and communicate it to the Management Board and to the Joint Supervisory Body.<sup>233</sup> In the performance of these tasks, the Data Protection Officer shall have access to all the data processed by Europol and to all Europol premises.

The European Data Protection Supervisor welcomed this development, but also pointed out that in the case of similar officials in other EU institutions there were provisions giving him the necessary staff and budget, and allowing him to be dismissed only in very exceptional circumstances.<sup>234</sup> Mr Smith<sup>235</sup> also welcomed this provision: "We are very supportive of the principle of setting up this quasi-independent data protection officer. It is a system which

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<sup>231</sup> Article 24 (5), Europol Convention

<sup>232</sup> including the processing of personal data on Europol staff which are protected by Article 24 of Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 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, 12.1.2001, p. 1.

<sup>233</sup> Article 28, Council Decision establishing Europol

<sup>234</sup> Paragraph 63, Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision establishing the European Police Office (Europol) — COM(2006) 817 final, (2007/C 255/02), 27.10.2007, Official Journal of the European Union

<sup>235</sup> Mr David Smith was the United Kingdom representative on the Europol Joint Supervisory Body (JSB), as well as its chairman in fall 2007

Eurojust has adopted and works well under the Eurojust Decision. We are particularly pleased that it emphasises the importance of data protection within Europol, emphasises that the responsibilities there go straight to the Director and that data protection has to be taken seriously. There is also a very clear duty to cooperate with the Joint Supervisory Body."<sup>236</sup>

#### **3.5.4.4. Possible shortcomings**

In October 2005 the Commission tabled a proposal for data protection provisions applying to the third pillar (which would therefore as well apply to Europol): a draft Data Protection Framework Decision (DPFD) to apply to all third pillar instruments.<sup>237</sup> Negotiations on this were taking place in January 2007, when the Commission brought out its proposal for the Europol Decision.

The conclusions of the Council meeting on 12-13 June 2007<sup>238</sup> note that the new framework decision will be based on the Council of Europe established minimum data protection principles set by the Convention of 28 January 1981 for the protection of individuals with regard to automatic processing of personal data and its Additional Protocol of 8 November 2001, including Recommendation (87)15 regulating the use of personal data in the police sector. So instead of using the DPFD as a data protection regime, the Council Decision establishing Europol actually draws on the much older Council of Europe Convention of 1981.<sup>239</sup> The DPFD will only be applicable to the transfer of personal data by Member States to Europol, but does not affect the specific data protection provisions in the Europol Decision.<sup>240</sup> Under Article 27 the general standard of data protection has reverted to that of

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<sup>236</sup> EUROPOL: *coordinating the fight against serious and organised crime Report with Evidence*, Ordered to be printed 28 October 2008 and published 12 November 2008, Published by the Authority of the House of Lords Report with Evidence of the HOUSE OF LORDS European Union Committee, 29th Report of Session 2007–08, Q434, p. 177

<sup>237</sup> Proposal for a Council Framework Decision *on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters*, document 13019/05

<sup>238</sup> Council Conclusions concerning the Council Framework Decision on the protection of personal data processed in the framework of police and judicial co-operation in criminal matters, 12.06.2007

<sup>239</sup> Council of Europe Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, and Recommendation, and Recommendation No R (87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1987

<sup>240</sup> The relevant set of data-protection provisions in this Decision will not be affected by that Framework Decision and this Decision should contain specific provisions on the protection of personal data regulating these matters in greater detail because of the particular nature, functions and competences of Europol. Paragraph 12, Council Decision establishing Europol

the Council of Europe Data Protection Convention, as it was already under the Europol Convention.

A fact which was heavily criticized by the European Data Protection Supervisor (EDPS) as the Council Decision “contains specific rules on data protection and data security, that can be considered as *lex specialis* providing for additional rules on top of a *lex generalis*, a general legal framework on data protection”<sup>241</sup> as well as by the House of Lords report which regrets that “the negotiations for a Data Protection Framework Decision, which could and should have resulted in an instrument setting a high general standard of protection for third pillar data exchanges, have instead produced an anodyne and toothless document which the Europol Decision does not trouble to apply to Europol’s work.”<sup>242</sup>

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<sup>241</sup> Para 4, Opinion of the European Data Protection Supervisor on the Proposal for a Council Decision establishing the European Police Office (Europol) — COM(2006) 817 final (2007/C 255/02)

<sup>242</sup> House of Lords, *EUROPOL: coordinating the fight against serious and organised crime*, op.cit.



### **3.6. Access to European Databases**

#### **3.6.1. Schengen Information System II**

The Schengen Information System (SIS) has been operational since March 1995 and covers 13 of the 15 EU countries, plus Norway and Iceland. SIS is a central police cooperation tool and was created to compensate for the removal of internal borders by increased information sharing between police forces. Member States contribute data to the SIS on people wanted for arrest, people to be placed under surveillance or subject to specific checks, people to be refused entry at external borders and lost or stolen items.

The effect of listing a person in the SIS (or later in SIS II), is that a person will be banned in principle from entering or remaining in any Schengen State. This is enforced by checking the SIS whenever a third country national (non-EU national) applies for a ‘Schengen visa’ to enter the Schengen States, and generally when such persons cross the external Schengen borders or apply for a long-term visa or residence permit.<sup>243</sup>

In 2005 SIS contained 13.000.000 data sets, including around 15.000 wanted suspects.

##### **3.6.1.1. From “SIS” via “SIS one4all” to “SIS II”**

The current SIS was not designed to cope with the increased number of EU Member States after the enlargement and United Kingdom and Ireland to join. The technology was outdated and did not provide the flexibility for adding easily new functionalities. Therefore the Council decided to develop the new generation Schengen Information System SIS II, which contains the existing and potential new functionalities like the use of biometrics.<sup>244</sup>

SIS II should have entered into force in fall 2007; hence the last tests would have needed to be done by March 2007. Some of the new Member States were not proceeding within the time frame what might lead to a longer transition period. In 2006, some Member States emphasised

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<sup>243</sup> Articles 5, 15 and 25 of the Schengen Convention

<sup>244</sup> Development of the Schengen Information System II and possible synergies with a future Visa Information System, COM(2003) 771 final, Brussels, 11 December 2003

in a communication to the Austrian Presidency that “for reaching the ambitious political goal of operation of the SIS II (...) a lot of additional effort is needed from all involved Parties.”<sup>245</sup>

In October 2006 Portugal put forward a proposal for “SIS one4all” (or SIS+), to allow the SIS to be adapted to include the new MSs, to enable them to join Schengen by October 2007.<sup>246</sup>

Some of those States were initially unenthusiastic; others feared that this would further delay SIS II. The Commission believed that it would add nine months to the planning of SIS II. On the 5<sup>th</sup> December 2006 the Justice and Home Affairs Council welcomed – even though “the development of the SIS II remains the absolute priority”<sup>247</sup> –decided to implement the SISone4all for those Member States.<sup>248</sup> SIS II might only be completed by the end of September 2009, as the Slovenian Minister of the Interior, Dragutin Mate, pointed out at the “Conference of Community and European Affairs Committees of Parliaments of the European Union” (COSAC) at the 7<sup>th</sup> of May 2008, during the Slovenian Presidency.

### **3.6.1.2.**

### **SIS access for Europol**

The SIS Working Group asked the Presidency in February 2002 to examine the case for giving Europol access to the SIS.<sup>249</sup> It was argued that Europol works on a wide range of operational projects and its analysts could make checks on people, vehicles and other objects in the SIS system. In the context of its strategic and operational work “Europol needs to check whether the data it obtains in the course of its duties appear in other European Union information systems; such checks could be of mutual benefit to Europol and the Member States.”

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<sup>245</sup> Czech Republic, Latvia, Hungary, Estonia, Lithuania and Slovakia in Joint declaration on the SIS II legal framework discussions, Council Doc. No. 8610/06, Brussels, 24 April 2006

<sup>246</sup> Portuguese Proposal called SISone4all, Doc. No.: 13540/06 SIS-TECH 101

<sup>247</sup> Presidency to the Council, *Council Conclusions on the SIS II, the SIS I+ and the enlargement of the Schengen area*, Brussels, 5 December 2006, Doc. No.: 16324/06, p. 3

<sup>248</sup> EE, HU, LV, LT, MT, PL, CZ, SK and SI

<sup>249</sup> Access by Europol to the Schengen Information System (SIS), Council Doc. No. 5970/02, Brussels, 8 February 2002, p. 2

### **Reluctance to grant access**

This obtained data “could enhance quantitatively and qualitatively Europol’s products and services, or in any case obviate unnecessary extra effort.”<sup>250</sup> On-line access to the SIS would help in identifying related or relevant activities in the Member States, allowing additional interesting data to be gathered for operative analysis and ensure that data that can be kept within the European framework are properly exploited.<sup>251</sup> This would enable strategic analysis and allow forecast by identifying and comparing changes in different levels of crime over a period of time, identifying possible relationships between relevant variables which have an impact on the crime rate and compare ethnic and demographic trends. Finally the report asks for immediate access of Europol to all information in the SIS and the possibility of partial downloading of data in order to carry out analyses and statistical studies and furthermore for the possibility to update SIS by adding, deleting and modifying information.

Article 6 (2) Europol Convention expressly prohibits the linking of the Europol Databases with any other national database “The computerized system of collected information operated by Europol must under no circumstances be linked to other automated processing systems, except for the automated processing systems of the national units.”

### **Climate change after 9/11**

The climate changed after the attacks of 9/11: “the new idea is: if something is available, we should use it as much as possible.”<sup>252</sup> According to the Commission<sup>253</sup> Europol should have the authority to access to alerts and additional data on persons wanted for arrest: “The European Police Office (Europol) shall have the right to access the data contained in alerts for arrest which is necessary for the performance of its tasks (...)”<sup>254</sup> “(...) to the data of the alerts referred to in Article 31 which are necessary to perform its tasks in accordance with the Europol Convention.”<sup>255</sup> According to Article 31, Member States shall “for the purpose of prosecuting criminal offences and for the prevention of threats to public security, issue in the Sis II alerts on person or vehicles, boats, aircrafts and containers for the purpose of discreet

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<sup>250</sup> Ibid.

<sup>251</sup> Access by Europol to the Schengen Information System (SIS), Council Doc. No. 5970/02, Brussels, 8 February 2002, p. 2

<sup>252</sup> Interview with Peter Michel, Data protection secretary, Joint Schengen Supervisory Board, Brussels, 14 February 2006

<sup>253</sup> Proposal for a Council Decision on the establishment, operation and use of the second generation Schengen information system (SIS II), COM(2005) 230 final, Brussels, 31 May 2005

<sup>254</sup> Ibid. Article 18 (2)

<sup>255</sup> Ibid. Article 33 (3)

surveillance or of specific checks”<sup>256</sup> when “there is a clear evidence that the person concerned intends to commit or is committing numerous and extremely serious criminal offences”<sup>257</sup> or “where an overall assessment of the person concerned (...) gives reason to suppose that that person will also commit extremely serious criminal offences in the future.”<sup>258</sup> The possible alerts range, according to article 35, from motor vehicles with a cylinder capacity exceeding 50cc, boats and aircraft; trailers with an unladen weight exceeding 750 kg, firearms, blank official documents, issued identity papers vehicle registration certificates and vehicle number plates, banknotes and securities and means of payment which have been stolen, misappropriated or lost. SIS II will also make links between different alerts possible. One could e.g. link a missing person to a stolen vehicle which is impossible with the old SIS.<sup>259</sup>

Europol argued, that the main added value of granting access to the SIS “is the possibility to cross-check information obtained by Europol through its standard communication channels against other information available in the countries of the Schengen area. This would be especially valuable in the cross-checking of Europol information originating from outside the European Union.”<sup>260</sup>

In a Council Decision Europol and Eurojust were finally granted access to the SIS<sup>261</sup> in February 2005: “The European Police Office (Europol) shall within its mandate and at its own expense have the right to have access to, and to search directly, data entered into the Schengen Information System”<sup>262</sup> as well as “the national members of Eurojust and their assistants shall have the right to have access to, and search, data entered.”<sup>263</sup>

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<sup>256</sup> Ibid. Article 31

<sup>257</sup> Ibid. Article 31 (1) a

<sup>258</sup> Ibid. Article 31 (1) b

<sup>259</sup> Interview with Yves Joannesse, DG Justice Liberté et Sécurité, European Commission, Brussels, 22. March 2006

<sup>260</sup> Europol to SIS Working Party (EU/Iceland and Norway mixed committee), *(Legal) Issues raised during the last session1 of the EU Working Party SIS in relation to access to the SIS for Europol*, Document No. 9323/02, Brussels, 28 May 2002

<sup>261</sup> Council Decision 2005/211/JHA *concerning the introduction of some new functions for the Schengen Information System including in the fight against terrorism*, 24 February 2005 (OJ 2005 L 68/44)

<sup>262</sup> Article 101A Schengen Convention, amended by Council Decision 2005/211/JHA *concerning the introduction of some new functions for the Schengen Information System including in the fight against terrorism*, 24 February 2005 (OJ 2005 L 68/44)

<sup>263</sup> Article 101B Schengen Convention, amended by Council Decision 2005/211/JHA *concerning the introduction of some new functions for the Schengen Information System including in the fight against terrorism*, 24 February 2005 (OJ 2005 L 68/44)

However, Europol has no power to take any action based on the alerts which it accesses, but will contact the Member States concerned for permission to use an alert found. “The information that Europol will get from the Member State that has been activated by our Schengen alert will be considered by Europol as a Member State contribution to Europol’s system, so it is no longer Schengen information ... and from then on we handle it according to Europol’s Convention.”<sup>264</sup> Which means that this information could - under the terms of the Europol Convention – consequently be transferred to third states or third parties, with which Europol has agreements in place for the exchange of personal data (Canada, Croatia, Eurojust, Iceland, Interpol, Norway, Switzerland and the United States).<sup>265</sup>

### **Data Protection**

Article 35 ensures data protection by the Europol Joint Supervisory Body (JSB). The Europol JSB supported the technical proposal for Europol’s access to certain SIS data but also proposed that all search requests made by Europol should be logged, including the identity of the enquirer, date and time of the action, search key and result, as a number representing the number of hits.<sup>266</sup> One should not forget that the SIS does not work without problems. Article 96 allows to refuse entry to “aliens who are reported for the purpose of being refused entry” by a MS. The grounds include “a threat to public order or national security”<sup>267</sup> In June 2005 a report from the Schengen Joint Supervisory Authority recommended that Member States prevent “Article 96 alerts on nationals from EU Member States”<sup>268</sup>

Yet a check on 31 March 2006<sup>269</sup> found 414 citizens from the EU and associated countries registered under Article 96.

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<sup>264</sup> Daniel Drewer, Europol Data Protection Officer, Examination of Witness, 28 November 2006, Question 450 and 458

<http://www.parliament.the-stationery-office.co.uk/pa/ld200607/ldselect/lddeucom/49/4902.htm>, 01 July 2008

<sup>265</sup> 9th Report of Session 2006–07, Schengen Information System II (SIS II), Report with Evidence, Published by the Authority of the House of Lords, 2 March 2007, p. 33

<sup>266</sup> Opinion of the JSB in respect to the technical proposal for Europol’s access to the SIS, Council Doc. No. 14079/05, Brussels, 7 November 2005, p. 2

<sup>267</sup> Article 98 (2)

<sup>268</sup> Article 96 Inspection, Schengen Joint Supervisory Authority, Report of the Schengen Joint Supervisory Authority on an inspection of the use of Article 96 alerts in the Schengen Information System, Brussels, 20 June 2005

<sup>269</sup> Alerts of EU citizens in the SIS pursuant to Article 96 SIC, Council Doc. 8281/06, Brussels, 6 April 2006

### 3.6.1.3.

### SIS II – Management by Europol?

Currently, the SIS is managed by France<sup>270</sup>. The Commission proposed to be responsible for the operational management of the System<sup>271</sup> “during a first transitional or interim phase”<sup>272</sup> of SIS II. The Member States rejected this idea, and concluded that the Commission will nominally be designated as the manager of SIS II, but that in practice the Commission will in fact delegate this management to France and Austria<sup>273</sup>. This is linked to the fact, that the principal central system is located in Strasbourg (France) and the backup central system is located in Sankt Johann in Pongau (Austria). They will be held accountable according to EC rules.<sup>274</sup>

According to a report of the House of Lords, there might be the possibility to grant the operational management to either Europol or Frontex,<sup>275</sup> as they are subject to Community law as the jurisdiction of the European Data Protection Supervisor is limited to data processed carried out by the EC institutions: “We were told about five possible options concerning the future Management Authority. The Authority could be operated by the Commission, by Frontex (the EU’s border control agency), by Europol, by one Member State on behalf of all of them, or by a new body to be established”<sup>276</sup> “The House of Lords assumes, that this problem is linked to the question of a management authority for the Visa Information System (VIS), and that it is rather unlikely that Europol will take this task over.

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<sup>270</sup> “The French Republic shall be responsible for the technical support function, which shall be located in Strasbourg.”, 92 (3) Schengen Convention

<sup>271</sup> Article 12, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment, operation and use of the second generation Schengen information system (SIS II), COM(2005) 236 final, Brussels, 31.5.2005

<sup>272</sup> Proposal for a COUNCIL DECISION on the establishment, operation and use of the second generation Schengen information system (SIS II), COM(2005) 230 final, Brussels, 31.5.2005

<sup>273</sup> Article 12, DRAFT COUNCIL REGULATION ON THE ESTABLISHMENT, OPERATION AND USE OF THE SECOND GENERATION SCHENGEN INFORMATION SYSTEM (SIS II), Doc. No.: 5709/06, Brussels, 27 January 2006

<sup>274</sup> Ibid.

<sup>275</sup> 9th Report of Session 2006–07, Schengen Information System II (SIS II), Report with Evidence, Published by the Authority of the House of Lords, 2 March 2007

<sup>276</sup> Ibid. P. 28

### **3.6.2. The Visa Information System (VIS)**

The Council adopted the Council Decision 2004/512/EC, establishing the Visa Information System (VIS), on the 8 June 2004. It constituted the required legal basis to allow for the inclusion in the budget of the European Communities of the necessary appropriations for the development of VIS and the execution of that part of the budget; defined the architecture of the VIS and gave the Commission the mandate to develop the VIS at technical level.

The VIS consists of a central information system, the "Central Visa Information System" (CS-VIS), and an interface in each Member State, the "National Interface" (NI-VIS) which provides the connection to the relevant central national authority of the respective Member State, and the communication infrastructure between the Central Visa Information System and the National Interfaces.<sup>277</sup>

#### **3.6.2.1. The purpose of VIS**

It enables border control authorities to check a visa application history and to verify whether a person presenting a visa is the same person to whom it was issued. It does – however - not keep track of the various entries of third-country nationals or check on whether persons have left by the end of their entitlement to stay; and does not concern third country nationals who are not required to hold a visa to enter the EU.<sup>278</sup>

The VIS was created to facilitate the application of the “Dublin II Regulation”<sup>279</sup>, and hence to improve the administration of the common visa policy, the consular cooperation and the consultation between central consular authorities in order to prevent threats to internal security and ‘visa shopping’, to facilitate the fight against fraud and checks at external border checkpoints and within the territory of the Member States, and to assist in the identification and return of illegal immigrants

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<sup>277</sup> Article 1, Council *Decision of 8 June 2004 establishing the Visa Information System (VIS)*, 2004/512/EC, Official Journal L 213 , 15/06/2004 P. 0005 - 0007

<sup>278</sup> Point 24, Communication from the Commission *on Policy priorities in the fight against illegal immigration of third-country nationals*, COM(2006) 402 final, Brussels, 19.7.2006

<sup>279</sup> Dublin II Regulation” (EC) No 343/2003, OJ L 50 of 25.2.2003, p. 1.

The original proposal of the Commission envisaged the following categories of data stored in the VIS:<sup>280</sup>

- a) alphanumeric data on the applicant and on visas requested, issued, refused, annulled, revoked or extended;
- b) photographs;
- c) fingerprint data;
- d) links to other applications.

Which was later expanded by more data, like the current nationality of the applicant, the purpose of travel, or the main destination and duration of the intended stay<sup>281</sup> and finally “details of the person issuing an invitation and/or liable to pay costs of living during the stay and shall, in case of a hit, give access to all of the above data as well as to”<sup>282</sup> was added by the European Parliament during the consultation procedure.

### **3.6.2.2. Access by Europol**

The proposal for the Council Decision concerning access of VIS by Europol, already mentioned the possible data concerning about 20 million visa applications annually, which would result in 70 million fingerprint data to be stored for a five-year term.<sup>283</sup> Therefore the proposal was introduced with the objective to grant Europol access to VIS for the purposes of the prevention, detection and investigation of terrorist offences and the types of crime and the offences in respect of which Europol is competent to.

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<sup>280</sup> Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL *concerning the Visa Information System (VIS) and the exchange of data between Member States on short stay-visas*, COM(2004) 835 final, Brussels, 28.12.2004

<sup>281</sup> Article 5, Proposal for a COUNCIL DECISION *concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences*, COM(2005) 600 final, Brussels, 24.11.2005

<sup>282</sup> Article 5, European Parliament legislative resolution of 7 June 2007 on the proposal for a Council decision concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences (COM(2005)0600 – C6-0053/2006 – 2005/0232(CNS))

<sup>283</sup> p. 4, Proposal for a COUNCIL DECISION *concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences*, op.cit.



The Joint Supervisory Body (although it has no supervisory role relating to VIS) also assessed the proposal and concluded that - although the conditions for Europol's access to VIS were defined in that proposal - more limitations to the access rules for Europol should be introduced. The JSB argued that granting Europol access to VIS data by simply referring to Europol's general task and without any specific explanation and limitation was in itself insufficient to justify the exception from the purpose of processing VIS data. Access to the VIS should only be allowed within the limits of a specific Europol task; and only when necessary for the performance of this task and for the purpose of a specific analysis file.<sup>284</sup>

Europol had to designate a specialised unit for the purpose of consultation (as well as each Member States had to designate a single national authority as central access point),<sup>285</sup> and keep records of all data processing operations resulting from access to the VIS (as well as the Member States and the Commission)<sup>286</sup>. After the amendments of the European Parliament, the records also have to show “the exact purpose of the access for consultation”,<sup>287</sup>

The agreement on VIS between the Council and the European Parliament was reached on the 7<sup>th</sup> of June 2007, under the German Presidency.

