



Justice and Home Affairs Issues **at European Union Level**

Written evidence submitted by
the Centre for European Policy Studies (CEPS)
to
The SELECT COMMITTEE ON HOME AFFAIRS
House of Commons
by
Elspeth Guild & Florian Geyer
November 2006

Summary

Further European integration in the field of police and judicial cooperation in criminal matters is at the crossroads. While its JHA sibling – asylum and immigration – was able to emancipate itself from the “Third Pillar”, police and judicial cooperation in criminal matters was forced to stay under the Union’s wings. Since their separation enacted by the Amsterdam treaty these two policy areas have experienced significantly different developments. A comparison elucidates that police and judicial cooperation in criminal matters has done considerably worse and currently suffers from a high degree of inconsistencies. Inconsistencies on various levels:

- a) Traditional inconsistencies among legal systems of member states.
- b) New European inconsistencies emanating from the fragmented participation in Schengen structures.
- c) Institutional inconsistencies resulting from EU pillar structures.
- d) Conceptual inconsistencies by focusing on security and failing to pay sufficient attention and priority to the citizens, civil liberties and fundamental rights.

It is the principle of mutual recognition that tries to address the first inconsistency. It was conceived as a means to avoid harmonization and to conserve the difference of different legal systems while at the same time allowing for a certain degree of effective European cooperation. Experience has shown, however, that it most probably has not delivered the expected results. A reassessment of mutual recognition is currently taking place. Its results might lead to a more open minded approach towards the continuously defied instrument of approximation of laws.

The Schengen inconsistency - with two Member States voluntarily only partly "in" and ten Member States involuntarily "out" - must be ended as soon as possible. The two might not be convinced to enter, but for the willing ten every possible effort must be made to realize their complete participation. Only this guarantees, e.g. that a genuinely European instrument like the European Arrest warrant is not dependent on an unaccountable international tool like Interpol to be effectively disseminated among EU Member States.

Attempts to avoid the institutional inconsistency have only recently failed. This is regrettable as a majority of actors, e.g. Member States, Parliament and Commission has been prepared and willing to address the undisputed lack of democratic and judicial control within the Third Pillar.

With regard to the conceptual inconsistency, unfortunately there appears to be no sign of change. Judicial and practical cooperation in criminal matters is still focusing on "security". "Security" and "freedom" are presented as antithetical values that supposedly require a balancing procedure. Coercive security, however, cannot be divorced from rule of law, civil liberties and fundamental rights. Instead, security must be understood as a flanking measure to secure freedom within the rule of law.

These conclusions will be elaborated in the course of this paper. It presents a comprehensive set of answers to the main questions raised by the Select Committee on Home Affairs of the House of Commons.

List of Questions and answers

1. *The current state of progress in **developing practical co-operation** between member states in the JHA field, and future options in this area.*

- *What benefits have accrued so far from practical co-operation between law enforcement and judicial authorities?*

- 1 **Answer:** To assess the “benefits of practical cooperation between law enforcement and judicial authorities” within the context of European JHA policies is not an easy task. Statistics are not necessarily available or may not provide the whole picture. This is particularly true for statistics dealing with the question to which extent judicial authorities of Member States use different possibilities provided by European law.¹ Apart from this technical problem, the very concept of “benefit” may vary from different points of view: what might be beneficial from a law enforcement’s perspective might be highly detrimental to civil liberties and fundamental freedoms.

- 2 Attention must further be given to the fact that European co-operation in police and criminal matters is conceived of different elements: legislative instruments that aim to facilitate immediate cooperation between competent authorities of Member States on one hand and “European” judicial and law enforcement bodies on the other hand. A prominent example of the first is the framework decision on the European arrest warrant (EAW)². Examples of the latter are Eurojust, Europol and others.³

- 3 Having regard of these preliminaries, it is possible to conclude from available figures that law enforcement and judicial authorities in Member States make more and more use of European instruments. There is a tangible added-value of European cooperation and coordination that is constantly increasing. However, in order to ensure individual procedural rights we consider it necessary that a parallel development allowing - among others - for an effective and coordinated cross-border defense must finally be instigated.

- 4 The number of cases referred to Eurojust by national authorities has risen from 202 in the year 2002 to 588 in 2005. The U.K. is among the top five users of Eurojust with 39 requests in 2005 after Germany (99), Italy (51) and Sweden (40). In 2005 Eurojust organised 73 co-ordination meetings to discuss with officials from national authorities the best way to proceed in specific cases. In 2004 52 such meetings were held. Taken from a non-representative Eurojust survey among national authorities the quality

¹ A recent Commission communication deals with the lack of data and seeks to develop a coherent framework on crime and criminal justice, cf. COM (2006) 437 final, 7.8.2006: “Developing a comprehensive and coherent EU strategy to measure crime and criminal justice: An EU Action Plan 2006 – 2010”.

