EU and International Crime Control

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*Marc Cools, Dusan Davidovic, Hilde De Clerck and Eddy De Raedt*

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## The anti money laundering complex on a crime control continuum: perceptions of risk, power and efficacy

**Antoinette Verhage**

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"Governance of Security" – Monitoring contemporary security issues

The governance of security has undergone profound changes over the past thirty years. Security has become a commodity in our mind-set and daily life and the governance aspect of security is more complex and expanded than ever before. Since 2007, the Research Unit Governance of Security of the Ghent University Association is a critical observer of the new developments in governance of security and addresses the complex question regarding efficient management and control (governance) of contemporary security issues. The touchstones for these observations are human rights and the implications of insecurity (policy) on human rights.

The GofS association research unit is interdisciplinary composed, consisting of three research units: (1) the Research Unit Social Analysis of Security of the Department of Criminal Law & Criminology, Faculty of Law of Ghent University (SVA) (co-directors Marc Cools, Lieven Pauwels and Paul Ponsaers), (2) the Institute for International Research on Criminal Policy of the Department of Criminal Law & Criminology, Faculty of Law of Ghent University (IRCP) (co-directors Brice De Ruyver, Tom Vander Beken and Gert Vermeulen), and (3) the Research Unit Governing and Policing Security (GaPS) of the Department of Business Administration and Public Administration of Ghent University College (director Marleen Easton). All members of these research-units participate in the GofS Research Unit since 2007 (Consult: http://www.gofs.ugent.be).

Within this interdisciplinary composed association research unit GofS develops three key research lines. The first research line focuses on the change of the concept of insecurity/security (the interaction between objective and subjective feelings of insecurity and the notions of nuisance, of victimisation, of mistrust in governments, ... alongside the changing areas of social relevance which the idea of insecurity has become associated with in late modern society (from traditional forms of criminality to food safety, environmental threats, corruption, terrorism).

The second research line sheds light on the administrative and judicial policies which relate to the changing paradigm of insecurity/security, paying particular attention to the problems of integration between: public versus private conduct of policy; centralised versus decentralised conduct of policy; international, rural and local conduct of policy and the development of sector specific policies in contrast to integral or integrated policy making.

The third research line concentrates on the implications for law and order and crime prevention policy execution of this evolving paradigm of insecurity/security, with a specific focus on the decreasing rigidity of organisational borders and competence displacement in its implementation with reference to police forces; administrative supervision holders; new security professions; the army; information services; inspection and detection services; private security, guarding and detection, self-regulating agencies and active citizen participation.

The GofS Research Unit wishes to disseminate the results of the research it conducts in this research area as widely as possible. It is with this intention that the group started the GofS publication project. On the one hand, GofS will encourage the writing of English contributions by GofS-members in the “GofS Research Paper
Topical Issues in EU and International Crime Control

Series. On the other hand, it is the intention to occasionally publish English or Dutch GofS research reports in the “GofS Research Report Series”. With this initiative the Governance of Security Research Unit contributes to a better understanding of contemporary governance of security by presenting recent research results and scientific reflections, by devising new approaches and by re-evaluating criminology’s heritage. It implies a new openness with regard to other disciplines and to the normative questions resulting from the commission of crime and the reaction to it by actors in the criminal justice system and beyond.

After release in early 2009 of an initial set of two volumes in the GofS Research Paper Series, the editorial board is proud to issue a set of two more volumes, comprising papers (again all reviewed by international peers, the list of which is set out in the appendix) clustered around two well-profiled research axes. Volume 3 provides new empirical data, theories and analyses on Safety, Societal Problems and Citizens’ Perceptions. Its table of contents is provided below the brief description of the papers comprised in the current book, which constitutes Volume 4, focusing on topical issues in EU and International Crime Control. The first five articles deal with intrinsic EU criminal policy aspects, including in its transatlantic cooperation with the US. The remaining three articles deal with anti money laundering control, counter-strategies of criminal organisations and police torture.

January 2010, The editorial board:


Volume 4: Topical Issues in EU and International Crime Control

Appreciating approximation. Using common offence concepts to facilitate police and judicial cooperation in the EU

Wendy De Bondt and Gert Vermeulen

The EU’s Justice and Home Affairs area encompasses a variety of policy areas, goals and means to achieve those goals. One of its components is approximation, i.e. the development of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties. Approximation can be pursued to the extent necessary to support police and judicial cooperation. This contribution analyses the link between approximation on the one hand and police and judicial cooperation on the other hand. Based on three case studies, the analysis reveals that the approximation acquis is often neglected or at least not used to its full potential. The incoherence in the use of the acquis proofs to be counterproductive and causes the progress made to crumble away. In search for alternatives, the potential of EU LCS – the EU level offence classification system – is part of the plea for consistency. Police and judicial
cooperation would benefit from a well founded and well considered strategic policy plan in which the added value of approximation is appreciated and the *acquis* used to its full potential.

**Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union**

*Gert Vermeulen and Laurens van Puyenbroeck*

The underlying research question of this article basically deals with a comparison of the possible options to take legal action at EU level in order to provide suspects and defendants within the EU with a better procedural protection. At present measures in this regard at EU level are primarily concerned with the introduction of common minimum standards. It should be considered not only to continue these approximation efforts at a wider and more specific scale (meaning the adoption of rights that go beyond the minimum level and which take account of the specific characteristics of intrusive investigative measures such as house search or interception of telecommunications) but also to introduce a mutual recognition of domestic procedural safeguards. Through a profound legal analysis the authors see such *lex mitior* option as a necessary counterbalance for the free movement of evidence as currently being envisaged at EU level.

**Shaping the competence of Europol. An FBI perspective**

*Alexandra De Moor and Gert Vermeulen*

In two parts and a conclusion, this contribution elaborates on the overall-question: How to shape the competence of Europol? The main questions concern the trigger to extend the competence of Europol time and again and the genuine need to do so. The non-existence of definitions of Europol-crimes leads to the result that the competence of Europol is being interpreted in different ways throughout the EU. The authors plea to formally recognise the readily available harmonised minimum definitions for forms of crime both the Europol Convention and the Europol Council Decision leave (largely) undefined. To test their thesis they turn to the US, where the FBI provides an interesting perspective, largely confirming that federal notions and definitions, emanating ‘federal competence worthiness’ shape the competence of the FBI – like it should be the case for Europol.

**Towards a coherent EU policy on outgoing data transfers for use in criminal matters? The adequacy requirement and the framework decision on data protection in criminal matters. A transatlantic exercise in adequacy**

*Els De Busser and Gert Vermeulen*

Safeguarding the EU’s standards on personal data protection encompasses a protection for the exchange of personal data between the member states and a protection for the exchange of personal data with third states or institutions. After all, the latter are not necessarily bound by the same data protection principles. Therefore, an assessment of the recipient state or institution regarding the adequacy of its level
of data protection is a prerequisite for guarding the EU’s data protection standards. Nevertheless, recent developments in the EU’s legal instruments and cooperation agreements, demonstrate a lack of a common attitude towards this prerequisite. The exceptional position that the US holds with regard to personal data exchange with the EU, Europol and Eurojust for the purposes of detection, investigation and prosecution of criminal offences is particularly unusual given the differences between the EU and the US data protection standards.

The international private security industry as part of the European Union security framework: a critical assessment of the French EU presidency White Paper

Marc Cools, Dusan Davidovic, Hilde De Clerck and Eddy De Raedt

This article critically assesses the white paper ‘Private security and its role in European security’ from a threefold – scientific, economic and political angle. This cannot be done without referring to the French EU presidency in 2008, the private security in France and the existing security discourses of the French president Sarkozy. This white paper, as the joint work effort of the Confederation of European Security Services (CoESS) and the Institut National des Hautes Etudes de Sécurité (INHES), is an important tool for further criminological reflections and research. The authors briefly summarize the white paper and describe its genesis by CoESS and INHES. It is still unclear which new initiatives the future EU presidencies will take to the private security industry. Nonetheless, the authors conclude with ‘another’ critical criminological view vis-à-vis the reality of private security in the EU.

The anti money laundering complex on a crime control continuum: perceptions of risk, power and efficacy

Antoinette Verhage

This article aims to discuss the general conclusions of a PhD research on anti-money laundering and compliance. One of the conclusions related to the finding that the fight against money laundering has resulted in an anti-money laundering complex, in which public and private actors are united in the fight against crime. This public-private approach, however, results in a number of dilemmas, mainly in the field of democratic control and human rights. In this contribution, the author has a look at this system as a whole, and discusses its underlying motives and theoretical assumptions. Based on the diversity of interests represented in the system, the system has impact on several levels, which brings about a variety of side-effects and problems. The author stresses the specific approach that the anti money laundering policy represents, specifically in comparison to the tackling of more traditional types of crime, and tries to position the anti money laundering system on a continuum of crime control.
Police officers’ views and fears about some criminals’ threatening reactions to police investigations

Fien Gilleir

This contribution focuses on the use of counter strategies of organized crime in Belgium. The most important aim of this article is to gain an insight in the phenomenon of organized crime and the way in which criminal organizations exert their influence against people who are involved in a criminal case. After all, police officers, magistrates as well interpreters, witnesses, informants etc often hold a precarious position in relation to offenders who have their own, conflicting interests. Since the nineties, the Belgian police may make use of special police techniques in order to engage the fight against organized crime. Whilst the competencies of the police increased, the members of criminal organizations have developed a series of strategies in order to reduce undesired interference of government. It is the use of these tactical counter strategies the author focuses on. Particular attention is given to intimidation of and violence against police officers, because of their paralyzing influence at different stages of the criminal justice system.