### **3.6.3. Access to Eurodac**

Eurodac, a Community-wide information technology system for the comparison of the fingerprints of asylum seekers, was adopted on 11 December 2000<sup>288</sup> and started operations on 15 January 2003. It was created in the context of the Dublin Convention, which came into force in 1997, and was replaced by the regulation (EC) 343/2003 establishing criteria and mechanism for determining the Member State responsible for examining an asylum

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<sup>284</sup> Third Activity Report of the Joint Supervisory Body of Europol, November 2004 – October 2006, p 12

<sup>285</sup> Article 7, *Ibid.*

<sup>286</sup> Article 10. *Ibid.*

<sup>287</sup> Article 10, European Parliament legislative resolution of 7 June 2007 on the proposal for a Council decision concerning access for consultation of the Visa Information System (VIS) by the authorities of Member States responsible for internal security and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences, *op.cit.*

<sup>288</sup> Council Regulation (EC) No 2725/2000 of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention, Official Journal L 316, 15/12/2000 P. 0001 - 0010

application lodged in one of the Member States of the European Union.<sup>289</sup> Member States anticipated that identifying aliens who had already lodged an asylum application in another Member State would be difficult, if not impossible unless an IT system would store fingerprints for identifying asylum seekers and irregular border-crossers.

Asylum applicants and irregular border-crossers over the age of 14 have their fingerprints taken as a matter of European Community law. These are then sent in digitally to a central unit at the European Commission, and automatically checked against other prints on the database. This enables authorities to determine whether asylum seekers have already applied for asylum in another EU Member State or have illegally transited through another EU Member State ("principle of first contact"). All EU Member States currently participate in the scheme, plus three additional European countries: Norway, Iceland and Switzerland...

On the 8<sup>th</sup> of July 2009, the Commission proposed to authorise the comparison of fingerprints which are contained in EURODAC with fingerprints in the possession of national law enforcement authorities or Europol for the fight against terrorist offences and serious crime, including trafficking in human beings and in drugs.<sup>290</sup> The Commission made the proposal following a request from member states, led by Germany, to allow their law enforcement authorities and Europol access to the Eurodac database to help investigations into terrorism and other serious crimes.

The move has been criticised by campaigners who say the Eurodac database was set up to identify asylum-seekers rather than to allow police to search for criminals. "Accessing Eurodac data by law enforcement bodies would increase the risk of stigmatisation of asylum-seekers and raise concerns about discrimination," said Gilles van Moortel, a spokesman for the United Nations High Commissioner for Refugees in Brussels.<sup>291</sup> The European Council on Refugees and Exiles (ECRE) said the move could potentially put asylum-seekers in danger, since Europol would also be allowed access. Europol can exchange data with other EU bodies and third countries. "How would it be ensured that information about people fleeing

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<sup>289</sup> Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50, 25.2.2003, p. 1–10

<sup>290</sup> AGENDA/09/23 Brussels Friday 26 June 2009, Top News from the European Commission, 29 June to 26 July 2009

<sup>291</sup> UNHCR Comment on Eurodac recast, 18 March 2009  
<http://www.unhcr.org/refworld/pdfid/49c0ca922.pdf> 02/10/2009

persecution doesn't reach their persecutors?" said Bjarte Vandvik, the ECRE's secretary-general.<sup>292</sup>

Experience with other European databases - as VIS or SIS - indicate however, that Europol will also be granted access to Eurodac.

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<sup>292</sup> openeurope.org <http://www.openeurope.org.uk/media-centre/summary.aspx?id=882> 02/010/2009

### **3.7. Conclusion**

As we have seen, the Council Decision establishing Europol brought some changes for the agency. From my point of view, the main alteration is the enhanced role of the European Parliament, which developed its position into that of a budget authority. This sincerely improves its abilities to exert influence. Later in the chapter on democratic accountability, I will explain why this was a change absolutely necessary. Another innovation brought by the Council Decision is the widening of the mandate, as Article 4 extends it to cover all forms of serious cross-border crime, as defined in Annex I. The new list of offences regarded as serious crime includes the forms of organised crime and terrorism, but also adds others, such as murder, organised or armed robbery, and rape. The new procedure in the nomination of a Director – only qualified majority instead of unanimity – presents a small step from intergovernmentalism to more towards integration.

The “bi-body” concept of Europol – with one “European” part with international staffers, and one intergovernmental part with Liaison Offices and National Units – makes it possible to use the agency in two different ways. The Member States are either able to exchange information by completely shutting out the “European part”, or may feed data into Europol’s IT system and benefit from a “greater perspective”. As shown above, the Member States largely prefer to exclude the agency from their knowledge and continue to work bi-laterally. So far intergovernmentalism plays a major role in The Hague. As explained above, e.g. the Management Board is composed by one representative by Member State, while the European Commission only acts as an observer. And the Council Decision establishing Europol strengthens the heads of the national units (HENU) even further.

As an “expert system”, Europol has a number of IT databases which clearly work very well. Data protection is – against claims sometimes heard – a very important issue. Individuals have the right to demand information if data is stored connected to them; there is a Joint Supervisory Board responsible for complaints and supervision, and the Council Decision establishing Europol introduces another control mechanism: the Data Protection Officer. Additionally Europol is very successful in gaining access to European databases, like the Schengen Information System or the Visa Information System. Right now there is a discussion going on grant the agency access to Eurodac. A move heavily criticized by NGOs

and UNHCR, as the fear that Europol could e.g. exchange information on people who are fleeing corrupt regimes with their countries of origin. We have also seen, that with the introduction of the Council Decision a chance was missed, to introduce a broader data protection regime for the third pillar and all of its agencies.

In order to create an added value for the national law enforcement agencies, Europol needs to publish reports like the OCTA report or the EU Terrorism Situation and Trend Report. This is impossible without receiving relevant information; therefore Europol fully depends on data of national police authorities.

Consequently we have to look into the willingness of national law enforcement agencies to share their knowledge and know-how. Furthermore we need to analyse how effectively the different European agencies and bodies can actually cooperate in fighting crime; how much room of manoeuvre the law grants them. My next chapter will concentrate on these questions.



“The trouble is that the al-Qaeda terrorists are thinking more European than Europe’s national anti-terrorism agencies.”<sup>293</sup>

## 4. The Institutional Framework and Cooperation

The Europol Work Programme lists European agencies, institutions and working groups with which it wants to cooperate closely in the fight against crime. This includes Eurojust, the Joint Situation Centre, the Counter Terrorism Group, and the Police Chiefs Task Force. At the same time, the Member States police agencies are interlinked on a bilateral basis, having liaison officers based at various other capitals. A number of non-EU states also maintain close ties to the diverse law enforcement bodies, including the American FBI or the Russian Federal Police.

The complexity of this organisational reality could best be characterised as a “crowded police space”<sup>294</sup>. European police co-operation can be viewed positively as such a space, with different countries and interest groups, being responsible for placing the emphasis on particular areas of co-operation. Almost all the European Member States are member countries of Interpol, the WCO and the United Nations. Therefore Europe can be considered, in policing terms, as being made up of a series of concentric and overlapping circles. There are overlaps according to institutional sources, territorial remits, functional specialisations and strategic emphasis. My research excludes the “Office européen de Lutte Anti-Fraude” (OLAF) as it is a General Service Directorate General of the European Commission, and does therefore not have the same organisational independence as the other below mentioned bodies.

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<sup>293</sup> Wolfgang Muchau, *Europe must tackle terrorism*, Financial Times, 10 July 2005  
<http://news.ft.com/cms/s/930466c8-f16c-11d9-9c3e-00000e2511c8.html> 08 May 2006

<sup>294</sup> quoting Bill Heberton and Terry Thomas, *Policing Europe*. New York: St. Martin’s Press, 1995 in Willy Bruggeman, *International law enforcement co-operation: a critical assessment*, European Journal on Criminal Policy and Research 9: 283–290, Kluwer Academic Publishers 2001, p 284

#### **4.1. The working structure of the Council**

The Article 36 Committee (Cats) coordinates the works of the various Third Pillar Working Groups dealing with police cooperation and judicial cooperation in criminal matters. It also brings together the Schengen Information System as well as EU agencies and various bodies working in the field of police and judicial cooperation.<sup>295</sup>

Carol Harlow describes the Article 36 Committee as the engine of third-pillar policy-making. It is composed of one official per Member States, plus a Commission representative, and its composition changes according to the matter under discussion. As a Committee advisory to the Council it is composed by national civil servants and responsible to national governments as a Community body. This is important, as officials who operate policies are not always in line with their ministers.<sup>296</sup> Jörg Monar thinks that it is the most important Council Committee for preparing ministerial decisions in the third pillar.<sup>297</sup>

The Article 36 Committee also works as an intermediate between the Management Board of Europol and the Council Secretariat. When Council working groups had asked “Europol to carry out tasks originally not foreseen by its yearly work programmes and budgets which are approved by the Council upon the recommendation of the Management Board”,<sup>298</sup> the Management Board expressed to the Article 36 Committee its wish for the “application of the appropriate procedures”,<sup>299</sup> which shows the important coordination position Cats has.

Within the third pillar a big number of Working Groups is concerned with the fight against Organised Crime. There are single Working Groups for the topics of Frontiers, Asylum, Visas, Expulsion, Customs, Civil Law Matters, Migration, Drug Trafficking, SIRENE, SIS, and a couple more. Working Groups concerned with Europol and Police Co-operation exist as well. They mainly do the preparatory work, which is then passed on to Cats, Coreper, and finally to the JHA Council.

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<sup>295</sup> *Working structures of the Council in terrorism matters – Options paper*, op.cit., p. 3

<sup>296</sup> Carol Harlow, *Accountability in the European Union*, Oxford University Press, New York, 2002, p. 42

<sup>297</sup> Jörg Monar, op.cit. p. 392

<sup>298</sup> Letter from Rodolfo Ronconi, Chairman of the Management Board, to Mr. Marotta, Article 36

<sup>299</sup> Ibid.



## **4.2. Eurojust**

Eurojust is in many respects the counterpart to Europol in the judicial cooperation area and has been designed as a facilitator of cooperation between national prosecution authorities. This includes the speeding up of legal assistance and extradition and support for the coordination of parallel prosecution operations in several Member States and information exchange.<sup>300</sup> It is made up of one national representative from each Member State who enjoys very different powers and status (mostly either being nation prosecutor or judge). They form the College of Eurojust and facilitate the work of national magistrates, to make their work easier and more effective, as “of course, one can combat terrorism in each country separately (...) however, one will never be able to tackle the whole network without this crucial exchange of information between the Member States concerned.”<sup>301</sup>

Eurojust was established as a result of a decision by the European Council of Tampere (15 – 16 October 1999) in order to improve the fight against serious crime by facilitating the optimal co-ordination of action for investigations and prosecutions covering the territory of more than one Member State with full respect for fundamental rights and freedoms. On 14 December 2000 the Council of the European Union formally established the provisional judicial co-operation unit “Pro-Eurojust”. Prosecutors from all the Member States tried and tested concepts to improve the fight against serious crime by facilitating co-ordination of action for investigations and prosecutions within the EU.

Pro-Eurojust started its work on 1 March 2001. Eurojust itself was set up by a Decision of 28 February 2002 as a body of the EU with legal personality,<sup>302</sup> Eurojust is the first permanent body established for judicial co-operation in the European legal area, and is financed through the European Union’s general budget.

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<sup>300</sup> Jörg Monar, *op.cit.*, pp 394

<sup>301</sup> Michèle Coninsx, *Eurojust and EU Judicial Cooperation in the Fight against Terrorism*, in *Legal Instruments in the Fight against International Terrorism, A transatlantic Dialogue*, edited by Cyrille Fijnaut, Jan Wouters and Frank Naert, Martinus Nijhoff Publishers, Leiden – Boston, 2004 , p. 177

<sup>302</sup> Article 1, Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/JHA

Eurojust is monitored by an independent Joint Supervisory Body, ensuring that the processing of personal data is carried out in accordance with the Eurojust Decision. It also hears appeals lodged by individuals regarding access to personal information.<sup>303</sup>

Eurojust is stimulating and improving the co-ordination of investigations and prosecutions between the competent authorities in the Member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests. Eurojust supports in any way possible the competent authorities of the Member States in order to render their investigations and prosecutions more effective when dealing with cross-border crime.<sup>304</sup>

At the request of a Member State, Eurojust may assist investigations and prosecutions concerning a particular Member State - or a non-Member State - if a co-operation agreement has been concluded or if there is an essential interest in providing such assistance.<sup>305</sup>

Eurojust's competence covers the same types of crime and offences for which Europol has competence, such as terrorism, drug trafficking, trafficking in human beings, counterfeiting, money laundering, computer crime, crime against property or public goods including fraud and corruption, criminal offences affecting the European Community's financial interests, environmental crime and participation in criminal organisations. For other types of offences Eurojust may assist in investigations and prosecutions at the request of a Member State.<sup>306</sup>

Eurojust may ask the competent authorities of the Member States concerned<sup>307</sup>:

- undertaking an investigation or prosecution of specific acts;
- accepting that one of them may be in a better position to undertake an investigation or to prosecute specific acts;
- coordinating between the competent authorities of the Member States concerned;
- setting up a joint investigation team in keeping with the relevant cooperation instruments;

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<sup>303</sup> Article 23, Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/JHA

<sup>304</sup> Article 3, Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/JHA

<sup>305</sup> Ibid.

<sup>306</sup> Article 4, Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/JHA

<sup>307</sup> Article 6, Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, 2002/187/JHA

- providing it with any information that is necessary for it to carry out its tasks;

In order to carry out its tasks, Eurojust maintains privileged relationships with the European Judicial Network, Europol, the European Anti-Fraud Office (OLAF), and Liaison Magistrates. Via the Council, Eurojust is enabled to conclude co-operation agreements with non-Member States and international organisations or bodies for the exchange of information or the secondment of officers.

#### **4.2.1. Number of cases on the increase**

Jean-Marie Cavada (ALDE, FR), the chair of the European Parliament Civil Liberties Committee, thinks that Eurojust should have a more central role in justice cooperation: “The reality is that many countries prefer to work with Interpol, even though they could use Eurojust.”<sup>308</sup> Michael G. Kennedy, the President of Eurojust, finds at least moderate optimism: “Although there has been a series of successes lately that led to the arrest of criminals in Bulgaria, Belgium and the UK, there are still limits to the activity of Eurojust. Two Member States (Greece and Spain) had not transposed the Eurojust decision into their national legislation until 2006 and only four countries gave structured information and four countries are forwarding at least information”.<sup>309</sup> In 2007, the Eurojust Decision was still not fully implemented into national legislation.<sup>310</sup> Nevertheless Eurojust is gaining influence. In 2004 Eurojust participated in 33 terrorist cases and 2005 in 25 terrorist cases. On first sight the number of cases decreased, but in the 2005 cases “the core business (of Eurojust) was echoed. The quality of cases increased incredibly.”<sup>311</sup>

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<sup>308</sup> *Police and judicial cooperation: better parliamentary scrutiny needed*, European Parliament meeting, 18 October 2005

<sup>309</sup> Ibid

<sup>310</sup> Eurojust, Annual report. 2007, p 8

<sup>311</sup> Ibid.

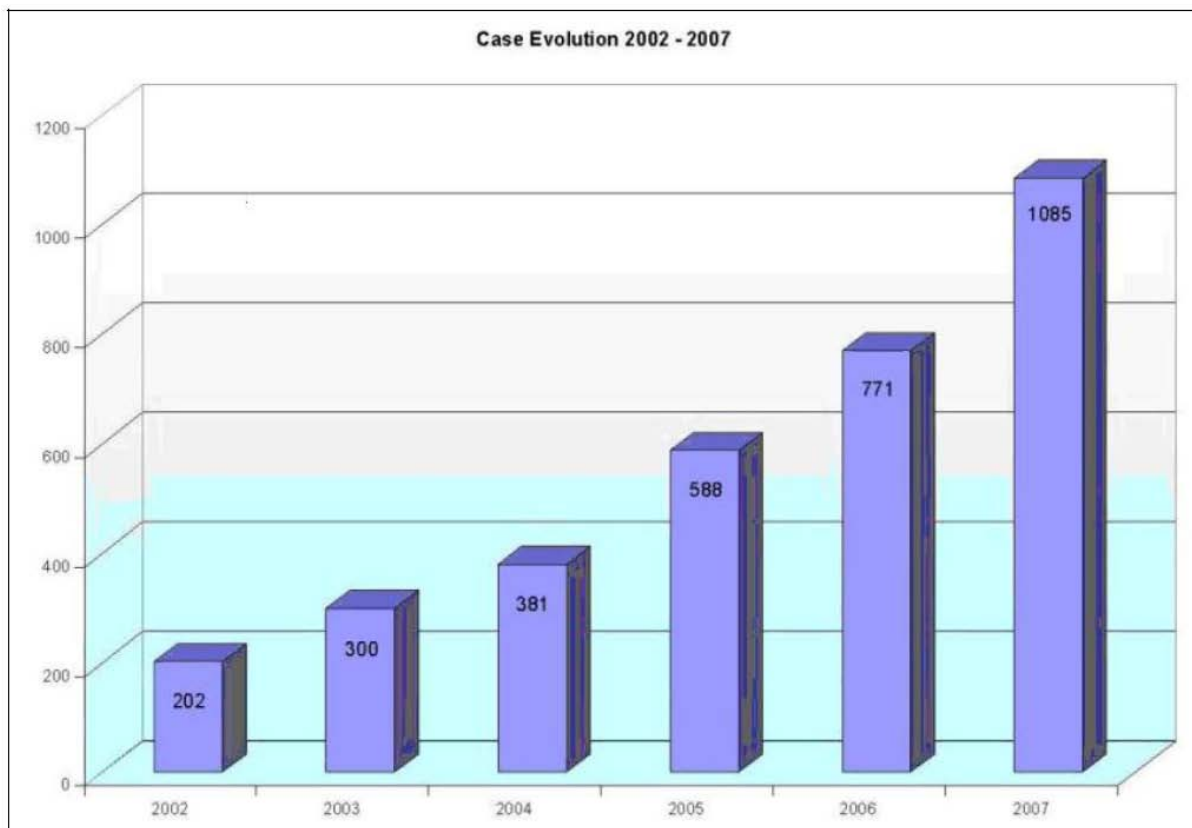


Figure 9: Evolution of Cases 2002 – 2007<sup>312</sup>

This figure shows that National Members registered 1 085 cases (increase of 41% compared to 2006, 771 cases) in 2007. Eurojust assumes that these figures do not only indicate a positive trend, but reveal that Member States are more aware than ever of the work and services provided by Eurojust and the added value resulting from our involvement.

According to Eurojust, 1 065 cases dealt with operational issues, while only 20 cases were registered to provide support to and expertise on general topics on legal matters related to each legal system or judicial questions or practicalities not involving the operational work of the College.

<sup>312</sup> Eurojust, Annual Report 2007, p 12

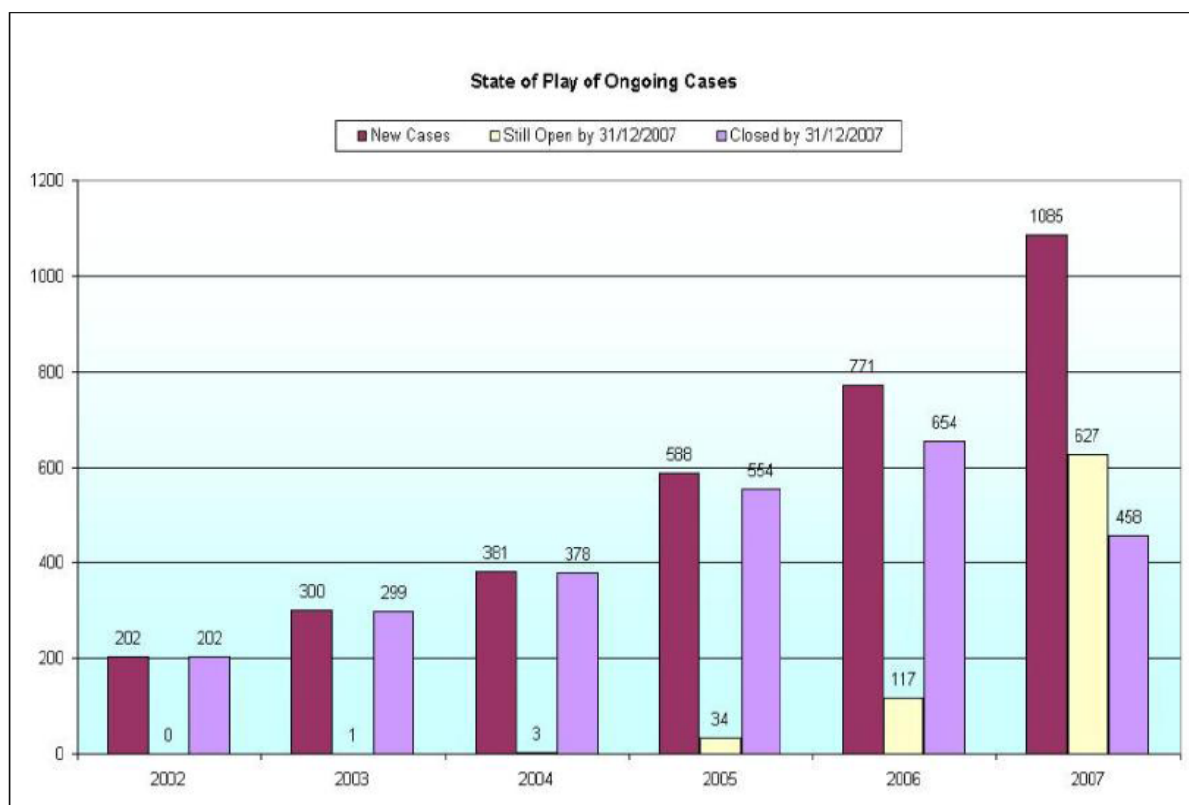


Figure 10: State of Play of Ongoing Cases<sup>313</sup>

This figure provides overview of the work of the College as it refers to the number of cases still open, or closed during all the years of Eurojust's activity. At the end of 2007 782 cases covering the period 2003 – 2007 were still active.

