

Differential Integration in the Third Pillar:
High Gear for Law Enforcement Changes in
the Accession States of
Eastern and Central Europe

Paper prepared for delivery at the Seventh Biennial International Conference of the
European Community Studies Association (ECSA), Monona Terrace Community &
Convention Center, Madison, Wisconsin, May 31-June 2, 2001.

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Introduction

This paper focuses on a recent area of European Union competence that is not often examined: law enforcement cooperation and integration within the third pillar of Justice and Home Affairs. Until quite recently, law enforcement cooperation under the auspices of the European Union was minimal. Law enforcement matters, like security and defense issues, have always been deemed to be core immutable responsibilities of independent sovereign states. Insofar as some degree of transnational cooperation was necessary to fight crime, limited bilateral or multilateral agreements were negotiated. More extensive institutionalized and 'Europeanized' forms of cooperation did not even begin until the early 1990s and then developed in a rather slow and awkward manner. Yet there is now much evidence to suggest that both the scope and speed of cooperation in this field are increasing.

Both the original impetus for dealing with some of these matters on a European level and the reasons for expanding these EU responsibilities are inextricably bound with developments in Central and Eastern Europe. The Schengen Agreement's goal of a Europe without internal borders, conceived as an extension of the logic of the single market, was decided at a time when Europe's eastern border was precisely defined, impermeable, and secure. By the time the Maastricht Treaty was being negotiated, none of this remained valid. The fall of Communism in the east opened borders wide and created new opportunities for both refugees and transnational criminals. At the same time, a broad consensus developed within the member states of the European Union that all of Europe needed to be reunited by expanding membership of the Union. So both the

new opportunities and the new dangers posed by the shifting boundaries of a new European order led to pressures to place some limited law enforcement matters under the aegis of the EU.

Now that a dozen prospective member states are changing their laws, practices, and even institutions to accommodate EU demands, these actions—as well as other unplanned events—are having a symbiotic affect on the prospects for further integration in this functional area. A combination of circumstances—an independent need for new institutions, a strong desire for EU membership, and lack of wherewithal to accomplish all of the requirements in time—have both predisposed these countries towards a high level of cooperation and integration in this field and provided the Commission with the necessary leverage to demand such actions.

This short paper is merely an exploratory essay, a first tentative foray towards both describing what has already occurred and predicting what is likely to happen in the future. A great deal of additional research needs to be done on these questions. I hope to do more in the coming months and years, but, alas, have had very little funding or time available to me. As anyone involved in researching these subjects is well aware, it is also sometimes difficult to get detailed information and accurate answers. My limited ambition in this paper is therefore to provoke discussion and to encourage further research.

The Functional Impetus for Change: New Opportunities and New Dangers

The looming shadow of more than a dozen prospective new members in Eastern and Central Europe has given current members an incentive to ‘deepen’ cooperation in this

field. Three potential problems with EU expansion are especially relevant: smuggling and immigration problems along external Schengen zone borders that will move hundreds of miles to the east, the inadequate institutional development of law enforcement agencies, and more frequent incidence of public corruption.

The first small entirely intergovernmental half-measures towards law enforcement cooperation in the EU were therefore inspired by one of the major geopolitical events of the 20th Century--the collapse of the Soviet bloc and the fall of Communist systems in Central and Eastern Europe. The planned Eastern enlargement of the European Union has caused reverberations in many different policy and procedural areas. The final adjustments have not been made nor have the last tremors been felt. Much of this has entailed changing EU practices and procedures to better fit the eventual altered circumstances of a much larger Union. The continuing debates over the proper respective roles of the EU institutions and member state governments, the distribution of votes in the Council and the European Parliament, the number of national Commissioners, and, of course, the whittling away of national policy vetoes have all been spurred by the prospect of enlargement and the rapid approach of the introduction of the Eurocurrency. It is feared that clumsy and unwieldy decision making procedures that sometimes barely function for a Community of Fifteen will grind to a standstill in a Community of Twenty-Seven. So the race is on to streamline and improve the functionality of these procedures before expansion makes reform immeasurably more difficult. The Treaty of Amsterdam and now the Treaty of Nice provide only the latest installments of the Member State's responses—not the final answers.

The European Union has also focused on modifying or eliminating aspects of very costly current programs that would be ruinously expensive to extend to all of the new member states. The Common Agricultural Policy, and the structural and cohesion funds are all targets for reform because of the relative underdevelopment of the prospective new member states and their oversized and uncompetitive agricultural sectors. But current members also lose from any changes—so these have also yet to reach their final form.