Police torture in China and its causes

Wei Wu and Tom Vander Beken

In the past twenty years, issues about human rights in criminal proceedings have attracted extensive attention from Chinese criminal justice researchers. More and more scholars have studied the use of torture by police in criminal investigations and openly debated on its causes. The authors review a selection of research articles on police torture in China published in Chinese language academic journals over the past 15 years (1994-2008) and recent literature on Chinese policing and criminal procedure in English. The article summarizes the current academic knowledge on police torture in criminal investigations and its causes in China and concludes by suggesting some future research directions.

Volume 3: New Empirical Data, Theories and Analyses on Security, Societal Problems and Citizens’ Perceptions

Different measures of fear of crime and survey measurement error – Wim Hardyns and Lieven Pauwels

Mobility and distance decay at the aggregated and individual level – Stijn Van Daele

Exploring the role of exposure to offending and deviant lifestyles in explaining offending, victimisation and the strength of the association between offending and victimisation – Gerwinde Vynckier and Lieven Pauwels
“Safety: everybody’s concern, everybody’s duty”? Questioning the significance of ‘active citizenship’ and ‘social cohesion’ for people’s perception of safety – Evelien Van den Herrewegen

Institutional distrust in Flanders. What is the role of social capital and dimensions of discontent? – Maarten Van de Velde and Lieven Pauwels

Conceptualising the role of police culture in change strategies – Marleen Easton and Dominique Van Ryckeghem

The view of the police on community policing in Belgian multicultural neighbourhoods – Marleen Easton and Paul Ponsaers

Population density, disadvantage, disorder and crime. Testing competing neighbourhood level theories in two urban settings – Caroline Mellgren, Lieven Pauwels and Marie Torstensson Levander

The continuum of conflicts of interest: from corruption to clubbing and the underlying risks at victimisation – Gudrun Vande Walle

Corruption as a judgement label – Arne Dormaels

Towards an integral and integrated drug policy: pearls and pitfalls – Liesbeth Vandam, Charlotte Colman, Freya Vander Laenen and Brice De Ruyver

Explaining violence and aggression on public transport from the perpetrator’s perspective – Literature on typology and etiology applied – Neil Paterson, Patrick Moreau, Gert Vermeulen and Marc Cools

Myths and reality in the history of restorative justice – Nikolaos Stamatakis and Tom Vander Beken
Appreciating Approximation

Using common offence concepts to facilitate police and judicial cooperation in the EU

Wendy De Bondt
Gert Vermeulen

1 Introduction

Approximation is the adoption of measures establishing minimum rules related to the constituent elements of offences and sanctions. It aims at overcoming legal differences and creating the common ground required for cooperation. This contribution is part of a PhD research centred around necessity and feasibility of approximation of offences and sanctions. The central research question in this contribution is whether and to what extent approximation of the constituent elements of criminal behaviour is necessary to ensure the smooth functioning of both police and judicial cooperation in criminal matters in the European Union. Hence, police and judicial cooperation on the one hand and approximation on the other hand, are the lead concepts in this contribution. The lack of coherence in European criminal policy with regard to those concepts will be demonstrated and a remedy will be suggested.

In this introductory section, first, the concept of approximation will be introduced. Second, the authors’ vision with regard to the discussions found in literature will be elaborated on. Third, the choice of case studies to analyse the development of police and judicial cooperation will be underpinned.

1.1 Approximation

First “approximation” will be introduced. Besides “approximation”, terms such as “harmonisation”, “convergence” and “coordination” appear both in literature and legal texts (Klip, 2009; Nelles, 2002; van der Wilt, 2002; Vander Beken, 2002; Weyembergh, 2006). Most often they are used as synonyms, but occasionally distinction is made between them, however without sufficiently explaining the nature of the distinction (Bantekas, 2007).

In essence, approximation is not a legal term as it is most commonly used in exact sciences and mathematics. There it is defined as the inexact representation of something that is still close enough to be useful. Surprisingly this definition turns out to be more useful in the context of law than one might expect. In the context of law, Vignes defined approximation of laws as reducing the distance between two objects (Weyembergh, 2004), the aim of which is of course to eliminate differences that render justice systems incompatible and thus cooperation cumbersome or even impossible.
This consideration will form the basis of how approximation is perceived. For the purpose of this contribution, approximation is defined as a technique used to overcome legal differences and create the common ground required for cooperation.

The possibility to approximate offences and sanctions was formally introduced at EU level in Artt. 29 and 31(e) TEU as amended by the Amsterdam Treaty. They allowed for the adoption of measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. To that end Art. 34 TEU introduced the framework decision. The Union’s overall objective is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. Approximation, where necessary, is considered to be one of the means to achieve that objective.

In literature, a series of discussions are held with regard to the effectiveness of framework decisions (Tadic, 2002), other possible instruments used to approximate (Bantekas, 2007; Weyembergh, 2005a), the functions of approximation (Bosly & Van Ravenstein, 2003; Kaiafa-Gbandi, 2001; Spencer, 2002; Weyembergh, 2005b), the use of the acquis for its purpose (Vermeulen & De Bondt, 2009) and whether or not that purpose is limited to judicial cooperation or could also encompass police cooperation (Vervaele, 2004).

Second, it is more than useful to briefly elaborate on the authors’ views before going into the choice of case studies. However, the elaboration is limited to the two aspects relevant to understand the discussion in this contribution, being the scope of the approximation acquis and the combination of both police and judicial cooperation.

1.2 Authors’ views

1.2.1 The scope of the approximation acquis

Traditionally, the scope of approximation is limited to the adoption of framework decisions. Therefore the traditional acquis, the assembly of approximated offences and sanction, is also limited to framework decisions only. That traditional “framework decision only”-view on approximation is left in favour of a very wide and progressive scope encompassing all relevant EU and even non-EU instruments. The following paragraphs clarify the rationale behind this choice.

Including a variety of EU instruments

Firstly, besides framework decisions, a variety of EU instruments are eligible for inclusion in the approximation acquis.

Previous paragraphs mentioned that Art. 34 TEU introduced the framework decision (FD) as the new instrument to establish minimum rules relating to the constituent elements of criminal acts and penalties. This legal basis is recalled to highlight the traditional link between approximation and the adoption of framework decisions.

However, analysis has revealed the pursuit of approximation in other EU instruments. The Union can adopt Conventions that possibly contain substantive criminal law provisions. Examples can be found in the 1995 Europol Convention which intro-
duced definitions of “illegal migrant smuggling”, “motor vehicle crime” and “traffic in human beings” (OJ C 316 of 27.11.1995). More obvious are the 1995 Convention on the Protection of the Communities’ Financial Interests (OJ C 316 of 27.11.1995) and the 1997 Convention on the fight against corruption involving Community Officials (OJ C 195 of 25.6.1997). Furthermore, the European Court of Justice (ECJ) has ruled that approximation of legislation can also be pursued in first pillar instruments (Cases 176/03 and 440/05). It is argued that even though criminal law is a third pillar matter and as such is subject to an intergovernmental decision making process, this does not prevent the Community legislature from taking measures related to criminal law in the first ‘supranational’ pillar when the application of effective, proportionate and dissuasive criminal penalties is an essential measure (Dawes & Lynskey, 2008; Jans, Sevenster, & Janssens, 2008; Kuhn, 2005; Siracusa, 2008; Somsen, 2003). The environmental directive 2008/99/EC (OJ L 328 of 6.12.2008) can serve as a striking example, adopted in the aftermath of the ECJ decisions. However, older examples such as the 2002 directive on the facilitation of unauthorised entry, transit and residence, also exist (OJ L 328 of 5.12.2002) (Adam, Vermeulen, & De Bondt, 2008).

Based on this analysis, it is indisputable that within the European Union, substantive criminal law has originated from various sorts of instruments. It has developed rather fast and organically in the sense that it is strongly dependant on the political climate, lacking a long term consistent policy plan (Swart, 2001; Vermeulen, 2002b, 2007; Weyembergh, 2004). When trying to assemble all the relevant provisions, analysis of framework decisions alone is insufficient.

**Including a variety of non-EU instruments**

Secondly, including only EU instruments into the approximation acquis, fails to take into account that substantive criminal law provisions can also originate from instruments adopted at other cooperation levels, amongst which the Council of Europe and the United Nations are the most significant. Incorporating non-EU international instruments in the so-called EU JHA acquis, justifies this approach. This EU JHA acquis is a list of the legal instruments, irrespective of the gremium in which they were negotiated, to which all EU (candidate) member states must conform (http://ec.europa.eu) (De Bondt & Vermeulen, 2009).

Because the Union itself underlined the importance of non-EU international instruments through their inclusion in the EU JHA acquis, the Union may be expected to take those instruments into account itself and use them to their full potential. This is exactly what is stipulated in the Vienna Action plan (OJ C 19 of 23.1.1999). Point 46 (a) concludes with the requirement to take parallel work in international organisations such as the Council of Europe into consideration.

Therefore, the approximation acquis taken into account in this contribution consists not only of framework decisions, but of a series of EU and even non-EU instruments, included in the EU JHA acquis.

**1.2.2 Police and judicial cooperation in criminal matters**

The strict reading of the relevant treaty provisions might suggest that approximation is only to be sought after to facilitate judicial cooperation. Elsewhere, we have discussed
how and why to improve the supporting role approximation has for judicial cooperation (De Bondt & Vermeulen, 2009). However, a such limitation of the supporting role of approximation is criticized in literature. Vervaele’s view on this needs to be endorsed: approximation should be considered a means to facilitate both police and judicial cooperation (Vervaele, 2004).