In 2007, Eurojust dealt with 813 bilateral cases, and 272 multilateral cases.

#### 4.2.2. Obstacles on the way

One, maybe the major obstacle, in the role of Eurojust in the fight against crime is the reluctance of national prosecutors to cooperate in sensitive investigations, which are deemed to be top secret information. The Subcommittee F proposes the establishment of Eurojust national correspondents dealing exclusively with terrorism and the adoption of high data protection standards, as “Eurojust can play a crucial part in fighting terrorism.”<sup>314</sup> The

<sup>313</sup> Eurojust, Annual Report 2007, p 13

<sup>314</sup> European Union Committee, *Judicial Co-Operation in the EU: The Role of Eurojust*, 23rd Report of Session 2003-04, London, 21 July 2004, p. 36

Council decision on the exchange of information and cooperation concerning terrorist offences<sup>315</sup> makes provision for the designation of a Eurojust national correspondent for terrorist matters or an appropriate judicial or other competent authority which shall have access to and can collect all relevant information concerning prosecutions and convictions for terrorist offences<sup>316</sup>.

The information that should be transmitted to Eurojust should include<sup>317</sup>

- data which identify the person, group or entity that is the object of a criminal investigation or prosecution;
- the offence concerned and its specific circumstances;
- information about final convictions for terrorist offences and the specific circumstances surrounding those offences;
- links with other relevant cases;
- request for judicial assistance, including letters rogatory, addressed to or by another Member State and the response.

#### **4.2.3. Cooperation with Europol**

It did not happen by chance that Eurojust was situated in Den Haag. A close cooperation between Eurojust and Europol was intended from the very start on. Nevertheless the two agencies work in two opposite areas of the city and are not only separated in a geographical matter.<sup>318</sup> Hubert Haenel, chair of the EU affairs delegation at the French Senate, indicates the lack of coordination between Eurojust and Europol<sup>319</sup> while Max-Peter Ratzel thinks that things are improving.<sup>320</sup> The number of cases dealt with by Eurojust involving Europol almost

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<sup>315</sup> Council Decision *on the exchange of information and cooperation concerning terrorist offences*, 2005/671/JHA, Brussels, 20 September 2005

<sup>316</sup> Ibid., Article 2 (2)

<sup>317</sup> Ibid., Article 2 (5)

<sup>318</sup> Max-Peter Ratzel, *Alle haben ihre Lektion gelernt*, FAZ, Frankfurt, 13 January 2006  
[www.pds-europa.de/dokumente/presse/vie-dok-html?zid=2030](http://www.pds-europa.de/dokumente/presse/vie-dok-html?zid=2030) 07 May 2006

<sup>319</sup> *Police and judicial cooperation: better parliamentary scrutiny needed*, European Parliament meeting, 18 October 2005

<sup>320</sup> Max-Peter Ratzel "Ich stelle mit großer Zufriedenheit fest, dass wir kooperativ auf einem guten Weg sind", *Mehr liefern als erwartet wird*, Öffentliche Sicherheit, 9-10/05, Vienna, 2005

quadrupled from 7 cases in 2006 and 25 cases in 2007. 12 Co-ordination meetings were held between the two bodies in 2007.<sup>321</sup>

As success story would be “Operation Koala” which was successfully launched against child sex offenders in 2006. A child abuse video - produced in Belgium - was discovered in Australia, and lead to a homepage of an Italian who offered more than 150 self-made, sexually explicit videos of underage girls. In a co-ordinated action, 2.500 “customers” in 19 countries were identified, thousands of computers videos and photographs were seized and more than a million files and pictures found. On the judicial level Eurojust took the lead and organised, together with Italy and Europol, four co-ordination meeting, resulting in simultaneous actions.<sup>322</sup> “They key to the success of this operation is the provision of valuable data by Member States and crime analysis carried out by specialists in dealing with online child sex abuse cases. The quality of the intelligence reports has been praised by the countries involved and has been considered crucial in relation to obtaining search warrants”<sup>323</sup>

The relations between Eurojust and Europol are regulated by an agreement which enables personal data to be exchange. According to Mr Kennedy, the agreement is not as ambitious as Eurojust would have hoped “We would have thought that there could have been a much stronger capacity for joint working and co-operation, a stronger sense of sharing their strategic analysis; our being able to initiate that strategic analysis, then feeding off it and working it; and initiating our own files.”<sup>324</sup>

It took until June 2007 to create a secure data connection between Eurojust and Europol. Eurojust was only able to access Europol via the Member States.<sup>325</sup> Franco Frattini described the new secure communication link between two “of the key actors in the EU architecture for internal security (as) another step towards the realisation of an area of freedom, security and justice in Europe.”<sup>326</sup> Michael Kennedy pictured the secure network line as one of his key priorities to ensure the effectiveness of Eurojust’s cooperation with Europol, and as a mean to develop the project on Joint Investigation Teams more efficiently. Detlef Wasser and Oliver

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<sup>321</sup> Eurojust, Annual report. 2007, p 8

<sup>322</sup> Michele Coninsx, Eurojust’s National member for Belgium, Press Conference, The Hague, 05 November 2007

<sup>323</sup> Mariano Simancas, Europol’s Deputy Director, Press conference, The Hague, 05 November 2007

<sup>324</sup> Kennedy in European Union Committee, op.cit., p. 29

<sup>325</sup> Interview with Michèle Coninsx, op.cit.

<sup>326</sup> Franco Frattini, Commissioner for Freedom, Security and Justice, The Hague, 07 June 2007, [http://eurojust.europa.eu/press\\_releases/2007/08-06-2007.htm](http://eurojust.europa.eu/press_releases/2007/08-06-2007.htm) 29. Retrieved May 2008

Fawzy however feel that the legal relationship between Europol and Eurojust is relatively vague. According to them, Europol has better access to information than Eurojust, which enables it to take on a lead function, even though the legal background only talks about complementing each other's competences.<sup>327</sup>

The Protocol of 27 November 2003 amending the Europol Convention, the so-called "Danish Protocol", created the possibility for Europol to invite experts of third States or third bodies to be associated with the activities of an analysis group<sup>328</sup>. Eurojust signed six Arrangements with Europol on 7 June 2007 and appointed National Members and case analysts to be associated as experts from Eurojust on judicial co-operation. A Europol - Eurojust joint working party on analysis work files has been established to examine legal and practical difficulties of Eurojust's involvement. Another provision of the Danish Protocol (which will be carried over into the Decision) allows Member States to authorise direct contacts between designated competent authorities and Europol.

#### **4.2.4. Under the Lisbon Treaty**

The Constitutional Treaty would have transformed Eurojust into the "embryo" of a European Public Prosecutor (EPP). It could have taken the role of national judges who supervise the police, Europol, under the control of judges "but has unfortunately not yet reached this stage".<sup>329</sup> An idea which was also supported by the Subcommittee F: "But if (...) an EPP is eventually created, we agree that (...) it should build on Eurojust. Eurojust is an institution which in our view is already showing its effectiveness: it works with the grain of different national legal systems and different criminal codes."<sup>330</sup>

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<sup>327</sup> Detlef Wasser & Oliver Fawzy, *Eurojust aus der Perspektive der Justiz*, Referat der Verfasser im Rahmen der Tagung „Eurojust" der Europäischen Rechtsakademie Trier am 31. März 2003, p. 97

<sup>328</sup> Article 10, (9): "Europol may invite experts of third States or third bodies within the meaning of paragraph 4 to be associated with the activities of an analysis group, (...) The association of experts of a third State or a third body with the activities of an analysis group shall be subject to an arrangement between Europol and the third State or third body. The rules governing such arrangements shall be determined by the Management Board acting by a majority of two thirds of its members. Details of the arrangements between Europol and third States or third bodies shall be sent to the Joint Supervisory Body referred to in Article 24 which may address any comments it deems necessary to the Management Board", Council Act of 27 November 2003, 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, 2004/C 2/01

<sup>329</sup> *Police and judicial cooperation: better parliamentary scrutiny needed*, op.cit.

<sup>330</sup> European Union Committee, *Judicial Co-Operation in the EU: The Role of Eurojust*, 23rd Report of op.cit., p. 36



The Lisbon Treaty states that “In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.”<sup>331</sup> Experts assume, that Eurojust could be broadened into becoming the office of the European Public Prosecutor, which would have a - relatively narrow - remit of protecting EU finances.<sup>332</sup> Sooner or later, the EPP might even have been installed to supervise Europol. Right now there is, according to Michèle Coninx, no need for such supervision as Europol does not have the means of a normal police force.<sup>333</sup>

Alternatively, the Treaty gives Member States the right - provided a minimum of nine of them want to do so - to apply “enhanced cooperation” in judicial matters to establish a EPP.<sup>334</sup> Unanimity in the Council is needed to broaden its scope to transnational serious crimes. It gives this group the further possibility of changing the decision-making procedures and introducing legislative reforms if the circumstances require.<sup>335</sup>

Andrew Duff claims that if plans for an EPP materialise, Member States will have to proceed very cautiously to ensure that there is sufficient mutual trust to create a new entity<sup>336</sup>. The EPP will be based on Eurojust and, once it starts work, Member States officials will have to go further in “harmonising” what constitutes criminal behaviour and agreeing the penalties to be applied. There would need greater collaboration among defence lawyers needed to ensure

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<sup>331</sup> Article 69 E (1), Lisbon Treaty

<sup>332</sup> Intergovernmental Conference, European Policy Center, Brussels

<http://www.epc.eu/en/er.asp?TYP=ER&LV=293&see=y&t=2&PG=ER/EN/detail&l=&AI=769> 03.June 2006

<sup>333</sup> Interview with Michèle Coninx, op.cit.

<sup>334</sup> Article 69 E (1): “In the absence of unanimity, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft regulation concerned, they shall notify the European Parliament, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 10(2) of the Treaty on European Union and Article 280 D(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.”, Lisbon Treaty

<sup>335</sup> Article 69 E (4): “The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission.”, Lisbon Treaty

<sup>336</sup> Andrew Duff, British MEP, Leader of the Liberal Democrat European Parliamentary Party, Intergovernmental Conference, EPC, op.cit.

that their clients are adequately protected. According to him, another “thorny issues” would be to clarify rules on jurisdictional competence, deciding which national enforcement system should be used as a model, given, for example, that the Dutch model would be more lenient in criminalising drug use than a French one.

Eurojust would surely like to extend its existing powers, e.g. by setting up joint prosecuting teams and liaison between prosecutors from different countries working on the same case. François Falletti thinks that the Lisbon Treaty would have given Eurojust additional - but limited - powers<sup>337</sup>, as Member States can still ignore its strictures since judicial powers remain at national level. Eurojust recommendations are non-binding to national judges who can choose either to cooperate or ignore them, depending on whether they accord with national practices. According to him, the EPP would bring added-value to Eurojust by making it possible to refer ongoing cases to a central information-gathering system, ensuring that individual lawyers are aware of what is happening across the EU. In order to use this properly, the relevant national police and judiciary will have to be involved.

Regarding the co-operation with Europol, the Lisbon Treaty clearly states, that “the European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.”<sup>338</sup>

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<sup>337</sup> François Falletti, National Member for Eurojust in France and President of the International Association of Prosecutors, , Intergovernmental Conference, EPC, op.cit.

<sup>338</sup> Article 69 (2), Lisbon Treaty

### **4.3. The Joint Situation Centre**

The Situation Centre was set up in Brussels in 2002 and counts around 45 staff. It is situated in the Council Secretariat and provides strategic analysis on terrorist threats for the Council.<sup>339</sup> It is responsible for monitoring potential crisis regions concerning terrorism and weapons of mass destruction,-proliferation. It furnishes the EU Council with strategic intelligence-based assessments on counter-terrorism matters.<sup>340</sup> William Shapcott, the head of SitCen, describes the position of the SitCen in the institutional framework as kind of cross pillar: “We have been quite careful, even from the beginning, not to formally have it in the Second Pillar. We have played with Solana's double-hating. He is the Secretary General; we are attached to his cabinet, so we are squarely in the Secretariat General. We are not exclusively a Second Pillar body.”<sup>341</sup>

#### **4.3.1. No European CIA**

Statewatch, an English government watch dog, thinks that SitCen was “clearly needed as attempts to bring together meaningful intelligence on terrorism through Europol was doomed to fail – internal security and external intelligence agencies are loath to share information with police agencies.”<sup>342</sup> The basic worries to share intelligence might be one of the reasons why SitCen processes only strategic information without personal data. Daniel Keohane claims that this seemingly small development of installing SitCen is significant because it “can encourage EU foreign, defence and internal security officials, as well as national security services, to better coordinate their thinking on the terrorist threat.”<sup>343</sup>

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<sup>339</sup> “With effect from 1 January 2005, SitCen will provide the Council with strategic analysis of the terrorist threat based on intelligence from Member States' intelligence and security services and, where appropriate, on information provided by Europol.” The Hague Program, cit.op., p. 29

<sup>340</sup> Information by the Institute of International & European Affairs, [http://www.iiea.com/eventsxtest.php?event\\_id=238](http://www.iiea.com/eventsxtest.php?event_id=238), 15. July 2008

<sup>341</sup> William Shapcott, Committee on European Union, op.cit., question 181

<sup>342</sup> Statewatch bulletin, Vol. 14, no 5, August – October 2004

<sup>343</sup> Daniel Keohane, *One step forward, two steps back*, E!Sharp, November – December 2005, p. 38

SitCen is however not likely to develop into a “European Intelligence Agency” as Anthony Glees points out who even insists that<sup>344</sup> “with great respect, to say we need a European CIA would be an admission that we are out of our minds. The one thing we do not need to replicate is the jungle that exists within the American intelligence community”.

Austria proposed the establishment of such an agency, which would have included security intelligence into the EU system, but was rejected by the Council on 19 February 2004, mainly because Member States considered it far too ambitious.<sup>345</sup> The five EU governments with the greatest intelligence resources (Britain, France, Germany, Italy and Spain) strongly opposed this idea as their intelligence agencies would rather share their most sensitive information with a few countries than with other governments which would increase the chance of leaks.<sup>346</sup>

In the minutes of a conversation with the European Committee of the House of Lords, William Shapcott answers the question after the nature of SitCen’s work at first with “I do not want to go into too much detail of precisely how we build the reports”<sup>347</sup> and proceeds rather cryptically: “An uninitiated reader might not read a sentence and conclude that beneath that sentence there is a piece of concrete intelligence, but, nevertheless, it is intelligent conclusions drawn from more fundamental material. You should think in those terms in how you regard our products. I think, for those reasons, it is fairly evident that we are quite a long way from the operational information.”

The answer of the Austrian Minister of Foreign Affairs, Ursula Plassnik, to a parliamentary query concerning the sources of SitCen, sheds more light on this topic: the analysis by SitCen is based on information of the media, reports of Member States and the Commission, reports and analysis of national intelligence agencies.<sup>348</sup> The information retrieved is not only

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<sup>344</sup> Anthony Glees, Director for the Brunel Centre for Intelligence and Security, *E.U. Works to Improve Counterterror Intelligence*, Interview by Mary Louise Kelly, NPR, 10 November 2004 <http://www.npr.org/templates/story/story.php?storyId=4163613> 08 May 2006

<sup>345</sup> Björn Müller-Wille, *Building a European Intelligence Community in response to terrorism*, European Security Review, Isis Europe, Number 22, April 2003

<sup>346</sup> Daniel Keohane, *One step forward, two steps back*, E!Sharp, November – December 2005, p. 38

<sup>347</sup> William Shapcott, Committee on European Union, Minutes of Evidence, Questions 175 and 176, London, 3 November 2004 <http://www.publications.parliament.uk/> 27 April 2006

<sup>348</sup> Anfragebeantwortung durch die Bundesministerin für europäische und internationale Angelegenheiten Dr. Ursula Plassnik zu der schriftlichen Anfrage (750/J) der Abgeordneten Dipl.-Ing. Karlheinz Klement, Kolleginnen und Kollegen an die Bundesministerin für europäische und internationale Angelegenheiten betreffend dem "Situation Centre" (SitCen) der Europäischen Kommission, 705/AB (XXIII. GP) dem "Situation Centre" (SitCen) der Europäischen Kommission, 4. June 2007

important for the international fight against terrorism, but also used to ensure the best possible security for ESDP missions outside the EU.<sup>349</sup>

#### **4.3.2. Cooperation with Europol**

On the question about the relation to Europol, William Shapcott answered, that "we are committed to working with Europol to produce joint reports where that is appropriate, but there will be some limitations. I think, also, just as in the national structures, if producing a joint report means you have to dumb down the quality of information needed in order to share it with a wider group then that is perhaps a disadvantage, so I think from time to time we will have to not share information directly. It is an area which is not fully resolved."<sup>350</sup> Basically SitCen provides tailored situation and threat assessments based on national intelligence, open sources, diplomatic reports from Member States and the Commission's representations.<sup>351</sup> Its reports for European politicians and national Ambassadors are essentially of diplomatic and preventive nature and do not include strikes against identified terrorist, proliferators or criminals on territory that falls under the authority of third states. SitCen's products are of a strategic rather than operational nature while any operations, like assaults on vessels in international waters or clandestine operations are executed by Member States independently.<sup>352</sup> Through the cooperation with Europol, Europol can improve their threat assessment which serves primarily the national police forces and SitCen is in a better position to advise the political branch.<sup>353</sup>

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<sup>349</sup> Ibid.

<sup>350</sup> Ibid., question 157

<sup>351</sup> Björn Müller-Wille, *op.cit.*

<sup>352</sup> Ibid.

<sup>353</sup> Max-Peter Ratzel, *Alle haben ihre Lektion gelernt*, FAZ, Frankfurt, 13 January 2006  
[www.pds-europa.de/dokumente/presse/vie-dok-html?zid=2030](http://www.pds-europa.de/dokumente/presse/vie-dok-html?zid=2030) 08 May 2006

#### **4.4. Frontex**

Frontex (“European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union”) is a specialised expert body tasked with improving the coordination of operational cooperation between Member States in the field of external border management.

According to its home-page, Frontex promotes a pan European model of Integrated Border Security, which consists not only of border controls but also other important elements. The first tier of the model is formed by exchange of information and cooperation between Member States on immigration and repatriation. The second tier is represented by border and customs control including surveillance, border checks and risk analysis. The third tier is linked to cooperation with border guards, customs and police authorities in neighbouring countries. The forth tier concerns cooperation with third countries including common activities.<sup>354</sup>

Frontex was created by the Council Regulation establishing Frontex on the 26<sup>th</sup> October 2004. The agency started to be operational on the 3<sup>rd</sup> October 2005 and was the first EU agency to be based in one of the members who joined in 2004, namely in Warsaw, Poland.

Its main tasks are to<sup>355</sup>

- a) coordinate operational cooperation between Member States in the field of management of external borders;
- b) assist Member States on training of national border guards, including the establishment of common training standards;
- c) carry out risk analyses;
- d) follow up on the development of research relevant for the control and surveillance of external borders; assist Member States in circumstances requiring increased
- e) technical and operational assistance at external borders;
- f) provide Member States with the necessary support in organising joint return operations.

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<sup>354</sup> [http://www.frontex.europa.eu/origin\\_and\\_tasks/origin/](http://www.frontex.europa.eu/origin_and_tasks/origin/), 30. Juni 2008

<sup>355</sup> Article 2 (1), 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

In the beginning Frontex suffered from a lack in professionals who were willing to work for the Agency because the salaries on offer are lower than in Western Europe. This was mainly linked to a ceiling which had been set equivalent to 81.4% of Brussels based officials' pay and lead to the delay of at least two or three projects in 2007.<sup>356</sup>

#### 4.4.1. Frontex' joint operations

Frontex started joint operations with the Member States immediately after being set up, increasing their number from 2006 to 2007:

Number of joint operations	2006	2007
at sea borders	5	7
at land borders	1	8
at air borders	2	5
Involving different types of borders	3	2

**Figure 11 Frontex' Operational Coordination**<sup>357</sup>

On an operational basis, Frontex mainly concentrated on intercepting third country nationals:

<sup>356</sup> Adam Easton, *Staff woes hit EU border agency*, BBC News, Warsaw, 26 January 2007  
<http://news.bbc.co.uk/2/hi/europe/6303089.stm>, Retrieved 1. July 2008

<sup>357</sup> Background Note, To the attention LIBE Committee of the European Parliament, Information on the activities of Frontex during the years 2006 and 2007, by Frontex, p. 1  
[http://www.infinitoedizioni.it/fileadmin/InfinitoEdizioni/rapporti/FRONTEX\\_activities\\_2006-2007.pdf](http://www.infinitoedizioni.it/fileadmin/InfinitoEdizioni/rapporti/FRONTEX_activities_2006-2007.pdf)  
 30. Juni 2006

<b>Number of intercepted/apprehended third country nationals</b>	<b>2006</b>	<b>2007</b>
at sea borders	23,438	11,476
at land borders	4,721	4,522
at air borders	3,857	3,297

**Figure 12 Number of intercepted/apprehended third country nationals<sup>358</sup>**

#### **4.4.2. Frontex and Europol**

Article 13 enables Frontex to cooperate with Europol and other international organisations, in accordance with the relevant provisions of the Treaty and the provisions on the competence of those bodies.<sup>359</sup> Both agencies make intense use of this opportunity.

