

# A vision on the future of Europol

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*Obviously, we do not have a crystal ball writing this article. Still, it is worth the effort to perform a prospective study about the future of Europol, definitely with The Hague Program and the European Constitution in perspective.*

*This future is linked to the expected developments in the European Union concerning home affairs and justice. Since a long time, the political authorities are - especially within the framework of the European Union - by all kinds of initiatives trying to turn around the constantly sensed threat, especially concerning cross-border (organised) crime<sup>2</sup>.*

*After crises, and more particularly in the light of the terrorist attacks of September 11<sup>th</sup> 2001 (US) and March 11<sup>th</sup> 2004 (Madrid), big expectations were being created, also by the media, concerning the tackling of cross-border problems such as illegal immigration, trafficking of human beings and frontier-running, terrorism and organised crime.*

*Thus, in the framework of the Schengen Conventions - but also next to those - a varied pattern of different forms of co-operation in the field of judicial and police co-operation has originated in the course of time. This concerned at first incidental and later on more structured exchange of data, regular consultation and co-ordination, and operational co-operation about the fight against crime in general, terrorism, trafficking of drugs and weapons, fraud, and so on.*

*Next to this, a lot of informal networks remain to exist, which often leads to an overlapping and complex tangle of forums which influence the co-operation. Still, the intra-European co-operation gradually becomes the most dominant factor in this whole, and becomes more and more the inspiration for similar developments – also within the United Nations (for example the 2000 Treaty concerning organised crime).*

## The European acquis

After a slow start, the European co-operation has gained momentum. First, there was the European Convention on mutual assistance in criminal matters (1959), then the Benelux Treaty on extradition and assistance in criminal matters (1962), and later, the breakthrough came on the basis of the Schengen Convention (1990), next to a lot of other agreements which are – still – being concluded bilaterally.

During the last years, the European Union has continued to enlarge its role in realising co-operation in the field of police, customs and justice, and in developing a coordinated policy with reference to asylum, immigration and controls at the external borders. This tendency will continue by the reinforcement of a common space of freedom, security and justice by the Treaty establishing a European Constitution, signed in Rome on October 29<sup>th</sup> 2004. The Treaty establishing a European Constitution and the preceding Treaties of Maastricht (1992), Amsterdam (1998) and Nice (2001) have gradually given shape to a common judicial framework in the field

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<sup>2</sup> J. Bevers and C. Joubert, *Politiële samenwerking in Europa*, Amsterdam, Vrije Universiteit, 1993, 4.6 (1)

of justice and home affairs, and have led to the integration of policy areas and other matters within the European Union. Article III-158 sums up the specific means by which the general mean of police and judicial co-operation has to be given shape. It is striking that, imperatively, the Treaty uses the term “constitute”, and not “contribute to”. Three activities are mentioned. Firstly, a close co-operation between police services, customs and other competent authorities, direct as well as through Europol. Secondly, a more close co-operation between Judicial and other competent authorities. Thirdly, the mutual approximation ‘if necessary’ concerning criminal matters.

Since the European Council of Tampere of 1999, the policy in the field of justice and home affairs has been developed in the framework of a general action program. Although not all initial goals have been realised, a considerable and coherent progress has been made. The foundation for a common asylum and immigration policy was laid, the way was cleared for the harmonisation of border controls, the police co-operation has improved and, in the field of judicial co-operation, progress has been made by the elaboration of the principle of mutual recognition of judicial decisions and criminal judgments.

In the course of time, the EC has created a number of organs which now carry out more or less independently some duties, more particularly with reference to information management and inspections. Amongst others, it concerns the European Environment Agency (Copenhagen), the European Training Foundation (Turin), The Veterinary and Phyto-sanitary inspection Service (Dublin), The European Observatory of Drugs and Drug Addictions Laboratory (Lisbon), The European Medicines Agency (London) and the Office for Harmonisation in Internal Market (Alicante).

