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The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration

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John A.E. Vervaele

Introduction

In the academic year 1991-1992, Utrecht University, on my initiative, started to offer courses in European criminal law. This initiative came at a symbolic moment, just prior to the entry into force of the EU Treaty of Maastricht¹ and the outlining of European policy in the areas of Justice and Home Affairs (JHA). The Director of the Legal Department, Paul DEMARET, was aware of the significance of this development and I have been given the opportunity to teach this subject at the College of Europe since 1995. Since then, JHA has evolved into one of the main areas of EU legislation. Now we are again on the threshold of an important historical feat. In June 2003, the European Convention reached agreement concerning a draft Treaty establishing a Constitution for Europe.² The use of the term "Constitution" for the future EU Treaty is not simply cosmetic. The realisation has dawned that EU integration must be embedded in a treaty document which also regulates the rights and duties of citizens, not just with respect to European citizenship, but also with respect to, for example, Justice. Where JHA is concerned, this result acknowledges that the harmonisation of criminal law and criminal procedure and transnational cooperation cannot preclude the harmonisation of principles of due law and fair trial.

Despite the substantial Europeanisation of criminal law, many criminal lawyers are defending the achievements and typicalities of their national criminal law like never before. EU initiatives are assessed from the perspective of the national agenda and national achievements. We are still

¹ 1 November 1993.

² <http://european-convention.eu.int/bienvenue.asp?lang=EN&Content=>

too far removed from a European criminal law policy that is both European and enjoys national support. The core issue is therefore not how to keep our criminal (procedural) law national and free from European influences, but rather how to ensure democratic decision making, the quality of the constitutional state and the guarantees of criminal law in a national administrative model which has to operate increasingly interactively within a European and international context.

In this contribution, the contours of the Europeanisation of criminal law are outlined and analysed. First, attention will be paid to the EC and, second, to the JHA. Following this, an evaluation and a look ahead at the current IGC are indicated.

I The EC and the Europeanisation of Enforcement in the Member States

For reasons which will shortly become apparent, the term used within the EC is not the Europeanisation of criminal law, but the Europeanisation of national enforcement law.³ The influence of EC law is felt through both the regulating effect of the case-law of the Community courts (Court of Justice and Court of First Instance) and through legislation (treaty, directives and regulations). In addition to the regulation and harmonisation of national enforcement law, operational European enforcement may also be seen to gain importance within the EC.

A. *Regulating Effect of Case-law on Enforcement in the Member States*

The power to enforce Community law in principle lies with the Member States. That is not to say, however, that the Member States may exercise this power, including in the field of criminal law, with complete freedom. As early as the 1980s, the Court of Justice created a Community duty to enforce,

³ See HARDING, C. & SWART, B. (eds.), *Enforcing European Community Rules*, Aldershot, Dartmouth, 1996 and DANNECKER, G., "Strafrecht der Europäischen Gemeinschaft" in A. ESER & B. HUBER (eds.) *Strafrechtsentwicklung in Europa*, Freiburg im Breisgau, Eigenverlag MPI, 1995, 4.3.

based on Community loyalty as laid down in Article 10 of the EC Treaty. Although the Member States retain their discretion in the use of their national (private law, disciplinary law, administrative law, criminal law) enforcement regimes, this freedom is further defined by the Court in accordance with the result sought. The Member States are obliged to provide an enforcement regime which is effective, proportionate and deterrent in nature. In this, they are moreover not allowed to discriminate between equivalent national and European interests (assimilation principle). If a Member State criminally enforces tax fraud it must do the same for Community customs fraud.⁴ That these requirements also apply to enforcement, including criminal law enforcement, has recently been confirmed by the Court in the Spanish Strawberries Case. When angry French farmers persistently took action against fruit transports from Spain, the French police did report the incidents, but they were systematically dismissed by the Public Prosecutor. The European Commission brought a case before the Court of Justice against France for failure to comply with treaty obligations and the Court found in favour of the Commission. Community loyalty and ensuring the free movement of goods do not oblige a Member State to use the principle of legality instead of the principle of discretionary powers in the enforcement of Community law, but when using the principle of discretionary powers the Member State must also make Community interests part of the balance.⁵

B. Legislative Regulation of Enforcement in the Member States

Since the 1980s, the Community legislator has substantially harmonised national enforcement by defining normative standards (prohibitions, commands, duties of care) and by prescribing obligations with respect to controls and penalties.⁶ Community directives and regulations concerning agriculture, fisheries, the environment, financial markets, money laundering,

⁴ Case 68/88, *Commission v. Greece*, 1989, ECR p.2965. VERVAELE, J.A.E., *Fraud against the Community. The Need for European Fraud Legislation*, Deventer-Boston, Kluwer, 1992.

⁵ Case C-265/95, *Commission v. France*, 1997, ECR p.I-6959.

⁶ VERVAELE, J.A.E., "Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?" in J.A.E. VERVAELE (ed.), *Administrative Law Application and Enforcement of Community Law in the Netherlands*, Deventer-Boston, Kluwer, 1994, pp.161-202.

etc. contain various examples of this.⁷ The Community harmonisation of national enforcement does not yet include the harmonisation of criminal law and criminal procedural law, at least, not directly. After all, the choice of which system of enforcement to use (civil law, disciplinary law, administrative law, criminal law or a combination of these) in order to give effect to Community law in principle remains a national one. However, Community principles of enforcement, like deterrence and effectiveness, and harmonising provisions⁸ in Community legislation may indirectly compel the national legislator to make use of punitive enforcement instruments. From the moment when a Member State opts to enforce an area of Community policy (perhaps partially) through criminal law means, Community law has full effect in criminal law. National criminal law must take account of the substantive normative standards of the Community policy area in question and of the relevant obligations with respect to enforcement. From this point of view, Community law clearly does indirectly harmonise national criminal law and criminal procedural law. National criminal law and criminal procedural law may need to be modified where national rules are incompatible with Community law (negative integration). The penalisation of smuggling and evasion of customs duties and the penalisation of transporting money within the European Union are no longer compatible with current Community law. The incomplete or defective transposal of directives in national criminal law and criminal procedural law is contrary to the Treaty and may result in proceedings before the Court of Justice against the Member State and in a bar on prosecution in criminal cases. The non-recognition of the evidentiary value of European Anti-Fraud Office (OLAF) enforcement reports is contrary to European law rules.⁹ National criminal law and criminal procedural law may also need to be modified because Community law must be enforced effectively (positive integration). Examples of this abound. Let me illustrate this point with the recent standardisation in the field of investments in securities and stock market fraud.

