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Edited by

Matthias Niedobitek
Jiří Zemánek

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Criminal Justice Cooperation in the Treaty establishing a Constitution for Europe

Von *Jiří Vlastník*

I. Introduction

Criminal justice cooperation was not at the centre of the debate on the Treaty establishing a Constitution for Europe (Constitutional Treaty, CT). This may be due to the fact that it does not form a part of the European constitutional law *stricto sensu*. However, it is very interesting to analyse it from the constitutional perspective, as it is one of areas where the Constitutional Treaty brings about some major changes.

The internationalization of crime implies the need for the internationalization of criminal justice. Many international conventions, treaties and agreements have been signed regulating the harmonization of criminal law and mutual legal aid, thus laying down the very initial nucleus of the international area of criminal justice. European law, as a new legal order of international law,[1] provides legal tools enabling Member States to go much further. However, criminal law is traditionaly perceived as being intrinsically linked to the very core of state sovereignty, which often puts an obstacle in the way of progress with the gradual creation of the *European area of criminal justice*. Nevertheless, from the origins of the European Communities we may trace a very clear shift from the informal to the formal, from the secondary to the primary law level, *from the intergovernmental to the supranational*. The Constitutional Treaty follows this trend. It aims to be another step on the way towards a consecutive completion of the "area of freedom, security and justice".

First, it should be specified what is meant by *criminal justice cooperation* in this paper. This term does not appear in the founding treaties. The Treaty on European Union (TEU) talks about "police and judicial cooperation in criminal matters", the Constitutional Treaty distinguishes between "police cooperation" and "judicial cooperation in criminal matters". The term criminal justice cooperation within the meaning of this paper covers both – police cooperation and judicial cooperation in

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[1] Case 26/62, judgment of the Court of 5 February 1963, NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, [1963] ECR 1.

criminal matters, these two sectors being closely interrelated as police authorities play a crucial role in criminal law enforcement.

Part II of this paper focuses on the evolution of primary law regulation of criminal justice cooperation from the origins of European Communities until the Treaty of Nice. In Part III it analyses amendments to this primary law framework as contained in the Constitutional Treaty. In conclusion (Part IV) it outlines the future development to be expected in this area.

II. The development of criminal justice cooperation in the primary law context

1. Internal and external factors

The founding treaties did not contain any provision specifically concerning criminal justice cooperation. However, throughout the history of the European Communities the interdependence of four basic economic freedoms and criminal law had appeared very clearly. In other words, the effect of *functional spillover* – spilling of Community action into domains originally exempt from Community competence – applied even in the area of criminal law, which had been traditionally perceived as an exclusive field of a national legislator. Moreover, Community institutions and European law provided *new opportunities* for enhancing international criminal justice cooperation, which had proved to be unsatisfactory in the face of the development and modernisation of international organized crime and terrorism.

Factors influencing the legal framework and forms of Community action in the domain of criminal justice cooperation may be divided into two sets – *internal factors* inherent in developments within the EU, and *external factors* applying from territories behind EU external borders. The functional spillover, the deepening of the integration, the enlargement of the EU, the redistribution of money on the European level, the abolition of internal borders by the Schengen agreements, evolutions of the EU crime scene, the jurisprudence of the ECJ, European legal principles or state sovereignty doctrines – these all may be classed as internal factors. The continuous internationalization and globalization of crime, the political instability and poverty in some parts of the world, legal and clandestine migration, diplomatic relations and foreign policy, the development of international law – these factors may be classified as external. It is characteristic that many criminal organisations operating in the EU have their seats in third countries, their principle areas of interest being drug trafficking (the import of heroin and cocaine, the export of ecstasy), smuggling counterfeit goods, identity thefts and illegal transfers from bank accounts, human trafficking, money counterfeiting, thefts of luxury cars, money laundering or the smuggling of cigarettes and alcohol motivated by the difference between excise duties.[2]

2. Origins of criminal justice cooperation

Due to the non-existence of any Community legal framework for criminal justice cooperation at the dawn of European integration, in order to fight cross-border crime Member States used *traditional instruments of international law* such as multilateral conventions (especially those adopted in the framework of the Council of Europe) and bilateral agreements as well as (rather informal) communication channels.

In the 1970s Europe experienced a *wave of terrorism,* such as the killing of Israeli athletes in Munich at the 1972 Olympic Games or the terrorist attacks by Red Army Fraction (Baader-Meinhof Group). Following these sanguinary incidents and due to the inability of international institutions like Interpol or the United Nations to deal effectively with terrorism, the *TREVI group*[3] was established in 1976 by the decision of Ministers of Justice and Home Affairs in the framework of the European Political Cooperation. Its three multi-level working groups[4] became a place for the *exchange of information* between representatives of governments, security experts and police officers. The remit of these working groups has been progressively enlarged[5] and new working groups have been added as new challenges in the fight against crime appeared.[6]

In 1985 and 1990 the *Schengen agreements* progressively abolished controls at the internal borders of most EU Member States, facilitating the free movement of persons, including criminals as well. Compensatory measures were introduced to balance the risks of the uncontrolled movement of persons. Police cooperation and criminal justice cooperation were strengthened. The *ne bis in idem* principle was clearly expressed. The provisions of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 were supplemented, as were those of the European Convention on Extradition of 13 December 1957 with the aim of facilitating cooperation based on these conventions. The Schengen cooperation was one of the key factors pressing for the introduction of new forms of criminal justice cooperation within the framework of Community law.

We can see that in its first phase criminal justice cooperation had a purely *international character* governed by the standard instruments of international law. The

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[2] On the proposal for a Council Framework Decision on the fight against organised crime (COM (2005) 6 – C6- 0061 / 2005 – 2005 / 0003(CNS))Committee on Civil Liberties, Justice and Home Affairs, Rapporteur: Bill Newton Dunn, A6 – 0277 / 2005.

[3] TREVI stands for "terrorisme, radicalisme, extrémisme et violence internationale".

[4] WG I, established in 1977, dealt with secure intelligence links for communicating intelligence concerning terrorism, WG II with the exchange of information on police training, equipment, forensic science and other general information.

[5] After an incident at Heysel stadium in Brussels in 1985 which took 39 lives, soccer hooliganism was added to the remit of WG II, at the same time WG III was established to deal with serious forms of organized international crime. WG on Europol was created in 1991.

[6] For more details see *John Occhipinti,* The Politics of EU Police Cooperation: Toward a European FBI?, London 2003.

Single European Act did not deal with this cooperation in any respect, the main change was introduced by the Maastricht Treaty.