The first pillar relates to subjects like environmental damage, animal diseases, the quality of goods, traffic safety, and health and so on. Here, safety can be equated with the kind of safety sociologists talk about. The second pillar deals with external safety: the safety which is linked to war and peace. The third pillar concerns criminal law and internal security, although the precise content thereof is not entirely clear. In the framework of the third pillar, Europol and Eurojust are located in The Hague. Also, an independent organ was created which is responsible for the control of the protection of personal data which are in the possession of the institutions and organs (the European supervisor for data protection).

The first pillar is about for the Risicogesellschaft, the second about the conduct of war and the third about the fight against crime. Since more and more “cross-pillar” contamination or osmosis arose, this pillar-structure has been adapted by the Treaty establishing a European Constitution (hereafter: the Constitutional Treaty).

In line with the treaties, the European Union formulated different action plans throughout the years with the aim to structurally substantiate the co-operation:

- The Action Plan to combat organised crime (1997): aimed at intensifying the mutual assistance in criminal matters, the creation of a judicial network of national contact points and an extension of the role of Europol to provide support to the preparation and the conduct of investigations;
- The Action Plan on how best to implement the provisions of The Amsterdam Treaty (1998): this action plan insisted on an adequate judicial instrument for

police co-operation and for the definition of conditions and limitations of cross-border actions;

- The Action Plan of Tampere (1999): aimed at the creation of Eurojust and the Police Chiefs Task Force. It was also proposed to introduce at a large extent the mutual recognition of judicial decisions, among which the decisions which refer to the collection of evidence in pre-investigations in criminal matters and the creation of joint investigative teams;
- The Action Plan to prevent and combat organised crime (2000): this action plan is a strategic plan which served as a re-consideration of decisions taken earlier;
- The Action Plan to combat terrorism (2001): this action plan was adopted by the Council ten days after the attacks of September 11<sup>th</sup> and contained the recommendation for the Member States to ratify the treaties aimed at the fight against terrorism. It also contains the introduction of the European Arrest Warrant, in line with the agreements of Tampere aimed at the mutual recognition of judicial decisions. Europol was given the task to create a team of anti-terrorism specialists from the member states. This team is currently rebuilt into a structural part of Europol<sup>3</sup>.

In 2000, the member states of the European Union signed a Convention on the mutual assistance in criminal matters, more particularly aimed at controlled deliveries, infiltration and joint investigative teams<sup>4</sup>. Controlled delivery is not limited to the illegal trafficking of drugs – as is the case in the Schengen Convention – but remains to be executed according to the procedures of the requested member state. The regulation of infiltrators is aimed at infiltrations by officials; thus, infiltration by civilians is under this agreement not allowed. Joint investigative teams can be created for a certain aim and for a limited period of time, while the execution of the investigation is being done by virtue of the national law of the member state where the team is active.

So, a lot has changed in the last years concerning international co-operation of police and justice. To sum up, the following trends can be distinguished:

- Conservation of the principle of sovereignty as a basis;
- Big efforts to promote the (cross-border) co-operation, partly on the basis of bilateral agreements, but more and more based on international treaties, of which the Benelux Convention (Benelux Treaty on extradition June 27<sup>th</sup> 1962), the Schengen Treaty (1985, 1990) and the European Union Treaty are the most important ones;
- The police had a head start on international judicial co-operation, but during the last years the judicial co-operation has proceeded with great strides, initially based on treaties concerning judicial co-operation which were developed in the framework of the Council of Europe; now based on modern treaties such as the 2000 Convention on mutual assistance in criminal matters of the European Union and the 2000 Convention against cross-border organised crime;

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<sup>3</sup> European Council, Europol 86, November 8<sup>th</sup> 2002

<sup>4</sup> Also: Framework Decision of the Council of June 13<sup>th</sup> 2002 on joint investigative teams

- The police co-operation developed from the exchange of data and concrete but limited co-operation subject to rogatory letters to cross-border actions (Schengen) and recently joint investigative teams;
- Justice is more and more able to innovatively co-operate internationally via the transfer of proceedings in criminal matters, the transfer of sentences, and recently as the high point the introduction of the European arrest warrant;
- Recently international police (Europol) and judicial (Eurojust) organisations have been established, which not only guarantee information exchange and analysis – in line with the activities of Interpol since its creation in 1923 - but which also are able to play a co-ordinating role, and even to request to start or expand an investigation;
- It is striking that, with reference to the protection of the financial interests of the European Union, an executive service has indeed been created (OLAF), however with limited competences;
- A lot of expectations have been created by establishment of the Police Chiefs Task Force and the results of the latest meeting under the Dutch presidency give reason to believe that, after a difficult start during many years, a common vision has now been developed and that a plan has been drawn up to jointly, in a coordinated manner, combat criminal groups which operate across the borders (COSPOL<sup>5</sup>).