² Official Journal of the European Union (OJ) L 190, 18.7.2002, p. 1.

³ Note however that Eurojust and Europol are based on different legal acts, cf. § 13.

and swiftness of Eurojust's assistance appeared to be highly satisfactory.⁴ These figures, however, merely reflect the law enforcement's perspective. Seen from a more coherent angle it is a considerable setback that there is hitherto no legal framework envisaged that would facilitate effective cross-border cooperation and coordination for defense lawyers. Existing structures are based on private initiatives that are not institutionalized and do not guarantee that every suspect who faces international investigations is able to enjoy the benefits of international defense teams. To address this shortcoming the Council of Bars and Law Societies of Europe (CCBE) has proposed to establish a European Criminal Law Ombudsman whose task not only would be to safeguard the rights of defense but also to provide help assembling international defense teams.⁵ While this proposal is still under discussion and may not be the final answer⁶, it illustrates, however, that there is need to create a European legal framework and European structures that allow for equality of arms in criminal procedures.

- 5 It is in particular with Eurojust's work that the possible problem of "forum-shopping" must be addressed. What does this indicate? One of Eurojust's tasks is to suggest to national authorities which jurisdiction is "in a better position" to undertake an investigation or to prosecute specific acts.⁷ In which sense "better position" is to be understood, remains, however, open to interpretation. It might include that a jurisdiction is "better" where legal obstacles like admissibility of evidence or other procedural rights are lower. Eurojust itself has addressed this issue quite early and has drawn up "Guidelines for deciding which prosecution should prosecute".⁸ These guidelines establish a presumption that prosecution should take place "where the majority of the criminality occurred or where the majority of the loss was sustained". It is also explicitly foreseen that "prosecutors must not decide to prosecute in one jurisdiction rather than another simply to avoid complying with the legal obligations that apply in one jurisdiction but not in another". Based on these guidelines, the fear of "forum-shopping" seems to be banned. However, they are no more than internal suggestions without binding legal force. The Eurojust Council decision does not explicitly forbid the practice of "forum-shopping". It cannot be excluded therefore that under specific circumstances, e.g. political pressure to achieve prestigious results, or in the course of day-to-day work, distinctions between "law-enforcement friendly" and "defense-friendly" jurisdictions might be drawn and national authorities accordingly advised.

⁴ All figures: Eurojust, Annual Report 2005, p. 30 ff.

⁵ Proposal by the CCBE for the establishment of a European Criminal Law Ombudsman, December 2004.

⁶ Cf. Han Jahae, The European Criminal Law Ombudsman, speech delivered at the ERA Seminar held 7 April 2006 in Trier, www.ecba.org/cms.

⁷ Articles 6 (a) (ii) and 7 (a) (ii) Eurojust Council decision, OJ L 63, 6.3.2002, p. 1.

⁸ Annex to Eurojust Annual Report 2003.

- 6 With regard to legislative measures it is towards the application of the European arrest warrant that some figures are available. Numbers for 2005 comprising 17 Member States were discussed in this year's June JHA Council: from 1.526 people arrested, 1.295 were effectively surrendered within 30 to 40 days.⁹ For the time up to September 2004 - comprising 20 Member States - 2.603 warrants had been issued with 653 persons arrested and 104 surrendered.¹⁰ Concerning the effectiveness of EAWs the Commission's report indicates that the average time to execute a warrant had fallen from more than nine months to 43 days. It is important to note furthermore that in those cases where the person consents to his surrender the average time is only 13 days.¹¹ Consented surrender is frequent according to the Commission's report. This illustrates in our view that benefits from practical police and judicial cooperation are highest when a consented solution together with the citizen under investigation is sought. When measures are coerced, however, swiftness and effectiveness suffers considerably.
- *What are the lessons of practical co-operation for European policy and legislation, and how effective is Eurojust in spreading best practice?*
- 7 **Answer:** In particular with regard to new European institutions and bodies one quite obvious lesson is that it is often not enough to simply establish such bodies. In addition Member States' authorities must be able and willing to cooperate and provide necessary information. The reluctance of national authorities to pass information, e.g. to Europol is a continuing problem that has often been mentioned and criticized.¹²
- 8 National officials must furthermore be aware of the possibilities, instruments and bodies that exist to facilitate European co-operation. However, to promote such knowledge cannot be the exclusive responsibility of these bodies or EU themselves. It is first and foremost Member States' duty to train and inform their officials. In spite of this, there is done a lot at EU level to disseminate relevant knowledge, e.g. by CEPOL, the European Police College in Bramshill, U.K. In 2005 CEPOL organized 56 courses training a total number of 1.087 officials.¹³ Eurojust as well is active in training and knowledge dissemination. In 2005 it organized seven strategic seminars on different issues like terrorism, EAW implementa-

⁹ Press Release 9409/06 (Presse 144), 2732nd Council Meeting, Justice and Home Affairs, Luxembourg, 1-2 June 2006, p. 24.