3. The Treaty of Maastricht

Title VI of the Treaty of Maastricht[7] (ToM) entitled "Provisions on cooperation in the fields of justice and home affairs" added the so-called third pillar (Justice and Home Affairs – JHA) to the EU construction and set the *primary law framework* for criminal justice cooperation. Inspired by the Schengen experience, it defined areas of common interest where European action should be taken, in particular to compensate for security risks related to the free movement of persons. *Judicial cooperation in criminal matters* and *police cooperation*[8] (Europol is mentioned as a project but it did not exist at that time) were ranked among these areas. The ToM does not specify what aspects of judicial or police cooperation the EU action should concern, this specification being introduced by the Treaty of Amsterdam.

Being enframed by the ToM on a primary law level, criminal justice cooperation remains strongly intergovernmental in nature. Its *intergovernmental features* may be listed as follows:

- the *right of initiative* is attributed only to Member States,[9] excluding the supranational Commission, whose role is limited to full association with the work of a Coordinating Committee set up on the basis of Article K.4;
- joint positions and joint actions, being the legal tools for achieving the objectives of criminal justice cooperation, are adopted by the Council *unanimously;*
- another legal tool, *conventions* drawn up by the Council and recommended to the Member States for adoption in accordance with their respective constitutional requirements are a classic tool of international law;
- the *role of the European Parliament* is minimised, its only rights being to be informed regularly by the Presidency of JHA discussions, to be consulted by the Presidency on the principal aspects of JHA activities and to ask questions of the Council or to make recommendations to it;[10]
- the role of the *European Court of Justice* (ECJ) is limited to the interpretation of conventions and to ruling on any disputes regarding their application provided that these conventions stipulate it;
- *no sanctions* are foreseen for the breach of engagements emanating for Member States from the third pillar provisions.

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[7] Signed on 7 February 1992, and entered into force on 1 November 1993.

[8] See ToM, Article K.1 paragraphs 7 and 9.

[9] See ToM, Article K 3(2)(b).

[10] See ToM, Article K.6.

Article K.9 first introduced the *passerelle clause*, developed later on by the Treaty of Amsterdam, which empowered the Council, acting unanimously on the initiative of the Commission or a Member State, to decide that a Community consultation legislative procedure[11] shall apply in some areas of JHA (implying as of 1 January 1996 the initiative of the Commission, qualified majority vote in the Council and obligatory consultation of the European Parliament) and to recommend Member States to adopt that decision in accordance with their respective constitutional requirements. However, *criminal justice cooperation was excluded* from the scope of the *passerelle clause*. In any case, this clause has never been used.

The ToM enframed criminal justice cooperation in *primary law*. On the basis of its Article K.3 many joint positions, joint actions, decisions and some conventions were adopted, bringing the criminal justice cooperation several steps further.[12] On the other hand, the ToM did not change much of its intergovernmental character, substantial modifications being anchored in the Treaty of Amsterdam.

4. The Treaty of Amsterdam

The Treaty of Amsterdam[13] (ToA) *modified the three-pillar structure* of the EU by transferring some of the JHA matters to the Community pillar, the third pillar henceforth governing only the *police and judicial cooperation in criminal matters*. This important change also concerned a part of the Schengen acquis[14] that was partly integrated into the first, partly into the third pillar (which was the case of provisions regulating the police and judicial cooperation in criminal matters).[15]

The ToA introduced a new concept of the *area of freedom, security and justice* (AFSJ), which became the key term for all the ensuing action programmes and legislation efforts, with criminal justice cooperation being an important part of it. In contrast to the ToM, the ToA governs the police and judicial cooperation in

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[11] See Article 100c of the Treaty establishing the European Community.

[12] Among many others we may cite the Europol Convention of 1995; Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation (OJ L 351, 29. 12. 1998, p. 1–3); Joint Action of 24th February 1997 concerning action to combat trafficking in human beings and the sexual exploitaiton of children (OJ L 63, 4. 3. 1997, p. 2); Joint Action of 17 December 1996 concerning the approximation of the laws and practices of the Members States of the EU to combat drug addiction and to prevent and combat illegal drug trafficking (OJ L 342, 31. 12. 1996, p. 6); Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (OJ C 316, 27. 11. 1995, p. 48).

[13] Signed on 2 October 1997 and entered into force on 1 May 1999.

[14] Protocol integrating the Schengen acquis into the framework of the European Union annexed to the ToA.

[15] See Council Decision of 20 May 1999 (1999/436/EC), OJ L 176, 10. 07. 1999, p. 17–30.

criminal matters in two separate articles; it is much more concrete about possible areas of European action in these fields.[16] It should be pointed out, though, that even the measures taken on the basis of a vague Article K.3 in the ToM concerned the listed areas, so the ToA brought about a *clarification, specification* and *limitation* of the ToM's very vague approach.

The reinforcement of the role of Europol seems to be one of the most important innovations. On 26 July 1995 the Europol Convention was signed, taking for its legal basis the Article K.3 of the ToM. It replaced the European Drugs Unit and as of 1 July 1999 Europol started its full activities, which soon proved to be a huge asset for the effectivity of the EU's criminal justice cooperation. The ToA's reaction to this success was a considerable *reinforcement of Europol's positition,* laying a primary law basis for the extension of Europol's mandate even beyond the limits of the Europol Convention.[17] Thus on the one hand the ToA refers to Europol, created by a convention delimitating its competence, and on the other it supposes that this competence may be enlarged by European acts other than conventions. Even if it enables a more flexible reaction to the challenges of the international crime scene, this legal technique may seem a *dubious one.* Due to the third-pillar legislative procedure, it allows the avoidance of national Parliaments, which are not involved in adopting either framework decisions or decisions, but which would be (in some Member States, at least[18]) involved if the Europol Convention was amended by an ordinary form of adoption (i.e. by a convention). *Transparency and legitimacy* may seem to suffer here because of the combination of two sources of law which have a different legal nature. However, as will be described below, the national legislator may still compensate for this lack of legitimacy by means of adequate constitutional rules.

The ToA introduced *new legal instruments* to be used under the third pillar, namely[19] *framework decisions* to approximate laws and regulations of Member States, and *decisions* for any other purpose.[20] Apart from these two new instruments *common positions* may still be adopted to define the EU approach to a particular matter, and *conventions* may be drafted by the Council, one innovation

16 See ToA, Articles 30 and 31 – ex Articles K.2, K.3 – of the TEU.

17 See ToA, Article 30(2) of the TEU compared to Article 3 of the Europol Convention.

18 National constitutional requirements may not require the involvement of national Parliaments in the process of adoption of a convention of a certain kind.