The so-called “approximation of criminal law”<sup>6</sup> is a huge step forwards too. Almost all possibilities concerning intergovernmental co-operation are now conventionally within the reach of police and justice, often and more and more even with the participation of Europol and Eurojust.

Article III-177 can also be seen as the basis for the development of a European police law, of which the (still small) core is now constituted by Europol (automatic exchange of data)<sup>7</sup>.

Still, efforts are being made to explore specific co-operation agreements (i.e. the new Schengen Convention and the renewed Benelux Convention<sup>8</sup>), which demonstrates that there are still specific needs which cannot or do not have to be solved in a European context (for example cross-border police operations and the collaboration in common offices).

Also, the practice within the European Union is less rosy than the political forum leads us to believe, especially because often – also in Belgium – the ratifications are a long time coming, the national laws significantly weaken the European ambitions (for example the joint investigative teams), and as was said by C. Fijnaut, because of the “getting stuck sometimes in nice words”<sup>9</sup>. His remark specifically refers to the plan for a common framework in which the conditions under which investigators can

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<sup>5</sup> Comprehensive Strategy for the Police

<sup>6</sup> There is the framework decision on terrorism (*PB. L.* 2002, 164), the framework decision euro falsification (*PB. L.* 2002, 164), payment card fraud (*PB. L.* 2001, 149), child porn (*PB. L.* 2001, 206) and the fight against racism and xenophobia (*PB. C.* 2001, 075)

<sup>7</sup> R. Barents and L.J. Brinkhorst, *De grondlijnen van het Europese recht*, Deventer, Tjeenk Willink, 2001

<sup>8</sup> Approved by Law February 13<sup>th</sup> 2005, *B.S.*, March 15<sup>th</sup> 2005

<sup>9</sup> C. Fijnaut, *De normering van het justitiële optreden van buitenlandse politieambtenaren op Nederlands grondgebied*, Clingendael, 2004, not published

operate abroad would be formulated. A lack of confidence, also after the enlargement of the Union, hampers operational co-operation, still blocks the way to the exchange of information and raises questions concerning the protection of the privacy in the use of the many electronic databases with personal data. Transnational crime often moves easily across internal borders, while police and justice still hardly provide an effective and common approach<sup>10</sup>. Illustrating examples are the difficulties encountered in the creation of the first joint investigative teams, where legal (national) imperfections as well as the old culture remain the main obstacles.

## Europol now

Europol was founded on the basis of article K1.9 of the Treaty of Maastricht, which states that “police co-operation for the purpose of preventing and combating terrorism, unlawful drug-trafficking and other forms of international crime” must be realised. The creation of Europol can be brought down to a German initiative. Even before the Treaty on the Union had entered into force, the member states had already started the creation of this service in the form of a European Drug Unit which was based in The Hague. It consists of liaison officers from different member states and is operational since 1994.

From the beginning, Europol had an informative, supporting and analytical role. This becomes clear out of the declaration on the police which is annex to the convention, and which only talks about databases, support of the national investigations, analysis of information, the development of preventive strategies ...<sup>11</sup>. The Europol Convention<sup>12</sup> states in its article 2 that “the objective of Europol shall be (...) to improve (...) the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved and two or more Member States are affected ...”.