But developments in the field of Justice and Home Affairs have not received the same kind of attention as other more traditional areas of EU responsibility. Indeed, this subject has nearly flown under the radar screens of academic and media attention. That is partly because EU involvement in this area is new, has been minimal, and has also been kept firmly under the control of the member states—until now. This area of EU involvement is also different because it was instigated largely as a response to developments in Central and Eastern Europe and also because, I contend, the willingness of the governments of the applicant states to adopt integrative solutions to law enforcement problems has spurred momentum for further action within the EU15.

Indeed, I coined the term ‘differential integration’ because it appears that even more integration may be occurring within the applicant states of Eastern and Central Europe in law enforcement matters than in the EU15. These nations are not only in the process of applying for EU membership. They have also had to simultaneously attempt to construct all new economic, governmental, and even social systems. This has required rebuilding institutions and laws from the ground up—a much more thorough and all-encompassing

process than that gone through by previous applicant states. Former aspirants simply had to adopt and implement the *acquis communautaire*—a daunting task in itself.

The simultaneous existence of what I call the transition imperative (the independent need to create new institutions and rules--independent, that is, of the EU membership process), the membership imperative (the strong desire of all these countries to belong to the EU), and the tactical handicaps of poverty and underdevelopment (which make it very unlikely that these states will be able to satisfy all EU membership requirements concurrently) combine to create an environment conducive to the development of high levels of integration. The transition imperative has placed these countries in the market for many changes. The membership imperative places them in a structured program for adopting required changes. The tactical handicaps that prevent these nations from meeting all of the membership requirements give the Commission and other EU bodies negotiating leverage for gaining concessions in areas that might remain outside their purview otherwise. The Commission after all decides when and if these applicants have satisfied the requirements in each of the policy titles. Applicant states are making major changes that will, in turn, affect the course of law enforcement integration within the EU 15. This hypothesis is tentative and requires much further supportive evidence.

Changes in the East: The Transformation of Law Enforcement in the
Applicant States of Central and Eastern Europe

During each of the Community's previous expansions, prospective member states have complained about the difficulty of adopting a body of legislation and rulings as

extensive as the *acquis communautaire*. The task becomes more onerous for each successive wave of applicants as the numbers increase with each new directive or court ruling. The comprehensive reach of EU legislation and authority has also grown as the organization has mutated from a modest economic organization with immodest goals to an immensely complicated and hard to understand new level of governance that will soon introduce a single new currency for twelve of its fifteen members.

Each country in the latest group of prospective members has not only had to overcome the higher hurdles of a larger and more extensive *acquis*, they have also had to build new institutions for satisfying the Community's most basic membership requirements—i.e. possession of a functioning market economy and a democratic political system. Furthermore, these countries have much fewer resources with which to finance these huge tasks.

Of course, in the area of law enforcement and criminal justice these changes must be especially extensive. Why? To one extent or another (there were certainly national variations) these countries did not really possess or apply the rule of law. The Communist Party ruled and decided how, when, and whether rules were applied or enforced. The primary responsibility of law enforcement (again with some variations of degree) was to defend the state—not protect citizens or enforce laws. Even fighting crime was a secondary task in many of these countries.

The task of rebuilding a refocused law enforcement establishment that meets Western criteria of efficacy and ethical standards is a tremendous undertaking and a major expense. The Commission's 2000 Report on Poland's Progress Towards Accession (which was printed in November) states that:

...the requirements of the sector [Justice and Home Affairs] are very large and it is only more recently that the size of the task which has to be accomplished has been recognized. The budgetary implications are being calculated more precisely within the emerging “strategic approach” which covers particularly the border guard and the police. (p.72).

The Commission is not satisfied if a country merely adopts a mass of new legislation. Practices must also change, and nations must demonstrate that they are capable of implementing these new laws. This is, of course, a most difficult challenge. A lot of time, money, and effort have been expended on creating and improving institutional capabilities.

The Twinning Program

One of the most extensive and interesting ways the EU has attempted to develop institutional capacity and ensure performance is the so-called twinning program. In the field of justice and home affairs this involves seconding police officers or judicial employees from West European agencies to serve time mentoring their eastern counterparts. They usually serve from six months to one year in their positions and advise their colleagues on the best practices in their own countries. Twinning programs have been instituted in virtually all of the priority crime problem areas mentioned below. One interesting aspect of this program, however, is that while officials in the applicant states feel that they have benefited enormously from the advice and expertise of the seconded officers, they also noticed a reciprocal learning process at work. More than one official told me that it was not uncommon to be told by an advisor (after changes had been accomplished) that his or her own country did not possess such integrated and rationalized tools or approaches for dealing with crime problems. “We asked: how have

you organized your agency to deal with this transnational problem? We often heard that they had not made any changes at all---yet.” But these same people seemed convinced that these officers would become advocates for change once they returned home.

Changed Priorities and New Responsibilities

The application process has also resulted in changed priorities and new responsibilities for law enforcement agencies in these countries. The European Union demands that certain problems or crimes be given additional personnel or funding. Sometimes applicant states must create new units or divisions to handle these problems. Of course, the EU often steps in with major financial and technical assistance—but these rarely cover more than half of the associated costs.