¹⁰ COM (2006) 8 final, 24.1.2006: "Report from the Commission based on Article 34 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedure between Member States", p. 4.

¹¹ *Ibid.*, p. 5.

¹² Cf. Commission communication COM (2004) 376 final, 18.5.2004: "Enhancing police and customs co-operation in the European Union", p. 15.

¹³ CEPOL, Annual Report 2005, p. 19.

tion, Euro counterfeiting, drug trafficking, trafficking in human beings and money laundering.¹⁴

- 9 One lesson that could be learned from the initial difficulties of CEPOL is that setting up European bodies without providing them neither with legal personality nor a budget - as the first Council decision of 22 December 2000¹⁵ did - makes it rather unlikely that this body will be able to deliver the envisaged effects.¹⁶
- 10 Apart from these more practical lessons, there are two observations that aim more directly at legislators. Further developments of EU Justice and Home Affairs will be influenced by the answers found to these observations:
- 11 a) European police and judicial co-operation in criminal matters under the existing legal framework is dependent on Member States' willingness to implement the necessary measures on national level. It can be observed, however, that Member States' implementing activities are generally rather slow and reluctant in spite earlier agreements on binding deadlines or invigorated declarations on the urge and necessity of certain measures. This observation can be made in relation to nearly every single Third Pillar action taken by the Council in the last years.¹⁷ A very prominent and sad but by far not the only example is the ratification of three protocols amending the 1995 Europol Convention. These protocols date back to 2000, 2002 and 2003. Only very recently all Member States succeeded in ratifying these provisions making it possible, that they enter into force in 2007.¹⁸
- 12 b) The most important lesson, however, is the need to develop a coherent understanding of the issues at stake. It is not without deeper meaning that the official label of JHA policies on European level, the "Area of freedom, security and justice" names "freedom" in the first place and flanks "security" with both "freedom" and "justice". Security cannot be achieved without securing fundamental rights and guaranteeing true judicial control and rule of law. The constitutional difficulties that became visible in many Member States in connection with the European arrest warrant made this very clear. Further progress must therefore strictly adhere to the principles of democratic accountability, judicial control and unconditional protection of civil liberties and fundamental rights. As

¹⁴ Eurojust, Annual Report 2005, p. 36 – 47.

¹⁵ OJ L 336, 30.12. 2006, p. 1.

¹⁶ Commission communication COM (2004) 376 final, 18.5.2004: "Enhancing police and customs co-operation in the European Union", p. 22.

¹⁷ Cf. e.g. Council document 9589/06 ADD 1, 19.5.2006: "Implementation of the Action Plan to combat terrorism", providing lists with the implementation state of play for several legislative instruments considered urgent.

¹⁸ Cf. Speech delivered by the Europol Director, Max-Peter Ratzel, on the Joint Parliamentary Meeting held in Brussels, 2-3 October 2006.

could be seen from the German ruling on the EAW¹⁹, national constitutional courts are observing European JHA developments very closely and with a certain amount of scepticism. EU governments are therefore well advised to resist the temptation of misusing current intransparent and uncontrolled Third pillar Council structures to realise security focused policies that – due to national constitutional limitations – they wouldn't be able to realise at home.

- *What should be the role of Europol, Interpol and Eurojust in facilitating practical co-operation?*

13 **Answer:** Answering this question makes it necessary to recall that Europol, Interpol and Eurojust are set up by different legal acts and consequently have very distinct features. Interpol, the International Criminal Police Organization, is an international organization founded in 1923 with currently 186 member countries. Europol was established in 1995 by an intergovernmental convention²⁰ and up till now stands outside genuine EU structures. Only Eurojust is – from its legal nature – a distinct “EU child”, established by a Council decision in 2002²¹. But even Eurojust differs from other EU bodies and agencies as powers and competences of Eurojust staff are unbalanced: national members have different judicial powers according to their Member States’ national laws; their salary is also paid by Member States.²²

14 Despite their differing legal construction Interpol and Europol have concluded agreements among each other with the aim of increasing effectiveness and avoiding duplication of work. This entails exchange of information and the exchange of liaison officers. As far as could be seen, however, there are no official links between Eurojust and Interpol. This seems us to be a major disadvantage taking into account which considerable practical role Interpol plays in realizing European judicial cooperation: Interpol currently bridges the gap for fast and effective transmission of EAWs via its system.²³ This is because not all Member States participate in the Schengen Information System. Two of the Member States decided to participate only partly but ten - and from 2007 on twelve - Member States are kept deliberately out of the system, despite their wishes to join. That Interpol - as a consequence - has in effect become an intrinsic part of the European system of judicial cooperation is unacceptable. To remedy this we consider it necessary that the new Member States must have access to the Schengen Information System as soon as possible.