Within five years after the Treaty of Amsterdam had entered into force, Europol had to be enabled to facilitate and support the specific investigative actions of the competent authorities and to facilitate the co-ordination, also of operational actions of joint teams in which representatives of Europol play a supporting role. It becomes again clear, as stated Zanders<sup>13</sup>, that only a supporting and not an independently executive competency was foreseen for Europol. Also with reference to the co-ordinating role, it can be said that this is very important out of the European thought, but that the real impact right now is very limited, since a lot of police officers on the field still work bilaterally (the so-called “old boys network”).

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<sup>10</sup> D. Broeders and M. Sie Dhian Ho, *Voorbij fort Europa? Vrijheid, veiligheid en rechtvaardigheid in een Europa-brede Unie*, Clingendael, 2004, not published

<sup>11</sup> W. Bruggeman, “Policing in Europe: a new wave?”, in M. Den Boer, *The implementation of Schengen*, Maastricht, European Institute of Public Administration, 1997, 111-128

<sup>12</sup> Council Act July 26<sup>th</sup> 1995 on the Convention based on article K.3 of the Treaty on the establishment of a European police office, *PB. C*. November 27<sup>th</sup> 1995, afl. 316

<sup>13</sup> P. Zanders, “De Europese politie-eenheid: Europol”, *Handboek politiediensten*, Kluwer Editorial, 1999, afl. 49, 104 (103)

In the mean time, Europol had a slow and sometimes difficult start<sup>14</sup>. Above all, there had to be sought for quality within the organisation before the member states were willing to use Europol as a valuable instrument for international co-operation. It was especially a shame that the adoption of the Europol Information System was a long time coming, for all different kinds of reasons, and that it will only be operational now in 2005. It is remarkable that the creation of joint investigative teams is being watched with great reserves. Also, the legal preparation at a national level in some countries is inadequate<sup>15</sup>.

Nevertheless, one can descry a trend that co-ordinating tasks can sometimes evolve into executive tasks. The recent confirmation by the Council that there was to a considerable extent an agreement on the participation of Europol in joint investigative teams, and on the right of Europol to ask the member states to start an investigation in specific cases, is a first but certain step on the road to a more executive Europol. And all this in spite of the limitations which – especially in national law - are being initiated in the practise of the European instruments.

Still, rather than to continue introducing more and often bureaucratic treaties and other decisions, I plead to strive for the acceptance of the Scandinavian flexibility in substantiating the willingness and the culture to co-operate. Thus, we can only hope that, even without the European Convention and The Hague Program, Europol will be a little more “desired” than tolerated.

## The European Convention

The Conventional Treaty is born under an unlucky star. On the one side, a lot of fantasizing has been done, at least according to the Dutch Minister of Foreign affairs Van Aartsen. On the other hand, the real situation, and especially the lack of co-operative culture within the member states still forces to some modesty<sup>16</sup>.

Although the conventional texts sound ambitious, the future perspective is highly counterbalanced by the rigid decision making process which has to accompany the acceptance of the great innovations.

The Constitutional Treaty<sup>17</sup> creates a space of freedom, security and justice, which comprises police co-operation. This is not an exclusive competence of the European Union such as the currency policy and the customs union, but it is a shared competence of the Union and the member states. This still departs from the principles of subsidiarity; solidarity in respect of the common policy in the field of asylum, immigration and external borders; and mutual recognition of judicial decisions in criminal and civil matters.

The Treaty states in article III-276 that “ Europol’s mission is to support and strengthen action by the Member States’ police authorities and other law enforcement

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<sup>14</sup> W. Bruggeman, “Europol: gewild of gedoogd?”, *Panopticon* 2004, 57-71

<sup>15</sup> Statewatch, *UK is not complying with the EU framework on JITs*, March 24<sup>th</sup> 2005

<sup>16</sup> P. Van Grinseven and J. Rood, *Het institutionele evenwicht na de Europese conventie*, Clingendael, 2005, not published

<sup>17</sup> Approved on June 18<sup>th</sup> 2004 by the Intergovernmental Conference of the Heads of states and the Heads of Governments

services and their mutual co-operation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

European laws shall determine Europol's structure, operation, field of action and tasks. These tasks may include:

- The collection, storage, processing, analysis and exchange of information forwarded particularly by the authorities of the member states or third countries or bodies;
- The co-ordination, organisation and implementation of investigative and operational action carried out jointly with the member states' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.