19 See ToA, Article 34 – ex Article K.6 – of the TEU.

20 The direct effect of framework decisions and decisions is expressely excluded. This construction reflected the Member States' reticence towards the progressive jurisprudence of the ECJ concerning the direct effect of directives – See for example Case 41 – 74, judgment of the Court of 4 December 1974; Yvonne van Duyn v Home Office, ECR [1974] 1337; Case 148/78, judgment of the Court of 5 April 1979, Tullio Ratti, [1979] ECR, 1629; Case 152/84, judgment of the Court of 26 February 1986, M. H. Marshall v Southampton and South-West Hampshire Area Health Authority, [1986] ECR 723; Case C-91/92, judgment of the Court of 14 July 1994, Paola Faccini Dori v Recreb Srl., [1994] ECR I-3325.

being that unless they stipulate otherwise, if adopted by at least half of the Member States they shall enter into force for those Member States.[21]

Thus, there are two legal instruments that can lead to the same effect, no criteria being set for the Council's (Commission's) choice between the two of them – conventions on the one hand, framework decisions (or decisions) on the other. Whereas the former are (after having been drafted by the Council) subject to the national constitutional ratification procedure (involving in many countries a vote by Parliament), the latter are subject only to the Council's unanimity vote, leaving national institutions uninvolved. And framework decisions and decisions outnumber conventions several times over. The reason is obvious – *flexibility*. Whereas framework decisions (decisions) enter into force generally on the day of their publication in the Official Journal, in order for a convention to enter into force, at least half of the Member States must ratify it (unless the convention provides otherwise), which has often caused considerable lags between the date of a Council's decision and the entry of a convention into force. This was the case, for example, with the Convention on Mutual Assistance in Criminal Matters of 29 May 2000 (which entered into force in 2005) or with the Convention on driving disqualifications of 17 June 1998 (which has not yet entered into force). The slow ratification process of the former led to the fact that a part of the Convention's scope of application (i.e. joint investigation teams) was governed separately by the framework decision.[22] This *circumvention of national Parliaments* raised very critical voices claiming the illegitimacy of framework decisions / decisions and calling for the immediate termination of their adoption. According to some authors, criminal law forms a part of the "social contract", the amendment of which always necessitates the involvement of the national Parliament, which must not be circumvented by resorting to the European level.[23]

Framework decisions and decisions may certainly touch the most *fundamental principles* of criminal law and criminal responsibility and may have a considerable impact on the domain of basic human rights and freedoms.[24] On the other hand (and notwithstanding the general argument of the legitimacy of the third pillar legislative process due to the ToA ratification), it must be added that even in the third pillar legislative process, Member States always keep the *means of ensuring their national Parliaments are involved*, for example by the need for a preliminary parliamentary authorization of the minister's vote in the Council. The European primary law

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[21] See ToA, Article 34(2)(b) of the TEU.

[22] Framework decision of 13 June 2002 on joint investigation teams (2002 / 465 / JHA), OJ L 162 of 20. 06. 2002, p. 1.

[23] See for example *Paul de Hert* (2004), "Division of Competencies between National and European Levels with Regard to Justice and Home Affairs", in: Apap J. (ed), Justice and Home Affairs in the EU, Liberty and Security Issues after Enlargement, Cheltenham: Edward Elgar, pp. 55 – 99.

[24] An example might be the requirement of many framework decisions to introduce a criminal responsibility of legal persons that many legal orders (including the Czech one) do not know.

even supposes that such a national regulation may be adopted, stating that "scrutiny by individual national parliaments of their own government in relation to the activities of the Union is a matter for the particular constitutional organisation and practice of each Member State".[25] So, the burden of setting an appropriate constitutional framework involving a national Parliament in the European legislative process lies on a national legislator (i.e. national Parliament itself). If this framework is set, the national Parliament may participate in the adoption of third pillar acts and may effectively block their adoption by forcing the national representative to use his right of veto. It becomes clear here that even if a framework decision / decision adoption process is more flexible than that of a convention, it could become equally lengthy (provided that the preliminary parliamentary approval of a minister's vote in the Counil applies in most Member States). This trap of inflexibility on the one hand and illegitimacy on the other presses for new concepts and solutions, notably for the creation of the concept of *European legitimacy* being flexible enough to respond to challenges of international organized crime.

To summarize, the *intergovernmental character* of criminal justice cooperation as shaped by the ToA is mainly reflected in these points:

- the *unanimity vote* is maintained;
- Member States may *block the establishment of a closer cooperation* between other Member States for important and stated reasons of national policy;[26]
- even if strenghtened, the role of the European Parliament is of a purely *consultative nature;*
- the role of the ECJ is strengthened (see below) but still limited;
- still *no sanctions* are foreseen for the breach of third pillar engagements of Member States.

However, a shift in favour of a *supranational approach* is apparent from these features:

- Member States henceforth share the right of initiative with the *Commission;*
- the role of the *European Parliament* is slightly strenghtened – the consultation of the European Parliament by the Council before adopting a framework decision / decision or before drafting a convention is obligatory;[27]
- the Council is empowered to lay down conditions and limitations for the operation of law enforcement authorities in the territory of another Member State in liaison and in agreement with the authorities of that State;[28]

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[25] See the Protocol on the role of national parliaments in the European Union annexed to the ToA.

[26] See ToA, Article 40(2) – ex Article K.12 – of the TEU.

[27] See ToA, Article 39 – ex Article K.11 – of the TEU.

[28] See ToA, Article 32 – ex Article K.4 – of the TEU.

- the *ECJ's competence* is enlarged – subject to special conditions, it has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, and on the interpretation of conventions and on the validity and interpretation of the measures implementing them. Even though its jurisdiction was limited, the ECJ grasped this opportunity and became a strong pro-European player in this field making some very important European law principles apply even in the third pillar-matters. Take, for example, the famous *Pupino* case expressing the principle of loyalty resulting in the obligation of an interpertation of national law in a way that conforms to framework decisions (the indirect effect of framework decisions);[29]
- the possibility of *passerelle*[30] may be henceforth used to transfer the third pillar matters (in their entirety) to the first Community pillar, the European Parliament having a right of preliminary consultation.

5. The Treaty of Nice

Even before the ToA came into force, the JHA Council adopted the so-called *Vienna action plan* on how to implement the provisions of the ToA on the AFSJ.[31] This plan was soon followed by a political programme for the further development of the AFSJ approved by the *Tampere 1999 European Council.*[32] Even though not of a binding nature, these documents gave the necessary impetus and direction to the further development of criminal justice cooperation. Paragraph 46 of the Tampere European Council conclusions called for the establishment of a *Eurojust unit* composed of national prosecutors, magistrates, or police officers of equivalent competence, from each Member State according to its legal system. The objective of Eurojust was to facilitate cross-border criminal justice cooperation mainly in the field of organised crime by coordinating the national prosecuting authorities and supporting the investigation. The Council was called on to adopt the necessary legal instrument by the end of 2001. In the year 2000, *Pro-Eurojust* (Provisional Judicial Cooperation Unit) was established,[33] soon being replaced by Eurojust (European Judicial Cooperation Unit).[34]

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[29] See Case C-105/03, judgement of the Court (Grand Chamber) of 16 June 2005, Maria Pupino, [2005] ECR I-5285.