However, before producing legal and policy arguments in support of including both police and judicial cooperation, the development of those cooperation forms as EU competences will be briefly recalled, in order to fully comprehend the argumentation for their combination.

**Development of police and judicial cooperation as an EU competence**

Police and judicial cooperation have not always been EU competences. The elimination of borders and the subsequent elimination of border controls sparked state awareness of the need to work closely together in order to tackle cross-border crime. Flanking measures were needed with regard to police and judicial cooperation in criminal matters (Swart, 2001). Nevertheless, member states remained reluctant to work together.

At the time of the creation of the European Community and its internal market, primary focus went to the economic development of Europe. The possible effects of such an internal market on the prevalence and evolution of crime did not receive much attention, neither did the potential problems caused by the differences in national legislation. In the fields of security, policing and justice, member states continued to work independently.

When the European Community developed into the European Union, this changed. With the 1992 Maastricht Treaty (OJ C 191 of 29.7.1992), the member states took an important step by incorporating Justice and Home Affairs into the European institutional framework. Art. K.1 of the Maastricht Treaty, clarified what constituted JHA at that time: for the purpose of achieving the objectives of the Union – in particular the free movement of persons – member states regarded the following areas as matters of common interest:

1. asylum policy;
2. rules governing the crossing by persons of the external borders of the member states and the exercise of controls thereon;
3. immigration policy and policy regarding nationals of third countries;
4. combating drug addiction in so far as this is not covered by (7) to (9);
5. combating fraud on an international scale in so far as this is not covered by (7) to (9);
6. judicial cooperation in civil matters;
7. judicial cooperation in criminal matters;
8. customs cooperation;
9. police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (hereafter Europol).
This is the first time police and judicial cooperation in criminal matters appear in EU treaties. Even where Art. K1 listed areas of common interests, it constituted only a small step forward, as no clear objectives were set. It was not until the entry into force of the 1997 Amsterdam Treaty (OJ C 340 of 10.11.1997), that the pillars were reshuffled and the policy areas concerned more elaborated on. Some of the JHA policy areas were shifted to the supranational first pillar and the slimmed down version of the third pillar was renamed accordingly into “police and judicial cooperation in criminal matters”.

The Amsterdam Treaty introduced the area of freedom, security and justice in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (Art. 2 TEU, OJ C 325 of 24.12.2002). Police and judicial cooperation in criminal matters are the means to accomplish the goal and create an area of freedom, security and justice.

Approximation in support of both police and judicial cooperation

The elaboration on want is included in police and judicial cooperation is split over two separate articles in the TEU. Even though the Treaty provisions elaborating on approximation are placed underneath the heading of judicial cooperation, the scope of this evaluation is broadened to police and judicial cooperation. The following paragraphs will justify the broadening of the perspective in this contribution, referring to various policy documents and Treaty provisions.

- Legal arguments
  
  First, Vervaele argues that it is unlikely that approximation covered in Art. 31(e) TEU is intended to remove hurdles and ensure compatibility in rules applicable in member states for judicial cooperation only. The observation that this specific objective related to judicial cooperation is already covered by Art. 31(c) TEU, forms the basis for this position (Vervaele, 2004). Furthermore, the introduction of the framework decision is covered by Art. 34 TEU, which is not limited to judicial cooperation.

  Second, in the new Art. 83(2) TFEU the competence to approximate is significantly expanded. The possibility is introduced to approximate laws when this proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures. Again, notwithstanding the fact that this provision maintains its position underneath the heading of judicial cooperation, the link with judicial cooperation seems long gone if the function of approximation is now to ensure effective implementation of Union policies (De Bondt & De Moor, 2009). The assumption that approximation is inextricably bound up with judicial cooperation cannot be maintained any longer.

- Policy arguments
  
  In addition to the above mentioned legal arguments, four policy arguments can be produced. In the Vienna Action Plan of 3 December 1998, approximation received a separate heading and was not merely introduced as a subsection of judicial cooperation. Furthermore, the members of the 2002 Working Group X pointed to the relevance to approximate to generate sufficient mutual confidence to guarantee the
effectiveness of common tools for police and judicial cooperation created by the Union. This broadening of the scope was picked up by the drafters of the 2004 *The Hague Programme*. The European Council at that time recalled that approximation is envisioned to facilitate police and judicial cooperation in criminal matters having a cross-border dimension. Finally, the Preamble of the 2005 *FD on attacks against information systems* clarifies that its objective is to improve cooperation between judicial and other competent authorities, including the police and other specialised law enforcement services of the member states through approximating rules on criminal law in the member states.

Based on this argumentation, *police and judicial cooperation* and *approximation* are the lead concepts in this contribution. The aim of this contribution is to assess whether and to what extent approximation of the constituent elements of criminal behaviour is necessary to ensure the smooth functioning of both police and judicial cooperation in criminal matters in the European Union. For such an assessment, the concept of police and judicial cooperation needs to be made more operational.

### 1.3 Choice of case studies

*Police and judicial cooperation* as a concept is too vague and abstract to evaluate. Therefore a set of three case studies was selected, which all have a link with approximation. The figure inserted below illustrates how the case studies relate to both *police and judicial cooperation* and *approximation*. The following paragraphs provide a brief context and justify the selection.

#### 1.3.3 Mutual recognition

Mutual recognition has an indisputable symbolic value. Launched as the cornerstone of judicial cooperation at the Tampere European Council, it is said to have induced one
of the most radical and far-reaching reorientations in the field (Nilsson, 2006; Satzger & Zimmermann, 2008; Swart, 2001). Growing into the overall principle in European cooperation, mutual recognition has to play a central role when analysing police and judicial cooperation. Therefore the first case study will focus on mutual recognition. The link with approximation can be found in the traditional double criminality requirement and the abandonment thereof in mutual recognition instruments.

1.3.4 Europol and Eurojust

Undeniably important in the field of police and judicial cooperation are the EU level actors. Both Europol and Eurojust deserve to be taken into account in this analysis. The second case study will focus on their mandated offences, which link the EU level actors to approximation.

1.3.5 Exchange of criminal records information

As a third case study, a specific cooperation instrument or tool was singled out. Considering the recent evolutions with regard to the exchange of criminal records information, an analysis of ECRIS (the European Criminal Records Information System) was considered appropriate. Approximation is important in the labelling of exchanged information.

2 Case study 1: Mutual recognition

This first case study will demonstrate the inappropriate use of the approximation acquis in the context of the principle of mutual recognition. Mutual recognition instruments abandon the double criminality requirement for a series of offences, without defining them. In doing so, the scope of the abandonment is unclear, and the support for the abandonment jeopardised. First a context will be provided for both the principle of mutual recognition and the double criminality requirement. Thereafter, the inappropriate use of the approximation acquis will be elaborated on.

2.1 The principle of mutual recognition

In general, mutual recognition of judicial decisions is designed to facilitate cooperation. To a certain extent it can be seen as the free movement of judicial decisions as it intends to erase the influence of national borders. The mere fact that a decision was taken by a foreign authority, becomes irrelevant for its execution. States recognise foreign decisions as if they were their own.

In the context of cooperation in the European Union, the principle of mutual recognition was first brought up in criminal matters by Jack Straw at the Cardiff European Council in 1998, where the Council was asked to identify the scope for greater mutual recognition of decisions of each other’s courts. The momentum grew in the course of the following year and was used to introduce mutual recognition as a cornerstone at the Tampere European Council in 1999 (Mitsilegas, 2006; Vermeulen, 2006). Upon the
coming into force of the Lisbon Treaty, mutual recognition will have its legal basis in Art. 82 TFEU.

Mutual recognition has the potential to bring about a very intensive – potentially even intrusive – influence on a member states’ criminal justice system, as it encompasses the willingness to attach legal consequences to situations which might have been – in some cases would certainly have been – decided upon differently by national authorities (Mitsilegas, 2006; Satzger & Zimmermann, 2008; Swart, 2001). Therefore in the Programme of Measures it is correctly argued that the implementation of the principle of mutual recognition presupposes member states to have a great deal of trust in each others’ criminal justice systems. Such trust is largely based upon a shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.

Big question marks are in order when it comes to this presumption of trust. Indeed, the yawning gap between the actual level of trust and the required level of trust often proved to be too deep to agree upon and implement mutual recognition (De Bondt & Vermeulen, 2009; Vermeulen, 2002a). The tragic events of 9/11 may have presented a window of opportunity for the adoption of mutual recognition instruments (Peers, 2004), their implementation and application is far from smooth.

2.2 The double criminality requirement

National police and judicial cooperation is very complex. Differences between national criminal justice systems make things even more complicated when attempting international cooperation. It provokes member states to stipulate conditions. A classic condition for cooperation in double criminality. It is precisely this double criminality requirement which links mutual recognition to the approximation acquis.

2.2.1 The background of the double criminality requirement

Double criminality – also referred to as dual criminality or duality of offences (Williams, 1991) – it is neglected in literature. The concept is often considered self-explanatory, whereas in practice it has almost as many shapes and sizes as the instruments it is used in.

Describing it as requiring that the behaviour constitutes an offence in both states, cannot suffice (Alegre & Leaf, 2003; Stessens, 2000; Thomas, 1980; Van den Wyngaert, 2003; Williams, 1991).

- Is it enough for the behaviour to be criminalised in both states? Should this be reviewed in general or should this review go into detail searching for perfectly matching constituent elements?
- Should factual circumstances that render offences not punishable be taken into account or should the review be limited to the mere abstract level?
- Can elements that cause preclusion of criminal proceedings (such as laps of time) also be taken into account?