¹⁹ Bundesverfassungsgericht, judgment of 18.7.2005, 2 BvR 2236/04.

²⁰ OJ C 316, 27.11.1995, p. 1.

²¹ OJ L 63, 6.3.2002, p. 1.

²² Articles 9 and 33 Eurojust decision.

²³ Cf. Council document 7702/05, 1.4.2005.

- 15 Various links including a cooperation agreement exist between Eurojust and Europol. Their roles seem to be clearly defined and distinct. While Europol's task is to improve effectiveness and cooperation of national authorities in „preventing and combating“ certain criminal acts where two or more Member States are concerned, Eurojust shall stimulate and improve coordination and cooperation “in the context of investigations and prosecutions” of criminal behaviour where two or more Member States are concerned. The role of Europol is - so far - characterized by information driven police work, while Eurojust follows a more practical approach, assisting Member States' authorities in overcoming obstacles in cross border investigations and prosecutions, that arise from different legal systems and language. In day-to-day work, however, the lines between the bodies' fields of competences seem to be somewhat blurred. It cannot be excluded that rivalries exist or arise between Europol and Eurojust. This might lead to a situation where information is held back in order to secure visible successes for one of the two actors. Published figures indicate that there is in fact much more room for co-operation. Only once in the whole year of 2005 did Europol send a request to Eurojust. In the other direction - from Eurojust to Europol - there have been 64 requests in the same year while only 52 have been answered by Europol.²⁴
- 16 Concerning the future role of Interpol, Europol and Eurojust, we are in favour of a system that would reflect the distinction between judicial tasks and police tasks in Member States' legal system. Eurojust should therefore be empowered to control police activities performed by Europol, including practical cooperation between Europol and Interpol.

2. *The current state of progress in mutual recognition, including the development of minimum standards, across the EU, and whether further steps in this direction are desirable.*

- *In which areas is mutual recognition currently employed (for example recognition of judicial judgements in other member states)?*

- 17 **Answer:** The principle of mutual recognition traces back to the Cardiff European Council on 15 and 16 June 1998. The Tampere European Council concluded that mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union. A program of measures to implement this principle was drawn up by the Commission and agreed upon by the JHA Council held in Marseille on 28 and 29 July 2000.²⁵ In criminal matters the principle of mutual recognition is the foundation of enacted EU legislation in the following areas: arrest warrants²⁶, orders freezing property or evidence²⁷, mutual recognition of

²⁴ Eurojust, Annual Report 2005, p. 19.

²⁵ Programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12, 15.1.2001, p. 10.

²⁶ OJ L 190, 18.7.2002, p. 1.

²⁷ OJ L 196, 2.8.2003, p. 45.

financial penalties²⁸, exchange of information extracted from criminal records²⁹.

- 18 In October 2006 the JHA Council finally adopted a framework decision on the application of the principle of mutual recognition to confiscation orders³⁰. It is furthermore foreseen that an agreement on the framework decision on mutual recognition of judgments in criminal matters will be reached in December 2006³¹.
- 19 The framework decision on the European evidence warrant³² is still in discussion in the Council working groups. Other areas of mutual recognition that are already addressed or – most likely – will be comprise: a European supervision order in pre-trial procedures³³, recognition of earlier convictions in the course of new criminal proceedings³⁴, recognitions of disqualifications arising from criminal convictions³⁵, the *ne bis in idem* principle³⁶. In a territorial scope, the principle of mutual recognition will be “exported” to the Kingdom of Norway and Iceland: an agreement on the surrender procedure between EU Member States and these countries is currently finalized in the Council working groups.³⁷
- *How has the principle, including minimum standards and protocols, worked in these areas? Is it an effective approach, including in terms of cost?*
- 20 **Answer:** In order to avoid repetitions we refer to the statistical data given in § 6. The figures on the EAW particularly the decrease of lengthy procedures show that the principle of mutual recognition can contribute to speed-up procedures – especially when there is consent of the individual – and can hereby reduce costs. However, there are a number of open questions and limitations, that we address in §§ 23-26.
- 21 Additionally we like to mention that cost efficiency is a particular aspect of the Commission’s proposals on the European supervision order. The aim of this proposal is to avoid pre-trial detention of suspects that are ar-

²⁸ OJ L 76, 22.3.2005, p. 16.