⁷ See Regulation No. 2988/95, O.J. (1995) L 312.

⁸ For a good example, see Article 31 of Fisheries Regulation No. 2847/93, O.J. (1993) L 261.

⁹ VERVAELE, J.A.E., "Community Regulation and Operational Application of Investigative Powers, the Gathering and Use of Evidence with Regard to the Infringement of EC Financial Interests" in J.A.E. VERVAELE (ed.), *Transnational Enforcement of the Financial Interests of the European Union. Developments in the Treaty of Amsterdam and the Corpus Juris*, Antwerpen/Groningen/Oxford, Intersentia, 1999, pp.53-92.

The complete liberalisation of the movement of capital took a long time to realise in the EC. This is the reason why the EC only harmonised the services of stockbrokers and investment managers in a directive at the beginning of the 1990s.¹⁰ In 1989 the EC had already approved a directive on the coordination of rules concerning the transactions of insiders.¹¹ As a result of the continuous integration of the European financial sector, including the mergers of stock markets, the introduction of the single currency, the globalisation of the securities business and the impact of new technologies, Community legislation was no longer adequately able to achieve an integrated European capital market. The 1993 Investment Services Directive underwent a substantial review¹² and in its wake new guidelines were drawn up concerning the prospectus which has to be published whenever new securities are issued to the public or admitted to trading¹³ and concerning insider dealing and market manipulation (market abuse).¹⁴ Here the EC has introduced a new prohibition, i.e. market abuse, which is much broader in scope than insider dealing. Besides insider dealing, market abuse also includes disrupting the price fixation of financial instruments and disseminating false or misleading information, either online or not. It is essential to investors that the rules of play concerning a) access to the information; b) awareness as to the price fixation and c) awareness as to the source of the public information are the same for all investors and that these rules are respected. Because of the increase of trade in financial instruments via the Internet and the digital supply of information concerning financial instruments this need on the part of investors has only become greater. It is required of the Member States that they impose effective, proportionate and deterrent administrative measures and sanctions. It is further required that in every Member State one independent administrative body is entrusted with the supervision and the imposition of administrative sanctions for insider dealing and market manipulation. This is without prejudice to a possible cumulation with criminal law sanctions. The administrative sanctions also

¹⁰ Directive 93/22 of 10 May 1993 on investment services in the securities field.

¹¹ Directive 89/592, O.J. L 334.

¹² COM/2002/625.

¹³ COM/2001/0280 final, O.J. (2001) C 240E, agreed upon in July 2003.

¹⁴ Directive 2003/6/EG of 28 January 2003.

include punitive sanctions in the sense of Article 6 ECHR, such as forfeiture of a penalty payment, administrative fines, suspension and cancellation of a permit. In short, this is punitive administration at work, under the direction of the EC.

Another new feature is that the Directive requires concrete minimum powers of investigation which the supervisor exercises “either directly, or in collaboration with other authorities, such as judicial authorities”.¹⁵ That access to the accounts and the request for information are part of this is hardly surprising, but the list in Article 12(2) also includes: the request for telephone and data traffic records, requesting the freezing and/or sequestration of assets and requesting a temporary prohibition of professional activity. The Directive therefore not only regulates the administrative powers of supervision but also in part certain powers of criminal investigation, at least by making it obligatory that the administrative enforcement agency can request the exercise of these powers before the judicial authorities. Many Member States will have to adjust their substantive criminal law provisions on stock market fraud, including the related powers of supervision and investigation. The Directive moreover provides a mandatory duty of information for traders who reasonably suspect that “a transaction might constitute insider dealing or market manipulation”.¹⁶ This duty to inform of course strongly resembles the duty to inform in the case of suspected money laundering, which is also laid down in Community law. This new duty of information must be incorporated in national legislation in such a way that it is enforceable.

The direct harmonisation of punitive administrative sanctions and punitive supervision by administrative enforcement bodies is not exceptional in the EC. Regulations concerning agriculture and customs and anti-fraud regulations¹⁷ provide detailed administrative sanctions which the Member States are obliged to impose.¹⁸ Whether these powers also allow for the direct harmonisation of national criminal and criminal procedural law is a controversial topic in the legal literature. The European Commission has repeatedly attempted to oblige Member States, through Directives, to

¹⁵ Article 12(1).

¹⁶ Article 6(9).

¹⁷ See for instance Regulation No. 2988/95, O.J. (1995) L 312.

implement direct measures of criminal law harmonisation,¹⁹ but in practice the Council of Ministers has removed the criminal law sting out and has left intact the discretion of the Member States with respect to their enforcement regimes. Whether this political conclusion also implies that the EC Treaty does not include a legal basis for direct harmonisation in the field of criminal law remains to be seen, however. Legally speaking, the introduction of the third pillar, including that of Amsterdam, did not affect the first pillar and therefore did not affect the possible legal basis for direct criminal law harmonisation within the first pillar either. In fact, Article 2 of the EU Treaty expressly provides that the third pillar must promote and comply with the Community *acquis*. In short, the powers under the third pillar may not be exercised at the expense of the powers under the first pillar and the third pillar also serves to enforce Community policy. What is important, however, is that in the Amsterdam EC Treaty an express legal basis was laid down for harmonisation with a view to protecting the financial interests of the EC and for customs cooperation.²⁰ These two Articles alone provide that measures which are taken on the basis of these Articles may not relate to the “application of national criminal law or the national administration of justice”.