Changed priorities closely mirror the top priorities of the current member states. The primary concerns are: border controls, migration and asylum policies, drug interdiction, money laundering, judicial cooperation, the fight against organized crime, and anti-fraud and corruption measures. Law enforcement agencies have had to effectuate numerous changes to meet EU requirements for each one of these policy areas. These actions have differed from country to country.

Let us look very briefly at the actions the Hungarian National Police and Ministry of Interior had to take in just one of these topical areas: the fight against organized crime. The Interior Ministry created and staffed an anti-terrorist and mobile crisis management center. The police investigation system was changed and upgraded to Europol standards. Various measures were taken to improve the ability to monitor traffic on public highways and all other forms of transportation. Regional drug laboratories were established and a

system for handling confiscated drugs was put into place. The police detention system was expanded and upgraded to EU norms. A national firearms registry was created. Infrastructural improvements were made to the system for handling illegal migrants. A witness protection system was created. Finally, many police staff attended specialized professional training courses. This is just a bare-bones outline of what one country has had to do to meet the requirements of one priority area within one chapter of the EU accession process.

Law enforcement has also had to take on new responsibilities. Enforcement of environmental regulations and requirements is new to many of these countries. The Union's environmental *acquis* is one of the largest and most demanding and is proving to be one of the biggest hurdles in accession negotiations. Law enforcement agencies require—and are receiving—a great deal of specialized training and equipment to help them deal with these new tasks. But much more will be necessary.

Another new responsibility is enforcing anti-discrimination laws and ensuring that ethnic, religious, and cultural minorities are treated fairly and lawfully. This is an especially pointed challenge as police in some applicant states are accused of being some of the worst offenders. The EU is providing an enormous amount of technical and financial assistance in this area—and insisting that verifiable progress be made. This is most certainly necessary and beneficial—but it sometimes appears that the relatively undeveloped fragile new democracies of the East are being held to a higher standard with regard to treatment of their Roma minorities (for example) than are the Germans with regards to their Turkish *gästarbeiter*, the French of their North African *pieds noirs*, or the

British their substantial Asian minorities. But the Commission has leverage at the moment in the east.

What is the Future for Law Enforcement Integration in the European Union?

I do not contend that a large degree of integration in law enforcement matters is inevitable within the European Union. It does appear, however, that the current trajectory of movement is towards more—rather than less—integration. As the date for accession of the first new members draws nearer (whenever that will be), the aforementioned factors will likely work to increase cooperation among national agencies and also harmonization and even centralization of some law enforcement functions.

In fact, some additional movement in this direction is guaranteed as a result of the changes incorporated into the newly negotiated Treaty of Nice. It is not my intention to provide a detailed analysis of the Treaty or their ramifications. Suffice it to say that the responsibilities and decision rules of the Justice and Home Affairs field continue to change. What started with the Maastricht Treaty as an intergovernmental so-called ‘Third Pillar’ policy area—with national governments entirely in charge through the Council, unanimity voting requirements, and no involvement of other Community institutions—continues its transformation through the Treaty of Nice into a more normal Community responsibility. The possibility of a national veto in the Council has been removed for those policies that deal with police and judicial cooperation in criminal matters. The member states are also on record as supporting an eventual move of these policy areas to the ‘First Pillar.’ Agreements to change voting rules for the related subjects of visa, asylum, and immigration policies produced stereotypically complex and

muddled results. Most aspects of these issues will now be decided by qualified majority voting—although many of these switches will be delayed and some aspects of the problems will be exempted. But while it is extremely hard for experts—much less citizens—to understand just exactly which rules apply at which times, the direction of these changes is evident. For ten years now the intergovernmental component of these policies has steadily reduced.

Other non-treaty based changes are more difficult to predict because they will be the product of numerous political interactions mixing with future unpredictable events. Just last week, the London Telegraph (a famously Euroskeptic British daily newspaper) characterized the European Union’s involvement in the field of law enforcement as “an area of galloping integration scarcely mentioned by the Tories in the election campaign.” The paper was referring to a draft Commission directive against fraud that would harmonize definitions of liability and criminal penalties for infringement in the member states. Developments seem to be occurring at a breakneck pace, even if most of these have yet to result in concrete changes.

In early May of 2001, a draft position paper on the future of the European Union was leaked to the German media. This paper, written by German Chancellor Helmut Schroeder for this fall’s upcoming SPD party conference, sets forth major institutional and constitutional changes that would result in the creation of a federal European state based roughly on the German federal model. These proposals—and the fact that they were advocated by the leader of the largest and most powerful member state of the Union—created a firestorm of controversy, especially in Britain (where an election is now being contested largely over the issue of the Euro and British sovereignty) and

France (where widespread criticism of the French European presidency that resulted in last year's flawed Nice Treaty still stings). In Germany however, it is worth noting that the leaders of all of the major political parties indicated their strong approval of the chancellor's ideas.