[30] See ToA, Article 42 – ex Article K.14 – of the TEU.

[31] Council of the European Union, European Commission (1998) Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice – Text adopted by the Justice and Home Affairs Council of 3 December 1998, OJ C 19 , 23. 1. 1999.

[32] These two programmes set priorities until 2004, when the multiannual *Hague programme*, "Strengthening freedom, security and justice in the European Union" was adopted, followed then by the *Commission Action Plan* "The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice" – see COM (2005) 184 final.

This development was reflected by the *Treaty of Nice*[35] (ToN), which brought two significant changes to Title VI of the TEU. First it "legalised" *Eurojust* by primary law in its Articles 29 and 31, recognising its role as one of the key players in the field of criminal justice cooperation. Then the ToN substantially amended the provisions concerning *enhanced cooperation* in the third pillar. Otherwise it did not bring about any major changes.

6. Summary of the primary law evolution

The *main features* of the development of the criminal justice primary law framework may be summarized as follows:

- the secondary law, reacting more swiftly on internal and external factors influencing the criminal justice cooperation, is often a step ahead of the express provisions of primary law;
- criminal justice cooperation is gradually strengthened;
- new European criminal justice institutions appear in the primary law;
- the character of criminal justice cooperation shifts progressively from the intergovernmental to the supranational.

Principal reservations about the current status quo are listed below:

- fragmentation of the legal regulation between sources of law of a different legal nature;
- the preceding fact results in an exclusively horizontal character of institutional cooperation leading to the fragmentation of and a lack of coordination between different European criminal justice actors;[36] in other words we experience the non-existence of a vertical integration of the EU criminal justice institutions, whose number has increased over time (apart from Europol and Eurojust e.g. liason magistrates, European Judicial Network, OLAF, Police Chiefs Task Force etc.); in turn, this may result in inefficiency, institutional overlap and duplications;
- a democracy deficit in the third pillar legislative process;
- a lack of democratic control over Europol and Eurojust.

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[33] Council of the European Union (2000) Decision 2000/799/JHA of 14 December 2000 setting up a Provisional Judicial Cooperation Unit, OJ L 324, 21. 12. 2000.

[34] Council of the European Union (2002), Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, OJ L 63, 06. 03. 2002.

[35] Signed on 26 February 2001, entered into force on 1 February 2003.

[36] These institutions must usually govern their mutual relations by means of special agreements (such as the Agreement between Europol and Eurojust of 9. 6. 2004). This appears not to provide sufficient coordination and may be an obstacle to the effective functioning of criminal justice cooperation.

The development of primary law from Maastricht to Nice proved that criminal justice cooperation is and shall be based on three major pillars: (1) *harmonization* of national material and procedural laws, (2) progressive introduction of the *mutual recognition principle* and (3) *institutional cooperation.* This is exactly the construction that the Constitutional Treaty further elaborates.

III. Criminal justice cooperation in the Constitutional Treaty

The ambitious project of the Constitutional Treaty combines *system changes* of the European Union construction (Part I, II, IV) with *amendments* to concrete provisions governing the EU policies (Part III). Criminal justice cooperation is one of the domains where most modifications are envisaged compared to the current Title VI of the TEU. Having analysed the system changes impacting on criminal justice cooperation (1), amendments to the TEU Title VI provisions will be approached (2).

1. System changes

According to Article I-3(2), the Union shall offer its citizens an area of freedom, security and justice (AFSJ) without internal frontiers. The AFSJ falls under the shared competence, which results in the fact that Member States may legislate and adopt legally binding acts to the extent that the Union has not exercised, or has decided to cease exercising, its competence.[37] As innovative as the new delimitation of the Union's competencies may seem, this is not a significant modification to the current system, where this categorization has been applied for certain competencies by the ECJ.[38] For other competencies it may be applied by a thorough interpretation of individual primary law provisions.

a) Abolition of the three-pillar structure

The principal change introduced by the CT is the *abolition of the EU three-pillar structure.* Criminal justice cooperation should be governed by Part III, Chapter IV Section 4 (Judicial cooperation in criminal matters) and Section 5 (Police cooperation).

Due to this fundamental change, the matters currently falling under the third pillar should be henceforth subjected to the *uniform Community approach* (communitarisation). The most important consequences are listed below:

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[37] See CT, Articles I-12(2) and I-14(2)(j).

[38] See for example joined cases 3, 4 and 6/76, judgment of the Court of 14 July 1976, Cornelis Kramer and others, [1976] ECR 1279; Case 22/70, judgment of the Court of 31 March 1971, Commission of the European Communities v Council of the European Communities, [1971] ECR 263.

- *European laws* and *European framework laws* (the former replacing current regulations, the latter replacing directives) should be the *legislative acts* that could be adopted in the AFSJ (the CT does not list conventions drafted by the Council any more).[39] Therefore the ordinary co-decision legislative procedure would apply, thus considerably strengthening the role of the European Parliament, putting it on an equal level with the Council.[40] To be complete, it shall be mentioned that the CT expressly states that even *non-legislative acts*[41] may be adopted in the AFSJ, in order to facilitate administrative cooperation between the relevant departments of Member States and vis-a-vis the Commission in the AFSJ,[42] or to set a framework for the control of a good implementation of the AFSJ engagements by Member States.[43]
- Due to this communitarisation, all *Community law principles* derived by the ECJ should apply (e.g. direct effect,[44] immediate effect and primacy over national law[45] or "euroconform" interpretation[46]) as well as possible sanctions for non-compliance with engagements following from the CT and secondary law.
- The *qualified majority vote* (QMV) shall apply in the Council. However, in case of framework decisions aiming to establish minimum rules of criminal procedure or minimum rules with regard to the definition of criminal offences and sanctions,[47] Member States may resort to an "*emergency break*" if the respective

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39 The legal effect of third-pillar acts would be preserved until these acts are repealed, annulled or amended in implementation of the CT (see CT, Article IV-438).

40 See CT, Article III-396.

41 See CT, Article I-35.

42 See CT, Article III-263; the European Parliament must be consulted prior to adopting the regulation. This concerns only administrative authorities. The cooperation between judicial authorities may only be governed by European laws or framework laws (CT, Article III-270 (1)(d)).