The first project launched between Europol and Frontex was named Agelaus and focused upon standard procedures of dealing with minors (passengers under 18 years of age) arriving from third countries by air at the external borders of the EU. A total of 18 Member States out of 25 (Bulgaria and Romania were not members at the commencement of the project) joined the project and 27 airports participated in this joint operation. During the four week operational period local border guard authorities carried out the checks and procedures described by the project team in the operational plan and at the initial project meeting.<sup>360</sup>

In September 2007 Europol and Frontex jointly produced a Report on the determination of “High Risk Routes Regarding Illegal Migration in the Western Balkan Countries” which was

<sup>358</sup> Background Note, To the attention LIBE Committee of the European Parliament, Information on the activities of Frontex during the years 2006 and 2007, by Frontex, p. 2  
[http://www.infinitoedizioni.it/fileadmin/InfinitoEdizioni/rapporti/FRONTEX\\_activities\\_2006-2007.pdf](http://www.infinitoedizioni.it/fileadmin/InfinitoEdizioni/rapporti/FRONTEX_activities_2006-2007.pdf)  
Retrieved 30. Juni 2006

<sup>359</sup> Article 13, 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

<sup>360</sup> [http://www.frontex.europa.eu/examples\\_of\\_accomplished\\_operati/art13.html](http://www.frontex.europa.eu/examples_of_accomplished_operati/art13.html) , 30. June 2008



discussed during the MDG meeting on 26 September 2007.<sup>361</sup> In February 2008, the Slovenian Presidency stressed the plan of Frontex and Europol to continue work on the region by delivering smaller intelligence products with an operational focus and involving both Member States and Western Balkan Countries. “Frontex and Europol will explore the opportunities to proceed with operational follow up to the intelligence process, especially emphasising on the concept of ‘Joint Teams’”,<sup>362</sup> and “(they) will explore the possibilities of providing training to the Western Balkan Countries. In particular, Europol will check the possibilities of including representatives of the Western Balkan Countries in training on strategic intelligence analysis. Europol has already agreed to provide strategic analysis training to the SECI Centre. Frontex will look into the possibility of including Western Balkan representatives in training sessions organised for Frontex and Member States.”<sup>363</sup>

In December 2007, the Commission reported that significant steps had been taken to improve the exchange of information between Frontex and Europol, and that there are regular exchanges of information between them on the Eastern and South-Eastern regions neighbouring the EU. They also stepped up their work on Intelligence and Risk Analysis, notably through the production of tailored assessments and analytical bulletins.<sup>364</sup> Furthermore Europol experts started to participate in the new Frontex Risk Analysis Network.<sup>365</sup> As Frontex understands itself as a connection facilitator between Intelligence Services and Border Control Services, this network is used to pass on classified information.<sup>366</sup> Frontex – on the other hand - contributing to Europol’s Organised Crime Threat Assessment Report (OCTA). According to the Commission, these “joint risk analysis

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<sup>361</sup> Summary Record of the Expert Meeting on the Follow-up of the Joint Frontex Europol Report on the High Risk Routes of Illegal Migration in the Western Balkan Countries within the Frontex Risk Analysis Network, 19 September 2007, in the Annex of Conclusions from the Expert Meeting on the Follow-up of the Joint Frontex Europol Report on the High Risk Routes of Illegal Migration in the Western Balkan Countries within the Frontex Risk Analysis Network, COUNCIL OF THE EUROPEAN UNION, Doc. No. 5685/08, Brussels, 15 February 2008

<sup>362</sup> Conclusions from the Expert Meeting on the Follow-up of the Joint Frontex Europol Report on the High Risk Routes of Illegal Migration in the Western Balkan Countries within the Frontex Risk Analysis Network, COUNCIL OF THE EUROPEAN UNION, Doc. No. 5685/08, Brussels, 15 February 2008, p. 2

<sup>363</sup> Ibid.

<sup>364</sup> This included an assessment of high risk routes of illegal migration through the Western Balkans, with the operational objective of setting up joint teams in the region. Member States cooperate closely on these issues, for example through the Organised Crime Threat Assessment (OCTA) exercise, during which they provide data for further analysis on a regular basis.

<sup>365</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - *Towards a Common Immigration Policy* = Interim progress report on the Global Approach to Migration, {COM(2007) 780 final}

<sup>366</sup> Bernd Kasperek, *Struktur und Aufgaben der Frontex-Agentur*, FRONTEX - Broschüre zur europäischen Grenzschutzagentur FRONTEX, in der Reihe "Materialien gegen Krieg, Repression und für andere Verhältnisse" (Nr. 4), 7. Januar 2008 - S. 7. Online-Zeitschrift "IMI-List" Nummer 0274 - 9. Januar 2008, <http://www.no-fortress-europe.eu/upload/FRONTEX-Broschuere.pdf>, Retrieved 30. June 2008

with Europol, international organisations and relevant third countries (based on the respective working arrangements) should be given priority, including more frequent geographical and/or theme oriented joint risk analysis, with relevant partners.”<sup>367</sup>

On 28th March 2008, Europol and Frontex signed a cooperation agreement to enhance the cooperation between Europol and Frontex, in particular through the exchange of strategic and technical information.<sup>368</sup>

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<sup>367</sup> 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, Brussels, 13.2.2008

<sup>368</sup> <http://www.europol.europa.eu/index.asp?page=news&news=pr080402.htm> 30. Juni 2008

#### **4.5. The Police Chiefs Task Force (PCTF)**

The Tampere European Council created the Police Chief Task Force (PCTF, which has been established in 2000) by recommendation no 44 which called for "the establishment of a European Police Chiefs Operational Task Force to exchange, in cooperation with Europol, experience, best practices and information on current trends in cross-border crime and contribute to the planning of operative actions". Statewatch criticizes PCTF for the lack of any constitutional or legal basis and a "wholly unaccountable arrangement which has no place in a democratic Europe."<sup>369</sup>

The PCTF and its cooperation with Europol intended to facilitate the exchange of experiences, common evaluations and the planning of common operations in the fight against cross-border crime. The Task Force is, unlike Europol, not an institution with legal competences and a permanent infrastructure but a high level coordination group that meets at least once per Presidency with changing priorities.<sup>370</sup> The Slovenian Presidency described it as "a forum where the highest police representatives of the EU Member States take strategic decisions. At PCTF meetings, its members discuss the challenges and problems faced by all European police forces, striving to find solutions."<sup>371</sup>

In April 2002 the PCTF agreed to set up a new structure involving the previous, current and forthcoming EU Presidencies, Europol and the Commission which should meet between PCTF meetings and improve coordination.<sup>372</sup> While the PCTF has focused its work on concrete operations, its relation to the Council structures and Europol stayed unclear.<sup>373</sup>

The Commission describes the PCTF as a platform to "develop personal and informal links between the heads of the various law-enforcement agencies across the EU, to exchange

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<sup>369</sup> Tony Bunyan, *The EU's Police chief Task Force (PCTF) and Police Chiefs Committee*, Statewatch analysis, 13 March 2006, p. 13

<http://www.statewatch.org/news/2006/mar/pctf.pdf>

Retrieved 8 May 2006

<sup>370</sup> Jörg Monar, *op.cit.p.* 394

<sup>371</sup> European Police Chiefs Task Force (EPCTF) Expanded Troika Meeting in Ljubljana, Press Release, 15. January 2008, [http://www.eu2008.si/en/News\\_and\\_Documents/Press\\_Releases/January/0115MNZ.html](http://www.eu2008.si/en/News_and_Documents/Press_Releases/January/0115MNZ.html), 15. July 2008

<sup>372</sup> European Union action plan to combat terrorism – update of the roadmap, Council Doc. No. 13909/1/02 Rev 1, Annex, at 28, 14 November 2002

<sup>373</sup> Presidency conclusion of extraordinary meeting of the European Chiefs of Police Task Force, Brussels, Council Doc. No. 9453/04, Brussels, 10 May 2004

information and assist with the development of more spontaneous interaction and closer cooperation between the various national and local police forces and other EU law-enforcement agencies (...) to help to drive a more spontaneous interaction and closer cooperation between national and local police forces in EU Member States in the continuing fight against crime.”<sup>374</sup>

At a meeting of PCTF with the expanded Troika<sup>375</sup> under the Slovenian Presidency in January 2008, the strengthening of further cooperation with other agencies such as Frontex and the Customs Cooperation Working Party (CCWP), and improvement of conditions for the operation of Joint Investigation Teams (JITs) in the new legal framework was discussed. Europol was invited as well. Europol’s Director Max-Peter Ratzel highlighted the fight against crime in the Western Balkans. In that context he also underlined the discussion on the report relating to Southeast Europe Organised Crime Threat Assessment.<sup>376</sup>

On the 11<sup>th</sup> of July 2008, the PCTF met at the Paris-Sorbonne University under the French Presidency to discuss the future of the Task Force in the architecture of Europe's internal security. This became necessary, as the Commission had pointed out the structural shortcomings of the Task Force, including too few meetings, inequalities between its participants' levels of representation, overloaded agendas, etc.<sup>377</sup>

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<sup>374</sup> Police Chiefs Task Force, Building personal links between police chiefs across the EU, European Commission, [http://ec.europa.eu/justice\\_home/fsj/police/chief/wai/fsj\\_police\\_task\\_force\\_en.htm](http://ec.europa.eu/justice_home/fsj/police/chief/wai/fsj_police_task_force_en.htm), 15. July 2008

<sup>375</sup> The main purpose of each EPCTF Expanded Troika Meeting is to finalise the selection of topics to be discussed under each Presidency. At the same time, such meetings serve as preparation for two formal meetings of the task force that are held under each Presidency, i.e. the strategic meeting taking place in the Council of the EU in Brussels, and the operational meeting taking place at Europol headquarters in the Hague.

<sup>376</sup> European Police Chiefs Task Force (EPCTF) Expanded Troika Meeting in Ljubljana, Press Release, op.cit.

<sup>377</sup> Ibid.

#### **4.6.            *Europol and the Member States***

According to Walsh, there were two major incentives for Member States to start sharing intelligence within the European Union<sup>378</sup>:

1. the EU instituted the free movement of people between its Member States, a single market for capital, goods and services and a single currency which has reduced national controls on cross-border activities and created a demand for sharing of intelligence about terrorism and other criminal activities;
2. the development of an EU defence and security policy has led the Member States to integrate some aspects of their defence policy planning, including intelligence on overseas developments.

Europol encourages intelligence-sharing by obtaining and analysing intelligence provided by the Member States, notifying Member States when it has information concerning them, especially of any connections identified between criminal offences, providing strategic intelligence and preparing general situation reports.<sup>379</sup>

Never the less, the relation between Europol and national police forces is a difficult one and exemplary for the lack of mutual trust between law enforcement and security agencies, as well as the judicial authorities in the EU.<sup>380</sup> Balzacq and Carrera link this to the different legal and historical traditions, visions and philosophies of the Member States.<sup>381</sup> Trust is essential for maintaining stable relationships in the JHA area and the “establishment of a high level of trust is closely intertwined with the progressive establishment of an Area of Freedom, Security and Justice.”<sup>382</sup> According to Deflem<sup>383</sup>, the preference of bilateral cooperation of Member States is most noticeably revealed in the relations between Europol and the FBI. Despite the cooperation agreement between Europol and the United States, the FBI prefers to conduct its international cooperation directly with the police of the EU Member States in a bilateral context. The police agencies of some Member States, have their own liaison officers stationed

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<sup>378</sup> James I. Walsh, *Intelligence-Sharing in the European Union: Institutions Are Not Enough*, JCMS 2006 Volume 44., Number 3. p. 627

<sup>379</sup> Article 3, Europol convention

<sup>380</sup> Mirjam Ditrich, *op.cit.*, p. 32

<sup>381</sup> Thierry Balzacq and Sergio Carrera, *The EU's fight against International Terrorism*, CEPS Policy Brief, No. 80, Brussels, July 2005, p. 4

<sup>382</sup> Ibid.

<sup>383</sup> Mathieu Deflem, *Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective*, Justice Quarterly Volume 23 Number 3, p.:336-359, September 2006, p. 353

in Washington, others pass on their request via the FBI legal attaché in the specific Member States.

“There is a difference between an agreement on paper and the actual performance. Europol can only perform, if Member States perform a better stream of information investing in what the Europol Convention allows.”<sup>384</sup> This might be linked to the relatively short timeframe, as “a new institution needs at least five years to be on the map.” And finally all central organisations suffer from the same thing: they do not get information and if they get it, they do not get it in time. The classical turf fights between different agencies is now also repeated on the European level. The creation of different data categories could help fostering cooperation, trust and recognition which lead to the result of being recognised as added value. And this added value is necessary to convince a police man to not only solve a crime but also feed the Europol information system.

National intelligence services seek to limit the number of recipients of sensitive information for fear of compromising operations and sources. As a result EU level institutions tend to be much weaker than its national-level equivalents. Europol is far from a European version of the FBI in the US. This is, amongst other reason, linked to the fact that national security and intelligence services, and also some national police forces, do not share information with Europol and it has no power to oblige national police forces to cooperate.<sup>385</sup>

Mathieu Deflem detects at least three ways in which the national persistence to collaborate is manifest<sup>386</sup>:

- police institutions will prefer to engage in unilaterally enacted transnational activities, most typically through a system of international liaisons stationed in foreign countries.
- international cooperation among police will typically take place in a bilateral form, between the police of two nations, and will be maintained only on a temporary basis for a specific inquiry or investigation.

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<sup>384</sup> Interview with Peter Michel, Data protection secretary, Joint Schengen Supervisory Board, Brussels, 14 February 2006

<sup>385</sup> Daniel Keohane, *One step forward, two steps back*, op.cit., p. 37

<sup>386</sup> Mathieu Deflem, *Social control and the policing of terrorism: Foundations for a sociology of counter-terrorism*. The American Sociologist, 2004, 35 (2), 75–92.

- national persistence in international police work is revealed in the fact that multilateral cooperation among police is of a collaborative nature that does not involve the formation of a supranational police force.

He thinks, that the idea of a supranational police force clashes with conceptions of both state sovereignty and police autonomy, whereas a collaborative network among police of different nations, for instance such as currently exists among the 184 member agencies of Interpol, can bring about the advantages of international cooperation. Mathieu Deflem explains the national resistance to pool in international police organisations by the preference of police institutions to engage in unilaterally enacted transnational activities, most typically through a system of international liaisons stationed in foreign countries. Therefore, international cooperation among police will typically take place in a bilateral form, between the police of two nations, and will be maintained only on a temporary basis for a specific inquiry or investigation. And finally, the idea of a supranational police force clashes with conceptions of both state sovereignty and police autonomy.<sup>387</sup>

#### **4.6.1. Intelligence vs. law enforcement information**

Finding a definition of “intelligence” seems to be rather tricky, as most authors describe the meaning of the word in a different way. I tried however to find a few definitions in order to give an idea of the complexity linked to the term.

The American Joint Chiefs of Staff qualifies as both - employers and consumers - of intelligence. Their latest Dictionary of Military and Associated Terms define intelligence as:

- The product resulting from the collection, processing, integration, analysis, evaluation and interpretation of available information concerning foreign countries or areas.
- Information and knowledge about an adversary obtained through observation, investigation, analysis, or understanding.<sup>388</sup>

The American Central Intelligence Agency (CIA) has used the following description:

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<sup>387</sup> Mathieu Deflem, 2002, *Policing world society: Historical foundations of international police cooperation*. Oxford; New York: Oxford University Press, pp. 87–89

<sup>388</sup> Joint Chiefs of Staff, Department of Defense Dictionary of Military and Associated Terms, Joint Publication 1-02, 12 April 2001, p. 208.

*“Reduced to its simplest terms, intelligence is knowledge and foreknowledge of the world around us—the prelude to decision and action by US policymakers.”*<sup>389</sup>

But as we are talking about a law enforcement agency, and Europol describes itself as “the European Union law enforcement organisation that handles criminal intelligence”<sup>390</sup>, the term “criminal intelligence” seems to be even more suitable. Wikipedia describes criminal intelligence as information *“gathered or collated, analyzed, recorded/reported and disseminated by law enforcement agencies concerning types of crime, identified criminals and known or suspected criminal groups. It is particularly useful when dealing with organized crime. Criminal intelligence is developed by using surveillance, informants, interrogation, and research, or may be just picked up on the “street” by individual police officers. Some larger law enforcement agencies have a department, division or section specifically designed to gather disparate pieces of information and develop criminal intelligence.”*<sup>391</sup>

Interpol divides “Criminal Intelligence Analysis” into operational (or tactical) and strategic analysis: *“The basic skills required are similar, and the difference lies in the level of detail and the type of client to whom the products are aimed. Operational Analysis aims to achieve a specific law enforcement outcome. This might be arrests, seizure or forfeiture of assets or money gained from criminal activities, or the disruption of a criminal group. Operational Analysis usually has a more immediate benefit. Strategic Analysis is intended to inform higher level decision making and the benefits are realised over the longer term. It is usually aimed at managers and policy-makers rather than individual investigators. The intention is to provide early warning of threats and to support senior decision-makers in setting priorities to prepare their organizations to be able to deal with emerging criminal issues. This might mean allocating resources to different areas of crime, increased training in a crime fighting technique, or taking steps to close a loophole in a process.”*<sup>392</sup>

Finally Europol talks about criminal intelligence as being *“based on raw information which can be about a crime, event, perpetrator, suspected person, etc. Intelligence is the enhancement of this basic information which provides additional knowledge about the activities of criminals. Intelligence provides information that is normally unknown by the*

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<sup>389</sup> Central Intelligence Agency (Office of Public Affairs), A Consumer's Guide to Intelligence, (Washington, DC: Central Intelligence Agency, 1999), p. vii

<sup>390</sup> Europol FAQ <http://www.europol.europa.eu/index.asp?page=faq> 01. December 2008

<sup>391</sup> Wikipedia, [http://en.wikipedia.org/wiki/Criminal\\_intelligence](http://en.wikipedia.org/wiki/Criminal_intelligence) 01. December 2008

<sup>392</sup> Interpol <http://www.interpol.int/Public/CIA/Default.asp> 01. December 2008



*investigating authorities and is intended to be used to enhance the efforts of the law enforcement investigators, it is information designed for action.*”<sup>393</sup>

#### **4.6.2. Information concerning terrorism**

For Europol it is essential that all relevant information, law enforcement and security and intelligence service information are sent forward by the Member States. The Europol Convention already provides a legal framework to share this information, but in its report to the Council on the implementation of the EU Action Plan on combating terrorism,<sup>394</sup> Europol stated that there is no structured provision of data from the security and intelligence service domain to Europol’s analysing work files on terrorism.

Most of the data contributions from Member States to the relevant analysis work file and projects of the Counter Terrorism Task Force are from law enforcement rather than from security and intelligence services.<sup>395</sup> This is rather linked to political will than to technical problems, as the “Bureau de Liaison” (BDL) network could easily be used for the exchange of encrypted information. Member State law enforcement bodies and security and intelligence services and Europol could easily have access to this network.<sup>396</sup>

The Council decision on the exchange of information and cooperation concerning terrorist offences<sup>397</sup> provides for the designation of a specialised service within the police services or other law enforcement authorities. This service will have access to, and will collect all relevant information concerning and resulting from criminal investigations conducted by its law enforcement agencies (but not security and intelligence services) with respect to terrorist offences, and send it to Europol.<sup>398</sup>

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<sup>393</sup> Europol. Intelligence Handling Booklet. The Hague, 2003, quoted in Steven David Brown, *The meaning of criminal intelligence*, International Journal of Police Science & Management Volume 9 Number 4, p. 338

<sup>394</sup> EU Plan of Action on combating terrorism, Council Doc. No. 9156/05, Brussels, 23 May 2005

<sup>395</sup> Evaluation of the Second Counter Terrorism Task Force, Council Doc. No. 12992/05, Brussels, September 2005

<sup>396</sup> Proposal for a Council Decision *on the transmission of information resulting from the activities of security and intelligence services with respect to terrorist offences*, Commission, COM(2005) 695 final, Brussels, 22 December 2005, p. 3

<sup>397</sup> Council decision on the exchange of information and cooperation concerning terrorist offences, Council Doc. No. 11259/05, Brussels, 05 September 2005

<sup>398</sup> Ibid. Article 2 (1)

The information that shall be transmitted to Europol includes<sup>399</sup>

- data which identify the person, group or entity;
- acts under investigation and their specific circumstances;
- the offence concerned;
- links with other relevant cases;
- the use of communication technologies; and
- the threat posed by the possession of weapons of mass destruction.

Article 4 emphasises that “each Member State shall take the necessary measures to ensure that requests from other Member States for mutual legal assistances and recognition and enforcement of judgments in connection with terrorist offences are dealt with as a matter of urgency and are given priority.”<sup>400</sup>

One of the problems Europol faces with respect to counter-terrorism intelligence is the fact that terrorism is in some EU countries dealt with by police agencies, whereas intelligence agencies are responsible for counter-terrorism in other EU states. Cooperation on a national level across intelligence and police agencies can be difficult, because police institutions tend to be interested in specific information about suspects in order to make an arrest, whereas intelligence agencies are very broadly interested in general information without prosecutorial purposes.<sup>401</sup>

#### **4.6.3. Exchanging information**

As the figures show, the overall activity in message exchange, and the cases initiated upon this activity increased significantly since the year 2000. This increase could however also be explained by the counting of the messages, as a former Europol official pointed out in an interview. Whenever Europol makes a request to the national police authorities, all 27 Member States authorities reply immediately. Most of them answer with a short message

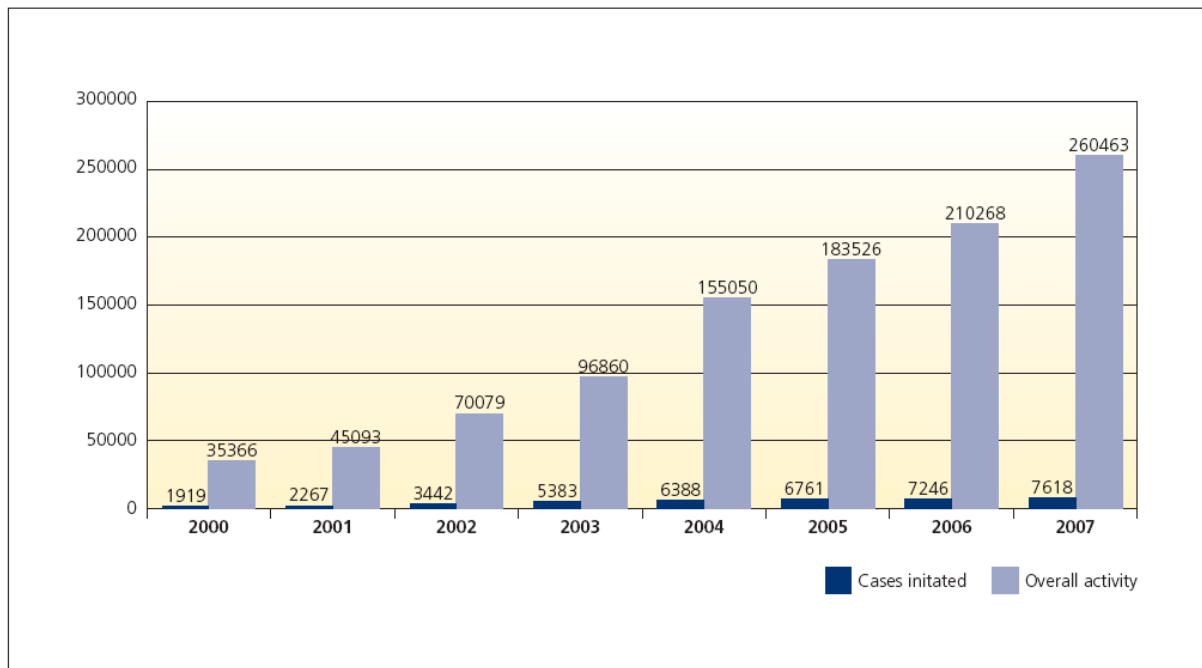
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<sup>399</sup> Ibid. Article 2 (4)

<sup>400</sup> Ibid. Article 4

<sup>401</sup> Mathieu Deflem, *Europol and the Policing of International Terrorism: Counter-Terrorism in a Global Perspective*, Justice Quarterly Volume 23 Number 3, p.:336-359, September 2006, p. 351

communicating that they do not have any information in the topic. Yet these messages are counted as message exchange.<sup>402</sup>



**Figure 13 Progression of information exchange from 2000 until 2007<sup>403</sup>**

Some Member States still do not give Europol sufficient or consistent support. In 2006, while one Member States contributed over 500 pages of criminal intelligence to Europol's first organised crime threat assessment, another Member States offered only a single page. Hugo Brady claims that some Member States send police officers to Europol without the necessary authority at home to help other colleagues resolve cross-border issues, which poses real difficulties for building trust and strengthening co-ordination in international investigations.<sup>404</sup> Talking to Europol officials usually brings about the same conclusions: the level of participation differs immensely between different Member States. This difference is not only explained by different policy approaches but also by the level of engagement of liaison officers or officers seconded to Europol.