The answers to these pertinent questions differ for each of the instruments. Analysis of legal texts and the complementing explanatory memoranda reveals the many different approaches. The following examples illustrate these differences:
• The Council of Europe Conventions on the Transfer of Proceedings and International Validity of Judgements require the act to be an offence if committed on the territory of the requested state and the person on whom the sanctions was imposed liable to punishment if he had committed the act there;
• The European Union Conventions on Transfer of Proceedings and the Enforcement of sanctions require that the underlying act be an offence in the requested state if committed on its territory;
• In the Framework decision on the European Arrest Warrant, it is required that the act constitutes an offence under the law of the executing member state, whatever the constituent elements or however it is described;
• In the Framework decision on the mutual recognition of confiscation orders, it is required that the act constitutes an offence which permits confiscation under the law of the executing state, whatever the constituent elements or however it is described under the law of the issuing state;

As a conclusion it is safe to say that the more far-reaching the cooperation is, the more far-reaching the double criminality requirement is likely to be. This is of course closely linked to the rationale behind the introduction of the double criminality requirement: it is a protection mechanism which aims at preventing member states from being obliged to cooperate in the enforcement of a decision contrary to their own legal (and criminal policy) views (Baaijens-van Geloven, 1989; Koers, 2001; Thomas, 1980).

2.2.2 The erosion of the double criminality requirement

Notwithstanding the importance of the double criminality requirement, it is considered an obstacle for smooth cooperation. Member states looked into alternatives. In spite the of the existence of instruments which no longer upheld the double criminality requirement (e.g. Art. 3 European MLA Convention of 29 May 2000), scholars considered it politically unlikely that the double criminality requirement would be abandoned in European judicial cooperation (Koers, 2001).

Even though examples may have existed in 2001, the erosion of the double criminality requirement only became truly apparent with the adoption of the new mutual recognition instruments. Abandoning double criminality is an appropriate alternative, if the approximation acquis is properly taken into account. Today, two tracks appear in mutual recognition instruments. The first consists of a partial abandonment of the double criminality requirement through incorporation of a list of offence types. The second consists of a general abandonment of the double criminality requirement, regardless of the offence types involved.

Partial abandonment: no double criminality for the listed offence (types)

A first appearance of the abandonment of the double criminality requirement can be found in the offence lists introduced in most mutual recognition instruments. A list of offence types in compiled for which double criminality will no longer be tested.

Peers clearly and concisely explains how the list of offences was drawn up. At first a list of twenty-four crimes was considered, comprising the first eleven crimes considered during the discussions of the freezing orders proposal, one crime taken from the
conclusions of the Tampere European Council (high-tech crime including computer crime), and twelve crimes taken from the Annex to the Europol Convention. By mid-November 2001, four more items joint the list, two (motor vehicle crime, trafficking in nuclear materials) because Europol could or did deal with them, one (rape) at the behest of France and one (facilitation of unauthorised entry or residence) because the Council had “recently adopted” a framework decision. [...] Finally, by the end of November 2001, the final four crimes (arson, crimes within the jurisdiction of the International Criminal Court, seizure of aircraft or ships and sabotage) had been added, although no explanation was offered for this addition (Peers, 2004).

The listed offences vary slightly across instruments. The list featuring in the 2005 FD on the mutual recognition of financial penalties is unusually broad as it lists more specific offences and ends with the inclusion of “all offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty” (OJ L 78 of 22.3.2005).

General abandonment: no double criminality what so ever

The second appearance of the abandonment of the double criminality requirement is not linked to offence types. The 2008 FD on the taking into account of prior convictions, does not feature a list at all (OJ L 220 of 15.8.2008). Article 3 of the FD stipulates that a conviction handed down in another member state shall be taken into account in the course of new criminal proceedings. Legal effects equivalent to previous national convictions must be attached in accordance with national law. It is amazing that unanimity was found to demand recognition of any conviction, which in practice includes the recognition of a conviction for behaviour not criminalised in own national criminal law provisions.

2.3 The inappropriate use of the approximation acquis

Even though the abandonment of the double criminality requirement might seem a logical consequence of the underlying principle of mutual recognition (Wouters & Naert, 2004), a sufficient level of approximation to justify that abandonment is currently lacking. The following paragraphs clarify why both the abovementioned partial and general abandonments constitute inappropriate decisions under the current legal constellation.

2.3.1 Internal incoherence

The current practice of partially or even generally abandoning the double criminality requirement completely disregards the approximation acquis and therefore causes internal incoherence in European criminal policy making.

Any abandonment of the double criminality requirement is only truly sustainable to the extent approximated offence concepts are available. Indeed, there is no longer a

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1 That list includes all the offences on the equivalent EAW list, and makes a meaningful supplement considering the context of financial penalties by introducing infringement of road traffic regulations, smuggling, intellectual property offences, threats and acts of violence against persons, criminal damage and theft.
need to check double criminality when a criminalisation obligation has been included in the EU JHA acquis. If the function of approximation is to facilitate and support mutual recognition, the approximation acquis should be used to its full potential; but not beyond that potential. Trusting other member states to have implemented the relevant instruments and criminalised offences to the extent constituent elements were agreed in approximating instruments, is already a huge step forward. This is especially so since the implementation track record of some member states is disappointing. It is not realistic and even unnecessary to expect member states to have mutual trust beyond the approximation acquis. Cooperation would already significantly benefit from the abandonment of the double criminality requirement to the extent it is justifiable, i.e. to the extent approximated offence concepts exist.

2.3.2 Political utopianism

The abovementioned position is reinforced by the German *demarche* with regard to the 2008 FD on the European Evidence Warrant (EEW) (OJ L 350 of 30.12.2008). It is a striking illustration of the false presumption of criminalisation of the listed offences and the abandonment of the double criminality requirement. Germany had made the lack of clear and common definitions and the possibility of having obligations with regard to behaviour not criminalised under German legislation, one of their key issues during negotiations. The compromise reached allows Germany a temporary derogation from the provisions of the FD and make execution of an EEW subject to verification of double criminality in the case of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling. These offences were highlighted by the German constitutional court in its 2005 ruling on the EAW (2 BvR 2236/04), expressing its apt concern about the fact that there is no EU wide definition of these crimes and therefore the substance of the allegation against a suspect may not be clear to him. This German *demarche* would not have been necessary, if the abandonment of the double criminality test was limited to the approximation acquis. Building on the discussions held with regard to the EEW, both Poland and Hungary are in favour of similar exceptions in other mutual recognition instruments. A full on return to nationally defined offences and the traditional double criminality requirement is an important setback for the progress made over the past years and has a negative impact on the coherent development of the EU JHA area.

2.3.3 Legal counter indications

Abandoning the double criminality requirement without taking the approximation acquis into account, renders some mutual recognition instruments inapplicable. The fundamental legal difficulties that arise can be illustrated using the 2008 *FD on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions* (OJ L 337 of 16.12.2008) as an example. In sum, this FD regulates the enforcement of foreign convictions. When the nature or the duration of the foreign conviction is incompatible with the law of the executing state, a solution needs to be found. Art. 9 holds the possibility to adapt the foreign conviction. Such adaptation should be carried out...
considering the conviction that would have been rendered in the executing state. This is exactly where the problems begin: a conviction cannot be adapted unless the double criminality requirement is met. How else to adapt a foreign conviction if the behaviour is not punishable in the executing state? It proofs to be crucial from a more technical legal perspective, to limit the obligation to automatically recognise and execute foreign convictions to situations where the double criminality requirement is met. Hence the suggestion to only abandon the double criminality requirement to the extent approximated offence concepts exist.

3 Case study 2: Europol and Eurojust

The second case study focuses on the mandates of Europol and Eurojust, as their mandate links the EU level actors with approximation. Before going into the inappropriate use of the approximation acquis, the composition of the mandates will be briefly recalled.

3.1 EU level actors and their mandate

3.1.1 Europol mandate

Europol was not established out of thin air. In the course of 1971 and 1972, a number of intergovernmental meetings were held with a focus on terrorism. Those meetings led to the setting up of TREVI (short for Terrorisme, Radicalisme, Extremisme et Violation International), the acknowledged forerunner of Europol, which took place in the margins of the European Community. Unlike Europol TREVI was not an institution, instead it operated around a system of confidential meetings where good practices, experiences and initiatives could be discussed and exchanged. The TREVI Working Groups and the development of the Europol Drug Unit (hereafter EDU) – the first phase of Europol – clarify the origin of the Europol mandate (Fijnaut, 1992; Flynn, 1997; Monaco, 1995).

In 1976, five TREVI Working Groups were set up: TREVI-I was responsible for the measures to combat terrorism; TREVI-II was responsible for police training and was later on expanded to public order and football hooliganism; TREVI-III initially set up to deal with civilian air travel, was redefined in 1985 to prepare the creation of the EDU. Offence wise, it also worked on offences related to stolen vehicles, to non-cash means of payment, to cultural property, to immigration and on armed robbery; TREVI-IV was tasked amongst others to ensure the safety and security of nuclear installations and transport; TREVI-V was to deal with contingency measures to respond to emergencies.

It is clear that the functions set forth for EDU and Europol mirrored the ones carried out by the TREVI Working Groups. On 3 January 1994 EDU started off tasked to fight against drug-related offences (Ministerial Agreement of 2.6.1993). In December of that year, the Essen European Council extended the mandate with trafficking in nuclear and radioactive substances, clandestine immigration networks and trafficking in stolen vehicles (SN 300/94). The Europol Convention was adopted on 26 July 1995 (OJ C 316 of 27.11.1995). It considers as serious international crime: crimes committed...
or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property, unlawful drug trafficking, illegal money-laundering activities, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings, motor vehicle crime and the forms of crime listed in the Annex or specific manifestations thereof. The offences listed to define the Europol mandate are clearly inspired by the offences connected to TREVI and EDU.