European laws shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with the member states' national parliaments. Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the member states whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities".

It is interesting to read this text together with article III-274: "In order to combat serious crime having a cross-border dimension, as well as crimes affecting the interests of the Union, a European law of the Council of Ministers may establish a European Public Prosecutor's Office from Eurojust.(...) The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of and accomplices in serious crimes affecting more than one member state and of offences against the Union's financial interests, as determined by the European law provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the member states in relation to such offences".

Thus, the operational competences of Eurojust are being expanded and described more precisely. Contrary to the agreements in the Treaty of Nice, where was stated that Eurojust could ask a member state to start an investigation without that member state being obliged to do so, Eurojust itself can now start a criminal investigation, suggest that the member states institute proceedings and coordinate the criminal investigation and the proceedings which have been carried out by the competent authorities. The actions of Eurojust must be in accordance with the fundamental rights and can be submitted to a judicial control by the European Court of Justice.

The Constitutional Treaty also states (art. III-271) that the Union can define criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions in ten areas: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.

With reference to police co-operation, the rules for the co-operation between the competent authorities (art. III-275) reach as far as the competencies which are

recorded in the current EU-Treaty. Nevertheless, the rules for the functioning of Europol are being changed. While article 32 of the current EU-Treaty states that every operational action of Europol has to be executed in consultation with the member states and that only the national authorities decide about the use of coercive measures, article III-276 reinforces the competencies of Europol. In case of serious crime affecting two or more member states, terrorism and forms of crime “which affect a common interest covered by a Union policy”, Europol has to support and strengthen action by the member states’ police authorities and other law enforcement services. The application of coercive measures shall be the exclusive responsibility of the competent national authorities. The police co-operation is not - neither in the constitutional treaty – covered by community law, although the way to harmonisation is kept open by enumerating the offences for which a European framework law can lay down minimum requirements.

However, confusion remains to exist on the ambitions of the Constitutional Treaty concerning the role of Europol, Eurojust and the standing Committee of article III-162. Minister Donner remarked that the articles on Europol and Eurojust depart from the principle of co-ordination and co-operation between the different national jurisdictions. He is convinced that these can be expanded and improved in a lot of ways<sup>18</sup>. Essential for the effectiveness of the co-ordination is whether, and to what extent the co-operation is compulsory. Are member states being forced to start investigations at the instigation of Europol or Eurojust, or can they disregard the request? The compulsory character however, does not match the principle that cases cannot be imposed unilaterally upon the states. Moreover, the compulsory character can lead to tension when prioritising cases of national interest.

Thus, the JAI co-operation is not only subject to (geographical) expansion, but especially to deepening. Next to the new framework of the Constitutional Treaty, the tasks of the European Union have been redefined. Also, there is apparently a major concern for effectiveness and legitimacy. The description of the task of Europol has to be replaced by a new treaty, in which the role of Europol in the international co-operation must be more clearly defined. Also, Europol will be connected more closely to Eurojust and vice versa.

However, as long as no real European criminal law nor a European judicial system exist, one must not dream, but one has to build on a more effective co-operation within the margins that have now been designed.

## **The Hague Program**

In 2004, the Council has adopted a new multi-annual program in the area of “freedom, security and justice”: The Hague Program<sup>19</sup>.

The Hague Program covers all aspects of policy – the external dimension included – of the area of freedom, security and justice, namely fundamental rights and citizenship, asylum and immigration, border control, integration, fight against terrorism and organised crime, judicial and police co-operation and civil law.