If an analysis group of the serious crime department is headed by a – let's say French – Police officer, chances are very good, that the flow of information between French competent authorities and Europol works perfectly well. If this person is later exchanged by a – let's say

<sup>402</sup> Interview with former Europol official, Vienna

<sup>403</sup> Europol Annual Report 2007, p. 33

<sup>404</sup> Hugo Brady, *Europol and the European Criminal Intelligence Model: A Non-state Response to Organised Crime*, Area: Europe – Security & Defence. ARI 126/2007, 1/12/2007, p. 5

Finish police officer – the amount of information provided by the French authorities might easily diminish, while the Finish contribution gets bigger. If this eventually proves to be an advantage or disadvantage mainly depends on the crime the group is investigating. The Finish contribution might prove to be more interesting in a Russian mafia case which involves smuggling in human beings, while French information might be more substantial in another case.

The Commission's proposal for a Council Decision on the transmission of information resulting from the activities of security and intelligence<sup>405</sup> services with respect to terrorist offences discussed how to improve things on a legal basis. No additional legislation "would lead to the continuation of the current situation that does not fully meet the current security challenges"<sup>406</sup> while a Council Framework Decision would allow the Member States some flexibility in the designation of contact points and the transmission of information. A Council Decision was considered as the best option, as "it establishes a mechanism for the transmission of such information without requiring the creation of new services or the approximation of national laws".<sup>407</sup> Finally the proposal asks the Member States security and intelligence services to transmit information to the national contact point<sup>408</sup> and make sure that the information received by its national contact point is transmitted to Europol.<sup>409</sup>

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<sup>405</sup> "Intelligence is the collection and analysis of open, publicly available and secret information with the goal of reducing policy-makers' uncertainty about a security policy problem.1 Intelligence takes raw information and analyses it, placing it in the proper context and using it to draw conclusions about attributes of other actors or about the state of the world that are not directly observable. Intelligence-sharing occurs when one state – the sender – communicates intelligence in its possession to another state – the receiver." James I. Walsh, *Intelligence-Sharing in the European Union: Institutions Are Not Enough*, JCMS 2006 Volume 44., Number 3. pp. 626

<sup>406</sup> Proposal for a Council Decision *on the transmission of information resulting from the activities of security and intelligence services with respect to terrorist offences*, Commission, COM(2005) 695 final, Brussels, 22 December 2005, p. 5

<sup>407</sup> Ibid.

<sup>408</sup> Ibid., Article 3 (1)

<sup>409</sup> Ibid., Article 4

## **4.7. Police cooperation outside of the European framework**

### **4.7.1. The Prüm Treaty**

For the Member States who want to walk a faster path in the coordinated fight against crime, the major weakness of the EU's Third Pillar is its unanimity rule. It cuts every programme down to the lowest common denominator and reduces the efficiency and overall usefulness of the operational settings.<sup>410</sup> This might be the major reason for Member States to organise themselves outside the EU framework in groups like the G5 or the Treaty of Prüm group. A smaller number of members makes it easier to find agreements. But are these agreements serving the European cause; do they play a pioneering role in setting up directions for the whole Union to follow, or do they intentionally exclude the EU in order to set up an autonomous framework?

The Schengen acquis, now binding on the Member States except the negotiated opt-outs, was actually drafted by an ad hoc group of representatives of six of the Member States behind closed doors. The process of incorporation was described as one in which Member States had signed up to a protocol of which no one knew the content.<sup>411</sup> What will happen to the agreements of the G5 or the Treaty of Prüm?

### **4.7.2. Interpol**

#### **4.7.2.1. Background**

Interpol is the world's largest international police organization, with 186 member countries. Created in 1923 in Vienna, it facilitates cross-border police co-operation, and supports and assists all organizations, authorities and services whose mission is to prevent or combat international crime. Interpol is neither a supranational police agency with investigative powers, nor an organization sanctioned by an international governing body such as the United Nations.

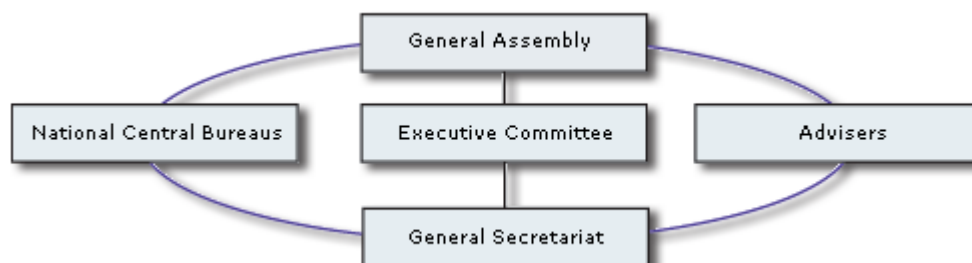
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<sup>410</sup> Thierry Balzacq and Sergio Carrera, *op.cit.*, p. 4

<sup>411</sup> House of Lords, „Defining the Schengen Acquis“, HL 87 (1997/8) in Carol Harlow, *op.cit.*, p. 46

It aims “to ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the Universal Declaration of Human Rights”<sup>412</sup> and “to establish and develop all institutions likely to contribute effectively to the prevention and suppression of ordinary law crimes.”<sup>413</sup>

The General Assembly is the body of supreme authority in the organisation and is composed of delegates appointed by the Member states. The Executive Committee is composed by the President of Interpol, the three Vice-Presidents and nine delegates. The General Secretariat serves as the technical and information centre and ensures the administration of the organisation. Each member country maintains a National Central Bureau (NCB) staffed by national law enforcement officers. The NCB is the designated contact point for the General Secretariat, regional offices and other member countries requiring assistance with overseas investigations and the location and apprehension of fugitives. The Advisers are experts in a purely advisory capacity, who may be appointed by the Executive Committee and confirmed by the General Assembly.



**Figure 14**

**Interpol's structure**<sup>414</sup>

#### **4.7.2.2. Core Functions**

Interpol's core-functions are: <sup>415</sup>

<sup>412</sup> Article 2 (1), Interpol Constitution

<sup>413</sup> Article 2 (2), Interpol Constitution

<sup>414</sup> <http://www.interpol.int/public/icpo/default.asp>, 25. June 2008

<sup>415</sup> <http://www.interpol.int/Public/icpo/about.asp> 25 June 2008

- Secure global police communication services (a global police communications system called I-24/7, which provides police around the world with a common platform through which they can share crucial information about criminals and criminality.)
- Operational data services and databases for police (databases and services ensure that police worldwide have access to the information and services they need to prevent and investigate crimes. Databases include data on criminals such as names, fingerprints and DNA profiles, and stolen property such as passports, vehicles and works of art.)
- Operational police support services (Interpol supports law enforcement officials in the field with emergency support and operational activities, especially in its priority crime areas of fugitives, public safety and terrorism, drugs and organized crime, trafficking in human beings and financial and high-tech crime. A Command and Co-ordination Centre operates 24 hours a day, seven days a week.
- Police training and development (Interpol provides focused police training initiatives for national police forces, and also offers on-demand advice, guidance and support in building dedicated crime-fighting components. The aim is to enhance the capacity of member countries to effectively combat serious trans-national crime and terrorism.)

#### **4.7.2.3. Differences between Europol & Interpol**

Interpol has a distinct but limited function in maintaining an international information network among police which is wholly dependent on the participation of the various member agencies. Technologically advanced systems of information exchange were set up and participating police agencies linked via the Interpol headquarters, which functions as a central clearinghouse. Interpol suffers basically from the same problem as Europol, namely the lack of sensitive police information. Taking into account, that some of member countries' police agencies already suffer from a substantial lack of financial means, training or democratic accountability in their home countries, one might easily imagine the problems their liaison officers face at the international level technically, financially and ideologically. Interpol

focuses on cooperation in criminal matters over which concerns are shared internationally instead of seeking to accomplish more complex tasks for which it is not equipped.<sup>416</sup>

Basically Interpol has a more global approach, while Europol's activities against international crime and terrorism focus on distinctly European problems or the European dimensions of more global concerns.<sup>417</sup> The technical approach (national units at Europol vs. national central bureaus) for the mere exchange of information is pretty similar. Europol is still sometimes seen as a kind of "European Interpol" in this regard<sup>418</sup>. The real added value Europol is able to contribute, is the work of its Serious Crime Department.

But as we have seen above, Europol is actually not as distinct from Interpol as it seems at the first glance. If the Member States use Europol for the simple purpose of exchanging information bi-laterally, the European agency basically just duplicates Interpol's function.

#### **4.7.2.4. The cooperation agreement**

Europol and Interpol signed a general co-operation agreement, which came into Force on 5th November 2001. In 2007 Interpol signed two arrangements by which the organisation became an associate member to two Europol Analysis Work Files.

On 27 August 2007, the Director of Europol and the Secretary General of Interpol met in The Hague and the Interpol liaison office at Europol headquarters was opened. Additionally an amendment to the Joint Initiative 2001 was signed which allows for close cooperation and information exchange on euro counterfeiting. On 1 November 2007, the new permanent Interpol representative to Europol took up his functions at Europol Headquarters.<sup>419</sup>

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<sup>416</sup> Mathieu Deflem, *Interpol*, in The Oxford Encyclopedia of the Modern World, edited by Peter N. Stearns. New York: Oxford University Press, 2008, pp.. 198-199

<sup>417</sup> Mathieu Deflem, *International Police Cooperation against Terrorism: Interpol and Europol in Comparison*, in Understanding and Responding to Terrorism, edited by H. Durmaz, B. Sevinc, A.S. Yayla, and S. Ekici. Amsterdam: IOS Press, 2007, pp. 17-25

<sup>418</sup> Interview National Liaison Officer at Europol, The Hague, 24 March 2008

<sup>419</sup> Europol Annual Report 2007, p. 86



## **4.8. Conclusion**

As discussed above, the specific setup of Europol poses a significant problem. As the Liaison Officers Network functions quasi parallel next to Europol, information exchanged via this network often does not get into the system of Europol. “The vast majority of information exchanges between liaison bureaux occurs outside the formal systems, and thus while providing very significant benefit to the participating countries the main loser is Europol, which is denied the opportunity to access the information. It is reported that up to 80% of bilateral engagement occurs this way”<sup>420</sup> A possible solution to cure this problem is provided by the Friends of the Presidency “Allowing the usage of Europol's secure ICT infrastructure for bilateral exchange of information between the Member States (Europol as service provider). Where possible, information exchanged bilaterally should be included in appropriate Europol databases.”<sup>421</sup> (compare Chapter 3.2.)

According to Monica the Boer, the way to a coherent internal security agenda may be jeopardized by two circumstances:<sup>422</sup>

- state security services find themselves placed in a more competitive environment, as the decline of the external security threat from communist states has forced them to explore new security markets, and
- the police services in the Member States are also involved in an increased competition with their neighbouring services as “police effectiveness is an important catalyst in the credibility of state action.”

The information that Europol would need to perform better and more efficient is at the disposal of the Member States. Europol’s analytical work is obviously dependent on the information they receive from Member States and other partners such as Interpol or the US authorities. Or as Max Ratzel, Director of Europol puts it:

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<sup>420</sup> House of Lords – Europol, p. 22

<sup>421</sup> Friends of the Presidency's report to the Future of Europol, recommendation 19

<sup>422</sup> Based upon Monika den Boer, *The fight against Terrorism in the Second and Third Pillars of the Maastricht Treaty: Complement of Overlap?*, op.cit., p. 217

*“Our philosophy is that intelligence which is not shared is useless and sometimes even dangerous, because decisions on police actions might be based on the wrong foundations. (...) No country or agency can shoulder the fight against organised crime alone. The strengthening of international and inter-agency cooperation is vital and there is no alternative.”*<sup>423</sup>

However, the information Europol seems to receive is growing in quantity and quality while it has to be kept in mind that Europol is still a relatively young organisation.<sup>424</sup> “It is not extra work, but an extra benefit”<sup>425</sup> and this needs to be communicated. In 2006, 12 of the 25 Member States were considered to be “paix contributeur” with being France, Spain, Germany, Italy and the UK as main contributors. The fact that these countries cooperated closely in the formation of the G5 to push better information exchange could also benefit Europol. The Council Decision on the exchange on information and cooperation concerning terrorist offences obliges Member States to make available to each other and to Europol and Eurojust data relating to pending investigations and prosecutions in the field of terrorism.<sup>426</sup> “Wir wollen nicht bedingungslos alles, aber eine ernsthafte Diskussion über die Mittel die uns zu Verfügung stehen sollen”<sup>427</sup> argues Peter Gridling, Head of the Europol Anti-Terrorism Unit.<sup>428</sup>

When trying to analyse the situation of intelligence sharing at Europol level one has to remember that information about the degree of sharing in actual cases is impossible to access for outsiders. Security services are extremely reluctant to share such information, even with other agencies of the same national government. James Walsh points out that officially disseminated information on cases in which sharing has occurred should not readily be

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<sup>423</sup> Max Ratzel, Director of Europol, Towards a European Area of Freedom, Security and Justice?, EPC Issue paper 14, 12-09-2005,

<http://www.epc.eu/en/ce.asp?TYP=CE&LV=177&see=y&t=42&PG=CE/EN/detail&l=3&AI=449>

Retrieved 03. June 2008

<sup>424</sup> Interview with Yves Joannesse, DG Justice Liberté et Sécurité, European Commission, Brussels, 22. March 2006

<sup>425</sup> Interview with Peter Michel, Data protection secretary, Joint Schengen Supervisory Board, Brussels, 14 February 2006

<sup>426</sup> Council Decision on the exchange of information and cooperation concerning terrorist offences, Council Doc. No. 2005/671/JHA, Brussels, 20 September 2005 OJ L 253, Brussels, 29 September 2005, p. 22

<sup>427</sup> (We do not want unconditionally everything, but at least an honest discussion about the means that should be at our disposal.)

<sup>428</sup> Interview with Peter Gridling, op.cit.

trusted. Governments may be most likely to release such information only when the sharing has resulted in successful operations.<sup>429</sup>

This short overview showed how many bodies (Agencies, Committees, Working Groups, etc) within the EU framework are actually concerned with the fight against terrorism. Ironically one of the major questions is how one is able to coordinate these coordinating bodies in an efficient manner. This problem is partly based on the pillar structure of the EU and partly based on the geographical (and maybe even ideological) distance between Brussels and the capitals.<sup>430</sup>

The current situation does not add to the effectiveness of the European approach. Even if every single group has its expertise and know-how, the latent danger of conflicts and turf fights between these groups is evident. The House of Lords thinks that the proliferation of EU Committees could have been prevented if Europol had established itself as the lead institution in EU counter-terrorism efforts. But it has not been able to claim such role; partly due to the fact that neither the Member States intelligence services share information, or that the EU capitals take Europol's role seriously enough.<sup>431</sup>

Daniel Keohane recommends the creation of a cross-institutional body, a "European security committee" (ESC)<sup>432</sup>. Its primary role would be to advise European head of government on security matters. The chairmanship would alternate between the EU's High Representative for foreign policy and the chair of the JHA ministerial council which would, according to Keohane, guarantee that ESC members addressed the concerns of both internal and external security decision-makers. The other permanent members of the ESC should include the counter-terrorism co-ordinator, the chief of the EU military Committee, the director of Europol, the justice commissioner and the head of the Situation Centre.

In my opinion the establishment of just another coordinating group would not really cure the situation. Keohane's ESC could help in bringing CFSP and JHA together, but it would only be another political round. As the experience show, there have been enough political decisions, pamphlets and even legislation on joining forces in the fight against terrorism.

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<sup>429</sup> James I. Walsh, *Intelligence-Sharing in the European Union: Institutions Are Not Enough*, JCMS 2006 Volume 44., Number 3. p. 634

<sup>430</sup> *Working structures of the Council in terrorism matters – Options paper*, op.cit.

<sup>431</sup> House of Lord, European Union Committee, *After Madrid: the EU's response to terrorism*, March 2005

<sup>432</sup> Daniel Keohane, *The EU and counter-terrorism*, op.cit., p. 20

The problems start when it comes down to practical multilateral cooperation. And here it makes more sense to use an already established agency with expertise in the fight against terrorism as a focal point. The choice for Europol seems almost logical: It is the European law enforcement agency, it had – compared to the recent nature of the Third Pillar – time enough to establish itself, and it employs experts in the fight against terrorism.<sup>433</sup>

A possible way to bring Europol “into the game” would be to continue the establishment of a so called “old boy network”. The employment of Peter Gridling as chief of the Anti Terrorism Unit might have had this intention.<sup>434</sup> The idea already worked quiet in increasing the role of Europol in the Euro counterfeiting protection, where it got its influence increased. “What happened was that the old boys’ network was to some extent combined with the formal procedures of Europol (...) (they) ran to the Member States and to the other old boys and said just get us this information; we need it. They organized the whole thing in quite an informal manner and then they used the Europol channels to formalize, to whitewash so they say, the information they collected in the member states.”<sup>435</sup>

Jürgen Storbeck put hope into the new generation of police officers. Officers towards the end of their careers may find it difficult to be open to the necessary changes and they might only able to communicate in the language of their homeland and with a vocabulary derived from another philosophy of policing. Computers and new technology have only the vaguest significance which makes dialogue not always easy. But according to him there is a new breed of young officials emerging, who are bright, well trained and highly skilled in modern approaches.<sup>436</sup>

The big question on Europol is how it is able to provide added value. As Europol is not involved in operational matters, it is very often perceived to complicating things. Cyrille

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<sup>433</sup> See also Mirjam Ditrich, *Facing the global terrorist threat: a European response*, EPC Working, Paper N 14, January 2005, p. 33

<sup>434</sup> „Peter Gridling gilt europaweit als einer der kompetentesten errorbekämpfungsexperten.“ Gert-René Polli, Head of the Austrian Bundesamtes für Verfassungsschutz und Terrorismusbekämpfung, *Öffentliche Sicherheit*, Nr. 1 -2, January February 2003

[http://www.bmi.gv.at/oeffentlsicherheit/2003/01\\_02/artikel\\_8.asp](http://www.bmi.gv.at/oeffentlsicherheit/2003/01_02/artikel_8.asp) 07 May 2006

<sup>435</sup> Cyrille Fijnaut, *On organized crime and police cooperation in the European union – lessons learned*, Research and Evaluation Community, Contract and Aboriginal policing Services, Royal Canadian Mounted police, Ottawa, 2003, p. 7

<sup>436</sup> Jürgen Storbeck, *The European Union and Enlargement: Challenge and Opportunity for Europol in the Fight Against International Crime*, Kluwer Law International, *European Foreign Affairs Review* 8: 283–288, 2003, p. 285

Fijnaut claims that police officers in the Member States - and especially those in criminal intelligence - quite often think that Europol (as it is now) is just one more complicating factor, and that they already have to cope with so many obstacles in international operations. For them Europol has no added value and it can't easily have added value because it is not involved in domestic police operations. Police officers are therefore not always willing to share information with Europol because it makes no sense to them. So Europol to some extent hopes that the possibility for it to join multi-national task forces will stimulate the flow of information between it and the member states.<sup>437</sup>

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<sup>437</sup> Marcel-Eugene LeBeuf, On organized crime and police cooperation in the European Union – lessons learned. An Interview with professor Cyrille Fijnaut, Trends in Organized Crime/Vol. 7, No. 4, Summer 2002, p. 58



## 5. Joint Investigation Teams

A tool which should enable Europol officers to get involved in investigative work was created with Joint Investigation Teams (JIT). Already the Amsterdam Treaty introduced the principle to “enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity.”<sup>438</sup>

This principle was again underlined by the Tampere Conclusions “Maximum benefit should be derived from co-operation between Member States' authorities when investigating cross-border crime in any Member State. The European Council calls for joint investigative teams as foreseen in the Treaty to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism. The rules to be set up in this respect should allow representatives of Europol to participate, as appropriate, in such teams in a support capacity.”<sup>439</sup>

However even Europol admits that the JIT initiative had not been widely accepted in practice by the Member States. Reasons for this seem to include: insecurity/uncertainty about national implementation of Article 13 of the Mutual Legal Assistance Convention and the Framework Decision on JITs, lack of awareness of the JITs as an investigative option; and, a lack of funding, as JITs can be expensive to negotiate and operate.<sup>440</sup>

### 5.1. *The legal background*

In accordance with Article 34 of the Treaty on the European Union, Article 13 of the 2000 Convention on Mutual Legal Assistance in Criminal Matters (hereinafter Convention on

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<sup>438</sup> Amsterdam Treaty, K 2 (2 a)

<sup>439</sup> Tampere Conclusions, Council document SN 200/99, IX. Stepping up co-operation against crime

<sup>440</sup> JIT – Historical Background, Europol website,

[http://www.europol.europa.eu/index.asp?page=content\\_jit&item=jit\\_historical\\_background](http://www.europol.europa.eu/index.asp?page=content_jit&item=jit_historical_background)

24. November 2008

Mutual Legal Assistance) provided the legal basis for JITs as an instrument to tackle transborder crime.