3.1.2 Europol mandate

To compose the Eurojust mandate, reference is made to the Europol mandate, which is supplemented with a number of offence types. Article 4 of the Eurojust Decision stipulates that the general competence of Eurojust shall cover the Europol offences, supplemented by computer crime, fraud and corruption and any criminal offence affecting the European Community’s financial interests, the laundering of the proceeds of crime, environmental crime and participation in a criminal organisation within the meaning of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (OJ L 63 of 6.3.2002).

When drawing up the mandates of both EU level actors, the approximation acquis is not properly used.

3.2 The inappropriate use of the approximation acquis

3.2.1 Different meaning across instruments

First, it is regrettable that similar or even the same offence concepts have a different meaning across instruments. The Europol list is similar to the lists in Art. 40(7) and Art. 41(4)(a) of the Schengen Implementation Convention (SIC) (OJ L 229 of 23.9.2000). However, the offences on the lists are not interpreted in the same manner. For the definition of the offences on the Europol list, it is explicitly stated that they shall be assessed by the competent national authorities in accordance with the national law of the member states to which they belong. In doing so the scope of the Europol mandate is left to the discretion of the individual member states. This is an unfortunate choice as no such clause can be found in the SIC. What is even more, there are strong indications that an entirely different interpretation is envisioned in SIC. When updating the Art. 40(7) SIC list to include participation to a criminal organisation and terrorism, references to the 1998 joint action (OJ L 351 of 29.12.1998) and the 2002 framework decision (OJ L 164 of 22.6.2002) were included. In doing so the SIC list tends towards the use of common offence concepts as included in the EU JHA acquis. As a result, mirroring offence concepts have a different meaning across instruments.

Second, some of the supplementing offences listed in Article 4 of the Eurojust Decision are seemingly redundant as they partially overlap with offences already included in the Europol mandate. The following example can serve as an illustration. The Europol mandated offences include “illegal money-laundering activities” defined in the Annex as the criminal offences listed in Article 6(1) to (3) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed at Strasbourg on 8 November 1990. In spite of this, the European legislator con-
sidered it necessary to include “laundering of the proceeds of crime” as a supplement in the Eurojust Decision without clarifying the difference with the mirroring Europol category. One could argue that supplements and refinements were necessary because the scope of the Europol mandate was not crystal-clear. However, money-laundering happens to be one of the clearer offences as it was further clarified by inserting a reference to a legal instrument. This confusion could have been avoided if the approximation acquis was used in a consistent manner throughout all instruments.

3.2.2 Incomplete and inconsistent referencing to the approximation acquis

Third, notwithstanding the choice to leave the assessment of the offences to the discretion of the individual member states, own Europol definitions were elaborated for three of the listed offences, namely “illegal immigrant smuggling”, “motor vehicle crime” and “traffic in human beings”. Knowing that in the initial convention a reference to the approximation acquis was included where possible – i.e. for crime connected with nuclear and radioactive substances, illegal money-laundering activities and unlawful drug trafficking – it is regrettable no such reference to the 1997 joint action (OJ L 63 of 4.3.1997) was made when updating the definition of trafficking in human beings in 1999 (OJ C 26 of 30.1.1999).

Uncertainty, vagueness and contradiction at least incoherence are the result of the current policy to combine references to approximating instruments, with own definitions and leaving the assessment of the offences to the discretion of the individual member states. At least a debate should be considered as to whether it is appropriate to delineate the scope of the Europol and Eurojust mandates using the approximation acquis. In doing so the minimum definitions for the member states are deployed as maximum definitions for the EU level actors. Such an approach would increase coherence in the EU JHA area as well as be to Europol and Eurojust’s advantage as it would facilitate communication, data exchange and data analysis. Indeed currently it can be difficult to interpret data as member states individually assess which cases fall within the scope of the actors’ mandates. Using strict boundaries would simplify procedures for all parties.

In light of that argumentation, it is commendable that the Eurojust Decision refers to the 1998 joint action to clarify what constitutes participation in a criminal organisation. It is unfortunate however that the Eurojust Decision fails to refer to the 1995 Convention on the Protection of the European Communities’ Financial interests (OJ C 316 of 27.11.1995), nor to the 1997 Convention on the fight against corruption involving Community Officials (OJ C 195 of 25.6.1997). Furthermore, it is unfortunate that

2 According to the Annex to the Europol Convention, crime connected with nuclear and radioactive substances means the criminal offences listed in Article 7(1) of the Convention on the Physical Protection of Nuclear Material, signed at Vienna and New York on 3 March 1980, and relating to the nuclear and/or radioactive materials defined in Article 197 of the Euratom Treaty and Directive 80/836 Euratom of 15 July 1980; Illegal money-laundering activities means the criminal offences listed in Article 6(1) to (3) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed at Strasbourg on 8 November 1990; Unlawful drug trafficking means the criminal offences listed in Article 3(1) of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the provisions amending or replacing that Convention.
the reference was not updated when the 1998 joint action was repealed by the 2008 FD on organised crime (OJ L 300 of 11.11.2008).

4 Case study 3: European Criminal Records Information System

4.1 Exchanging criminal records information

The third case study focuses on the exchange of criminal records information. The exchange of such information is far from new. It dates back to the 1959 Council of Europe Convention on mutual assistance in criminal matters (CETS no. 047, Strasbourg, 20.5.1959). Article 22 of that convention deals with the exchange of information from judicial records and stipulates that the Ministries of Justice shall communicate information on criminal convictions and subsequent measures of other countries nationals at least once a year (De Busser, 2008; Vermeulen, Vander Beken, De Busser, & Dormaels, 2002). The recent development of ECRIS – the European criminal records information system – is linked to that and has its EU roots in The Hague Programme which says that efficient and swift exchange of information on the criminal history of individuals constitutes an important priority (OJ C 53 of 3.3.2005) (Jacobs & Blitsa, 2008; Marin, 2008; Stefanou & Xanthaki, 2008).

ECRIS (OJ L 93 of 7.4.2009) is set up to enable the efficient exchange of information on previous convictions. It is annexed to the FD on the organisation and content of the exchange of information extracted from the criminal record between member states, itself adopted on 27 February 2009. It is based on the classification system elaborated by Unisys and IRCP in the 2005 criminal records study and sets up a general architecture for the electronic exchange of information, laying the foundations for future IT developments, related to the interconnections of national criminal records.

4.2 Inappropriate use of the approximation acquis

4.2.1 Exchange of criminal records information

The development and architecture of ECRIS are not free from critique. The main problems are the poor compatibility with the approximation acquis and the inclusion of phenomena that do not constitute offences. These phenomena will not appear as such in criminal record information and should therefore not appear in an information system such as ECRIS. Three examples are singled out to illustrate the problem.

- **Domestic violence** is a criminological phenomenon that occurs when a family member, partner or ex-partner attempts to physically or psychologically dominate another. It has many forms, including physical violence, sexual abuse, emotional abuse, intimidation, economic deprivation, and threats of violence. However, as it is not an offence type, it should not be included as such in ECRIS.

- **Shoplifting** is defined as theft from a retail establishment. It might very well be the most common way theft offences are committed, but it does not constitute a separate offence in the sense that there is no legal difference between forms of theft according to the location.
• Theft of a car is a similar example. This time the additional specification does not concern the location, but the object of the offence. Similarly, it should not be included as an offence type in ECRIS.

First and foremost, the design of a criminal records information system should be based on offences, because the criminal records system itself is based on offences. Furthermore, it should take into account the similarities in offence types which can be deduced from the approximation acquis. Labelling exchanged information as to whether or not it corresponds to an approximated offence concept has the potential to considerably facilitate the comprehensibility of such information.

4.2.2 Use of exchanged criminal records information

In addition, there is a huge difference between on the one hand informing other countries of convictions of their nationals and exchanging information to keep each other's criminal records system updated, and on the other hand taking those foreign convictions into account in the course of new criminal proceedings and attaching legal effects equivalent to previous national convictions to it. When ECRIS is intended to be used in the mutual recognition sphere to support the taking into account of a previous conviction, it becomes all the more important to use the approximation acquis to its full potential, as this would significantly facilitate the interpretation of the foreign conviction and the attaching legal effects equivalent to previous national convictions to it. Indicating that the foreign conviction falls within the minimum constituent elements of offences as agreed in an approximation instrument, would not just facilitate the taking into account of the conviction in the course of new criminal proceedings: the lack thereof will potentially render interpretation impossible.

5 EULOCS: Appreciating Approximation

For each of the case studies, the use of offence concepts has been analysed in light of the approximation acquis. Analysis revealed a need to carefully (re)consider the technique of approximation, the function thereof and the use of the acquis. When abandoning the double criminality requirement, when defining the mandate of an EU level actor or when exchanging criminal records information, the scope thereof needs to be clarified. It needs to be clear which offences are involved and how they are defined. The latter part would benefit from more appreciation for the approximation acquis. There are various possible approaches to put that into practice.

A first approach consists of inserting a direct reference to an approximating instrument immediately behind the offence type. Instead of referring to terrorism, a reference would be made to terrorism as defined in the 2002 FD on combating terrorism (OJ L 164 of 22.6.2002), amended by the 2008 FD (OJ L 330 of 9.12.2008). This approach is not uncommon. Even though references were never included in a coherent manner, examples are legio:

• Participation in a criminal organisation: The Council joint action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organi-


- **Fraud:** The 1995 Convention on the Protection of the European Communities' Financial Interests is referred to in Art.1(3) 2001 MLA Protocol (CETS no. 182 Strasbourg, 8.11.2001) and the standard offence list in the mutual recognition instruments (e.g. OJ L 190 of 18.7.2002).