²⁹ OJ L 322, 9.12.2005, p. 33.

³⁰ Press Release 13068/06 (Presse 258), 2752nd Council Meeting, Justice and Home Affairs, Luxembourg, 5-6 October 2006, p. 30.

³¹ Press Release 13068/06 (Presse 258), 2752nd Council Meeting, Justice and Home Affairs, Luxembourg, 5-6 October 2006, p. 21.

³² Press Release 9409/06 (Presse 144), 2732nd Council Meeting, Justice and Home Affairs, Luxembourg, 1-2 June 2006, p. 9.

³³ Commission proposal, COM (2006) 468 final, 29.8.2006.

³⁴ Commission proposal, COM (2005) 91 final, 17.3.2005; see also Press Release 13068/06 (Presse 258), 2752nd Council Meeting, Justice and Home Affairs, Luxembourg, 5-6 October 2006, p. 24.

³⁵ Commission communication COM (2006) 73 final, 21.2.2006: “Disqualifications arising from criminal convictions in the European Union”.

³⁶ Commission Green Paper COM (2005) 696 final, 23.12.2005: “On conflicts of jurisdiction and the principle of *ne bis in idem* in criminal proceedings.”

³⁷ Council document 5653/4/06 REV 4, 29.6.2006.

rested in a Member State that is not their Member State of residence. In this case a detention order is often issued because authorities see a flight risk. The European supervision order aims at avoiding such unnecessary pre-trial detentions by allowing the suspect to return to his Member State of residence and oblige authorities there to ensure that the suspect will appear and stay possible court proceedings and/or further investigations. With an average pre-trial detention time of 42,5 days in the U.K. and costs of 3.039 € per month³⁸ and person, this proposal could help to reduce expenditures and save prison space.

- 22 A coherent and European wide application of the principle of *ne bis in idem*, furthermore, is another means that does not only serve the individual's right to be only sentenced once for the same wrongdoing but also helps to reduce costs: duplicate, cost intensive proceedings in different Member States can be avoided.
- *What are the limitations of mutual recognition as a cornerstone of co-operation, for example in cases such as the European Arrest Warrant where there are controversies over dual criminality? What have been the successes, and how might these be built on?*
- 23 **Answer:** The principle of mutual recognition has always been a compromise solution to enhance cooperation in criminal justice matters without the need to harmonise different legal systems. As a "working compromise" it might be characterized as a truly European product. However, as it is often the case: solutions that might seem easy, turn out to be more problematic. After several years of trying to make the principle of mutual recognition work, it seems that it - while delivering some results - eventually has caused more difficulties than benefits. This assessment is illustrated by a recent Presidency proposal, named: "Follow-up to the mutual recognition programme: difficulties in negotiating legislative instruments on the mutual recognition of judicial decisions in criminal matters and possible solutions"³⁹.
- 24 Major limitations of the principle are less certain technical intricacies that might be solved. Instead the most pressing constraint towards the principle of mutual recognition is the context in which it stands and is applied. Apart from our concerns formulated in § 12, we consider it - particularly in the field of criminal substantive and procedural law - indispensable that the development of a common judicial area built on the principle of mutual recognition is accompanied by measures that guarantee effective procedural rights of a suspect. The way Council is and has been dealing with the respective Commission's proposal from April 2004⁴⁰ compromises the entire system with no signals in sight that there will soon be an

³⁸ Commission staff working document SEC (2006) 1079, 29.8.2006, p. 11 and 13 based on official U.K. information.

³⁹ Press release, Finnish Presidency, 4.9.2006.

⁴⁰ Commission proposal, COM (2004) 328 final, 28.4.2004.

agreement. This despite the fact that in 2001 it was agreed upon that “mechanisms for safeguarding the rights of third parties, victims and suspects” are an important parameter which determines the principles’ effectiveness.⁴¹

25 Furthermore - like in the field of practical police co-operation - effective democratic and judicial control as well as accountable and transparent legislative procedures are necessary preconditions to develop and maintain mutual trust. Without mutual trust, the principle of mutual recognition is doomed as the latter builds on the first. It is furthermore not enough that mutual trust is gained between judicial authorities and their officials. In order to realise the common area of freedom, security and justice trust into each others legal systems that guarantee civil liberties, fundamental freedoms and rule of law must exist between the citizens of Europe.

26 The inherent link between mutual recognition, mutual trust and the shared commitment to the principles of freedom, democracy and the respect for human rights, fundamental freedoms and the rule of law has been seen and established by the Council and the Commission in an early phase.⁴² It seems, however, that this coherent approach and understanding has progressively been abandoned in the last five years. It is these developments that, in our view, constitute major limitations of mutual recognition.