As the ratification of the Convention turned out to be a “rather lengthy” process, some Member States took the initiative for the legally binding Framework Decision on Joint Investigation Teams which was adopted by the Council in 2002.<sup>441</sup> This Framework Decision reproduced Articles 13, 15 and 16 of the Convention on Mutual Legal Assistance,<sup>442</sup> dealing not only with the setting up of teams but also with criminal and civil liability regarding officials. It did not oblige Member States to set up JITs but rather aimed at providing the Member States with the required legal framework to do so.

When the Convention on Mutual Legal Assistance finally entered into force on 23 August 2005, it replaced the Framework Decision on Joint Investigation Teams.

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<sup>441</sup> Convention on *Mutual Assistance in Criminal Matters between the Member States of the European Union*, Brussels, 29 May 2000 OJ C 197/3

<sup>442</sup> Council Framework Decision *on Joint Investigation Teams*, Council Doc. No. 2002/465/JHA, Brussels, 13 June 2002, OJ L 162/1



## **5.2. Convention on Mutual Legal Assistance**

Article 13 of the Convention on Mutual Legal Assistance focuses on the setting up of JITs and provides a legal basis. Until November 2008 the Convention was signed by all Member States excluding Greece, Italy, Ireland and Luxembourg.

Article 4 (Para 4) of Article 13 allows requests to be made via Interpol where an urgent reply is needed. In addition the reference in the paragraph to anybody competent under provisions introduced pursuant to the Treaty on European Union was primarily designed to enable requests to be channelled through a body such as Europol or a body yet to be created, such as Eurojust, if it were authorised to fulfil that function in the future.<sup>443</sup>

One of the obstacles for JITs had been the lack of a specific framework within which such teams should be established and operated. To meet that concern it was decided that the relevant matters should be dealt with in the Convention. Article 13 Para 1 standardised and facilitated the operation of joint teams by defining the role of the team leader and its relationship to the team. The team has to act within the scope of the national law of the Member States in which the team operates. As a consequence, the team leader has to have the nationality of the Member States in which the team is operating, to ensure that national law is applied. If the investigation is carried out in more than one Member States, the leadership of the team has to change and will be taken over by as many members as the number of Member States in which the team operates.<sup>444</sup>

Para 5, 6 and 7 concentrate on the competences of the seconded team members, para 8 regulates possible assistance from a Member States other than those which have set up the team, para 9 and 10 concentrate on the exchange of information and para 12 paves the way for the Member States to agree that persons who are not representatives of their competent authorities can take part in the activities of the team. It should be noted that specific reference is made to officials of bodies set up pursuant to the Treaty on European Union., meaning Europol or Eurojust.

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<sup>443</sup> Explanatory Report - Official Journal C 379 of 29.12.2000, Explanatory report on the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union (Text approved by the Council on 30 November 2000)

<sup>444</sup> Claudia Gualtieri, Joint Investigation Teams, ERA Forum 8 2007, p 235

In 2003 a Council Recommendation proposed a model agreement to facilitate the setting up of JITs as referred to in Article 13 of the Convention on Mutual Legal Assistance.<sup>445</sup> By providing a template for the setting up of JITs it intended to help facilitating the implementation of Article 13 Joint Investigation Teams and reminded the user of possible open questions like costs, office accommodation, insurance, allowances, and so on. Furthermore it contains provisions on the participating authorities, the purpose of the JIT, the duration. Section 7 is dedicated to the participation of officials from Europol, Eurojust, Olaf or other bodies set up under the Treaty. It mentions that the exact arrangements of such an agreement are subject to a separate agreement, for which a model is provided for in the appendix to the model agreement.

Another Council recommendation concerned the establishment of joint teams for the gathering and exchange of information on suspected cases of terrorism in the pre-criminal investigative phase and was adopted by the JHA Council in 2002<sup>446</sup>. The aim was the establishment of JIT for “gathering and exchanging information in accordance with national law including constitutional provisions in order to combat terrorism”. These teams would be made up of officials of national competent authorities from participating Member States and could be assisted by Europol officers in accordance with the Europol Convention.<sup>447</sup>

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<sup>445</sup> COUNCIL RECOMMENDATION of 8 May 2003 on a model agreement for setting up a joint investigation team (JIT) (2003/C 121/01)

<sup>446</sup> Council recommendation for the establishment of multinational ad-hoc teams for gathering and exchanging information on terrorists, 25. April 2002

[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/polju/EN/EJN278.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/EN/EJN278.pdf), 24. November 2008

<sup>447</sup> The Council recommendations basically consisted only of two recommendations, namely “The aim is the establishment of such teams for gathering and exchanging information in accordance with national law including constitutional provisions in order to combat terrorism as defined in European Union instruments. They would be able to work more expeditiously and more effectively, within a framework adequate for the purposes of Member States interested in participating, with cooperation subject in all cases to national law and the authority and legislation of the Member State in which the activities are carried out.” and “Such teams would be made up of officials of national competent authorities from participating Member States that are responsible for combating terrorism in the European Union, and could be assisted by Europol officers, provided that their participation is requested by the team, in accordance with the Europol Convention.”, Council recommendation for the establishment of multinational ad-hoc teams for gathering and exchanging information on terrorists, op.cit.

### **5.3.            *Europol taking part***

The legal basis for the participation of Europol in JITs is Article 3a of the Europol Convention, which was inserted by the so called JIT Protocol.<sup>448</sup> The long span it took before it was ratified by all Member States – nearly five years from its adoption by the Council to the entry into force on 29 March 2007 – shows one again how cumbersome the process of modifying Europol proofs to be in practise. Since then, Europol staff has been allowed to participate in JITs in a supporting capacity. This will continue under the Council Decision establishing Europol, allowing the teams to take advantage in particular of the analytical strengths of Europol staff.

Para 1 of Article 3a states, that Europol officials may participate in a support capacity in Joint Investigation Teams and that Europol official may - within the limits provided for by the law of the Member State where the joint investigation team operates - assist in all activities and exchange information with all members of the Joint Investigation Team. They shall however not take part in any coercive measures. Bart de Buck describes this wording as rather unfortunate, as there is a contradiction between “can assist in all activities” and “shall not take part in the taking of any coercive measures”.<sup>449</sup> For him it remains unclear, whether Europol officials may assist or even be present while operational actions planned by a JIT are carried out. An offered solution would be to grant Europol officials an “expert” status, allowing them to assist national police officers in the carrying out of coercive measures.

Para 2 of Article 3a of the Europol Convention regulates the administrative implementation of the participation of Europol officials in a JIT, which shall be laid down in an arrangement between the Director of Europol and the competent authorities of the Member States participating in the joint investigation team, with the involvement of the National Units.

Para 3 declares that Europol officials shall carry out their tasks under the leadership of the leader of the team; para 4 indicates that Europol may liaise directly with the members of the JIT and provide information from any of the components of the computerised system of collected information; para 5 states that information obtained by a Europol official while part

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<sup>448</sup> Inserted by the Council Act of 28 November 2002, Official Journal 312, 16/12/2002

<sup>449</sup> Bart de Buck, Joint Investigation Teams: The participation of Europol officials, ERA Forum 8 2007, Published online 14 June 2008, p. 260

of a JIT may be - with the consent and under the responsibility of the Member State which provided the information - included in the computerised system.

The Protocol also states in Article 2 that the immunity of Europol's staff members in respect to words spoken or written and/or acts performed by them in the exercise of their official functions, does not extend to their activities as participants in the Joint Investigation Teams.

According to Bart de Buck<sup>450</sup> the main principle of Europol's involvement in JITs is that Europol is there to provide its support. This support is subject to certain conditions: its involvement must be expressly requested by one or more Member States participating in the JIT, the JIT must include amongst its participants at least two Member States with which Europol has concluded a Cooperation Agreement with, and the offences investigated must fall within the scope of Europol's mandate.

He sees Europol's support for a JIT possible in three ways: as "communication channel" in which Europol offers the participants a fast and secure telecommunications network, as "analytical support" in which Europol disseminates analytical reports containing assembled intelligence and as "logistical support" where Europol offers meeting facilities and the maintain aces of an operations support centre.<sup>451</sup>

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<sup>450</sup> Bart de Buck, Joint Investigation Teams: The participation of Europol officials, ERA Forum 8 2007, Published online 14 June 2008, p. 257

<sup>451</sup> Ibid. p. 258

#### **5.4. Eurojust getting involved**

The members of the Eurojust College may participate or even ask to initiate JITs in two different ways: either by of individual National Members and or by a request of the College as a whole.

- Article 6 of the Eurojust Decision enables individual national members of Eurojust to ask the competent authorities to consider setting up a JIT.<sup>452</sup> In this case Eurojust has the simple right to request the Member States to reflect on the possibility of setting up a JIT in a particular case.
- Under Article 7 the College<sup>453</sup> may ask the competent authorities to set up a JIT.<sup>454</sup> In this case Eurojust must give its reasons for the request, but is also able to execute more power. In the case of denial, national authorities must give their reasons for non compliance to Eurojust.<sup>455</sup>

Apart from that, Eurojust offers – as Europol - a variety of possibilities to “smoothen” of facilitate the work of a JIT, like helping negotiating the JITs agreements, support in legal questions (also on national level), provide facilities, or help with the involvement of other non participating countries.<sup>456</sup>

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<sup>452</sup> Article 6a (IV) “When Eurojust acts through its national members concerned, it (a) may ask the competent authorities of the Member States concerned to consider (iv) setting up a joint investigation team in keeping with the relevant cooperation instruments”, COUNCIL DECISION of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, (2002/187/JHA), OJ L 63/1, 6.3.2002

<sup>453</sup> Article 10 “The College shall consist of all the national members. Each national member shall have one vote.” *ibid.*

<sup>454</sup> Article 7 “When Eurojust acts as a College, it: (a) may in relation to the types of crime and the offences referred to in Article 4(1) ask the competent authorities of the Member States concerned, giving its reasons: (iv) to set up a joint investigation team in keeping with the relevant cooperation instruments”, *ibid.*

<sup>455</sup> Article 8 “If the competent authorities of the Member State concerned decide not to comply with a request referred to in Article 7(a), they shall inform Eurojust of their decision and of the reasons for it unless, in the cases referred to in Article 7(a)(i), (ii) and (v), they are unable to give their reasons because: (i) to do so would harm essential national security interests, or (ii) to do so would jeopardise the success of investigations under way or the safety of individuals.” *Ibid.*

<sup>456</sup> Monika Helmberg, Eurojust and Joint Investigation Teams: How Eurojust can support JIT’s, ERA Forum 8 2007, pp. 249

## **5.5. *JITs national experts network***

### **5.5.1. Guiding principles**

In order to help implementing the Hague Programme, the Luxembourg Presidency suggested in 2005 that a national expert on JITs should be designated by each Member State, to install a network of expertise on JITs. This led to an Article 36 Committee (Cats) agreement that an informal JITs Experts Network should be established.<sup>457</sup>

This initiative was mainly due to the limited experience within the Member States regarding the use of joint investigation teams. Until summer 2005 only three JITs -one between the UK and the Netherlands and two between France and Spain- had been established according to the Framework Decision model. These concerned two drug trafficking cases and an investigation on terrorism.<sup>458</sup>

The following principles were accepted:

- all Member States agreed on the need to make better use of and share experience concerning Joint Investigation Teams;
- in line with the commitment in the Hague Programme, all Member States should designate national experts;
- national experts may either be a person or a representative of a generic organisation (a contact point, perhaps representing a law enforcement and/or a judicial authority e.g. Head of International Division, the National Criminal Intelligence Service) depending on national law and the circumstances and national arrangements in each Member State;
- national experts will be responsible for liaising with other persons and organisations within that MS;
- national experts do not necessarily need to have operational experience of a Joint Investigation Team nor do they need to be directly involved in the establishment or running of a Joint Investigation Team;

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<sup>457</sup> Joint Investigation Teams - Proposal for designation of national experts, Article 36 Committee, Council Document 11037/05, Brussels, 7 and 8 July 2005

<sup>458</sup> *libd*, p. 4

- national experts should not form a new formal network or overly bureaucratic structure but should be able to meet collectively or in smaller groups if this would facilitate the sharing of best practice and experience. These meetings should be organised in a flexible way, perhaps in the margins of a working group or at Eurojust or Europol, as appropriate.

The main task of national experts is to facilitate the setting up of JITs, be national contact points, be able to collect and receive information about best practises as well as on obstacles and problems in the setting up and organization of JITs, and be in a position to have close contact with Eurojust and Europol when dealing with JITs.

### **5.5.2. The annual meetings of the network**

In November 2005, Eurojust and Europol hosted the first meeting of the Network of National Experts on JITs which was attended by experts from 22 Member States, Olaf, Eurojust and Europol, as well as representatives from the General Secretariat of the Council and from the Commission.<sup>459</sup> The Experts agreed that a general meeting with all Experts should be convened as necessary under the aegis of Europol and Eurojust in order to fulfil their tasks and recognized the central role of Europol, Eurojust and Olaf in the international police and judicial cooperation.<sup>460</sup>

At second meeting of the Network of National Experts on JITs in November 2006 (again hosted by Europol and Eurojust in co-operation) experts and practitioners from 22 Member States, representatives from Olaf, Eurojust, Europol, the Commission and General Secretariat of the Council discussed the model agreement on JITs, how to identify the need for a JIT and other practical issues. And even though the national experts welcomed the work carried out by Europol and Eurojust it was only recommended that Europol Eurojust and OLAF should be informed “where appropriate” about any JIT project. Furthermore it was underlined that the “setting up of JITs should be a bottom-up process on the initiative of investigating/

<sup>459</sup> [http://www.eurojust.europa.eu/jit\\_meetings.htm](http://www.eurojust.europa.eu/jit_meetings.htm) 25. November 2008

<sup>460</sup> Conclusions of the first meeting of the national experts on Joint Investigation Teams, General Secretariat, Council Document 15227/05, Brussels, 2 December 2005, p. 2

prosecuting authorities.”<sup>461</sup> This recommendation indicates the reluctance to let Europol or Eurojust take a leading role.

A different, more optimistic picture was drawn on 29 and 30 November 2007, at the third meeting of National Experts on Joint Investigation Teams (again organised by Eurojust in collaboration with Europol, the General Secretariat of the Council and the Commission). It was attended by experts and practitioners from 25 Member States, representatives from OLAF, Eurojust, Europol, the Commission and the General Secretariat of the Council. The general rapporteur concluded that the “overall picture is extremely positive. It is a fact: investigations carried out with JITs are successful” and even though the JIT had a difficult start, it was reported that in 2006 already to 11 JITs were set up. According to the attending experts around 35 JITs were active in 2007, and additionally so-called "light" JITs and "permanent" JITs were going on.<sup>462</sup>

The perception of Eurojust’s and Europol’s work also seemed to have changed significantly. Their contribution was appreciated as essential, as they could offer support at many levels. Therefore “it is fundamental to inform them about trans-national cases which appear to be suitable for the setting up of JITs as soon as possible. The idea launched during the meeting, of imposing on national investigative authorities to inform Eurojust and Europol in any occasion they envisage setting up a JIT should be taken in serious consideration.”<sup>463</sup>

This improvement might be linked to the publication of a guide to the EU Member States’ legislation on Joint Investigation Teams. It gives an overview of the legal possibilities in all EU Member States to set up Joint Investigation Teams (pursuant to Article 13 of the Convention on Mutual Legal Assistance), as well as the means by which Europol and Eurojust can support these teams under each legal framework. The finalised guide was presented at the second meeting of the national experts on JITs held at Europol on 10 November 2006.

It was agreed that a permanent Europol-Eurojust Team should be created which would ensure a follow-up to the JITs project. It would tie in with related initiatives aimed at supporting the network of the national experts on JITs (managing the webpage and organisation of the

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<sup>461</sup> Conclusions of the second meeting of the national Experts on Joint Investigation Teams, General Secretariat, Council Document 15023/06, Brussels, 21 November 2006, p. 5

<sup>462</sup> Conclusions of the third meeting of National Experts on Joint Investigation Teams, General Secretariat, Council Document 5526/08, Brussels, 22 January 2008, p. 3

<sup>463</sup> *Ibid.* p. 4



annual JIT experts meetings) and the project of operational guidelines on how to set up JITs.<sup>464</sup>

Unfortunately the Conclusions of the fourth meeting of National Experts on Joint Investigation Teams were not published so far, as it would have been interesting to see how things developed further.

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<sup>464</sup> Lisa Horvatits, Bart de Buck, The Europol and Eurojust Project on Joint Investigation Teams, ERA Forum 8 2007, p. 243

## **5.6.            *Issues concerning the immunity of JIT members***

One of the most important problems that needed to be resolved before converting Europol into an agency was the status of JITs. As explained above, JITs can also include staff from Europol. The concern was what would happen if members of a JIT were suspected of acting illegally during its operations and member state authorities wished to question or even prosecute them.

The Commission's initial thinking was that Europol officers would be subject only to 'ex-post' lifting of their immunity. This would have meant that any member state which suspected a JIT member of having committed an offence would have had to make a request to the director of Europol for the officer's immunity to be lifted. He would have then been able to refuse such requests if they were not considered to be in the European interest.

The immunity issue has been a major cause of concern in a large number of Member States, such as the UK and Germany, who insisted that they should be able to question foreign officers immediately and prosecute them in accordance with national law.

Siim Kallas, the European commissioner for administrative affairs, initially prevented the Commission from backing down on this question, as he argued against ex-ante immunity because it went against the principles of the EU staff regulations (which apply to Europol staff in its new legal form).<sup>465</sup>

Kallas eventually gave in, as the establishment of joint investigation teams was meant to be encouraged and it was considered important that Europol staff would be able to participate in them. To ensure that such participation was possible in every Member State, it was necessary to guarantee that Europol staff would not benefit from the application of immunities while they are participating in a support capacity in joint investigation teams. Para 6 of Article 3a of the Council Decision on Europol regulates the status of immunity of Europol officials. During the operations of a JIT Europol officials are - with respect to offences committed against or by them - subject to national law of the Member State applicable to persons with comparable

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<sup>465</sup> European Voice, *Commission U-turn over Europol officers' immunity*, by Jim Brunsten, Vol. 14 No. 7 : 21 February 2008

functions. Additionally to the change in the Convention, the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol was amended.<sup>466</sup> The amendments lay down rules governing the participation of Europol in Joint Investigation Teams.

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<sup>466</sup> 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 312/2, 16.12.2002

## 5.7. Conclusion

JITs would basically have the potential to be an innovative tool in the fight against cross-border organised crime. But so far police has only set up a handful – mostly on drug trafficking, fraud and terrorism – and none of those involve more than two countries. Police officials argue that this is because JITs are too bureaucratic to start and complicated to operate and say they prefer to use the old Council of Europe procedures or informal agreements while EU officials counter that JITs will become more common as soon as police and prosecutors get used to the new system.<sup>467</sup>

The expert group identified a number of potential problems<sup>468</sup> like lack of resources; lack of added value for each involved country or authority; problems with national legislation and the asset-sharing regime; lack of European approach; Cumbersome procedures- especially in bilateral cases; easy setting up of traditional police co-operation; lack of knowledge about JIT and the language barrier. The group also made recommendations on how to tackle these issues, and underlined the importance of working as informal and unbureaucratic as possible.<sup>469</sup> This recommendation supports the theory, that Police officers in general have a pragmatic outlook on the world and that they know that trust is very important and that formalizing things can hamper trust and even destroy trust.

*“Within the police culture it is common to hear ‘we are all police officers’. We know who the enemy is, we know the problem, we know what we want to achieve. Why should it be necessary to write this down in a formal agreement - it just creates a lot of problems. (...) In addition, the moment you start to formalize these arrangements, all sorts of other people have to become involved -judicial authorities, chief constables and ministries. In the end you are organizing the bureaucratization of your own investigations and you spend more time on this than with investigating the case. Police have good reasons to dislike this formalization.”<sup>470</sup>*

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<sup>467</sup> Hugo Brady, Europol and the European Criminal Intelligence Model: A Non-state Response to Organised Crime, Area: Europe – Security & Defence. ARI 126/2007, 1/12/2007, p. 5

<sup>468</sup> Conclusions of the first meeting of the national experts on Joint Investigation Teams, General Secretariat, Council Document 15227/05, Brussels, 2 December 2005, p. 2

<sup>469</sup> libd. P. 7

<sup>470</sup> Marcel-Eugene LeBeuf, On organized crime and police cooperation in the European Union – lessons learned. An Interview with professor Cyrille Fijnaut, Trends in Organized Crime/Vol. 7, No. 4, Summer 2002, p. 62

Monika Helmberg indicates a number of legal problems with JITs: for example the gathering of evidence (where the future location of the prosecution already needs to be taken into account in order to ensure compliance with the conditions for evidence to be admissible in court), or the setting up of the JIT if more parties are added when new connections to other countries are becoming apparent.<sup>471</sup>

Nevertheless the concept definitely has a number of advantages: it enables a number of Member States to collaborate on specific cases in the fight against transborder crime by providing legal basis for multilateral cooperation instead of the – let’s call it old-fashioned – “bi-lateral” agreements. Members of the JIT receive information in real-time and are involved in decision making processes. If the JIT gets active within one of the Member States, the team leader is responsible of ensuring the compliance with national law and ensures the link to the national law enforcement agencies. These agencies can then provide investigative or coercive measures to be taken.