Further, the European Commission is of the opinion, and this opinion is supported by the European Parliament, that the EC Treaty most certainly includes the power to directly harmonise criminal law. For this reason, the European Commission has recently submitted two proposals for directives which would directly harmonise criminal law. The proposals concern EC fraud²¹ and environmental criminal law.²² Both proposals compete with third-pillar initiatives: the first with the PIF Convention and its protocols²³ and the second with the proposal for a framework decision on environmental criminal law.²⁴ It has meanwhile emerged that the Council’s Legal Service has advised that the EC Treaty does indeed contain a legal basis for direct criminal law

¹⁸ Case C-240/90, *Germany v. Commission*, 1992, ECR p.I-5383.

¹⁹ See proposal for a Council directive on prevention of the financial system for the purpose of money laundering, COM/1990/106 final, O.J. (1990) C 106.

²⁰ Articles 280 and 135 respectively of the EC Treaty of Amsterdam.

²¹ COM/2001/0139 final, C 180E/238.

²² COM/2001/272 final, C 240E/125. COMTE, F., “Criminal Environmental Law and Community Competence”, *European Environmental Law Review*, 2003, Volume 12, No. 5, pp.135-147.

²³ O.J. (1995) C 316; O.J. (1996) C 313 and O.J. (1997) C 221.

²⁴ O.J. (2000) C 39.

harmonisation, although this is limited to laying down prohibitions or prescriptions (offence descriptions) and the duty to impose penal sanctions. The criminal law harmonisation of penalties, of aspects relating to prosecution and criminal liability and of cooperation in the field of criminal law can only be effected under the third pillar. It is clear that not all Member States support this unexpected advice, which recognises a competence for limited criminal law harmonisation under the first pillar. The Council of Ministers paid it little heed and has meanwhile adopted the framework decision on environmental criminal law.²⁵ This obliges Member States to penalise certain intentional and culpable environmental offences and also to provide custodial sentences for the more serious ones. As far as I am concerned, the European Commission has been right to contest the adoption of the framework decision before the Court of Justice for being contrary to the Community *acquis*. Hopefully this will result in the long-awaited decision on the principle concerning the division of powers with respect to criminal law harmonisation and put an end to the institutional battles between the EC and the EU.

C. Regulation of National Cooperation and Exchange of Information

The cooperation between the national enforcement authorities is also regulated within the first pillar and centres around mutual administrative assistance.²⁶ Briefly summarised, this concerns the exchange of information between supervisors in the field of customs, taxation²⁷ and money laundering.²⁸ Investigation upon request, with the participation of foreign inspectors, is also possible in the framework of this assistance. In the field of customs duties²⁹ the European Commission is a recognised requesting party.

²⁵ Framework Decision 2003/80/JHA of 27 January 2003, O.J. L 5 February 2003.

²⁶ For further analysis see VERVAELE, J.A.E. and KLIP, A. (eds.), *European Cooperation between Tax, Customs and Judicial Authorities*, Deventer, Kluwer Law International, 2002.

²⁷ Directive 77/799, O.J. (1977) L 336 and Regulation No. 1798/2003, O.J. L 264. See VERVAELE, J.A.E. (ed.), *Lutte contre la fraude à la TVA dans L'Union européenne*, Antwerp-Brussels, Maklu-Bruylant, 1996.

²⁸ See Council Decision of 17 October 2000 concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information, O.J. (2000) L 271.

²⁹ See Council Regulation No. 515/97, O.J. (1997) L 82 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters.

The Commission can therefore also request the Member States to start an investigation and participate in it when asked. That the importance of the exchange of information between national enforcement authorities (either voluntarily or upon request) in the administrative trajectory is not restricted to the establishment of a tax assessment or customs duties arrears was recently confirmed in the KB Luxembourg scandal where client information of the Luxembourg branch of the Belgian KB bank which had been stolen by an employee fell into the hands of the Belgian authorities who passed on this information by voluntary assistance to the Dutch and German authorities.

D. Operational Powers of Enforcement of the European Commission

The European Commission has had operational powers of investigation and punishment in the field of European competition since the 1960s. These powers have their legal basis in Articles 80 and 81 of the EC Treaty and have been further elaborated in the historic Regulation No. 17/62.³⁰ In short, it can be said that the European Commission can independently supervise companies and third parties, has access to premises and records, can ask questions and make copies of invoices, hard disks, etc. The European Commission has no powers of criminal investigation or prosecutorial means of coercion at its disposal, but in case of non-cooperation it can request the assistance of the Member State in question, which has to take all appropriate measures. Since the Hoechst case³¹ it is generally accepted that this assistance may include an inspection of premises, i.e. breaking into storage areas, hacking into computer files, etc. This administrative law inspection strongly resembles a criminal law search. For this reason, the Commission must first apply to a judicial authority for authorisation in a number of Member States. Here, too, it has become apparent that the dividing line between administrative law supervision and criminal law investigation is beginning to fade. Regulation No. 17/62 has recently been replaced by Regulation No.

³⁰ O.J. 13 of 21 February 1962.

³¹ Case 46/87 and 227/88, *Hoechst*, 1989, *ECR* p.2859.

1/2003³² which in Article 21 authorises the European Commission also to carry out this inspection of premises in other than business premises, including the homes of directors, managers and other staff. This inspection is also subject to judicial authorisation.³³

That the Commission has independent operational powers of supervision is exceptional, but in 1996 an important power was nevertheless added, i.e. that of the European Commission's anti-fraud unit OLAF (or UCLAF).³⁴ OLAF may request Member States to start an administrative investigation and have its own inspectors participate in this investigation, but under Regulation No. 2185/96³⁵ OLAF also has the power to investigate in the Member States independently. The Regulation provides for a horizontal arrangement, meaning that the provisions apply to all EC policy areas where these have a connection with EC finances. The mandate not only covers transnational fraud, but also serious fraud and in addition the Commission can carry out inspections in special cases to correct a failure to enforce on the part of a Member State (the principle of proactive assimilation). Within this mandate, OLAF may independently, i.e. on its own authority, but under the responsibility of the Commission, carry out outside inspections with teams that may consist of inspectors from the Member State concerned and/or from other Member States. The powers of investigation are regulated under Article 7 and include classic powers of supervision, i.e. not powers of investigation therefore. However, also in this case Member States have a duty to assist, which is in practice often fulfilled by judicial authorities. In addition, OLAF has internal supervision powers at the European institutions in the fight against fraud and corruption.³⁶ OLAF does not therefore have any powers of judicial investigation or means of coercion, but the Regulation does provide for direct cooperation with the national judicial authorities. The importance of this OLAF Regulation has recently been demonstrated in high-profile fraud scandals like

³² O.J. L 4 January 2003.