43 See CT, Article III-260; the European Parliament is not involved.

44 See for example Case 26/62 Van Gend, precited (note 1); Case 8/81, judgment of the Court of 19 January 1982, Ursula Becker v Finanzamt Münster, [1982] ECR 53; Case 28/67, judgment of the Court of 3 April 1968, Firma Molkerei-Zentrale Westfalen/Lippe GmbH v Hauptzollamt Paderborn, [1968] ECR 143; Joined Cases C-100/89 and C-101/89, judgment of the Court of 12 December 1990, Peter Kaefer and Andréa Procacci v French State, [1990] ECR I-4647.

45 See for example Case 6/64, judgment of the Court of 15 July 1964, Flaminio Costa v E.N.E.L., [1964] ECR 585; Case 106/77, judgment of the Court of 9 March 1978, Amministrazione delle Finanze dello Stato v Simmenthal SpA, [1978] ECR 629; Case 34/73, judgment of the Court of 10 October 1973, Fratelli Variola S.p.A. v Amministrazione italiana delle Finanze, [1973] ECR 981.

46 See for example Case C-106/89. judgment of the Court of 13 November 1990, Marleasing SA v La Comercial Internacional de Alimentacion SA, [1990] ECR I-4135. This first pillar jurisprudence of indirect effect of directives has already been applied even in the third pillar as far as concerns indirect effect of framework decisions (see C-105/03, Maria Pupino, case precited, note 29).

47 See CT, Articles III-270(2) and III-271(2).

framework decision affects fundamental aspects of its criminal justice system. Then the draft shall be referred to the European Council, where the principle of consensus applies. This gives Member States an effective right of veto, which is not an obstacle for the establishment of enhanced cooperation between Member States wishing to go further.[48] The QMV being the principle, *the unanimity vote* combined with the obligatory consultation of the European Parliament should still apply in some cases.[49]

- In comparison with other areas of the Union's competence, the *legislative process* in the area of criminal justice cooperation keeps some specificities, the principal one being that the *right of initiative* is shared between the Commission and one quarter of Member States.[50] However, such an initiative from Member States supposes a considerable level of coordination. Thus the principal initiator of legislative acts would be the Commission.
- The role of national Parliaments is strenghtened by the "Protocol on the role of national Parliaments in the EU", and the "Protocol on the application of the principles of subsidiarity and proportionality". National Parliaments have the right to be informed about all draft European legislative acts. Within a six-week period they may send a reasoned opinion stating the breach of a principle of subsidiarity. Each national Parliament has two votes, and where reasoned opinions on a draft European legislative act's non-compliance with the principle of subsidiarity represent at least one third of all the votes, the draft must be reviewed. In the AFSJ this threshold is only *a quarter.*[51] This reflects the special importance attached by Member States to the AFSJ.[52] On the other hand, it must be said that a revision does not mean a withdrawal of the draft, which can be maintained even in spite of the "yellow card" wielded by national Parliaments. This considerably weakens the position of national Parliements, leaving them defenceless in the end (from the legal, not the political, point of view).
- The full jurisdiction of the *Court of Justice of the European Union* applies even in the AFSJ. The CT contains some provisions relating specifically to criminal justice cooperation. Thus, if a preliminary question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court shall act with the minimum of delay.[53]

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[48] See CT, Articles III-270 (3,4), III-271 (3,4).

[49] See CT, Articles III-275(1), III-275(3), III-277(3).

[50] See CT, Articles I-34 (3), I-42 (2), III-264.

[51] See Article 7 of the 2. Protocol annexed to the CT.

[52] The role of national Parliaments as the guardians of subsidiarity is highlighted even in Article III-259.

[53] See CT, Article III-369 *in fine.*

b) A single institutional umbrella

As specified above, Europol finds its legal basis in the 1995 Europol Convention, and Eurojust finds its in a Council decision taken on the basis of the vague Articles 31 and 34(2)(c) of the TEU, its existence being acknowledged by primary law only *ex post* by the Treaty of Nice. This diversity of basic legal documents, the manner of their adoption (in the case of Eurojust) and the functioning of both institutions became a source of interpretation problems and critical voices invoking the democracy deficit in the functioning and control of both institutions.[54]

The "European Convention" was well aware of these criticisms and opted for a solution of a *single institutional umbrella* leading to the legal simplification and opening-up of both institutions to more effective control by both European and national Parliaments. The Europol Convention and the Eurojust decision were to be replaced by European laws determining the structure, operation, field of action and tasks of these institutions as well as the arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities, and for the scrutiny of Europol activities by the European Parliament together with national Parliaments.[55] The European Parliament and national Parliaments were also to be be involved in the evaluation of the Member States' implementation of engagements in the AFSJ.[56] The CT does not explicitly envisage the creation of vertical links between Europol and Eurojust (for example, the scrutiny of Europol by Eurojust, similar to the relationship between police authorities and prosecutors in some countries), which would be a very strong feature of a federal criminal justice system. However, the Constitutional Treaty's silence on this matter does not prevent the creation of such links in European laws or framework laws replacing the current founding documents of these institutions.

c) The Charter of Fundamental Rights of the Union

The insertion of the Charter of Fundamental Rights of the Union into the CT as its Part II has two consequences in the area of criminal justice cooperation (as in others). First, the provisions of the Charter would apply to (1) *all European institutions,* including Europol, Eurojust and other EU criminal justice players and (2) *to all Member States* when implementing the Union law (including the current third-pillar acts and future legislative and non-legislative acts of the Union).[57] The border between implementing a rule of Union law and a rule of a purely national character is not at all easy to trace. The importance of the Charter is therefore im-

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[54] See for example *Gerard Deprez,* Le point de vue du Parlement européen, or *Gerritjan van Oven,* Le role des Parlements nationaux dans la convention Europol, both in: La convention Europol: L'emergence d'une police européenne?, Strasbourg 2001, p. 55 resp. p. 39.

[55] See CT, Articles I-42, III-273(2), III-276(3).

[56] See CT, Article III-260.

[57] See CT, Article II-111.

mense as it supports the idea of basic human rights *permeating the legal order* in its entirety.

The Charter contains many provisions of particular importance for criminal justice cooperation, the study of which would go beyond the scope of this paper.[58] The majority of these rights correspond to the catalogue of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), some seem to go further.[59] The express formulation and the scope of application of these fundamental rights and freedoms would certainly be beneficial to the greater respect of these rights in the daily routine of all European and Member States' bodies implementing the Union law. This might be particularly important today, when some Member States (e.g. the United Kingdom) have signalled the possibility of suspending or withdrawing from the ECHR in order to introduce some more effective anti-terrorist measures that could come into conflict with their Convention engagements.