The changing tone in the annual “Conclusions of National Experts on Joint Investigation Teams” showed the growing acceptance of JITs. The Member States – and the respective law enforcement agencies – clearly understood the usefulness and opportunities the teams provide. The “Future Group” however pointed out that not all types of criminal investigation are suitable for JIT:

*“For certain aspects of criminal investigation, it will probably be necessary to work towards a simplification of the regulations applied when an investigation needs to be carried out on the territory of another Member State. There are many ways in which police and legal cooperation – which are – closely related – could be improved. (...) Another simplification would be a system of written requests for information by public entities or individuals from one country to another. Such a system would make today's extremely constraining procedural practices more flexible, without affecting the general principles of legal cooperation in criminal matters.”*<sup>472</sup>

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<sup>471</sup> Monika Helmberg, Eurojust and Joint Investigation Teams: How Eurojust can support JIT’s, ERA Forum 8 2007, pp. 247

<sup>472</sup> Freedom, Security, Privacy – European Home Affairs in an open world, Report of the Informal High Level advisory Group on the Future of European Home Affairs Policy („The Future Group“), June 2008, para 44 - 45



## 6. Democratic Accountability

“All our countries are committed to pluralist and parliamentary democracy, the indivisibility and universality of human rights, the rule of law and a common cultural heritage enriched by its diversity.”<sup>473</sup>

Successful police cooperation cannot be measured purely in terms of operational effectiveness but also has to be regarded as socially legitimate to be truly effective: “It is vital that any strategy initiated is tempered by those overall guiding principles which help to prevent an erosion of the standards and traditions which make a democratically liberal way of life possible in the first place.”<sup>474</sup>

In particularly important is the democratic legitimacy and accountability of the police forces which are executing the political will to fight terrorism.<sup>475</sup> In example the (very) hypothetical scenario in which police interrogates a terrorist who knows where a time-bomb is hidden raises the question of how far a democratic state can go in order to obtain information.

The emerging role of a pan European police force poses the question how it fits into our concept of “European democracy”. The European integration brought a shift of sovereignty from the Member States to the Union level. But e.g. the action plan on terrorism was not even communicated to the European Parliament before it was adopted by the European Council. The only subjects of consultation with the European Parliament are legislative initiatives.<sup>476</sup> Only within the context of intergovernmental and supranational development one is able to understand the discussion about the accountability of Europol.

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<sup>473</sup> Vienna Declaration, 9 October 1993

<sup>474</sup> Peter Chalk, *op.cit.*, p. 186

<sup>475</sup> “Even if accountability does not play a big role in the practical cooperation”, Interview with Peter Gridling, *op.cit.*

<sup>476</sup> Article 24 TEU Amsterdam Treaty

## **6.1. Definitions of Accountability**

I will briefly discuss the definition of accountability. A very helpful definition is provided by Christopher Lord who argues that “political leaders and power relations be authorised by the people; that the continuous flow of decisions should be made in a manner that is representative of public needs and values; and that rulers should be accountable to the people, who should be the ultimate judges of their performance”<sup>477</sup> For him, effective democratic accountability is provided by four elements: electoral accountability which legitimates and provides authorization; continuous parliamentary accountability of political leaders to a representative assembly; administrative accountability understood as ministerial responsibility; and judicial or legal accountability.<sup>478</sup>

The Commission issued a White Paper on European Governance<sup>479</sup> where it identifies accountability as one of several values essential to good governance, saying that “roles in legislative and executive processes need to be clearer. Each of the EU institutions must explain and take responsibility for what it does in Europe.” This idea focuses on the policy-making process and pays minimal attention to the more traditional obligation of government to render an account of its doings. The White Paper downplays the role of parliaments, reducing them to the level of pressure groups and other organisations of civil society to which the Commission wishes to entrust the task of collecting and collating public opinion and neglects the classical definitions of responsibility and accountability as recognised within the democratic systems of government of the MS.<sup>480</sup>

The growing amount of Framework Decisions and other EU legislation in the third pillar raises the question of its accountability. The Schengen acquis, now binding the Schengen Member States (except for the negotiated opt-outs), was actually drafted by an ad hoc group of representatives of six of the Member States behind closed doors. The process of incorporation was described by the House of Lords as one in which Member States had signed up to a protocol of which no one knew the content.<sup>481</sup>

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<sup>477</sup> Christopher Lord, *Democracy in the European Union*, Sheffield, Academic Press, 1998, p. 15

<sup>478</sup> Ibid.

<sup>479</sup> European Commission, *White Paper on European Governance* (COM(2001) 428 final), July 2001, p. 32

<sup>480</sup> Critic based on Carol Harlow, *Problems of Accountability in the European Union*, National Europe Centre Paper No. 53, The Australian National University, 27 November 2002, p. 5

<sup>481</sup> House of Lords, „Defining the Schengen Acquis“, HL 87 (1997/8) in Carol Harlow, *Accountability in the European Union*, Oxford University Press, New York, 2002, p. 46



## **6.2. Civil Society in the EU**

Another problem with regard to accountability is the diverging perception of the rights of citizens. The Swedish Journalist Union (SJU) <sup>482</sup> applied under Swedish law for documents used by the Justice Council and obtained around 80 per cent. Applying for the same documents under EC law, the Council secretariat was prepared to release just 20 per cent.

The ECJ stated that "the objective of Decision 93/731 is to give effect to the principle of the largest possible access for citizens to information with a view to strengthening the democratic character of the institutions."<sup>483</sup> Something similar happened in the case of Kuijer<sup>484</sup> where a researcher in asylum issues was refused to receive documents on the ground of potential damage on international relations even though information supplied by Denmark showed that much of the material in the refused reports was not particularly sensitive.

The European Ombudsman (EO) followed a complaint by the NGO "Statewatch" and asked the Council to provide at least a list of "instruments adopted" after it denied information to the "Statewatch".<sup>485</sup> In a second complaint from the same NGO that the Council had refused access to Minutes of the Article 36 Committee the EO made a "critical remark" which indicates that the EO will not make a finding of maladministration but is nonetheless not entirely satisfied with the administrators' conduct of an affair.<sup>486</sup>

On the 29<sup>th</sup> of January 2009, the European Ombudsman, P. Nikiforos Diamandouros, urged the European Commission to set up a comprehensive register of the documents it produces or receives. This followed a complaint from Statewatch about the Commission's failure to register the vast majority of its documents. According to the Commission, the establishment of a comprehensive register is impossible at this point in time, mainly because of the use of incompatible registers in its different departments. The Ombudsman was unconvinced. He

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<sup>482</sup> Judgment of 17.06.1998, in case T-174/95, *Svenska Journalistförbundet v Council*, [1998]

<sup>483</sup> Ibid.

<sup>484</sup> Judgment of 06.04.2000, in case T-188/98, *Aldo Kuijer v Council*, [2000]

<sup>485</sup> Complaint of 25.11.1996, 1055/25, *Statewatch against the Council*, [1996]  
Statewatch Annual Report for 1998, 256-9, Annual Report of 1999, 232-3

<sup>486</sup> Harlow, op.cit., p. 43

considered the Commission's failure to comply with the legal obligation to establish such a register to constitute maladministration.<sup>487</sup>

On 14 January 2009 the European Parliament adopted a strong Resolution, urging the Commission to follow the recommendation of the European Ombudsman (Complaint 3208/2006/GG) on the Commission register as regards its obligation to "include references to all documents within the meaning of Article 3(a)<sup>488</sup> that are in its possession in the register foreseen by Article 11<sup>489</sup> to the extent that this has not yet been done."<sup>490</sup>

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<sup>487</sup> THE EUROPEAN OMBUDSMAN, Ombudsman criticises Commission for inadequate register of documents, PRESS RELEASE NO. 2/2009, Brussels, 29 January 2009

<sup>488</sup> "'document' shall mean any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility", Regulation (EC) No 1049/2001

<sup>489</sup> Ibid.

<sup>490</sup> Resolution on public access to European Parliament, Council and Commission documents (implementation of Regulation (EC) No 1049/2001): Rapporteur: Marco Cappato

### **6.3.            *Accountability and police forces***

With regards to police forces, Bill and Alison Tupman distinguish between legitimacy and accountability. Legitimacy is the acceptance of the police by the public. If legitimacy was not given it would be followed by civil unrest and disorder. And if the police are used incautiously and aggressively to counter this civil unrest there is a good chance that the political order will be challenged as well.<sup>491</sup> Accountability needs to be provided by a mechanism by which comment can be made on general policy. In most democratic systems such a comment is best made by elected representatives of the public. Police actions are also subject to the rule of law which can only be represented by magistrates, judges and prosecutors. This relationship between the police and local or national governments and judicial authorities is named accountability.<sup>492</sup>

The first part of this chapter will show the recent developments within the Third Pillar. How does the Council work, where did the Commission get in, how is the European Parliament trying to enlarge its influence and how is the role of the European Court of Justice perceived. The second part will in particular focus on the current discussion about the accountability of Europol. It is mainly concerned with the shrinking influence of national parliaments which leads to a lack of accountability. My analysis will concentrate on the role of the European Parliament which usually advocates itself as a remedy for this problem.

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<sup>491</sup> Bill Tupman, *Policing in Europe – Uniform in Diversity*, Intellect Books, Exeter, 1999,p. 66

<sup>492</sup> Ibid,p. 73

## **6.4.                    *Developments within the Third Pillar***

### **6.4.1.                    Scrutiny by national parliaments**

Liberal-intergovernmentalists argue that the Member State always intends and controls actions on the Union level. Therefore ministers, who meet decisions within the third pillar, are to be held responsible by their national parliaments. In theory this is a plausible concept. But the powers of national parliaments to scrutinise their governments in EU decisions vary.

The degree of control exercised depends on two variables:<sup>493</sup>

- the balance of power inside the national system between the parliament and the government;
- and the degree of parliamentary control over the conduct of foreign affairs.

The most stringent instrument of control that can be issued by a parliament is through mandate, but this is rather exceptional. Beside the Danish Parliament no other national parliament has taken political accountability to such limits and it is doubtful if the EU could function if mandate were to be tried more widely. Protocol 1 on the Role of National Parliaments in the European Union of the Constitutional Treaty would have required the Commission to forward all consultation and Green and White papers “promptly”<sup>494</sup> to national parliaments. It expresses the desire of the institutions to “encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on matters which may be of particular interest to them.”<sup>495</sup>

But as this is rather speculative, we need to concentrate on the current methods of decision making. It is common for Member States to enter scrutiny reserves where their national parliaments need more time to form a position but this power is more used strategically to achieve the bargaining preferences of governments rather than to protect the purview of the parliaments. The difference is that some parliaments, like the Danish, Austrian, Finnish and Swedish can issue instructions to their governments which are more or less, but never

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<sup>493</sup> Harlow, op.cit., p. 16

<sup>494</sup> 1 Protocol, Constitutional Treaty, On the role of national Parliaments in the European Union, OJ 2004/C 310/01

<sup>495</sup> Ibid.

completely, binding. In all of the six<sup>496</sup> countries, the Ministers have the power to put through at least deviations from their mandates.<sup>497</sup>

This can, however, also be seen as problematical: Having the negotiator in the Council Working Group his hands tied also makes the decision making process extremely difficult. The negotiations take place with not only the representatives of the Member States but also with the national parliaments. As they are not present in the Working Group it is not infrequent that a negotiator says that he cannot change the position of his parliament.<sup>498</sup> These problems are twofold: On one hand the parliaments do not really have the means to bind the Minister for decisions, and on the other hand they are still influential enough to make the negotiations more difficult.

Carol Harlow thinks that the format of informal, intergovernmental cooperation conducted through ad hoc groups, working groups and committees was designed to exclude the Community institutions under the pretext of lack of formal EC competence in the field. This did not only avoid a transfer of scrutiny powers to the European Parliament but also had a seriously detrimental effect on control by national parliaments.<sup>499</sup>

#### **6.4.2. Possible roles for the EP**

The European Parliament takes accountability seriously and likes to present itself as “the” democratic European institution. It holds various powers which it wrested rather painfully from institutions and Member States during the process of Treaty amendment and sees success in holding “the government” to account as a vital component of the power struggle in which it is engaged against Council and Commission.<sup>500</sup>

The European Parliament has always been critical of the secretive nature of intergovernmental cooperation on migration and secrecy issues since the establishment of the Trevi and

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<sup>496</sup> According to Christopher Lord, 2004, p. 160: Denmark, Austria, Finland, Sweden, Dutch and Germany

<sup>497</sup> Christopher Lord, *A Democratic Audit of the European Union*, Palgrave MacMillan, Hampshire and New York, 2004, p. 169

<sup>498</sup> Hans Nilsson, *Decision-Making in EU Justice and Home Affairs: Current Shortcomings and Reform Possibilities*, SEI Working Paper NO 57, Sussex, 2002, p. 5

<sup>499</sup> Carol Harlow, op.cit., p. 13

<sup>500</sup> Carol Harlow, op.cit., p. 10

Schengen groups. It argued that the decision procedures removed the accountability of policy-making from national parliaments without replacing it with powers of scrutiny for itself. The European Parliament's demanded more democratic accountability and greater transparency and the right to issue an opinion on policy proposals, which was also supported by domestic politicians and finally lead to the consultation procedure for the European Parliament with the Amsterdam Treaty. According to Christopher Lord<sup>501</sup> there would be different roles for the European Parliament to play today.

One is that the European Parliament should scrutinise the Council while the national parliaments should concentrate on holding their governments to account for their individual contributions. In another one, the national parliaments would concentrate on the 2nd and 3rd pillar where decisions are met by unanimity and the European Parliament should play a relatively weak role. A third opinion suggests that the national parliaments should guard their powers carefully against the European Parliament. It is well known as enthusiast for supranational solutions which would take away power from the national parliaments. The European Parliament considers itself as the Parliament of the European Union and thinks therefore that it has the responsibility to scrutinise all three pillars as decisions in one pillar may include external effects on the other two. It is important to remember that the means of the European Parliament to influence legislation are very limited under the Consultation Procedure.

The national Parliaments of the EU Member States and the European Parliament have a mission and a mandate to monitor and evaluate the activities that take place in the framework of Title VI TEU (Police and judicial co-operation in criminal matters), notably those of Europol and the Member States supposed to actively participate in Europol's activities.

Parlopol (a joint committee of members of the European Parliament and national Parliaments to oversee Europol) the Commission and the European Parliament called on the Council to strengthen the European Parliament's democratic power of control over Europol and, to that end, to adopt a number of provisions, the most important being<sup>502</sup>

- a provision amending art. 34 of the Europol convention laying down that one single annual activity report (including data protection aspects).

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<sup>501</sup> Christopher Lord, *A Democratic Audit of the European Union*, op.cit., p. 166

<sup>502</sup> What Future for Europol? Increasing Europol's Accountability and Improving Europol's Operational Capacity, European Parliament, Brussels, 7 September 2006

- a regular, formal exchange of information between Europol, the national parliaments and the European Parliament and a formally established Parlopol;
- a provision amending art. 34 of the Europol Convention and conferring on the European Parliament the formal right to invite the Director of Europol to appear before the competent committee and make the Director of Europol accountable to the competent Parliamentary committee;
- the establishment in art. 22(2) of the Constitutional Treaty of a legal base for the adoption of measures which will enable the scrutiny of Europol's activities by the European Parliament and national parliaments;
- a provision amending art. 28 of the Europol Convention on altering the composition of the Europol Management Board to include two representatives of the Commission and two representatives of the European Parliament, in addition to one representative from each Member State;
- a provision amending art. 29 of the Europol Convention and laying down that the European
- Parliament shall be equally involved in the procedure for the appointment and dismissal of the Director of Europol, jointly with the Council;

### **6.4.3. The increasing influence of the Commission**

The influence of the Commission increased when the Member States delegated tasks of the intergovernmental procedure to supranational mechanisms in order to improve the credibility and accountability of policy-making. Even though it was originally excluded from influencing the policy-making in the JHA field under the Maastricht Treaty it set up a policy portfolio and sought to develop credible policy ideas. The effort obviously paid off as the Member States decided in the Amsterdam Treaty to share the right of initiative with the Commission.<sup>503</sup> Even though the DG LJS (Liberté, Sécurité et Justice) is one of the smallest DGs of the Commission it has a very high output. Its launched proposals are often made in consultation with the Member States.<sup>504</sup>

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<sup>503</sup> Simon Hix, *The Political System of the European Union*, Second Edition, Palgrave Macmillan, London 2005, p. 370

<sup>504</sup> Interview with Yves Joannesse, DG Justice Liberté et Sécurité, European Commission, Brussels, 22. March 2006

But they take a long time to be tabled and are not always in line with the necessity of a rapid reaction to new events. The European Arrest Warrant had been prepared for two years within the Commission after the Tampere European Council. This is the main reason why the Commission was able to present the initiative for a Framework Decision on terrorism and the EAW at the 19 September 2001 right after 9/11.<sup>505</sup> The fact that the staff of the DG “Freedom, Security and Justice” will soon be almost doubled shows the increasing role it intends to play.<sup>506</sup>

#### **6.4.4. The ECJ and its jurisdiction**

Christopher Lord sees “judicial or legal accountability”<sup>507</sup> as the fourth part of effective democratic accountability. Oliver considers “a framework for the exercise of state power in a liberal-democratic system, within which public bodies are forced to seek to promote the public interest and compelled to justify their actions in those terms or in other constitutionally acceptable terms (justice, humanity, equity); to modify policies if they should turn out to have been ill conceived; and to make amends if mistakes and errors of judgement have been made” as necessary to create accountability.<sup>508</sup> Carol Harrow thinks that the ECJ has recognised its potential<sup>509</sup> and stresses this by his standard formula justifying the reasoning of decisions with the control function of judicial review.

By ensuring that “in the interpretation and application of this Treaty, the law is observed”<sup>510</sup> the ECJ posses - if this power was initially intended to be granted is another question - the final word in interpreting the Treaties. It decides on validity of EU legislation and preserves the “institutional valance” of the Treaties, maintaining the balance of power between the EU institutions.<sup>511</sup> But it is important to keep in mind, that the ECJ is also criticised on the bases

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<sup>505</sup> Hans Nilsson, op.cit., p. 4

<sup>506</sup> Lecture by Hans Nilsson, College of Europe, Brugge, 25. March 2006

<sup>507</sup> see Introduction

<sup>508</sup> Dawn Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship*, Milton Keynes, Open University Press, 1991, p. 28.

<sup>509</sup> Based on TEC Article 253 which contains an obligation for the institutions to „state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty.”

<sup>510</sup> TEC Article 220

<sup>511</sup> Carol Harlow, op.cit., p. 26



of democratic principle. In the view of some,<sup>512</sup> the ECJ has itself subverted the rule of law principle that all Union actions and institutions should comply with the terms by which they were democratically authorised, others think that it is acting contrary to division of powers principles on the ground that some of its rulings encroach on decisions that should be left to legislators, and some even doubt the neutrality of the judges as the ECJ is often perceived as a partisan for a particular cause, that of integration itself.

The ECJ was successful in slowly enlarging his room of manoeuvre in the third pillar. It has always been arguing that there was a clear clash of jurisdictions in the Maastricht design and suggested that the intergovernmental conference should determine the limits of EU action in the JHA field. It criticised the lack of proper instruments and mechanisms for legal oversight of Council decisions. NGOs condemn the shortage of judicial and parliamentary control, and the subordination of migration issues to crime policies which lead to an extension of the ECJ's jurisdiction to all migration and security issues.<sup>513</sup> Within the third pillar, the ECJ cannot review the validity of acts conducted by national police and administrative agencies when carrying out their objectives meaning that the ECJ is largely excluded where it is, arguably, most needed:<sup>514</sup> “The role of the judiciary is of utmost importance if we want to protect our democratic values and the individual.”<sup>515</sup> But it has judicial review over decisions and framework decisions and can rule on a dispute between Member States over the interpretation of acts under the third pillar. Member States can voluntarily accept the jurisdiction of the ECJ to make preliminary rulings which are then binding on all courts in all Member States. Simon Hix thinks that “it is unlikely that most of the governments were aware of this implication when signing the Amsterdam Treaty.”<sup>516</sup>

The ECJ has no direct jurisdiction over agencies such as Europol - except in matters where a conflict of interpretation arises over the Convention between the agency and a Member State, or between two Member States. The Court of Human Rights would be the appropriate court when it concerns complaints from individuals about the way they have been treated by law-

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<sup>512</sup> Critic based on Christopher Lord, *A Democratic Audit of the European Union*, op.cit., p. 211

<sup>513</sup> Simon Hix, op.cit., pp. 371

<sup>514</sup> Christopher Lord, *A Democratic Audit of the European Union*, op.cit., p. 213

<sup>515</sup> Thierry Balzacq and Sergio Carrera, *The EU's fight against International Terrorism*, CEPS Policy Brief, No. 80, Brussels, July 2005

<sup>516</sup> Simon Hix, op.cit., p. 358

enforcement agencies. However, as Monica den Boer points out, a complaint first has to be submitted to a national court in one of the Member States.<sup>517</sup>

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<sup>517</sup> Monica den Boer, Claudia Hillebrand, Andreas Nölke, *Legitimacy under Pressure: The European Web of Counter-Terrorism Networks*, JCMS 2008 Volume 46. Number 1. p. 107

## **6.5. Accountability of Europol**

Whenever we discuss Europol's operational accountability, we need to remind that according to the Europol convention the agencies tasks are limited to crime analysis, information exchange and co-ordination. Europol has only a relatively limited function compared with the wide range of functions entrusted to "normal" police forces in the Member States; it yields no executive powers. This has been confirmed by Europol's management board<sup>518</sup>, and is also made clear in the declaration on the police in the annex to the convention, which only talks about databases, support of national investigations, the development of preventive strategies, and so on.

Therefore the discussion about operational accountability of Europol staff is difficult to lead as it is quite unclear if Europol officers actually work operationally.<sup>519</sup> Article 41 of the Europol convention states that "Europol, the members of its organs and the Deputy Directors and employees of Europol shall enjoy the privileges and immunities necessary for the performance of their tasks"<sup>520</sup> Seconded liaison officers from the other Member States and their families enjoy the "privileges and immunities necessary for the proper performance of the tasks of the liaison officers at Europol."<sup>521</sup> However, one should keep in mind that it is not unusual to grant immunity to international police cooperation, as France did in the case of Interpol<sup>212</sup>. And finally, "If you want the best people in different law systems, you need to protect them."<sup>522</sup>

As mentioned above, the Council Decision establishing Europol brought an extension of Europol's mandate so that it may support Member State investigations into serious crimes that are not necessarily thought to be carried out by organised gangs. However this extension is limited by the requirement that any such investigation must at least two Member States and thus be cross border in nature. This broadening of the mandate went along with enhancing the role of the European Parliament. By establishing Europol as an entity of the Union, funded

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<sup>518</sup> when discussing the Rhodes vision document in 2003, Europol, 3000-19r1, 11 april 2003, quoted in Bruggeman, op.cit "what are the options for improving democratic control of Europol and for providing it with adequate operational capabilities?"