- **Illegal money-laundering activities:** Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed at Strasbourg on 8 November 1990 is referred to in the Europol Annex


The most important benefit of this approach is the proximity of the references and the offence concepts, whereas the most important disadvantage is the poor prospect of being able to stand the test of time. It is important to take the rapidly changing nature of the approximation acquis into account. The past has learnt that it is unrealistic to keep all references updated by repeated amending initiatives. It was already mentioned that the references to the 1998 joint action on participating in a criminal organisation were not updated when that joint action was repealed by the 2008 FD on organised crime (OJ L 300 of 11.11.2008). Inserting a suffix “and all amending and replacing provisions” is a way to by-pass this inaccuracy and avoid legal discussions. It is exactly what has been done in the Europol Annex when defining “unlawful drug trafficking”. However, such a by-pass operation is extremely user unfriendly as it expects users to be fully updated.

A second approach consists of developing a separate reference index which brings together and structures the entire approximating acquis. Instead of referring to individual approximating instruments, a reference to the separate index can suffice. One would not refer to terrorism, but to terrorism as it is defined in the separate reference index. The most important advantages of such an approach lie in a certain consistency and a limited amending requirement, as only the separate reference index needs to be kept updated. In absence of an appropriate instrument to refer to, this approach has never been deployed before. EULOCS – the EU level offence classification system – represents the practical implementation of this second approach. Its design allows it to be used as such a separate reference index. Before elaborating on the added value of the use of EULOCS in the analysed case studies, some background as to the development and structure of EULOCS is provided.
5.1 EULOCS’ background

In March 2007, the European Commission launched a call for tender for a “Study on the development of an EU level offence classification system and an assessment of its feasibility to supporting the implementation of the Action Plan to develop an EU strategy to measure crime and criminal justice” – The Crime Statistics Project. The main objective in the study’s terms of reference was to create a EULOCS for the purpose of exchanging comparable statistical information on offences throughout the EU. The classification system should serve as a first step towards the development of a more comprehensive and sophisticated EU level offence classification system (Mennens, et al., 2009). The momentum created by this study was seized to develop a more sophisticated EULOCS with the potential to have an added value beyond crime statistics.

In essence, EULOCS is a list of offence labels grouped in families and sub-families and broken down into subcategories, based on their constituent elements according to the way these offence labels appear in legal instruments relevant for the European Union. Grouping offence labels is inspired by the fact offence labels sometimes appear in groups in legal instruments. Breaking down is similarly inspired by the fact some legal instruments only refer to parts of offences. The 1997 Corruption Convention for example, does not deal with corruption in its entirety, but deals with corruption involving officials of the European Communities or officials of member states of the European Union. Similarly, the 1995 Fraud Convention does not deal with fraud in its entirety, but only with fraud affecting the financial interests of the European Communities.

This exercises has lead to a simple but at the same time complex architecture which forms the backbone of EULOCS.

Illustrative extract from EULOCS

<table>
<thead>
<tr>
<th>0905 00</th>
<th>Corruption</th>
</tr>
</thead>
<tbody>
<tr>
<td>0905 01</td>
<td>Offences jointly defined as corruption</td>
</tr>
<tr>
<td>0905 01 01</td>
<td>Active corruption in the public sector involving a EU public official</td>
</tr>
<tr>
<td>0905 01 02</td>
<td>Passive corruption in the public sector involving a EU public official</td>
</tr>
<tr>
<td>0905 02</td>
<td>Other forms of corruption</td>
</tr>
</tbody>
</table>

The offence labels are then combined with reference to instruments which hold approximated offence definitions and the definitions themselves. As a result, EULOCS is the ideal reference instrument to use if one wants to limit certain applications to behaviour that is criminalised in all member states. The idea is to keep one separate reference index updated which can then be referred to in various legal instruments (Vermeulen & De Bondt, 2009).
5.2  EULOCS’ added value for the case studies

5.2.1  Facilitating cooperation whilst clarifying mutual recognition obligations

The first case study illustrated that the obligations arising from mutual recognition instruments are usually insufficiently clarified: the double criminality test is abandoned for either a list of offence types or simply for all offence types. This approach presupposes a degree of mutual understanding and mutual trust with regard to those offences which is not available today. Failing to make reference to an agreed minimum definition to clarify the extent to which the double criminality test is abandoned and/or leaving the assessment of the offence and thus the scope of the abandonment of the double criminality test to the discretion of the national authorities, is a considerable concern for some member states. The German demarche with regard to the EEW is a striking example of the confidence problem arisen from the abandonment of the double criminality test. Considering the efforts and progress made to establish minimum rules related to constituent elements and penalties, the double criminality test can be abandoned in mutual recognition instruments, but only to the extent approximated offence concepts exist. Indeed, the test is no longer meaningful in cases concerning offences for which minimum definitions are agreed upon in the EU JHA acquis. Offences falling outside the approximation acquis should remain subject to a double criminality test.

The matter deserves in-depth debate as to the desirability to limit the abandonment of a double criminality requirement to the approximated offence concepts. EULOCS can be an interesting tool to refer to in mutual recognition instruments. Three advantages can be highlighted.

First, it would be a welcome clarification of the extent to which the double criminality requirement is abandoned.

Second, inserting a reference to EULOCS – as opposed to a reference to an agreed minimum definition in a specific legal instrument – has the additional advantage of being able to stand the test of time. Above we have already pointed to the need to take the dynamic and rapidly changing nature of the JHA field into account. In that respect a reference to a generic reference index such as EULOCS would get priority over a static reference to a specific legal instrument.

Third, a standard reference to EULOCS in all instruments would considerably decrease the risk of internal incoherence or even incompatibility between instruments.

5.2.2  Facilitating cooperation whilst clarifying the scope of mandates

The second case study discussed the use of offence concepts to define the mandates of Europol and Eurojust. The choice to leave the assessment of the offences to the discretion of the national authorities, gives way for confusion and unnecessary complications. Furthermore, some of the offence categories are specified via the inclusion of a reference to an agreed minimum definition, whilst others are specified via the creation of an own internal definition. Most of the offences however are left open.

Clarifying the scope of the mandated offences via reference to agreed minimum definitions, would facilitate the work of EU level actors. A reference to EULOCS would
simplify communication, data sharing and data analysis. Indeed currently it can be difficult to interpret data as member states individually assess which cases fall within the scope of the mandates. Using strict boundaries would simplify procedures for all parties.

5.2.3 Facilitating cooperation whilst clarifying the meaning of exchanged information

Criminal records information is not exchanged merely to inform one another. The 2008 FD on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ L 337 of 16.12.2008) proves member states are ready to move ahead and use foreign criminal records information as if it were their own. This of course requires member states to fully grasp the nature of foreign convictions. From that perspective it becomes more and more important to fully exploit the advantages approximation can bring.

The architecture of the information system should be linked to the approximation acquis and exchanged information should be tagged as to whether it concerns a conviction based on an agreed minimum definition or a conviction that still needs to be tested for double criminality.

6 Conclusion

Police and judicial cooperation has passed the stage of infancy, but is far from fully grown. The current chaotic development reveals the lack of a long-term policy plan. Three case studies have illustrated how the use of approximated offence concepts can facilitate cooperation. Therefore, during the coming maturing process, more attention should be paid to internal coherence between the development of police and judicial cooperation on the one hand, and approximation on the other hand.

The creation of EULCOCS is mainly a plea for coherence and internal consistence in the EU JHA area, which deserves in-depth debate. Police and judicial cooperation would benefit from a well founded and well considered strategic policy plan in which the added value of approximation is appreciated more and the acquis used to its full potential.

The authors welcome the initiative of the European Commission to launch a Study on the future institutional and legal framework of judicial cooperation in criminal matters in the EU. It is encouraging to find that the Study is to provide the Commission with an independent, long-term strategic view to ensure consistency in future policy making (tender n° JLS/2009/JPEN/PR/0028/E4). Let us hope the subject matter of this paper will not be ignored during the discussions on the Stockholm Programme, detailing the future of cooperation in the area of freedom, security and justice.
7 Bibliography

7.1 Selected legal and policy documents


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Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (OJ C 316 of 27.11.1995).


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### 7.2 Literature


Approximation and mutual recognition of procedural safeguards of suspects and defendants in criminal proceedings throughout the European Union

Gert Vermeulen
Laurens van Puyvenbroeck

1 General introduction

Since the concept of an ‘area of freedom, security and justice’ was introduced in 1997 with the Amsterdam Treaty, the European Union (EU) has added a new dimension to the traditional police and judicial cooperation between its member states. In the main EU policy documents aimed to elaborate this ambitious goal, European policy makers have always stressed the importance of a well-balanced agenda taking into account the core principles which lay at the foundation of the EU itself. In the conclusions of the Tampere European Council of 15 and 16 October 1999, the following principles – which have been reiterated in subsequent policy documents in this area ever since – were expressed:

"From its very beginning European integration has been firmly rooted in a shared commitment to freedom based on human rights, democratic institutions and the rule of law. These common values have proved necessary for securing peace and developing prosperity in the European Union. They will also serve as a cornerstone for the enlarging Union.

“People have the right to expect the Union to address the threat to their freedom and legal rights posed by serious crime. To counter these threats a common effort is needed to prevent and fight crime and criminal organisations throughout the Union. The joint mobilisation of police and judicial resources is needed to guarantee that there is no hiding place for criminals or the proceeds of crime within the Union.”