2. Concrete modifications of the TEU Title VI provisions

Article I-42 of the CT encompasses all three pillars of criminal justice cooperation: (1) harmonisation, (2) mutual recognition, (3) institutional cooperation. These three domains are developed in Part II, Chapter IV, Sections 4 and 5.

a) Harmonisation of material criminal law

aa) Functional approach of the Constitutional Treaty

A significant change to the current explicit harmonisation rules was not the focus of the CT debate in spite of the fact that a very heated discussion arose about the ECJ jurisprudence on exactly that point. In case C-176/03 (Commission v Council), the ECJ upheld the functional concept of European law. This jurispru-

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[58] Notably the right to the integrity of the person, prohibition of torture and inhuman or degrading treatment or punishment, prohibition of slavery and forced labour, right to liberty and security, respect for private and family life, protection of personal data (see Articles II-63 – II-68), right to good administration, right of access to documents (see Articles II-101, II-102), freedom of movement and of residence, diplomatic and consular protection, right to an effective remedy and to a fair trial, presumption of innocence and right of defence, principles of legality and proportionality of criminal offences and penalties, right not to be tried or punished twice in criminal proceedings for the same criminal offence (see Article II-105 – II-110).

[59] This is the case, for example, with the protection of personal data, which is not expressely stated in the Convention where it was derived by the jurisprudence of the Strasbourg Court concerning the concrete emanation of the right to privacy (Article 8 of the Convention) – see, for example, the cases of Leander (judgement of 26. 3. 1987), Gaskin (7. 7. 1989), Klass (6. 9. 1978), Kopp (25.3. 1998), Rotaru (5. 5. 2000).

dence attributes to the Community an *implicit criminal law competence at sectoral level*, this attribution being an exception to the general rule excluding the criminal substantive and procedural rules from Community competence.[60] According to the ECJ, the Community is entitled to take measures relating to the criminal law of Member States (including their harmonisation) which it considers necessary to ensure that the rules, which it lays down in the area of its explicit competence (environmental protection in this particular case), are fully effective.[61] It is a logical prolongation of the *effet utile doctrine* requiring the efficient application of Community rules including the criminalisation of the most serious breaches. According to the consistent case-law of the ECJ Member States must "ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."[62] The *functional approach* shifts this jurisprudence another step further. It aims to ensure that the most serious breaches of Community law are effectively fought in a uniform way by all Member States, one of its reasons being mistrust in Member States' motivation and ability to secure this objective.

The Commission welcomed this ECJ decision favouring a Community approach and clarifying the distribution of powers between the first and the third pillar. Two months after the judgement it made public its conclusions,[63] stating that because of the functional approach of the ECJ the Commission will propose the adoption of measures of criminal law character where they are necessary to ensure that Community rules and regulations are respected. The sectoral criminal law should therefore generally be adopted under the Community pillar, the horizontal criminal law under the third pillar. In the annex the Commission lists already adopted framework decisions which are affected by this ECJ jurisprudence as they are based on a wrong legal basis. Due to the expiry of a two-month period, the Commission could introduce an appeal for annulment only in case of a framework decision concerning ship-source pollution (relating to the common transport policy).[64] The

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60 See for example Case 203/80, judgment of the Court of 11 November 1981, Guerrino Casati, [1981] ECR 2595; Case C-226/97, judgment of the Court of 16 June 1998, Johannes Martinus Lemmens, [1998] ECR I-3711.

61 See Case C-176/03, Commission of the European Communities v Council of the European Union, [2005] ECR I-7879.

62 See Case C-326/88, Anklagemyndigheden v Hansen & Soen I/S., [1990] ECR I-2911; Case 68/88, Commission of the European Communities v Hellenic Republic, [1989] ECR 2965.

63 Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (C-176/03), COM (2005) 583.

64 Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255, 30. 09. 2005, p. 164.

ECJ's decision[65] is expected with impatience, the Commission being supported by the European Parliament, the Council by almost all Member States. This intervention of Member States demonstrates their reticence with regard to the supranational approach in the area of criminal law.[66] This reticence may well have a "*reverse effect*" in the form of weakening the Community action in the criminal law area and may thus lead to a diminution of the degree of criminal law protection. In other words, if a framework decision, which Member States have adopted by unanimity, is annulled due to the Commission's opposition and the functional approach of the ECJ, it is not definite that Member States will adopt a directive of the same content by the supranational QMV (which they firmly reject). The *content* may become of lesser importance than the *manner* here. An indication of this possible reverse effect was, for example, the discussion of the Council in Luxembourg (held on 5 and 6 October 2006) on the proposal of a directive on criminal measures aimed at ensuring the enforcement of intellectual property rights.[67] The Council agreed that it is necessary to continue with the analysis of the effectivity of the current framework provided by the Community directive 2004/48/EC in order to assess whether the protection offered by this instrument is sufficient or whether it is necessary to adopt another instrument harmonizing even criminal rules (this process should guarantee that the principle of subsidiarity is respected).

The CT had been drafted before the above-mentioned jurisprudence appeared. However, the functional approach is clearly mantained in its Article III–271(2). Thus, in case of a necessity to harmonise national criminal law in the area where a sectoral Union's competence has already been subject to harmonisation, the criminal law harmonisation measure shall be taken on the basis of the respective sectoral provisions and not on the basis of Section 4 of Chapter IV. Consequently, the Commission's exclusive right of initiative would apply and Member States could not rely on an "emergency break" in the form of a veto (see above). The supranational functional approach dominates in the CT in this area.

bb) Breadth of the Union's competence

Compared to Article 31(1)(e) of the TEU allowing the harmonisation of constituent elements of criminal acts and penalties in the area of organised crime, terrorism and illicit drug trafficking, the CT extends the Union's competence even to other serious crime with a cross-border dimension. It should be noted, though, that

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[65] See Case C-440/05, action brought on 8 December 2005 by the Commission of the European Communities against the Council of the European Union; OJ C 22 of 28. 01. 2006, p. 10.

[66] It should be added that the notion of a crime is not clear, as the jurisprudence of the European Court of Human Rights shows, whose interpretation of the notion of a criminal offence is considerably wider that national law concepts (where the notion of a criminal offence is often linked with imprisonment in contrast to other non-criminal offences).