<sup>519</sup> Peter Gridling doubts that Europol officers work operationally, Interview with Peter Gridling, op.cit.

<sup>520</sup> Europol Convention, Article 41 (1)

<sup>521</sup> Ibid. Article 41 (2)

<sup>522</sup> Interview with Peter Michel, Data protection secretary, Joint Schengen Supervisory Board, Brussels,

from the general budget of the European Union, the role of the European Parliament in the control of

Europol will be enhanced through the involvement of the European Parliament in the adoption of that budget, including the establishment plan, and the discharge procedure. With the entry into force of the Council Decision in 2010, the European Parliament may also call the Director and Management Board Chair to account for their actions.

### **6.5.1. National Parliaments “left outside”**

The creation of agencies at EU level as the centre of a “policy network” of national agencies and other policy actors is likely to diminish the input of national parliaments as policy-makers as well as scrutiny stages.<sup>523</sup> The Member States simply use informal methods of collaboration if they wish to avoid the legal and institutional controls of the EU Treaties. They chose ad hoc groups, Working Groups and Committees designed to exclude the Community institutions under the pretext of lack of formal EC competence in the field. This has a seriously detrimental effect on control by national parliaments and avoids a transfer of scrutiny powers to the European Parliament. The JHA agenda has a tendency to grow invisibly and create agencies such as Europol over which there is little control from any parliament in the EU.<sup>524</sup> If the question of parliamentary scrutiny of Europol is discussed within the European framework, it is almost always linked or raised by the European Parliament and its LIBE Committee (Committee on Civil liberties and Justice and Home affairs). Basically Europol has no executive powers; no power to conduct wire tapping, house searches or arrests and other police measures which regularly intrude on the fundamental rights of citizens and have to be under the control of public prosecutors or other democratically accountable authority.

Hence one could follow António Vitorino’s conclusions and argue that “it is no surprise therefore that for the moment there does not exist any judicial control of Europol at EU level. It has simply not been necessary, (but) things could change in the future and sincerely things should change.”<sup>525</sup> The national parliaments, on the other hand, do not have any rights to

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<sup>523</sup> Carol Harlow, *op.cit.*, p. 13

<sup>524</sup> *Ibid.*

<sup>525</sup> António Vitorino, *Democratic Control of Europol*, Europol Conference, The Hague, 8 June 2001

control the decision-making of the Council or the Management Board as regards implementing measures. They do not even have the right to be informed of implementing measures or reports produced pursuant to the Convention.<sup>526</sup> And their ability to scrutinize operational accountability depends on each Member States national decision whether or not to give information, consultation or control powers to its parliament.<sup>527</sup>

Europol Director, Mr. Storbeck, mentioned during a hearing of the Working Group X “Freedom, security and justice” of the Convention on the reforms of EU Treaties, that the parliamentary control of Europol is currently unclear and that there are also difficulties in being accountable to too many national parliaments. He proposed the perspective of control by the European Parliament as a possible solution and the final report of the WG raises the question if “Europol activities will need in the future to be subject to democratic accountability to the European Parliament and to the Council as well as to judicial control by the ECJ in accordance with the normal Treaty rules.”<sup>528</sup>

### **6.5.2. Europol in the Centre of the EP’s attention**

As explained above, police cooperation is a politically sensitive subject for the Member States which shows why decisions can only be taken by unanimity; why in addition to the Commission each Member States has a right of initiative for legislative proposals. The legislative accountability of Europol was focused on national parliaments who approved the initial Convention and had the right to control any changes to the Convention that are made by Protocols. The European Parliament was not consulted on the initial Europol Convention or its Protocols before their adoption. Its role was enhanced by the Treaty of Amsterdam, which gave the European Parliament the right to be consulted on Conventions and all measures implementing Conventions.<sup>529</sup> This means that the European Parliament has to be consulted if the Convention is amended or when the Council adopts one of the measures mentioned in the Europol convention. So far the European Parliament has been consulted on twelve of the seventeen measures implementing the Europol Convention and on all three

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<sup>526</sup> Steve Peers, op.cit.,p. 257

<sup>527</sup> Ibid.p. 259

<sup>528</sup> Minutes of the WG X “Freedom, Security and justice” of the Convention of the reform of EU Treaties, cited in European Parliament, 26 March 1993, Rapporteur, M. Turco A5-0107/2003, 26 March 1993

<sup>529</sup> Article 39 EU

Protocols on the Europol Convention adopted since the Treaty of Amsterdam came into force.<sup>530</sup>

National parliaments are often provided with strong powers to commit democratic control on police and intelligence services, while the European Parliament has only limited control, such as the weak right to be informed and consulted.<sup>531</sup> National parliaments have at least the power to block amendments to the Convention or planned implementing measures, while the European Parliament only receives a “sanitized version”<sup>532</sup> of the annual report of Europol. In 2001, the European Parliament adopted a resolution demanding the Commission to submit a proposal for a comprehensive reform of instruments of police and judicial co-operation. This proposal was meant to include a revision of the Europol Convention to bring the whole area into line “with highest standards and methods of democratic control of police forces of the Member States.”<sup>533</sup>

The European Parliament issued a number of reports, most notably the Nassauer, Karamanou, Turco and Deprez reports<sup>534</sup>, asking for

- budgetary powers: European Parliament involvement in the Europol budget procedure and Europol funding through the Community budget
- appointment powers: European Parliament involvement in the appointment and dismissal of Europol’s Director and Deputy Directors and two European Parliament elected representatives to take part in the Management Board meetings
- information and consultation rights: an extension of the documents on which the European Parliament shall be consulted
- the strengthening of judicial control by the ECJ, and
- ultimately the communitarisation of Europol

The European Parliament emphasised, that “in order for the European Parliament to exercise democratic control, Europol must, as with the other European Institutions (e.g. the European Central Bank and the European Ombudsman) report on its activities in an annual exchange of view. In addition, the Director of Europol should appear before Parliament’s competent

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<sup>530</sup> Steve Peers, op.cit., p. 258

<sup>531</sup> Rapporteur M. Turco, European Parliament A5-0107/2003, 26 March 1993, op.cit

<sup>532</sup> Steve Peers, op.cit., p. 259

<sup>533</sup> Rapporteur, M. Turco, European Parliament A5-0370/2001, 13 Nov. 2001

<sup>534</sup> Quoted in European Parliament, Rapporteur, M. Turco A5-0107/2003, 26 March 1993, op.cit

Committees when circumstances so require. Finally, the European Parliament should have a say in the choice of the Director of Europol.”<sup>535</sup>

The Commission published a Communication to the European Parliament and the Council under the title of “Democratic Control over Europol” in 2002.<sup>536</sup> This Communications put the need for an adequate level of control over Europol beyond doubt but it also points out that Europol is working in the highly sensitive area of fight against organised crime and that the challenge is therefore to find the right balance between an appropriate level of parliamentary control on the one hand and the need for confidentiality and discretion of a police organisation to fight crime effectively. The existing controls could not be regarded as legally insufficient, in particular regarding the limited powers of Europol by comparison with those of national police forces, but the mechanisms are exercised in an indirect, fragmented and not easily understood manner.<sup>537</sup>

Hence the Commission proposed an institutionalised and regular information exchange between those responsible in national parliaments and the European Parliament. It follows the argumentation of Antonio Vitorino,<sup>538</sup> that the intensified use of already existing provisions and procedures of parliamentary control at national or EU level would improve the situation already considerably. Furthermore the Commission proposes to establish a formal mechanism for information exchange between national Parliaments and the European Parliament and the installation of a joint Committee responsible for police matters which meets twice a year to exchange information and experience relating to Europol.<sup>539</sup>

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<sup>535</sup> European Parliament, 2000b, in Christopher Lord, *A Democratic Audit of the European Union*, op.cit, p. 191

<sup>536</sup> *Democratic Control over Europol*, COM(2002)95 final, Brussels, 26 February 2002

<sup>537</sup> *Ibid.*, p. 11

<sup>538</sup> António Vitorino, *Democratic Control of Europol*, Europol Conference, The Hague, 8 June 2001

<sup>539</sup> *Democratic Control over Europol*, op.cit.

## **6.6.           *Ways out of the accountability dilemma***

The last chapter showed how national parliaments lost their influence of the Justice and Home Affairs area which is dealt with by the Council. They parliaments lack not only the means to bind their Ministers, but also the information and knowledge to keep up with the topic. One possibility would be to include the parliaments more in the decision making process. Protocol 1 on the Role of National Parliaments in the European Union of the Constitutional Treaty would have required the Commission to forward all consultation and Green and White papers “promptly”<sup>540</sup> to national parliaments. It expresses the desire of the institutions to “encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on matters which may be of particular interest to them.”<sup>541</sup>

The wish of the European Parliament to have influence in the appointment of the Director of Europol or to receive the same report as the Council, and not a “sanitised” version is as plausible as the call for a communitarisation of Europol. A Europol with more powers most certainly needs clear structures of accountability and democratic legitimacy.

Article 37 of the Council Decision establishing Europol now states, that the European Parliament shall receive the same documents, the Management Board adopts, and the Council endorsed before, namely:

- the draft estimate of revenue and expenditure, including the draft establishment plan; the preliminary draft budget to be submitted to the Commission; and the final budget;
- a work programme for Europol's future activities taking into account Member States' operational requirements and budgetary and staffing implications for Europol, after the Commission has delivered an opinion;
- a general report on Europol's activities during the previous year including the results achieved on the priorities set by the Council.

Furthermore the Management Board shall commission an independent external evaluation of the implementation of this Decision and of the activities carried out by Europol within four

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<sup>540</sup> 1 Protocol, On the role of national Parliaments in the European Union, Constitutional Treaty, OJ 2004/C 310/01

<sup>541</sup> *ibid.*



years of the date of application of this Decision and every four years thereafter. The report of the evaluation should be forwarded to the Council and the Commission, and again as well to the European Parliament.

The Council Decision marks an improvement from the point of view of budgetary control. It makes the control of Europol more democratic, more transparent. Article 42 states that the “revenues of Europol shall consist, without prejudice to other types of income, of a subsidy from the Community entered in the general budget of the European Union (Commission section) as from the date of application of this Decision. The financing of Europol shall be subject to an agreement by the European Parliament and the Council.” This transposes more responsibility to the European Parliament, which I regard as a significant step forward.

Article 48 rules that the Presidency of the Council, the Chairperson of the Management Board and the Director shall appear before the European Parliament at its request to discuss matters relating to Europol taking into account the obligations of discretion and confidentiality. Finally having Europol officials appointed as Community officials and will subject them to the same selection and integrity regime as their fellow officials in the Community.<sup>542</sup> So even if the changes introduced by the Council Decision in other matters might be considered modest, it definitely brought an improvement in terms of involvement of the European Parliament. This marks a development which has been necessary for quite a while, and became even more pressing with the new, wider mandate of the agency.

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<sup>542</sup> Compare with Monika den Boer, Select Committee on European Union Minutes of Evidence, Examination of Witnesses (Questions 146 - 159), TUESDAY 24 JUNE 2008



## 7. Conclusion

Let me remind you of the underlying assumption of my thesis. The transnational cooperation between law enforcement agencies is shaped by a historical process of bureaucratization in which police institutions have a relative independence from the dictates of their governments; the police institutions share the same conception of crime and crime control and create transnational “expert systems” to exchange their knowledge; and a remarkable persistence of nationality can be observed in international police work.

My chapter on the historical evolution of “Police and Judicial Cooperation” (chapter 2.) showed how police cooperation slowly emerged as policy area within the European Union. It started with informal meetings, and became more and more structured. Trevi was shaped under the impression of terrorist attacks across Europe; the idea of fighting illicit drug trafficking across borders gave birth to Europol. Even though there were set-backs when Member States had political issues about terrorism, the bureaucratization of transnational police cooperation developed further. The institutional progress in the third pillar followed the advancement of the “acquis communautaire” as a whole. When the Treaty of Maastricht introduced Police and Judicial Cooperation in 1993 and the Schengen Agreement was signed between five of the ten Member States in 1985, the conclusion that cooperation between internal security forces and judicial authorities should be the answer to a Single European Market, followed suit. It was liberal, western Democracies who shared a common understanding of human rights and civil liberties and refrained from instrumentalizing and abusing their police institutions who decided to let their police forces collaborate on an institutionalized basis within an “Area of Freedom, Security and Justice”.

In 1999, Europol became fully operational. It represents an “expert system” which aims at improving the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organised crime. Its mandate has ever since been continuously enlarged, and will cover “organised crime, terrorism and other forms of serious crime (...) affecting two or more Member States in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences” from 1<sup>st</sup> of January 2010 onwards (when the Council Decision establishing Europol will enter into force

and replace the old Europol Convention.) For this purpose, Europol is making use of a highly sophisticated IT system, which underlies – next to very strict data security standards – a comprehensive data protection regime. And the agency is able to hire international staffs who work as crime fighting experts in one of the serious crime departments. One of their duties is to condense their findings on pan-European trends in annual publications like the “European Organised Crime Threat Assessment” (OCTA) or the “EU Terrorism Situation and Trend Report” (TE-SAT).

But Europol also serves another function. Beside the international staffers, or the “European part” as I call it, the Member States are represented by Liaison Offices and National Units. They are supposed to serve as an interface between Europol and national police authorities, somehow like in international permanent representations to other International Organisations like the United Nations. But instead of feeding their data into Europol’s system, they prefer to exchange their information bi-laterally, e.g. directly between Germany and France and exclude the agency and its experts. Informal estimations assume that up to 80 % of the information is exchanged outside the formal system by bilateral engagement. In this respect Europol pretty much resembles or even duplicates the work of Interpol. This very fact alone supports my third hypothesis, namely that a remarkable persistence of nationality can be observed in international police work. Lack of trust, turf fights and the overwhelming complexity of coordinating police intelligence work make it difficult for Europol to benefit from comprehensive data. The exhaustive legislation produced so far has not really been improving the situation successfully.

Even if Europol is improving its cooperation with other European agencies and bodies, like Eurojust, Frontex, the Joint Situation Center or the Police Chiefs Task Force, the pre-dominance of intergovernmental cooperation is evident.

One might argue that the new Council Decision establishing Europol changed that situation. It establishes Europol as an entity of the European Union, funded from the general EU, and will enhance the role of the European Parliament in the control of Europol. And it enables the Council to appoint a Director by qualified majority instead of unanimity, which will hopefully prevent just another deadlock in finding a politically suitable candidate. Even the most influential organ of Europol – the Management Board which is composed by one

representative per Member State – will decide by a majority of two thirds of its members in most of the cases.

But still Europol has only a relatively limited function compared with the wide range of functions entrusted to “normal” police forces in the Member States; it yields no executive powers. Its tasks are limited to crime analysis, information exchange and co-ordination. Even if Europol officers are finally able to assist in Joint Investigation Teams, they shall however not take part in any coercive measures. Nevertheless, it could be precisely those Joint Investigation Teams which might enable Europol to “get a foot into the door”.

And instead of redesigning the whole set-up of Europol in order to impede national police authorities from bypassing it bilaterally, e.g. after the blueprint of Eurojust, the Member States strengthened the National Units and brought even more bureaucracy to the Management Board. From now on the Chairperson and the Deputy Chairperson will be selected by and from the three Member States of the EU Troika. This excludes a number of possible Chairpersons just because they do not belong to the “right” country, and it links the term of the Chairpersons to the – for Europol rather irrelevant – Troika period.

From the perspective of democratic accountability, things improved satisfactory. Even if the agency is relatively weak compared to national police forces, and control by the national governments is guaranteed through the Management Board, granting the European Parliament control over the budget was a correct and overdue decision. I trust the Members of European Parliament to make the most out of this new situation, and hence compensate the lack of influence of national parliaments.

During my research appeared some interesting questions to be asked: which impact will the Prüm Treaty eventually have on Europol? National police authorities opening up their databases for each other might on one hand make the European agency in The Hague obsolete; on the other hand it could mark a new era of mutual trust which might finally enable the European crime fighters to draw upon the information they need.

Or how much sense would it make to merge Europol and Eurojust? Within European Member States the powers Police Officers yield vary considerably. In some countries they exercise powers which are considered to be the work of a public prosecutor in other countries.

Merging the two European agencies might help to overcome differences in national tradition and legislation. But would this eventually lead to the dissolution of the separation of powers? And finally the “old-boys network”: If Europol manages to hire senior law enforcement personal, with a vast personal network across Europe which is build upon mutual trust and respect; will those “old boys” be able to increase the amount of information fed into the system? Or is the structure really as rigid as my interview partners tried to make me believe.

Finally one thing seems rather sure: Europol will not be given coercive powers, to create a kind of European Union FBI in the near future. The huge differences in criminal law and procedural law ask for much more harmonization or approximation in this area, before such a step could be done. And most of all, granting Europol such powers would heavily interfere with national sovereignty; even if – for example during the EURO championship in 2008 – there are already bilateral agreements, which allow police officers to work almost equal to their host police forces. Such a radical change of role on multilateral bases seems very unlikely. Therefore Europol fictional appearance, like in the 2004 movie “Oceans’s Twelve” in which Catherine Zeta-Jones plays the proactive Europol agent Isabel Lahiri, will stay – as the word indicates – purely fictional.

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## Abstract

In 1999, the European Union established the European Police Agency (Europol) which aims at improving the effectiveness and cooperation of competent authorities in Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international organized crime. My thesis aspires at understanding how Europol fits into the European architecture for internal security, and if its legal basis and the inter-institutional framework allows the agency to achieve its goals.

I will start by analyzing how the evolution of the Police and Judicial Cooperation triggered and supported the installation of Europol and slowly advanced its role over the years. Based on the analyses of Europol's mandate, I will argue that its setup – with factual two different entities – favors the by-passing of its “European Core”. I will then look into the agencies relation with the Member States and its interconnection with other European agencies and bodies concerned with a similar agenda. I will argue that even though there is a thorough legal basis for police cooperation with Europol, national police forces are quiet reluctant to make use of the agency. Lack of trust, turf fights and the overwhelming complexity of coordinating police intelligence work across borders severely hinder Europol from unfolding. A situation mirrored by the fate of other agencies like Eurojust or Frontex.

Developments like the shift from the old Europol Convention to the new Council Decision establishing Europol, or the intensified use of “Joint Investigation Teams” might however effectively lead to a relaunch of the agency. Only if national police forces can be convinced that Europol does not only produce “added work” but also “added value”, they will be prepared to cooperate fully.

An examination of a new policy agency can only be comprehensive, if the question after democratic legitimacy and operational accountability is asked. My argument is that the current regulations are fully sufficient for Europol's mandate. A deepening or widening of its authority – e.g. towards executive powers – might however make changes necessary.

My thesis will mainly draw on documents published by the European institutions, and secondary literature like scientific books or articles concerned with the topic. Expert interviews will provide a valuable insight on the agencies work, while news coverage will provide supplementing information.



## Zusammenfassung

1991 begann die Europäische Polizeiagentur (Europol) ihre Arbeit in Den Haag mit dem Ziel, die Zusammenarbeit der Polizeibehörden in den europäischen Mitgliedsstaaten im Bereich der Terrorbekämpfung, des Drogenhandels und anderen Formen internationaler Kriminalität zu verbessern. Meine Dissertation widmet sich der Frage, wie sich die Rolle Europol's in der europäischen Sicherheitsarchitektur für Inneres definiert, und welche Gestaltungsmöglichkeiten der Agentur durch ihre rechtlichen Grundlagen und die inter-institutionellen Rahmenbedingungen zu Verfügung stehen.

Zum Einstieg werde ich die Entwicklung der Polizeilichen und Justiziellen Zusammenarbeit untersuchen, und zeigen wie sie zur Entstehung der Agentur geführt, und ihren langsam wachsenden Einflussbereich begünstigt hat. Ich argumentieren, dass der Aufbau der Agentur zu einer faktischen Zweiteilung– in die zwischenstaatlichen Verbindungsbüros und einen „Europäischen Kern“ – geführt hat, die Umgehung des Letzteren sehr stark begünstigt. Danach werde ich die Beziehung der Agentur mit den Mitgliedsstaaten und zu anderen europäischen Agenturen mit einer ähnlichen Agenda untersuchen. Ich werde argumentieren, dass – obwohl eine ausreichende rechtliche Grundlage vorherrscht – die nationalen Polizeibehörden nur sehr zurückhaltenden Gebrauch von Europol's Möglichkeiten machen. Mangelndes Vertrauen, Grabenkämpfe und die hohe Komplexität internationaler Polizeiarbeit erlauben es Europol nicht, das zu Verfügung stehende Potential in vollem Umfang einzusetzen. Darin ähnelt Europol auch anderen europäischen Agenturen wie Eurojust oder Frontex.

Neue Entwicklungen, wie etwa der Beschluss des Rates zur Errichtung Europol's der die alten Europolkonvention ersetzen wird, oder die zunehmende Nutzung der „Joint Investigation Teams“ könnte den Wirkungsgrad der Agentur wesentlich verbessern. Nur wenn nationale Polizeibehörden davon überzeugt werden können, dass Europol nicht nur „Mehr-Arbeit“ sondern auch einen „Mehr-Wert“ liefert, werden sie bereit sein voll zu kooperieren.

Eine Untersuchung der Polizeiagentur kann nur dann umfassend sein, wenn sie auch die Frage nach der demokratischen Legitimation und der operationalen Verantwortlichkeit stellt. Ich

werde argumentieren, dass die derzeitigen Bestimmungen völlig ausreichend gestaltet sind. Falls allerdings das Mandat Europol's in Zukunft erweitert oder vertieft werden sollte – etwa in Richtung behördlicher Zwangsgewalt – wird es notwendig werden, Legitimation und Verantwortung neu zu definieren.

Dokumente der europäischen Institutionen und Sekundärliteratur wie wissenschaftliche Bücher oder Artikel zum Thema bilden die Grundlage meiner Arbeit. Weiters boten Experteninterviews wertvolle Einblicke in die Arbeitsweise der Agentur, während Presseberichte zusätzliche Informationen lieferten.

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