In other words, according to Europe’s leaders, in building the ‘area of freedom, security and justice’, crime-fighting and protection of fundamental rights and freedoms should go hand in hand.

Within this context, European criminal (procedural) law has developed with the central goal of improving cooperation, both at the supranational as the inter-state level. Important achievements have indeed been made since the Tampere Council. The European arrest warrant being probably the best example of the direction in which the EU wants to proceed. The main characteristic of this innovative instrument (the adoption of which was highly influenced by the post ‘9/11’ trauma) is the principle of mutual recognition. This principle, in a broad sense meaning the recognition of foreign decisions without prior conditions and with immediate effect in the requested
state, has taken judicial cooperation in criminal matters to a new level. However, the practical implementation of the mutual recognition principle may be detrimental to fundamental rights. The most striking example is the formal removal of the non-discrimination rule from extradition/surrender law in the European Arrest Warrant (EA W) framework.

A critical observer of EU policy in the field of criminal law, cannot deny that the practice of EU-policy making (in the implementation of the Tampere Programme, particularly since September 2001) and the main emphasis of the Action Plan implementing the Hague Programme are mainly repressive and prosecution-oriented. The idea of introducing a set of common (minimum) rules, guaranteeing the rights of defence at a EU-wide level, has not been accorded the same attention as the introduction of instruments aimed at improving the effectiveness of crime-fighting. Although some symbolic steps have been taken (such as the signing of the Charter of Fundamental Rights of the European Union in December 2000 by the European Commission, the Council and the Parliament and the Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, submitted by the European Commission on 28 April 2004), the realisation of minimum standards still seems far away.

What does this finding mean for the future of the EU’s criminal policy? Will the EU succeed the coming years in developing an area where freedom, security and justice are truly balanced? According to several authors, the EU has evolved in the opposite direction. As one observer put it: “if Procedural Criminal Law arises from the application of Constitutional Law, or indeed if it may be described as ‘a seismograph of the constitutional system of a State’, then as a consequence the Procedural Criminal Law of the European Union shows the extent of the Democratic Rule of Law, of the existence of a true ‘Rechtsstaat’, within an integrated Europe. This situation may be qualified as lamentable, as the main plank of the EU’s criminal justice policy relates to the simplification and the speeding up of police and judicial cooperation – articles 30 and 31 of the Treaty of the EU – but without at the same time setting an acceptable standard for fundamental rights throughout a united Europe.”

Against this background, the current article aims to explore some of the options available to the EU in proceeding with its work in this field. Three aspects constitute the main framework. Firstly, a description of the work the EU has done so far in relation to procedural rights in criminal proceedings. Depending on this ‘status questionis’, a

1 The remaining paragraph in the preamble, stating that the framework decision respects the fundamental rights and observes the principles recognised by Article 6 Treaty on the European Union (TEU) and the EU Charter of Fundamental Rights (Chapter VI) and that nothing in the framework decision may be interpreted as prohibiting refusal to surrender a person for whom a EAW has been issued when objective elements exist for believing that the EAW is issued for the purpose of prosecuting or punishing a person on account of his or her sex, race, religion, ethnic origin, nationality, political opinion or sexual orientation, or that that person’s position may be prejudiced for any of these reasons, is de iure insufficient to rule out that persons will be subjected to discriminatory prosecution in one of the member states.


positive answer to the question whether there is a real need for EU action in this field is a prerequisite in order to proceed to the final aspect, comprising an in-depth analysis of the ideal (legal) mechanism(s) to achieve the two core objectives in this area: (1) improving judicial (and police) cooperation and (2) providing suspects and defendants within the EU with a procedural protection adequate to counterbalance the rapidly expanding spectrum of investigation/prosecution-oriented instruments.

2 Criminal procedure within the EU: status questionis

2.1 Introduction

The current basic framework of the EU regarding procedural rights in criminal proceedings consists of article 6 of the Treaty on European Union (TEU) and the EU Charter of Fundamental Rights. Both documents explicitly refer to the *acquis* of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of the Council of Europe.

Article 6 TEU provides that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to Member States.

In December 2000, The European Commission, The Council and the Parliament jointly signed and solemnly proclaimed the Charter of Fundamental Rights of the European Union. The Charter includes several rights applicable to criminal proceedings such as the ‘right to an effective remedy and a fair trial’ (article 47) and ‘the presumption of innocence and right of defence’ (article 48). Moreover, article 53 states that “in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” Following the entry into force of the Lisbon Treaty, the Charter now is a legally binding text.

In order to better understand the background of the developments the past five years at EU level in regard of procedural guarantees, two basis concepts should first be explained, both lying at the core of the EU’s efforts to enhance cooperation between competent authorities in criminal cases: (1) approximation and (2) mutual recognition.

2.2 Approximation of criminal procedure vs. mutual recognition

For decades, differences between national laws and legal cultures have been a breeding ground for distrust and have resulted in a reluctance to cooperate and delays to investigations. Taking away these differences, often referred to as harmonisation of

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4 OJ., 18 December 2000, C.346/1
criminal law and procedure although approximation is a more accurate term, is one way of getting round such difficulties. ספר
This strategy, however, is inclined to run up against the hurdle of subsidiarity in the field of justice and home affairs, states not being much inclined to regard their own laws and policies as being in need of adaptation.4 Therefore, a more subtle mechanism has been developed.

The concept of mutual recognition of judicial decisions has been known, since the European Council of Tampere in 1999,5 as the future ‘cornerstone’ of judicial cooperation in civil as well as criminal matters and has in that context fulfilled the role of catalyst in the development of harmonisation of the criminal law of the EU member states. It implies that while another state may not deal with a certain matter in the same or even a similar way as one’s own state, the results are accepted as equivalent to decisions of one’s own state.

Finding its practical rendering in a well-structured 24-measure programme,6 the realisation of the concept has featured high on the EU’s justice and home affairs agenda during the past six years. Aimed at the elimination of all exequatur procedures applicable between the EU member states, the mutual recognition principle requires mutual trust between these states in the sense that they feel confident relying on each other’s decisions in criminal matters and executing them without further requirements or conformity control vis-à-vis their own substantive and procedural criminal law standards.7 So far, several steps have been taken to accomplish mutual recognition of certain decisions in criminal matters.8

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7 Ibid.
9 Council of the EU, Programme of measures to implement the principle of mutual recognition of judicial decisions in criminal matters, OJ C 12, of 15.1.2001.
2.3 The link between mutual recognition and procedural safeguards

The principle of mutual recognition has been known and applied in the context of Europe’s internal market for decades (by establishing free movement of goods and mutually recognising product standards). Transferring this principle to the setting of criminal proceedings is not a simple matter though. The free movement of goods cannot be compared to the free movement of evidence or data in the context of a criminal prosecution. This is not only due to the fact that evidence or data to be used in criminal proceedings cannot be extracted or ‘exported’ as a ‘final product’ from the general context of its legal order, with its respective particularities relating to the way it is gathered, without bringing about changes or loss of probative value. At least as crucial is the fact that the personal freedoms of the EU’s citizens are at stake in this field. This requires a specific approach.

The Tampere version of the mutual recognition principle was something of a novum, in that it requires the recognition and execution of judicial decisions from other member states without a national, judicial test of their lawfulness or legitimacy. The logical implication of this is mutual recognition a priori that the foreign process in question meets all of the requirements that flow from the rule of law, as understood by the executing state. It is a logical conclusion therefore that, given the sensitivities surrounding sovereignty and feelings of superiority with regard to one’s own national criminal procedures, mutual recognition in the field of judicial cooperation in criminal matters is only feasible if all states can rely on decisions taken abroad meeting at least the minimum safeguards that their own procedures provide.

2.4 Towards approximation of procedural rights of suspects and defendants: the proposal for a framework decision

The Commission stated in 2000 in a Communication to the Council and the European Parliament that “it must therefore be ensured that the treatment of suspects and the rights of the defence would not only suffer from the implementation of the principle (of mutual recognition) but that the safeguards would even be improved through the process”. This was endorsed in the Programme of Measures to implement the Principle of Mutual Recognition of Decisions in Criminal Matters, adopted by the Council and the Commission. It pointed out that “mutual recognition is very much dependent on a number of parameters which determine its effectiveness” and that these parameters include “mechanisms for safeguarding the rights of […] suspects” (parameter 3) and “the definition of common minimum standards necessary to facilitate the application of the principle of mutual recognition” (parameter 4).

This conviction led to the drafting by the Commission in 2004 of a ‘Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings.”

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12 ECJ, 20 February 1979 (case 120/78).
13 Through the so-called principle of availability, cf. supra.
14 K. Ambos, l.c., 31.
15 Ch. Brants, l.c., 106
16 Ibid..
Emerging from the consultation process preceding the drafting of this proposal were five areas of priority rights: legal aid for suspects and defendants; the development of a ‘letter of rights’ to inform suspects which rights they could exercise; extra protection for ‘vulnerable groups’; consular assistance; and translators and interpreters. Other subjects (such as bail, the principles of nemo tenetur and ne bis in idem, fairness in the handling of evidence, appeal and trial in absentia) were reserved for ‘further research’.