[67] See COM (2005) 276 final.

many framework decisions or joint actions were adopted in these areas on the basis of the vague term "organised crime", the interpretation of which could become a subject of a separate paper.[68] However the Union's competence pursuant to the CT is undoubtedly broader, allowing the Union's action in some crime sectors even without the need of an organised crime element (which, however, will very often be the case). The CT counts on the possibility of a kind of *passerelle*[69] as well as on allowing the Council to extend the Union's competence to other areas of crime by means of a European decision adopted unanimously (and with the consent of the European Parliament).

b) Approximation of rules of criminal procedure

The foremost principle of judicial cooperation is the *mutual recognition of decisions*. In order to attain its full application, the CT brings some clarifications which are more specific in concrete areas where Union action may be taken, which is meant to remove any doubts due to the vagueness of Article 31 TEU. For example, the competence of the EU to harmonise certain procedural rights of individuals in criminal proceedings by means of a framework decision[70] was disputed by some. The CT expressely includes this aspect of criminal procedure in the Union's competence. This part of the CT is another example of the motivation not so much to enlarge the Union's competence but to clarify it and confirm that Union was and will be competent to adopt approximation measures in the respective areas. The *passerelle clause* is included in Article III-270(2)(d).

c) Institutional cooperation

The third pillar of criminal justice cooperation is structured in accordance with the ToA between judicial cooperation in criminal matters and police cooperation.[71]

aa) Eurojust

The CT strengthens the role of Eurojust, making it a key Union institution in the area of judicial cooperation in criminal matters. It lists specific tasks in Eurojust's

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[68] For example, Framework Decisions on combating trafficking in human beings (OJ L 203 of 01. 08. 2002, p. 1), counterfeiting of Euro (OJ L 140 of 14. 06. 2000, p. 1), money laundering (OJ L 182 of 05. 07. 2001 p. 1).

[69] The term *passerelle* has a different meaning here than under the current Article 42 of TEU, where it means transfer from the third pillar to the first pillar. In this context the *passerelle* means a transfer of a national competence from a Member State to the Union without the need to change the CT by an ordinary procedure.

[70] Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final.

[71] See CT, Articles III-273, III-274 of Section 4 and Section 5 of Part III, Chapter IV.

mission, going much further than the current Eurojust decision. The CT envisages that Eurojust could even have *executive competencies* to initiate criminal investigations or to resolve conflicts of jurisdictions. This is an important modification to current rules, according to which the decisions of Eurojust and its Members are of an advisory, coordinating and recommending character.

In the Convention and during the IGC, the *passerelle* indeed seemed to be an efficient legal tool bringing more flexibility into the Union's reaction to new challenges. Another example, which became the focus of many debates, is the provision of Article III-274 (inspired by *Corpus Juris* – a project of a European Criminal Code containing criminal rules concerning the protection of financial interests of the European Union which was elaborated by a group of experts and revealed in 1996), envisaging the possibilitiy of the establishment of a *European Public Prosecutor's Office* (EPPO) by the unanimous decision of the Council requiring the preliminary consent of the European Parliament.

Criminal law, as an *ultima ratio,* defines which interests are so important that they need the utmost protection offered by criminal sanctions enforced in criminal procedures. Within the European Union we may (*cum grano salis*) talk about Member States' interests, interests common to Member States and Union (Community) interests. The problem is that these sets do not (and will never) necessarily completely coincide. What makes a difference is the motivation of Member States *to protect Union interests,* which may in some cases even be an obstacle for achieving some Member States' objectives (such as the protection of some industrial or agricultural sectors, concealing the cases of misusing European funds to be able able to use them in future etc.).[72] This results in the fact that in some cases Member States are not willing to protect Community interests as vigorously as their own (thus breaching their obligation of loyalty[73]), which justifies the calls for the establishment of a European body responsible for the protection of Union interests. Some authors argue that the EPPO should be created from OLAF (which is an administrative investigation body at the moment) because OLAF was designed from its origins to protect Community interests (although only financial ones) and has a more developed infrastructure.[74] According to this conception, Eurojust should remain competent for crimes violating the common interests of Member States, where Member States' motivation is supposed to be given (we may talk about the mutual trust in protecting the interests common to Member States).

The CT has opted for a different solution. The EPPO should be created from Eurojust. As a starting point its task should be to defend the *Union interests.* It

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[72] See for example Case C-265/95, Commission of the European Communities v French Republic, [1997] ECR I-6959.

[73] Which seems to be one of the reasons for the ECJ jurisprudence of the Community's implicit criminal law competence.

[74] See, for example, the opinion of *Joachim Vogel* in his Memorandum to the House of Lords. In Judicial Cooperation in the EU: the role of Eurojust. House of Lords, 23rd Report of Session 2003 – 2004, p. 105.

should be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests. The CT grants an executive law enforcement competence to the EPPO as it is meant to exercise the functions of a prosecutor in the competent courts of the Member States in relation to such offences.[75] This means that the concept of the EPPO is based on the *single European jurisdiction,* confirming the double role of national courts acting as both national and European judicial organs. In Article III-274(4) the CT uses another *passerelle clause* permitting the enlargement of the EPPO's competence to include *other types of serious cross-border crimes,* which would make the EPPO a guardian of Member States' *common interests.* This enlargement of the EPPO's competence would confirm the Member States' interest in fighting some forms of crime on a European level. In the case of EPPO, the European decision is not taken by the Council, but by the European Council acting unanimously after obtaining the consent of the European Parliament and after consulting the Commission.

bb) Europol

In the area of police cooperation, the CT approach is much less supranational compared with judicial cooperation in criminal matters. The CT expressly excludes any use of coercive measures by Europol,[76] thus denying the concept of Europol as "the Union's FBI". Nevertheless, compared with the Europol Convention, the CT considerably enlarges Europol's competence to include crimes which affect a common interest covered by a Union policy.[77] This delimitation of competence would make Europol a guardian of Union interests in the police sector, in other words *European police* without coercive powers. It is also linked to the functional concept of criminal law. As explained above, the Union may harmonise criminal offences even under sectoral policies provisions. These crimes will automatically fall under Europol's competence.

3. Summary of principal features of the Constitutional Treaty

The area of criminal justice cooperation demonstrates well that the CT is a mixture of the intergovernmental and the supranational (or federalist), trying to find a certain balance.

Based on the analysis above, the following *federal traits* may be listed:

- abolition of the three-pillar structure and communitarisation of the criminal justice cooperation, which results in

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[75] See CT, Article III-274(2).

[76] See CT, Article III-276(3).

[77] See CT, Article III-276(1).

- a strengthened role for the Commission;
- increased flexibility due to the introduction of a QMV in most areas;
- full involvement of the European Parliament in the legislative procedure;
- full jurisdiction of the ECJ and full application of Community law principles;
- possibility of sanctions for breaching the Member States' engagements in AFSJ;
- considerable strengthening of the role of Eurojust;
- creation of a legal basis for the establishment of the EPPO;
- extending Europol's competence.