3. *The current state of progress in and appetite for harmonising criminal justice systems across the EU, and whether further steps in this direction are desirable.*

- *How do proposals for harmonisation of criminal law across member states substantially differ from mutual recognition?*

27 **Answer:** As far as can be seen, there are no European efforts to harmonise entire “criminal justice systems” as the heading of this set of questions suggests. There are however certain European acts that approximate some rules on criminal matters as it is foreseen in articles 29 and 31 (e) TEU. Approximation of criminal matters aims to ensure that certain procedural measures and/or certain substantive rules exist in all Member States in order to give effective answers to cross-border crime within the common judicial area by trying to close existing gaps. It differs from mutual recognition in so far as it aims at establishing a common set of rules. Mutual recognition, however, tries to avoid exactly this, by recognizing and accepting existing disparities among Member States’ criminal law systems.

⁴¹ Cf. p. 11 of the programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12, 15.1.2001, p. 10.

⁴² Cf. p.10 of the programme of measures to implement the principle of mutual recognition of decisions in criminal matters, OJ C 12, 15.1.2001, p. 10.

- 28 From a theoretical point of view, approximation of laws seems to be more efficient and effective compared to mutual recognition as disparities among legal systems might provide certain obstacles to the practical application of mutual recognition. However, approximation of laws has often proven to be difficult. It has involved lengthy discussions and procedures. These discussions have in some cases eventually lead to the setting of minimum standards, which open possibilities of downgrading existing standards or maintaining existing disparities.
- 29 In spite these difficulties, approximation of laws has been the path that was chosen in establishing a common asylum and immigration policy. Although certain setbacks in this field of policy are undisputable, experience has shown that Member States are eventually able to achieve results. While some approaches to downgrade standards have been undertaken, we consider that this should not be the reason to abandon the instrument of approximation of laws as such. Several aspects have to be kept in mind: 1) Approximation of laws - in contrast to mutual recognition - provides a clear and certain set of rules. 2) It prevents Member States - even in case of minimum standards - to go below these minimum standards. Such an effect could be observed lately in connection with the directive on family reunification and certain plans of the Netherlands to further restrict national laws on family reunification. 3) As all Member States are members of the Council of Europe and therefore bound by the Convention for the Protection of Human Rights and Fundamental Freedoms, any European legislation is eventually subject to the rulings of the European Court of Human Rights in Strasbourg.
- 30 Concerning approximation of criminal law a considerable amount of turmoil has been produced recently by the European Court of Justice's (ECJ) involvement. In case C-176/03 from 13 September 2005 the ECJ has annulled a Council framework decision approximating environmental criminal law. The ECJ was of the view that article 175 TEC provides the Community and not the Union with the competence to adopt measures relating to criminal law of Member States. The framework decision approximating environmental criminal law therefore encroached on this Community competence. A second case is currently pending with the Commission seeking to get annulled another environmental crime framework decision.⁴³ After the first ECJ judgment the Commission has released a communication announcing that it revises a large number of existing approximation acts and that considers that a solution must be found in order to guarantee legal certainty.⁴⁴ Before the ECJ has not delivered its judgment it is unlikely that the Council will press forward with further approximation measures.⁴⁵ Until now approximation of laws has

⁴³ Case C-440/05, OJ C 22, 28.1.2006, p. 10.

⁴⁴ Commission communication, COM (2005) 583 final/2, 24.11.2005.

⁴⁵ Press Release 13068/06 (Presse 258), 2752nd Council Meeting, Justice and Home Affairs, Luxembourg, 5-6 October 2006, p. 23

been enacted in the following areas: fraud and counterfeiting of non-cash means of payment⁴⁶, confiscation of crime-related proceeds, instrumentalities and property⁴⁷, counterfeiting in connection with the introduction of the euro⁴⁸, terrorism⁴⁹, trafficking in human beings⁵⁰, unauthorized entry, transit and residence⁵¹, private-sector corruption⁵², sexual exploitation of children and child pornography⁵³, attacks on information systems⁵⁴, ship-source pollution⁵⁵. A legislative proposal has been tabled dealing with ensuring the enforcement of intellectual property rights⁵⁶.

- *Would particular areas benefit from harmonisation on issues such as migration, serious crime cases and terrorism, rather than practical co-operation or mutual recognition?*

31 **Answer:** As preliminaries we would like to recall that “migration” is not a crime and that we are astounded about grouping migration in a row with “serious crime cases” and “terrorism”. We furthermore like to recall that the term “benefit” does depend on the spectator’s view, see § 1.