Schroeder's paper was replete with attention-grabbing suggestions. One little-noticed proposal, however, was to expand the authority and responsibilities of Europol. Schroeder would like to see Europol endowed with operational capacities and become something like a European FBI.

By the end of the month, Lionel Jospin, the Prime Minister of France, set forth his own vision for a European 'federation of nation-states' as a counterpoint to the German proposal. Attention has focused on the substantial differences between these proposals—and there are many. The contrasts between the near-Gaullist 'Europe of the nation-states' French proposal and the Monnet-like 'United States of Europe' German plan inevitably lead many analysts to focus on the intergovernmental-integrationist debates of the past. It is too easy to miss the essential federal character of both schemes, and to minimize the importance of the fact that two of the largest and most influential of the EU member states (the traditional 'motors' of European integration) are now on record in support of some variation of such plans.

While Jospin does not favor the bolder German moves for redesigning the institutional architecture of the Union, and is especially opposed to relegating the nation states to a second parliamentary chamber, he nonetheless advocates broader and deeper European involvement in a number of policy areas. Those that are most relevant to the subject of this paper are his support for creation of a European criminal police force, a

common immigration policy, and 'closer coordination' of criminal justice systems. In the area of law enforcement and justice, at least, Schroeder and Jospin largely agree on what ought to be done. In fact, Jospin even goes further in calling for the creation of a European border patrol service that would "protect...the external borders of the Union and its international airports." This broad agreement between the French and the Germans should be a good indicator of the possibilities for further action in these areas in the near future.

Wherever one looks it is possible to see more integrative movement in this field. More than a year ago the Commission recommended to the IGC working on the new treaty that it create an office of European Prosecutor empowered to fight fraud and watch over the financial interests of the Union. This idea did not make it into the final Treaty. The treaty does create a new judicial body called 'Eurojust' which will begin work later this year. Composed of judges from each of the member states, it will be tasked with assisting in the coordination of judicial cooperation in criminal matters. They are empowered to request member states to initiate criminal investigations and prosecutions. States must either comply or provide a 'reasoned justification' for refusals. The European Parliament is already attempting to broaden the mandate of Eurojust. In mid-May it passed a proposal for that body to become "the nucleus of a future European public prosecution service." Many in the EP would like to see it become a full-fledged European Justice Ministry. And Prime Minister Jospin did not rule out this possibility in his speech earlier this week. He advocated the creation of a "true European Judicial Area" that, in his words, "could ultimately lead to the creation of a European public prosecutor's office."

The task of training law enforcement personnel has also become more coordinated and appears to be headed for some degree of integration in the near future. Prior to 1996, all member states had their own police academies or colleges that determined their own curricula and training standards. The Association of European Police Colleges was created in that year for two main purposes: 1. to regularize contacts between law enforcement training institutions, to exchange information, and to begin discussions about harmonizing training standards and standardizing some elements of the curricula, and, 2. to act as a point of contact for the provision of law enforcement training assistance to Central and Eastern Europe.

A decision was taken at the Tampere Council meeting in late 1999 to create an even more ambitious undertaking—the European Police College Network. Begun in January of this year (2001), this organization is also tasked with creating a European curriculum for police training. Another explicit goal of this organization is to build a European Police Academy sometime in the future.

The Tampere JHA Council meeting also established the European Police Chiefs Operational Task Force. This group held its first meeting in Lisbon in April of 2000. At this point its objectives—much less its powers—are extremely limited. It is meant to be a forum for establishing high-level contacts among different law enforcement agencies so that they can exchange information and work together more efficiently. The history of the European Union is replete with a long list of organizations that started with very modest remits.

It does appear that two main factors are pushing towards greater integration in the area of Justice and Home Affairs. First, the EU15 are sufficiently worried about future

dangers of expanded EU membership (loosely guarded external borders, more organized crime, smuggling of contraband and human beings, prostitution, and corruption) to set aside their traditional reluctance to share responsibility for a key state power: law enforcement. This will grow as accession draws nearer. Secondly, the tremendous institutional and procedural changes made by law enforcement agencies under the direction of the European Union, has produced greater harmonization and this in turn will result in easier cooperation among those countries. The demonstration effect of this harmonization will be to create support for similar changes in the EU15. It is not that the countries of Central and Eastern Europe possess any institutions or procedures that the current member states lack---it is that it appears that these are becoming more alike in the East. The western members are still too attached to their own individual practices and procedures. Functional needs and the press of changed membership will likely result in a much greater role for the European Union in the area of law enforcement.