³³ See the recent cases *Colas Est (ECHR)* and *Roquette Frères (ECJ)*. Comments in KRANENBORG, H.R., "Artikel 8 EVRM en de verificatiebevoegdheden van de Commissie", *Tijdschrift voor Europees en Economisch Recht*, Sociaal-economische Wetgeving, 2003, pp.49-57.

³⁴ VERVAELE, J.A.E., "Towards an Independent European Agency to Fight Fraud and Corruption in the EU?", *European Journal of Crime, Criminal Law and Criminal Justice*, 1999, pp.331-346.

³⁵ Regulation No. 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, O.J. (1996) L 292.

the one at the Eurostat Office³⁷ and the insider dealing scandal where EC public servants allegedly tipped off grain companies concerning the weekly grain prices (insider dealing in raw materials).

II The EU and the Europeanisation of Criminal Law

A. Europeanisation of Criminal Law under the Maastricht Treaty

During the 1980s, JHA-related topics were already being discussed at the European level. The European Political Cooperation (EPC)³⁸ and Schengen are the appropriate forums for consultation and specific standard setting. The EPC treaties and the Schengen *acquis*³⁹ are results of this. Nevertheless, at the beginning of the 1990s there was clearly a need for a more structural and fundamental approach. Integrating JHA in the Community structure and rules of play proved to be several steps too far for many countries. The EU pillar structure with its mixture of Community and intergovernmental policy emerged as the optimum compromise. JHA became a part of the EU structure, although in that part the Member States quite clearly ruled the roost and different rules applied, like the rule of unanimity in decision making, limited powers for the European Parliament and optional jurisdiction for the European Court of Justice.

1. Harmonisation

Upon the entry into force of the Maastricht Treaty, no one could suspect that the Europeanisation of criminal law would be accelerated to the extent that it was. Title VI of the EU Treaty⁴⁰ made no mention of criminal law harmonisation, but of judicial cooperation in criminal matters and police cooperation. To the extent that there were substantive areas of common

³⁶ Regulation No. 1073/1999, O.J. (1999) L 136 of 31 May 1999.

³⁷ See <http://www.uba.uva.nl/jb/object.cfm?objectid=C9E49C83-F015-421D-A1EA8F30619620E9>.

³⁸ VERVAELE, *Fraud against the Community*, see *supra* footnote 4.

³⁹ The Schengen *Acquis* integrated into the EU, May 1999, Council of the EU.

⁴⁰ For more background information see MONAR, J. & MORGAN, R. (eds.), *The Third Pillar of the European Union*, Brussels, College of Europe and European Interuniversity Press, 1994; BIEBER, R. & MONAR, J. (eds.), *Justice and Home Affairs in the European Union*, Brussels, College of Europe

interest, these were quite limited and exclusively listed under Article K.1. Despite this, in the period between 1993 and 1998 a considerable number of JHA activities were carried out which appeared to go outside the mandate of Title VI. Especially as regards the non-binding instruments a rather wide range of topics may be found in resolutions, recommendations, common positions, etc. I refer, for example, to terrorism, money laundering, environmental crime, racism, xenophobia, illegal art trade, counterfeiting, hooliganism, human trafficking and driving disqualifications.⁴¹ It would be difficult to contribute this to the regulatory zeal of the European Commission or to reproach the Commission in this respect, as it had no right of initiative with respect to these expressly criminal law topics. In short, the need to cooperate intergovernmentally in criminal matters was blatantly met and increasingly filled in the field of harmonisation of substantive criminal law. It is also worth noting that most topics were inspired by national, topical political items.

2. *The Regulation of National Cooperation and the Exchange of Information*

In the period 1992-1998 the improved regulation of legal assistance and extradition in the EU, which would serve to replace the classic Council of Europe instruments, was also progressing, among other things by the introduction of simplified extradition with the consent of the suspect.⁴² The jewel in the crown is undoubtedly the European Mutual Assistance Convention which after years of negotiations was adopted in 2000.⁴³ The Convention introduced direct cooperation between the enforcement agencies as a principle (instead of the 'royal route' via the Ministries of Foreign Affairs) and also provides proactive and special prosecutorial investigation techniques, like infiltration, controlled delivery and the power to tap phones.

and European Interuniversity Press, 1995 and TULKENS, F. & BOSLY, H.D., *La justice pénale et l'Europe*, Brussels, Bruylant, 1996.

⁴¹ See website of the Council for an overview: <http://www.consilium.eu.int/jai/default.asp?lang=en>.

⁴² Convention on simplified extradition procedure between the Member States of the European Union, O.J. (1995) C 078.

⁴³ Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, O.J. (2000) C 197. See VERVAELE & KLIP, *European Cooperation between Tax, Customs and Judicial Authorities*, see *supra* footnote 26.

Furthermore, subject to certain conditions, it is also possible to make use of the *lex forum*, i.e. the law of the requesting state, when implementing a request for legal assistance in the requested state. It may, for example, be helpful for the use of evidence in the forum to have the suspect's lawyer present in the investigation, even if a provision to this end does not exist in the requested state.

3. *Operational Enforcement by the EU*

A clear choice was made under the EU of Maastricht in favour of supranational enforcement. The most obvious example is the establishment of Europol,⁴⁴ which has developed from a drug unit into a European police organisation with an impressive scope of subject-matter jurisdiction. This is the result of the often-used provisions under the Europol Convention, which entered into force in 1998, to expand the scope of Europol's subject-matter jurisdiction. By now, offences such as the counterfeiting of euros, international fraud, human trafficking, terrorism, etc. also fall within the subject-matter jurisdiction of Europol. Still, as is a known fact, Europol's tasks with respect to these offences is limited to gathering and enhancing criminal data and using these to support the operational activities in the Member States. To this end, special databases have been developed within Europol, which also contain personal data. In short, Europol is not a police authority carrying out police supervision.