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<sup>18</sup> Speech at the official opening of Eurojust on April 29<sup>th</sup> 2003 in The Hague

<sup>19</sup> Council of Europe 13993/04: European Commission, November 5<sup>th</sup> 2004, 14292/04

This program reflects the ambitions which are being stated in the Constitutional Treaty and contributes to the preparation of the Union for the entering into force thereof. It continues building on the program of Tampere and on the so-called “first generation” measures. It was drawn up on the basis of this Constitutional Treaty, but the fact remains that, as long as the Constitutional Treaty has not entered into force, the existing treaties contain the legal basis for the actions of the Council. With reference thereof, the Council of Europe is of the opinion that it is very important to elaborate adequate European legal instruments, to strengthen the practical and operational co-operation between the national authorities involved, and to execute the agreed measures in time. Thus, efforts have been made to set off the weaknesses of the existing co-operation, without affecting the principle of sovereignty by – where possible and needed – making adjustments.

A first lesson which is learnt in The Hague Program is the need for adequate and timely execution and evaluation (‘scoreboard’) of all planned measures in the field of freedom, security and justice. These evaluations will be started from July 1<sup>st</sup> 2005 on. Also in 2005, practical methods will be developed to promote a timely execution, also – and maybe especially – at a national level.

The European Commission (indeed) is mandated to elaborate proposals concerning the role of the European Parliament and the national parliaments in the evaluation of the activities of Europol and Eurojust. These proposals have to be introduced as soon as the Constitutional Treaty has entered into force.

Europol is specifically mentioned several times in The Hague Program.

### ***Border controls and the fight against illegal immigration***

In the framework of the Agency for Border Management and in close co-operation with Europol and Eurojust, the member states have to improve their common analysis of migration routes, of practices of frontier-running and trafficking of human beings and of the networks that are active in that area. Efforts have to be made for the connection and co-operation (interoperability) of the Schengen Information System (SIS II), the Visa Information System (VIS) and Eurodac.

### ***Improvement of the information exchange***

From 2008 on, the exchange of law enforcement information has to be based on the principle of “availability”. This means that, throughout the Union, a law enforcement officer of a member state can, from another member state, receive the information which he needs for the performance of his duties. The law enforcement agency of the requested state makes that information available for the indicated purpose, taking into account the interest of the ongoing investigations in the requesting state. Without prejudice to the running initiatives (draft framework decision on the simplification of the information exchange between the member states of the European Union, namely with reference to serious crime such as terrorism), the Commission is requested to introduce proposals for the application of the principle of availability before the end of 2005.

Full use has to be made of the new technologies in the methods of information exchange. They have to be adapted to the type of information, i.e. by mutual access to; by connection and co-operation of the national databases; or by direct access – also for Europol – to the central EU databases, like the SIS. The condition for all of this is that an added value thereof has been demonstrated.

## ***Terrorism***

Preventing and combating terrorism<sup>20</sup> are central points in The Hague Program. The activities of the member states have to be aimed at the security of the Union as a whole, which means that the competencies and the information of intelligence services and law enforcements agencies should be available to other member states, and that cross-border observation must not be interrupted. These activities have to be deployed in co-operation with Europol and Eurojust. Next to these activities, a strategic analysis of terrorist threats will be made; measures are being taken to fight the financing of terrorism; proposals are being introduced to improve the security of the storage and transport of explosives and to ensure the traceability of industrial and chemical precursors; and efforts will be made to define measures to give the victims of terrorism an adequate protection and support. Europol is being asked to develop a network of experts in anti-terrorism who are available for technical assistance in the training and instruction of their authorities.

All aspects of the Declaration of the Council of Europe of March 25<sup>th</sup> 2004 and of the EU-Action Plan on the fight against terrorism have to be executed in a short term, using Europol and Eurojust as intensively as possible.

Starting January 1<sup>st</sup> 2005 SitCen will submit to the Council a strategic analysis, which has been elaborated on the basis of information of the intelligence services and law enforcement agencies and, if necessary, of Europol.

## ***Police co-operation***

An effective combat of cross-border organised and other serious crime and terrorism requires a closer practical co-operation of the police and custom authorities of the member states among themselves and with Europol.

The member states are being urged to enable Europol to fulfil its key role together with Eurojust, by ratifying the pending legal instruments (before the end of 2004), by supplying all high value information and by encouraging the close co-operation between the competent national authorities and Europol.