32 We think that a common understanding and common definitions of certain crimes would benefit the whole system. Legal certainty and clarity would be gained. The existing legal instruments on mutual recognition mainly imply a list of 32 crime descriptions to which certain legal consequences are attached, e.g. no double criminality check. The lack of common definitions of these crimes, e.g. “computer related crime” or “racism and xenophobia” is seen by many as a considerable flaw. We concur with this assessment. However, defining criminal acts, implies defining which human behaviour is deemed punishable. This, however, is not for governments to decide behind closed Council doors, void from parliamentary scrutiny and control. Under the existing Third Pillar rules and procedures we therefore consider it not beneficial to approximate substantive criminal law in a large scale.

⁴⁶ OJ L 149, 2.6.2001, p. 1.

⁴⁷ OJ L 182, 5.7.2001, p. 1 and OJ L 68, 15.3.2005, p. 49.

⁴⁸ OJ L 329, 14.12.2001, p. 3.

⁴⁹ OJ L 164, 22.6.2002, p. 3.

⁵⁰ OJ L 203, 1.8.2002, p. 1.

⁵¹ OJ L 328, 5.12.2002, p. 17.

⁵² OJ L 192, 31.7.2003, p. 54.

⁵³ OJ L 13, 20.1.2004, p. 44.

⁵⁴ OJ L 69, 16.3.2005, p. 67.

⁵⁵ OJ L 255, 30.9.2005, p. 164. Please note: the validity of this framework decision is challenged by the Commission in the European Court of Justice, case C-440/05, OJ C 22, 28.1.2006, p. 10.

⁵⁶ Commission proposal, COM (2006), 168 final, 26.4.2006.

4. The *process of decision-making* on JHA issues at EU level: in particular, the extent to which current difficulties in reaching agreement derive from 'third pillar' voting procedure and might be remedied by implementation of the passerelle clauses in previous treaties.

- What implications might use of the passerelle have for the UK's legal and judicial systems? What alternative action might improve decision-making? How can transparency and accountability at European level best be extended?

33 **Answer:** With the Constitutional Treaty being unlikely to come into force within foreseeable time and acknowledging that European police and penal co-operation has positive effects for the safety of European citizens we see - under the existing legal possibilities provided for by TEU and TEC - no alternative to reach acceptable levels of transparency, accountability as well as democratic and judicial control other than to make use of article 42 TEU. This view is shared not only by the Commission, the European Parliament and nearly all NGO's working in the field, but also by a considerable number of Member States, not least the current Finnish presidency.⁵⁷ We consider it therefore regrettable that attempts to make use of article 42 TEU were recently blocked, namely by Germany.⁵⁸ However, we like to highlight that our main concern in this context is not about efficiency in terms of speed, but about true accountability, legitimacy and control.

5. How significant is the recent trend towards *internal agreements between groups of member states* outside the framework of the EU, for instance the Schengen countries, or the Prüm convention? To what extent is this due to unanimity or difficulties in decision making? What are the implications for the UK and for EU fragmentation?

34 **Answer:** The trend towards internal agreements between groups of Member States in the field of JHA policies is significant in so far as it avoids full force of the European Union/Community cooperation. As the JHA unit of CEPS has stated earlier in relation to the Prüm treaty but applicable to other comparable activities, like the G6 meetings in Heilgen-damm and Stratford-upon-Avon: "The Treaty of Prüm undermines the EU's ability to become an efficient policy-making body in the field of security. To start with, by setting up exclusive and competitive measures that seek to address threats that affect the EU as a whole, it blurs the coherence of EU action in these fields. Second, by developing new mechanisms of security that operate above and below the EU level, it dismantles trust among Member States. Finally, by establishing a framework whose rules are not subject to Parliamentary oversight, the Convention impacts on the EU principle of transparency. These three principles - trust, coher-

⁵⁷ Press Release, Finnish Presidency, 22.9.2006: "EU's operating conditions in matters of justice and home affairs must be guaranteed"; see also Commission Communication, COM (2006) 331 final, 28.6.2006: "Implementing The Hague Programme: the way forward", p. 13 seq.

⁵⁸ Cf. Euractiv. 25.9.2006: "Justice veto left standing post-Tampere".

ency and transparency – are yardsticks against which Prüm should be assessed”⁵⁹.

- 35 Difficulties in decision making or unanimity do not appear to us as being the underlying motivation of these or similar initiatives. If this were the case, it would not make any sense why Prüm signatory states have been divided over the implementation of the passarelle in September 2006. While France, Spain and Luxembourg apparently backed the passarelle proposal, Germany – a leading actor in nearly all small JHA circles – fiercely opposed it.⁶⁰ It should be noted that all informal JHA activities tend to emphasise that they are in line with EU JHA activities and that they aim to strengthen it, however, one gets the impression that the true objective is to pre-design JHA co-operation in a smaller extent with the aim of importing it later into the European structure. In the light of EU Treaty provisions that allow for enhanced cooperation even in the JHA field (articles 40, 43 – 45 TEU) one might question not only the political wisdom of separate JHA circles but their legality as well.