Under the Maastricht Treaty, the coordination and operationalisation of legal assistance and extradition were also improved. In a number of Member States, liaison magistrates⁴⁵ were posted to the international criminal law departments (central authorities) of the Ministries of Justice. An experienced French examining magistrate or prosecutor working in The Hague acts as liaison between the two countries in case of requests for legal assistance or extradition. He knows the law, the practice and customs of both countries and has a coordinating function. He does not exercise any independent investigative power in the host country. Only a minority of Member States

⁴⁴ Convention on the establishment of a European Police Office (Europol Convention), O.J. (1995) C 316.

have effectively introduced this system. Further, a European Judicial Network (EJN)⁴⁶ was established in Brussels, which operates mainly in the field of making the legal assistance instruments accessible to practitioners.

B. Europeanisation under the Treaty of Amsterdam⁴⁷

The negotiations concerning the reform of the third pillar were extremely laborious.⁴⁸ Major issues, among which the integration of the Schengen *acquis* into the EU,⁴⁹ were only resolved at the final summit meeting of Government Leaders and Heads of State in Amsterdam. Besides the integration of Schengen, the section containing immigration, asylum and visa and judicial cooperation in civil matters was transferred to the first pillar⁵⁰ and the third pillar was substantially reformed. Title VI was transformed into a specific title concerning police and judicial cooperation.⁵¹ The Title's objectives are described somewhat vaguely in Article 29: "to provide citizens with a high level of safety within an area of freedom, security and justice [...] by preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud". Instruments to achieve these ends are not just police and judicial cooperation as indicated in Title VI, but also "approximation, where necessary, of rules on criminal matters in the Member States", i.e. direct harmonisation of criminal (procedural) law.

In the EU Treaty of Amsterdam the Commission was also given the right of initiative for the third pillar. Quite soon a directorate-general for JHA was established⁵² under the European Commission and already in December

⁴⁵ Joint Action, O.J. (1996) L 105.

⁴⁶ Joint Action, O.J. (1998) L 191.

⁴⁷ Came into force on 1 May 1999.

⁴⁸ See DE ZWAAN, J., "The Future of the Third Pillar and the Fight against EU Fraud: Evaluation of the IGC and the Treaty of Amsterdam", in VERVAELE, *Transnational Enforcement of the Financial Interests of the European Union*, see *supra* footnote 9, pp.13-29.

⁴⁹ Implementation Convention, O.J. (2000) L 239.

⁵⁰ It should be noted, however, that many of the third pillar rules still apply to this Title IV, such as the unanimity rule for the adoption of Regulations and Directives under Title IV.

⁵¹ DE KERCHOVE, G. & WEYEMBERGH, A., *Quelles réformes pour l'espace pénal européen?*, Bruxelles, Université libre de Bruxelles, 2003.

⁵² A small task force operated under the EU Treaty of Maastricht.
See http://europa.eu.int/comm/dgs/justice_home/index_en.htm.

1998 the action plan of the Council and the Commission concerning the realisation of the area of freedom, security and justice⁵³ was adopted. The action plan contains a long list of policy priorities with time frames. Concerning these, it should in any case be noted that the harmonisation of substantive criminal law is not limited to the three paradigms mentioned. The prime impulse for the Europeanisation of criminal law, however, came from the special European Council of Government Leaders and Heads of State at Tampere (October 1999), which was exclusively dedicated to the area of freedom, security and justice. The Tampere conclusions⁵⁴ pushed to the forefront the well-known EC law principle of mutual recognition⁵⁵ as the cornerstone of judicial cooperation. Member States must mutually recognise each other's judicial decisions, including those delivered during the investigation stage, and give them legal effect without too much ado. The underlying thought is that this mutual recognition will eliminate the need for extensive and detailed harmonisation of national criminal (procedural) law. It is, however, recognised in recital 37 that a certain harmonisation of criminal procedural law will be necessary, namely the minimum standards that will enable mutual recognition. In the Tampere conclusions the Council and the Commission are asked to adopt a programme of measures to implement the principle of mutual recognition. It was also expressly requested that in this programme attention should be given to a "European Enforcement Order and on those aspects of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition, respecting the fundamental legal principles of Member States [...]". The Commission has transposed the conclusions of Tampere in a substantive working programme known as the scoreboard,⁵⁶ which is adjusted every six months and contains an impressive list of policy priorities. The Commission has also drawn up a communication concerning mutual

⁵³ O.J. C of 23 January 1999.

⁵⁴ http://www.europarl.eu.int/summits/tam_en.htm#c.

⁵⁵ DE KERCHOVE, G. & WEYEMBERGH, A., *Vers un espace judiciaire pénal Européen*, Bruxelles, Université libre de Bruxelles, 2000; DE KERCHOVE, G. & WEYEMBERGH, A., *La reconnaissance mutuelle des décisions judiciaires en matière pénale dans l'Union européenne*, Bruxelles, Université libre de Bruxelles, 2001; DE KERCHOVE, G. & WEYEMBERGH, A., *L'espace pénal européen*, Bruxelles, Université libre de Bruxelles, 2002.

⁵⁶ http://europa.eu.int/eur-lex/en/com/cnc/2002/com2002_0261en01.pdf.

recognition of final judgments in criminal cases,⁵⁷ a green paper concerning the compensation of victims⁵⁸ and a green paper concerning the rights of suspects and defendants.⁵⁹ Finally, these internal dynamics were given extra impetus by the terrorist attacks of 11 September 2001 and the external and internal pressure which resulted for EU decision making in the field of JHA. There is no doubt that the decision making process concerning the European arrest warrant and harmonisation in the field of terrorist offences has been considerably accelerated by this, even to the extent that the European Council imposed a deadline on the JHA Ministers. Of course, determination in decision making is not always synonymous with democracy, constitutionalism and legislative quality.