Starting January 1<sup>st</sup> 2006, Europol has to replace its situation reports on crime by yearly “threat analyses” of serious organised crime, on the basis of contributions of the member states, Eurojust, and the Police Chiefs Task Force. These analyses will be used by the Council when deciding on the yearly strategic priorities.

As soon as possible after the entering into force of the Constitutional Treaty, and at the latest by January 1<sup>st</sup> 2008, the Council has to adopt the European Law on Europol which is prescribed in article III-177 of the Constitutional Treaty, taking into account all duties which have been assigned to Europol. Until then, Europol has to improve its own functioning by fully using the co-operation agreement with Eurojust.

Every year, Europol and Eurojust have to report to the Union on their common experiences and specific results. Further, Europol and Eurojust have to stimulate the use of and their own participation in the joint investigative teams of the member states. The member states, with the support of Europol, have to strive towards an

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<sup>20</sup> Council of Europe, Declaration on the fight against terrorism, approved on March 25<sup>th</sup> 2004, doc. 7906/04, 6

improvement of the quality of their investigative data. Europol must also advise the Council about methods to improve the quality of the data. The Europol Information System has to be put into operation without any delay.

Europol has to be appointed by the member states as the central bureau of the Union for the falsification of the euro, in the sense of the international Convention on counterfeiting<sup>21</sup>.

Europol and Eurojust have to stimulate the member states in using joint investigative teams. As for the member states, they appoint national experts in the area of joint investigative teams.

The Council asks the Commission to formulate proposals for a further expansion of the Schengen acquis with reference to the operational co-operation. The member states, with the help of Europol, have to work on the improvement of the investigative data. The Europol Information System has to be put into operation and “best practises” are to be exchanged in the area of forensic research and the protection of information technology.

The member states have to intensify and better coordinate the police co-operation, and more attention has to be paid to insight in the functioning of judicial systems and organisations of other member states. Standards and modules with reference to the practical aspects of the police co-operation in EU- context have to be developed in co-operation with the European Police Academy before the end of 2005.

### ***Further on***

- *Judicial co-operation in criminal matters*: the continuing development of judicial co-operation in criminal matters is crucial for an adequate follow-up of investigations by the investigative authorities and by Europol
- *Eurojust*: an effective combat of cross-border organised and other serious crime and terrorism requires co-operation in and co-ordination of the investigations and, where possible, focussed prosecutions by Eurojust in co-operation with Europol
- Eurojust has to maximise the use of the co-ordination agreement with Europol and has to continue the co-ordination with the European Judicial Network and other partners
- The Council wants more attention for and co-ordination in the approach of cross-border crisis situations
- The Council has to establish a standing Committee for the operational co-operation in the area of internal security. However, it is not clear whether the standing Committee (art. III-162) operates out of an operational, strategic or political prospective. The establishment of this committee is being prepared by half-yearly meetings of the chairs of the strategic Committee immigration, borders and asylum, respectively the Committee of article 36 (CATS) and the representatives of the Commission, Europol, Eurojust, the EBA, the European Police Chiefs Task Force and SitCen<sup>22</sup>.

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<sup>21</sup> Geneva, April 20<sup>th</sup> 1929

<sup>22</sup> SitCen is the European “situation centre” which analyses threats. SitCen keeps close contact with the “situation centres” of the NATO, the OECD and the United Nations

- In the area of crime prevention, the European network concerning crime prevention has to be professionalized and strengthened. The Commission wants instruments to be available for the collection, analysis and comparison of information with reference to crime, victims of crime and the respective tendencies in the member states, for which national statistics and other sources of information are being used. Eurostat is being charged with the definition and collection of the data.
- In co-operation with the Commission, Europol, Eurojust, the European Police Chiefs Task Force, the European Prevention Network (founded in 2001) and the European Police Academy, The European Council is developing a strategic concept with reference to the fight against cross-border crime at EU level.
- The Drugs Strategy 2005-2012 has to be implemented and here as well, an imported role has been assigned to Europol in co-operation with the Drugs Observatory in Lisbon.