The most important *intergovernmental features* are:

- even if QMV is the principle, Member States may resort to an "emergency break", thus blocking the legislative process;
- unanimity vote still applies in some areas;
- no vertical links are explicitly envisaged between Europol, Eurojust or other institutions active in the criminal justice sector;
- the federalist project of *Corpus Juris* was left aside;
- Europol is not assigned executive and coercive powers.

To conclude, it should be noted that a frequent use of *passerelle clauses* (i.e. transferring a competence from Member States to the Union without changing the CT) makes the national legislator responsible for adopting adequate constitutional rules so that national Parliaments cannot be circumvented when applying such a *passerelle clause.*

IV. What future for the criminal justice cooperation?

The evolution of the criminal justice cooperation legal framework is a very good example of difficulties involved in the process of creating an ever closer union among the peoples of Europe[78] in areas touching the traditional essence of state sovereignty. However, it reflects the progressive increase in the level of mutual trust between Member States – trust in the quality of foreign criminal laws, trust in the quality of foreign law enforcement personnel, trust in the informal institutions existing in other Member States that often have a great impact on criminal law in practice.

The so-called period of reflection on the Constitutional Treaty is over. The German presidency was striving to resume its ratification process.[79] However, it is not

[78] See Article 1 of the TEU.

[79] See, for example, the speech by *Angela Merkel* to the European Parliament on January 17, 2007, http://www.eu2007.de/en/News/Speeches_Interviews/January/Rede_Bundeskanzlerin2.html.

at all clear if and in what form the CT will come into force. The CT follows the tendency of primary law from the founding treaties to Nice, which is slowly to shift criminal justice cooperation *from the intergovernmental to the supranational* system. With or without the effectivity of the CT, this tendency will indubitably continue. It will do so because of the development of the international crime scene, because of its globalisation, because of the internal and external factors that instilled this tendency from the very origins of the European Communities.

Some of the principal contemporary *internal and external factors* may be listed here:

- enlargement of the Schengen zone – in 2008 a majority of new Member States are supposed to join the Schengen system, which will facilitate criminal mobility within the EU;
- the Eurozone will be enlarged as well, new Member States joining it sooner or later, which will affect crime against the single currency;
- financing projects from European funds – for the period 2007–2013 the sum amounts to 308 billion EUR,[80] the protection of Community financial interests becoming even more urgent;
- the recent accessions of Romania and Bulgaria, where organised crime has a strong background, and the prospect of further EU enlargement underline the need for closer and more flexible criminal justice cooperation;
- strengthening the importance of human rights in criminal procedures favours the further harmonisation of the rights of all the parties involved;
- urgent calls for more democracy through the involvement of the European and national Parliaments in the legislative and control procedures;
- development of new forms of international organised crime, including sophisticated white-collar crime or crimes committed via the internet;
- imminent threat of terrorism (all the recent major terrorist attacks such as September 11, the Madrid train bombings or the London "7/7" bombings occurred after the drafting of the Treaty of Nice and were not reflected in primary law);
- continuous legal and illegal migration from former Soviet Union countries, Northern Africa, Asia or the Western Balkans.

The existence of an environment that is favourable for international crime is a *toll of democracy* and the gradual abolition of internal barriers in the European Union. On the other hand, as mentioned already in the introduction, its institutional system enables *closer criminal justice cooperation.* The CT provisions and princi-

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[80] Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, OJ L 210, 31. 07. 2006, p. 25, Article 18.

ples are certainly valuable indicators of the future development of the European criminal justice system, regardless of whether the CT enters into force.

The current third pillar legislative system is a very rigid one. The consensus is hard to reach, and if reached, because of the lack of sanction mechanisms, there are only very soft tools for fully implementing its results in practice. On the other hand, it suffers from an important democracy deficit because of the very weak role of the European Parliament (the lack of involvement of national Parliaments being a matter of national constitutional systems). Legitimacy on the one hand and flexibility on the other must be carefully balanced. As already mentioned, it seems necessary to develop new concepts recognized by all Member States, such as *European legitimacy*, which would still leave enough flexibility to respond to challenges of international organised crime.

The Commission has already called for,[81] and will surely continue to press for, the use of *the passerelle clause* contained in Article 42 of the TEU, by means of which the objectives of the CT could partly be reached. The use of *passerelle* could help to attain:

- *more efficiency* (QMV, effective means of enforcing Member States' engagement, complete jurisdiction of the ECJ);
- *more transparency* (single legal basis eliminating doubts resulting from recent ECJ jurisprudence, removing the democracy deficit);
- *more responsability* (involvement of the European Parliament and national Parliaments in the control of Eurojust and Europol.

However, it will not be easy to make the *passerelle clause* apply, as this cannot be done without unlocking the *double lock* of (1) unanimity in the Council and (2) approval by Member States in accordance with their constitutional rules.

The gradual abolition of real and legal barriers in favour of the basic freedoms (which remain at the heart of European integration) implies the gradual abolition of legal barriers between criminal jurisdictions as well. This abolition could be reached either within the EU's institutional framework or outside it. The rigidity of reaching it within the EU motivates some Member States to go further than others, an international convention being more flexible than enhanced cooperation. This can be well demonstrated in the case of the *Convention of Prüm* on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration, signed on 27 May 2005 by Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria. This form of further conventional cooperation is certainly beneficial to criminal cooperation, all the more so because it very clearly governs its relation to European law.[82] It may be quite a flexi-

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[81] See the Memorandum of the Commission of June 28, 2006, MEMO/06/254.

[82] According to its Article 47 the provisions of this Convention shall apply only in so far as they are compatible with European Union law.

ble way as well, because it can enter into force after it has been ratified by not more than two Contracting Parties (only between those who have ratified it).[83]

However, the way of international conventions results in the European Union criminal justice cooperation working at different speeds and in the fragmentation of the legal framework. The only way of preventing this seems to be a further enhancement of the mutual trust between all Member States and a reconsideration of the traditional doctrine of a close link between criminal law and State sovereignty. The internationalisation and globalisation of crime challenges this doctrine. To be effective, preventive and repressive measures to fight international crime should be taken at the level corresponding to the territory that is affected by this international crime. To promote mutual trust and to transfer part of the individual Member State's sovereignty to the European Union in order to participate in a collective sovereignty of a new quality seems to be the only way to create a more efficient, more transparent and more democratic system of European criminal justice cooperation.

[83] See the particular case of Article 50(1) of the Convention of Prüm (see http://www.libertysecurity.org/IMG/rtf/Convention_prum_fr.rtf).