1. *Harmonisation*

As opposed to police and judicial cooperation, the harmonisation of criminal (procedural) law is not elaborated separately in Title VI. Under the heading “judicial cooperation” Article 31e provides for the progressive adoption of “measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking”. It is worth noting that Article 31e is worded more restrictively than the umbrella Article 29. The substantive area is limited to three paradigms; criminal procedural law appears to have been exempted from harmonisation and the placement of this subsection suggests some kind of link with judicial cooperation, such as, for example, the removal of obstacles to judicial cooperation. This, however, seems improbable, as Article 31c already provides for this. Furthermore, the EU Treaty of Amsterdam provides a new legal instrument for the specific purpose of harmonisation: the framework decision. Framework Decisions still have to be taken on the basis of unanimity, but the framework decision need not be ratified by the Member States, like the Convention, but does need to be implemented in national law.

⁵⁷ COM/2000/0485 final.

⁵⁸ http://europa.eu.int/eur-lex/en/com/gpr/2001/com2001_0536en01.pdf.

⁵⁹ http://europa.eu.int/cgi-bin/eur-lex/udl.pl?GUILANGUAGE=en&DOCID=503PC0075&LANGUAGE=en&SERVICE=all&COLLECTION=com&REQUEST=Service-Search&FORMAT=all&CURRENTFORM=Service-Search&switch_nl.x=13&switch_nl.y=15.

The framework decision sets a time-limit. This has considerably increased the efficacy of third-pillar standard setting, but has also resulted in the fact that national democratic supervision of the decision-making process in Brussels will from now on only take place during the preparatory stages. All the more reason for national parliaments to take a proactive stance vis-à-vis their national Ministers. This development has also made the attention and role of certain NGOs quite important. Statewatch⁶⁰ in the UK, for example, has developed into a real watchdog of civil rights and EU policy, including in the field of JHA.

Neither the treaty provisions, nor the principle of mutual recognition have prevented the Commission or the Member States from submitting a steady flow of proposals for the harmonisation of criminal (procedural) law. Some claim the Union has gone overboard in this respect.⁶¹ As opposed to the Commission, which is working towards the execution of a consistent programme based on the scoreboard, the Member States - including those which are in principle unfavourably disposed towards European criminal law - are submitting a panoply of proposals.⁶² The harmonisation proposals concern both substantive and procedural criminal law and penal sanctions. The substantive topics are very wide-ranging and do not always show links with serious crime; often, they are the product of national political agendas. Spain has been very active in the field provisions on terrorism, France in the field of financial crime, Belgium in the field of sexual abuse of children, etc. The topicality factor is less obvious in the framework decisions which have entered into force. Relevant framework decisions are those on the counterfeiting of the euro,⁶³ money laundering⁶⁴ and combating terrorism.⁶⁵ This latter framework decision reveals how deeply third-pillar law affects

⁶⁰ <http://www.statewatch.org/news/index.html>.

⁶¹ KLIP, A., "Harmonisierung des Strafrechts - eine Fixe Idee", *Neue Zeitschrift für Strafrecht*, 2000, pp.626-630 and KLIP, A. & VAN DER WILT, H. (eds.), *Harmonisation and Harmonising Measures in Criminal Law*, Amsterdam, Royal Netherlands Academy of Arts and Sciences, 2003.

⁶² See <http://www.consilium.eu.int/jai/default.asp?lang=en> for the initiatives of the Member States. See also CORSTENS, G. AND PRADEL, J., *European Criminal Law*, The Hague/London/New York, Kluwer Law International, 2002.

⁶³ O.J. (2000) L 140. See VERVAELE, J.A.E., "Counterfeiting the Single European Currency (Euro): Towards the Federalization of Enforcement in the European Union?", *The Columbia Journal of European Law*, 2002, pp.151-179.

⁶⁴ O.J. (2001) L 182.

⁶⁵ O.J. (2002) L 182.

national criminal law, as many Member States did not specifically penalise terrorism in the past, but punished such offences as crimes under ordinary law, for example the formation of criminal gangs. This harmonisation is not limited to the component parts of the crime, but also includes elements of the criminal law sentence. The ad hoc approach of minimum maximum sentences has come under fire. Proposals have been tabled for discussion that suggest using four categories of maximum penalties (extraditable offences, offences with a maximum custodial penalty of between 1 and 5 years, between 5 and 10 years, and more than 10 years). Due to mutual recognition and the resulting elaboration of transnational European criminal law harmonisation also increasingly involves criminal procedural law. Prime examples of this are the framework decision on the execution of orders freezing assets or evidence⁶⁶ and the proposal for the mutual recognition of fines.⁶⁷

2. Regulation of (National) Cooperation and Exchange of Information

Police and judicial cooperation have been elaborated in Articles 30 and 31 EU respectively. As regards the regulation of national cooperation there is nothing new here. And yet, appearances can be deceptive. Because of the interpretation which the Tampere agreement has given to the area of freedom, security and justice and how it has made the notion of mutual recognition a focal point, the Commission has formulated an elaborate programme in the scoreboard of instruments of mutual recognition which are to speed up legal assistance, extradition and the execution of criminal sentences. In this context and partly under pressure from the 11 September attacks the framework decision on a European arrest warrant and surrender procedures⁶⁸ was established. The importance of this framework decision must not be underestimated. Between the Member States, the classic extradition procedure is replaced by this warrant. The judicial authorities in the requested state automatically execute the warrant. Judicial testing in the

⁶⁶ O.J. (2003) L 196.

⁶⁷ Initiative of the United Kingdom, the French Republic and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the application of the principle of mutual recognition to financial penalties, O.J. (2001) C 278.

⁶⁸ Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, O.J. (2002) L 190.

requested state is only of a very marginal character, while political authorities are no longer involved at all. The requirement of double criminality has been dropped for 32 offence descriptions (covering many more offences in practice). Surrender takes place within 10 days in case of the consent of the person to be surrendered, and within 60 days in all other cases. There are still grounds for compulsory and optional refusal, but compared to the classic extradition treaties these are very limited.

With respect to the exchange of information, the integration of the Schengen Information System (SIS) in the EU is of course of major importance, as is the exchange of information in the framework of Europol.⁶⁹ Meanwhile, SIS II and the access of Europol and Eurojust to certain fields of SIS II are being actively pursued.⁷⁰ However, one still cannot speak of a true European Information System (EIS).