The Hague Program certainly shows a clear intention to better organise and reinforce the European police and judicial scenery, with or without the Constitutional Treaty. One has to add however that without Constitutional Treaties, The Hague Program remains a declaration of intent which in many ways lacks the legal basis to become reality. The European Council did indeed, without running ahead of the financial framework 2007-2013, point out that the financial consequences of the multi-annual plan for the area of freedom, security and justice have to be given due consideration. One can hope that the national governments will do so as well at a national level.

Not only is the position of Europol being reinforced, but Europol is also more and more being imbedded in the co-operation structures which are being introduced in the European Union. Of course, everything will depend on the degree of quality which Europol can demonstrate. It will also depend on the member states' willingness to fully support the Europol co-operation, which is always a problem of "willing" and "being able". A shift of the police culture is essential.

Thus, Europol absolutely has to continue being the centre of "intelligence" par excellence. The question whether Europol will also become the centre of "evidence" will depend on the practical realisation which is given to these decisions, and on the content which is given to the co-operation with Eurojust. In search of possible scenarios, different models arise:

- The developing of a genuine European institute, where someday all European components of police co-operation are gathered (Europol, OLAF, Cepol, the famous European Gendarmerie, and - why not - the Schengen Computers), whether or not steered and led by the European Police Chiefs Task Force;
- The creation of a structural co-operation between these components, still co-ordinated by the European Police Chiefs Task Force;
- The mere implementation of The Hague Program without further structural interventions.

Probably, we will have to manage for a while with the third scenario. Moreover, the first scenario is not even really imbedded in the Constitutional Treaty.

The approach of the euro counterfeiting will remain a test case to find out to what degree the European member states are willing to establish and operationalise Europol. Here as well, the co-operation (competition?) between Europol and OLAF will remain an issue.

### ***Conclusion***

It is clear that the European Union keeps on believing in the principle of sovereignty and in solid partnerships, supported by new organisations and initiatives. The political belief in the future of Europol remains strong, notwithstanding the fact that Europol apparently has difficulties in obtaining its politically and legally assigned position. Thus the European co-operation remains a learning process during which fundamental changes and adaptations of the treaty are regularly being made, while not always realising enough depth in the existing partnerships and possibilities for co-operation.

The tendency to harmonise the regulations, combined with the more far-reaching competencies of Europol and Eurojust and the changes in the decision-making procedure for the aspects of police and judicial co-operation in all respects shows a Europe that is moving fast towards a “Europeanised” approach of crime. Fijnaut also remarks that the subject “police and judicial co-operation” no longer constitutes a separate title, but is covered by the title “internal security”. This incites him to believe that the ambitions of the European Union reach further than an expansion and intensification of the co-operation between the member states. The suspicion that we are gradually evolving towards a harmonisation of the national legal systems<sup>23</sup> arises. The Hague Program is very ambitious as far as the future of Europol (and Eurojust) is concerned. Other possibilities for intergovernmental co-operation than the ones which are summed up in the Program do not exist.

The question whether there is a need for an executive police is not new. Articles which try to answer this question have regularly been published. In a lot of cases, the authors have motivated the answer in connection with the question whether there is a need for a European Prosecutor, a so-called “corpus juris” and a European criminal justice.

A few supporters of a real European space have pleaded for such an initiative. Most were against it or kept open their options. The police services usually use the same arguments as they do when they defend or obstruct the establishment of a national criminal investigation department.

Yet, I believe that there is room for a limited European police; limited in competencies as well as in criminal areas. Creating a European police which is competent for the euro counterfeiting could be a first impulse. On the model of the Dutch national criminal investigation department, which is supposed to co-operate with the regional and supra-regional criminal investigation departments, this European police should co-operate with the national police services.

The realisation of a European Prosecutor’s Office is however a prerequisite for such an initiative. On the model which is being used by OLAF, the prosecution would then

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<sup>23</sup> C. Fijnaut, *De normering van het justitiële optreden van buitenlandse politieambtenaren op Nederlands grondgebied*, Clingendael, 2004, not published

be reserved to the national authorities, with due respect for the national laws and regulations.

First however, we should await whether the European Constitution will enter into force, and whether and at which rate The Hague Program will also be realised at a national level.