*6. What are the current developments in the area of **common border controls and visa arrangements**? Will the proposed changes to the short-stay visa arrangements in relation to the eastern neighbours of the EU open up new channels for illegal migration further westward in the EU? What are the implications of enlargement for JHA issues, including the impact of labour migration and confidence in new member states’ justice systems?*

- 36 **Answer:** Recent years have seen efforts to Europeanize and to strengthen EU external borders management and visa rules as well as efforts to ease some effects of EU enlargement for neighbouring countries. Common rules for the movement of persons across borders, the Schengen Borders Code⁶¹ have been enacted and an agency for the management of operational cooperation at external borders, Frontex, established⁶². Standards for security features and biometrics in passports and travel documents have been agreed upon⁶³ as well as a tool to provide exchange of Visa data, the Visa Information System⁶⁴. Proposals have been tabled to establish a Community Code on Visas⁶⁵ and a mechanism for the creation of so called “Rapid Border Intervention Teams”⁶⁶. Visible actions are currently performed on Europe’s southern maritime borders while their effectiveness and legality, especially with regard to “interceptions at sea” aiming at preventing migrants to reach Europe’s shores allow for some questions.

⁵⁹ T. Balzacq, D. Bigo, S. Carrera and E. Guild, Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats, CEPS Working Document, No. 134, January 2006, p. 17.

⁶⁰ ADNKI.com, 22.9.2006: “EU: Ministers deadlocked over immigration and terrorism”.

⁶¹ OJ L 105, 13.4.2006, p. 1.

⁶² OJ L 349, 25.11.2004, p. 1.

⁶³ OJ L 385, 29.12.2004, p. 1.

⁶⁴ OJ L 213, 15.6.2004, p. 5.

⁶⁵ Commission proposal COM (2006) 403 final, 19.7.2006.

⁶⁶ Commission proposal COM (2006) 401 final, 19.7.2006.

- 37 Concerning envisaged visa facilitations for citizens from Russia and Ukraine, we do not see any imminent threat that these measures will “open up new channels for illegal migration”. Instead we conceive such measures as being part of very sensible developments that aim at strengthening economic, humanitarian, cultural and scientific ties with neighboring countries that will positively influence trade, stability and inter-personal exchange.
- 38 Regarding EU enlargement and JHA issues it is possible to observe a common more skeptical and less enthusiastic trend. While by 2006 nearly all Member States have opened up their labour markets for EU citizens from the ten new Member States, only some Member States will allow for unrestricted inner-EU-migration with regard to Bulgaria and Romania. We like to recall, however, that free movement within the EU is a fundamental right and essential part of the whole European project. Therefore: limitations to this fundamental right in the form of transitional safeguarding measures are only allowed in exceptional circumstances. We welcome that the EU 15 had opened up towards EU 10 much faster than initially expected and hope that a similar development will be possible towards EU citizens from Bulgaria and Romania.
- 39 Safeguarding clauses, however, are not only foreseen for the movement of people but may also apply in relation to mutual recognition and other principles of JHA policies.⁶⁷ In its monitoring report on the state of preparedness for EU membership of Bulgaria and Romania the Commission has formulated some criticism with regard to their respective justice systems.⁶⁸ Safeguarding JHA measures from the date of accession, however, have not been proposed by the Commission. Instead a reporting system was instigated with a first report due by 31 March 2007. In some Member States, however, e.g. in Germany, there were parliamentary discussions dealing with the question if the Government should be officially asked to implement and notify JHA safeguarding measures from the date of accession.⁶⁹ Such developments highlight again that mutual trust cannot be imposed. It must grow, instead, relying on tangible facts and shared fundamental principles and values. It is furthermore a strong argument for agreeing on common binding principles in JHA issues within the EU instead of trying to cover existing disparities by relying on the principle of mutual recognition.

⁶⁷ Article 38 Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the treaties on which the European Union is founded, OJ L 157, 21.6.2005, p. 203.

⁶⁸ Commission communication, COM (2006) 549 final, 26.9.2006, p. 9.

⁶⁹ Deutscher Bundestag, Antrag der Fraktionen der CDU/CSU, SPD, FDP und Bündnis90/DIE GRÜNEN “EU-Beitritt Bulgariens und Rumaniens zum Erfolg führen”, Drucksache 16/3090, 25.10.2006; Deutscher Bundestag - 16. Wahlperiode - 60. Sitzung, Berlin, Donnerstag, den 26. Oktober 2006. Plenarprotokoll 16/60, p. 5850 – 5867.