Also of great importance is that Article 28 EU provides a special legal basis for the conclusion of agreements in the field of JHA between the EU and third countries. It came as no surprise after 11 September that for the first time the Council gave permission to the Commission to open negotiations with the USA. The USA would have liked to be recognised as the 16th state for the purpose of the European arrest warrant. This was not negotiable for most Member States, but also the fact that the death penalty can be imposed in many states of the USA and at the federal level created a problem, among other things because this goes against Article 3 of the European Convention on Human Rights (ECHR). The negotiations have not been easy, but have still resulted in two historic instruments, namely a bilateral extradition treaty and a bilateral legal assistance treaty between the EU and the USA.⁷¹ Extradition may be refused if there is no guarantee that the death penalty will not be carried out.

3. *EU Operational Enforcement*

⁶⁹ http://europa.eu.int/comm/justice_home/doc_centre/police/europol/doc_police_europol_en.htm.

⁷⁰ See Regulation No. 24/2001 and Decision 2001/866/JHA concerning SIS II.

⁷¹ Agreement on Mutual Legal Assistance between the European Union and the United States of America, O.J. (2003) L 181; Agreement on Extradition between the European Union and the United States of America, O.J. (2003) L 181.

Articles 30 and 31 EU mainly emphasise operational aspects, the enhancement and exchange of information and developing common standards (education, technical equipment, etc.). As regards Europol, the EU Treaty still does not provide any operational powers, but by Article 30 does create the legal basis for a role for Europol in joint investigation teams. The idea is that these teams, consisting of members of enforcement organisations from different Member States, could operate in the territory of the participating Member States with respect to specific crimes (e.g. human trafficking, drug dealing, smuggling of cigarettes or alcohol). A need to cross the boundaries of national territory is thus emerging, a fact which had already become clear in the Schengen agreements with the regulation of cross-border pursuit. A framework decision on these teams has meanwhile been adopted,⁷² but the participation in the teams of Europol public servants is up to the Member States who set them up. The Europol Convention has been amended by a protocol⁷³ which still awaits ratification, but gives Europol public servants the power to request the establishment, carrying out or coordination of investigation and to take part in joint investigation teams.

The EU Treaty of Amsterdam does not mention any further European operationalisation of judicial cooperation as compared to the EU Treaty of Maastricht. Nevertheless, these matters are the subject of political and institutional strife within the European institutions. The European Parliament and the European Commission have always been quite critical of the existence and functioning of the third pillar. They have always defended the Community approach. They moreover take the view that third-pillar regulation and third-pillar coordination of judicial cooperation are inadequate to deal with clear Community interests, such as combating EC fraud. For this reason, at their request a model has been drawn up in the *Corpus Juris* study for a European criminal law area with a European Public Prosecutor's Office and judges of freedoms in the Member States.⁷⁴ Based on these preliminary

⁷² Council Framework Decision of 13 June 2002 on joint investigation teams, O.J. (2002) L 162.

⁷³ Protocol of 28 November 2002. In the meantime, recommendations were adopted on 28 September 2000 and 30 November 2000 requesting the Member States to begin already applying the Protocol's contents.

⁷⁴ See DELMAS-MARTY, M. (ed.), *Corpus Juris*, Paris, Economica, 1997 and DELMAS-MARTY, M. AND VERVAELE, J.A.E., *The Implementation of the Corpus Juris in the Member States*, Antwerp Groningen Oxford, Intersentia, Volume I-IV, 2000-2001.

studies the European Commission at the IGC while preparing the Nice Treaty in 2001 proposed⁷⁵ to include an Article 280bis that would provide for the appointment of a European Public Prosecutor. The proposal was not adopted in Nice, ostensibly due to lack of time and the need to examine practical consequences further. However, the Tampere conclusions already provided for the establishment of Eurojust with the aims of contributing to a proper coordination between the national prosecution authorities and supporting investigations in the field of organised crime. It was decided at the IGC to incorporate Eurojust in the Treaty. The Eurojust decision⁷⁶ has meanwhile been approved. It does not give Eurojust any actual operational Public Prosecutor's tasks either. Eurojust can, however, and not unimportantly, play a significant coordinating and directing role.⁷⁷ It can do this based on Article 6 acting through the national members or via Article 7 as a College. The power is the same, but in Article 7 it has clearly been prescribed with more binding force to the Member States. Eurojust as a College can not only request information from the Member States, but also, in case of serious crime, request that they start an investigation or prosecute, that they attune jurisdictions, or set up joint investigation teams. The powers of the national members of the College depend on national law. In the Rules of Procedure⁷⁸ Eurojust's functioning is further defined. However useful Eurojust may be, it is clear that with Eurojust the rules of play concerning territorial boundaries and powers have not changed significantly. Operational action is taken through the national authority, whose powers are defined nationally, rather than at the European level. This is therefore quite far removed from the model of a European Public Prosecutor's Office that could take investigative and prosecuting action based on a European territorial principle throughout the entire European justice area.⁷⁹ For this reason, the Commission decided to persevere. It published a detailed Green Paper on the protection under criminal law of the financial interests of the Community and the appointment

⁷⁵ COM/2000/608.

⁷⁶ Decision of 28 February 2002, O.J. (2002) L 63.

⁷⁷ THWAITES, N., « Eurojust: autre brique dans l'édifice de la coopération judiciaire en matière pénale ou solide mortier? », *Revue de Science Criminelle et de droit pénal comparé*, 2003, pp.45-61.

⁷⁸ O.J. (2002) C 286.

⁷⁹ VERVAELE, J.A.E., « L'Union européenne et son espace pénal européen: les défis du modèle Corpus Juris 2000 », *Revue de Droit Pénal et de Criminologie*, 2001, pp.775-779.

of a European Public Prosecutor.⁸⁰ The numerous reactions to the Green Paper⁸¹ were processed for the negotiations in the European Convention, where the European Public Prosecutor's Office was one of the items on the agenda.

III Evaluation and a Look Ahead

The influence of European law and policy on national criminal (procedural) law has grown considerably over the past ten years. Especially direct harmonisation, the regulation of transnational cooperation and the continued development of European enforcement bodies under the third pillar have put Europe in the picture for the everyday practice of criminal law. It should be noted, though, that all major decision making concerning the outlines of European criminal law was initiated by the European Council. Both at the special European Council on JHA at Tampere and at the European Council after 11 September it was the Government Leaders and Heads of State who drew up the agenda and kept the JHA on the ball. Despite the tremendous performance of the past ten years there is still discontentment, also within the EU. The conflict of powers between the first and the third pillar, especially in the field of criminal law, has still not fully crystallised. The ratification process of the third pillar is only progressing with difficulty. The framework decision solves the problem of ratification, but the question remains whether, and how, the Member States will implement the framework decisions in national law. Furthermore, in the third pillar, the EU lacks the instruments for the legal enforcement of such implementation. Finally, there is disagreement in the Council over the quantity and quality of the proposals which the Member States submit. The Member States are dissatisfied with the decision-making process. The national ministries and parliaments have too little influence on decision making in the Council. It is also openly doubted whether the EU has exclusive competence in the field of external JHA policy.

⁸⁰ COM/2001/715.

⁸¹ See for the dissenting opinions
http://europa.eu.int/comm/anti_fraud/green_paper/contributions/date.html.

Of course the European Convention was an excellent and representative forum of indirect democracy for sketching the contours of the future European JHA policy within the framework of the draft EU Constitution. It has become clear from the numerous amendments and discussions that contradicting views abounded within the Convention concerning the third pillar, both on matters of principle and on technical matters. Despite the many compromises, the approved proposals are quite coherent. In part I, concerning the values and objectives of the EU, Article 18 postulates a single institutional framework with a common set of legal instruments (legislation, framework laws, regulations and decisions). Article 22 lays down that decisions of the Council of Ministers shall be taken by qualified majority, unless expressly provided otherwise. A single institutional framework does not mean, however, that the rules of play are necessarily the same everywhere. The pillar structure is thus being pulled down. An advantage is that many Community principles, like the Community loyalty of Article 10 of the EC Treaty (now included in Article 5(2)) and the Commission's right to start infringement proceedings against the Member States before the Court of Justice will also start to apply in JHA matters. Article 41 further includes in the underlying principles of the EU the concept of mutual recognition and the political monitoring by the national parliaments of Europol and Eurojust. Chapter IV of the draft Constitution includes the special provisions concerning the area of freedom, security and justice. Judicial cooperation rests on two pillars, namely mutual recognition and approximation of national legislation with a view to developing European minimum rules (Article III-171). This minimum harmonisation may concern the admissibility of evidence, the rights of individuals in criminal procedure and the rights of victims of crime. For this in fact quite extensive competence of mutual recognition and harmonisation of criminal procedural law, decision making on the basis of qualified majority and codecision has been provided. If the Council wishes to harmonise other specific elements of criminal procedure, unanimity is required. Further, Article III-172(1) provides minimum rules in the field of substantive criminal law and sanctions and does so for particularly serious crime with cross-border dimensions (nature, consequences, special need for Community approach). The Article provides an exclusive list (terrorism, trafficking in human beings and sexual exploitation

of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime), but this list can be extended by a unanimous decision of the Council. The framework laws can be adopted by qualified majority and codecision. This has finally increased consistency within the Treaty among the objectives of criminal law harmonisation. Finally, and not unimportantly, Article III-172b(2) for the first time makes a clear connection between the substantive policy areas of the EU and enforcement: "If the approximation of criminal legislation proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, European framework laws may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned". Here too a qualified majority is sufficient. In future, therefore, the criminal law enforcement of European rules concerning the environment or the stock markets can be included in the same legislation or framework law. Chapter IV further defines the tasks of Eurojust and Europol as based on the Treaty. Any expansion of the tasks of the European enforcement bodies must be decided on the basis of unanimity. Finally, Article III-175 provides a legal basis for the expansion of Eurojust into a European Public Prosecutor's Office with European jurisdiction as regards the investigating, prosecuting and bringing to justice of perpetrators and accomplices of both EU fraud and serious crime affecting more than one Member State. The essence of the *Corpus Juris* and the Green Paper on the European Public Prosecutor's Office was followed here. Subject-matter jurisdiction was, however, and rightly so, extended to include cross-border offences and not limited to EC fraud. However, a legal basis is just a legal basis. To this end, a European law must be unanimously passed with the approval of the EP. It is also crystal clear that double sovereignty with double jurisdiction, like in the US, is rejected in favour of integrating the European criminal law dimension into the integrated legal order.

The proposals of the European Convention will undoubtedly be subject to close inspection at the IGC, but there is still a very good possibility that they will emerge reasonably intact. The Member States clearly have other fish to fry (the Chair of the Council, the number of commissioners on the

Commission, funding, the foreign and security policy, etc.) and have apparently accepted that an important part of European criminal law, to the extent that it is expressly mentioned in the draft Convention, can be established through decision making on the basis of qualified majority and codecision of the European Parliament. If necessary, the Council can amend the list of criminal law and criminal procedural law issues and the tasks assigned to Europol and Eurojust based on a unanimous decision. There is no doubt that this could herald a new age in which especially the criminal law enforcement of classic Community policy finally acquires shape and substance. Whatever the final outcome of the IGC may be, it is crystal clear that the Europeanisation of criminal law as we have witnessed it over the past ten years is only the beginning. Everything points to increased intensity. It is a cause for joy that realisation has finally dawned that mutual recognition presupposes the harmonisation of criminal procedural law and that special and express attention is paid to the rights of individuals in criminal procedure and to legal protection and fundamental rights and that the positions of both the European Parliament and the national parliaments and of the Court of Justice are also strengthened. If the EU would also become a party to the ECHR (Article 7(2) of the draft Constitution) and the Charter of Fundamental Rights would become binding on the EU, we could also continue work on making the tasks of Europol and Eurojust operational.

Respect for the rule of law and fair trial are, also at the EU level, a condition *sine qua non* for the establishment of judicial law enforcement agencies at EU level. This also includes recognising the full jurisdiction of the ECJ in the field of fundamental rights and European law enforcement. The ECJ ruling on the *ne bis in idem principle*⁸² is a first step in the right direction.

⁸² Judgment of the Court of Justice of 11 February 2003, *Hüseyin Gözütok and Klaus Brügge*, Cases C-187/01 and C-385/01, *ECR* p.I-5689.



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