As negotiations developed, increasing opposition to the proposal emerged. Probably the main dividing line was the question whether the EU was competent to legislate on purely domestic proceedings or whether the legislation should be devoted only to cross-border cases.²⁰ It is striking to note in this respect that this element did not prevent member states to adopt a wide range of measures in the fight against crime, which also have direct implications for domestic law and domestic proceedings (e.g. common definitions on terrorist offences²¹ or minimum standards on maximum sentences for certain types of trafficking in persons²²). Nor was it an obstacle in 2001 for improving the standing of victims in criminal proceedings.²³ In this context reference should also be made to article 82 of the Treaty on the Functioning of the European Union (TFEU).²⁴ According to this article, directives establishing minimum rules should aim at facilitating mutual recognition of judgments and judicial decisions, and police and judicial cooperation in criminal matters. These minimum rules should concern, inter alia, mutual admissibility of evidence between member states, the rights of individuals in criminal procedure and the rights of victims of crime. This competence of the EU is new, in the sense that criminal procedure had so far been left out of the scope of harmonisation (cf. the wordings of article 31 TEU). Another common critique to the proposed framework decision was that the rights were too vague and set at too low a threshold or that the proposal would have added little value to the existing protections under the ECHR.

Eventually, no political agreement could be reached.²⁵ The Commission however remained convinced of the need for EU action on this point. A Study carried out for the Commission by the Université Libre de Bruxelles (ULB) between 2007 and 2009 showed that almost all practitioners involved in cross-border proceedings consider an instrument of this sort to be essential.²⁶ Moreover, the Commission ordered a study

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²⁴ OJ. 9 May 2008, C 115, 47. With the entrance into force of the Lisbon Treaty, the existing Treaty establishing the European Community will be renamed as Treaty on the Functioning of the European Union (TFEU). Together with the new Treaty on the European Union (TEU), the TFEU constitutes the new foundation of the EU (see for a detailed explanation and for the status of ratifications: http://europa.eu/lisbon_treaty/index_en.htm
²⁵ Even on a diluted version, Justice Ministers could not find any agreement at the Justice and Home Affairs Council on 19 to 20 April 2007. The proposal was discussed again by the Council on 13 June 2007. The Council was unable to agree and there the matter has lain since.
to be carried out in order to obtain up to date information on this subject that could provide a basis for a new proposal for a council framework decision.\textsuperscript{27}

Finally, on 8 July 2009 the European Commission presented a new and much more limited draft for a Council Framework Decision on procedural rights.\textsuperscript{28} Unlike the previous proposal, this new draft only focuses on one set of rights, namely those relating to interpretation and translation.

3 Is there need for EU action in the field of procedural rights in criminal proceedings?

3.1 Introduction

Given the difficulties already encountered in the negotiation of the 2004 Proposal and taking account of the possible overlap with the ECHR, as stated by several member states, it is useful to reflect on the need for a EU instrument on procedural rights. Could it not suffice to refer to the ECHR as the main mechanism for preserving fundamental rights in Europe? Could the EU bring added value and, if so, in what way? And does the mutual recognition doctrine not imply a basic level of trust between EU’s member states?

The current chapter will show that the answer to each of these questions all comes down to the same fundamental conclusion: there is an urgent need for an in-depth EU legal initiative on procedural rights, not only to safeguard subjects involved in criminal proceedings throughout the EU but also to ensure the effectiveness of judicial and police cooperation as such.

3.2 The (in)adequacy of the ECHR framework

A first question is whether the ECHR framework does not offer sufficient protection to suspects and defendants in criminal proceedings. Doubts about whether the ECHR and the European Court for Human Rights (ECtHR) are able to offer this kind of protection, are not ill-founded. The ECHR is implemented to very differing standards in the member states and there are many violations. The number of applications is growing every year and the ECtHR is seriously overloaded (there are currently 110,000 cases outstanding at the ECtHR and articles 5 and 6 of the Convention are the most commonly cited in applications). Moreover, member states have not always amended their legislation to adapt them to the condemning judgements of the ECtHR which – in essence – are not of an enforceable nature.

Further, the ECHR jurisprudence does not contain any explicit imperative on the rules of evidence.\textsuperscript{29} The admissibility of evidence is primarily governed by the rules
of domestic law, provided that they respect the rights and freedoms guaranteed by the Convention. It often remains difficult to conclude from the ECHR’s decisions whether or to what extent the use of illegally or unfairly obtained evidence constitutes a violation.

Besides the apparent need to complement or reinforce the protection offered by the ECHR mechanism, a reflection on the need for initiatives on procedural rights at EU level should also include some of the latest developments in the field of police and judicial cooperation in criminal matters within the EU, in particular in the area of evidence gathering and transferral.

### 3.3 Towards a free movement of evidence: what with procedural rights?

The main aspect in this respect concerns the recent adoption of the Council Framework Decision on the European Evidence warrant (EEW). It has the aim of simplifying and accelerating the gathering and transfer of evidence in criminal proceedings with a cross-border element. It is mainly intended to replace the 19th century mutual assistance approach with a modern procedure.

The Framework Decision applies to objects, documents or data obtained under various procedural powers, including seizure, production or searches. The EEW can however not be used to interview suspects, take statements or hear witnesses and victims. It can also not be used for investigative measures which involve obtaining evidence in real-time such as interception of telecommunication and monitoring of bank accounts. Nor can it be used to obtain evidence that can only result from further investigation or analysis (e.g. to require the commissioning of an expert’s report or to require the executing authority to undertake computerised comparison of information (computer matching) to identify a person). The EEW will thus be used where evidence is directly available in the executing state (e.g. extracting information from a register of criminal convictions or requesting data on the existence of bank accounts). It is also usable for obtaining objects, documents or data falling within the excluded categories provided that they had already been gathered prior to the issuing of the warrant (e.g. to obtain existing records of intercepted communications, surveillance, interviews with suspects, statements from witnesses and DNA test results).

Although the framework decision on the EEW does not directly address the issue of mutual admissibility of evidence, the EEW nevertheless aims to facilitate the admissibility of evidence obtained from the territory of another member state. It intends to achieve this mainly in two ways, which touch upon the legal position of the individual(s) concerned.

Firstly, certain procedural safeguards are included to protect some fundamental rights: (1) only judicial authorities may issue such a warrant; (2) several conditions must be met before a warrant can be issued (such as certification of its content and

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31 Explanatory Memorandum Nos. 38 f., Proposal for a European Evidence Warrant.
32 Article 4, 2° (a).
33 Article 4, 2° (c).
34 Article 4, 4°.
translation into one of the official languages of the executing state); and (3) certain grounds of refusal may be claimed by the executing state.

Secondly, admissibility should be facilitated by adopting the ‘forum regit actum’ principle, introduced in 2000 by article 4 of the EU Convention on mutual legal assistance in criminal matters. According to this principle, the requested state must provide assistance in accordance with the formalities and procedures expressly indicated by the requesting state to the maximum extent possible. The requested state can only refuse to comply with these requirements where this would be contrary to the fundamental principles of law of the executing state or where the Convention itself expressly states that the execution of requests is governed by the law of the requested State.

The rationale behind this principle is the idea that a piece of evidence, legally obtained in one member state would be admissible as evidence throughout the EU. This is probably not a realistic goal, for it requires the existence of a certain minimum degree of trust of member states in one another’s criminal justice system. Only when the executing member state deems the issuing state’s legal system sufficiently compatible with its own ‘fundamental principles of law’, will the execution of evidence warrants (and the admissibility of evidence acquired) happen in a smooth and flexible way. It is clear that a EU initiative on procedural rights would potentially have a positive effect on guaranteeing this necessary confidence of member states in one another.

This is all the more necessary given the current plans of the Commission to initiate preparatory work on a Framework Decision which would expand the scope of application of the Framework Decision on the EEW in order to further replace the existing regime of mutual assistance within the EU by the principle of mutual recognition. The explanatory memorandum of the EEW leaves no doubt in this respect:

“…the European Evidence Warrant is, in the Commission’s view, the first step towards a single mutual recognition instrument that would in due course replace all of the existing mutual assistance regime. [...] Such a single consolidated instrument would within the EU replace mutual legal assistance in the same way that the European arrest warrant will replace extradition. The existing mosaic of international and EU conventions governing the cross-border gathering of evidence within the EU would thus be replaced by a single EU body of law.”

Traditional judicial cooperation in criminal matters will thus eventually be replaced by the mutual recognition principle, which should smooth the way for interstate assistance and remove superfluous formalities from all methods of cooperation. Combined with the continuing shift from the traditional ‘locus regit actum’ rule to the ‘forum regit actum’ principle, this would imply that the execution of these mutually recognised warrants would be increasingly determined by the procedural rules of the

36 Article 12.
37 A preparatory study “The laws of evidence in criminal proceedings throughout the European Union” (JLS 2008/E4/006) is currently carried out by the Institute for International Research on Criminal Policy (IRCP) of Ghent University (Prof. Gert Vermeulen) in cooperation with the University of Maastricht (dr. Wilma Dreissen).
issuing/requesting state. This evolution implies that the EU is a considerable step closer towards a genuine free movement of evidence between its member states.39

The link with the respect for procedural safeguards at a minimum level throughout the EU is evident. The evolution towards a free movement of evidence would be detrimental for the legal position of suspects and defendants throughout the EU, if no adequate level of procedural protection were to be guaranteed. Furthermore, the effectiveness of the system (i.e. a smooth execution of the ‘warrants’) would be seriously hindered if the current differences between members in regard of procedural rights were to be maintained. The executing member state would have to make a case by case comparison between the procedural rules of the issuing member state and its own fundamental principles of law.

It cannot be predicted how member state would deal with such an exercise. One thing is sure though. A minimum standard of procedural safeguards, taking into account the ECHR and case law of ECtHR on the one hand, and the fundamental principles of each member state on the other hand, would hugely diminish potential obstacles in applying the ‘forum rule’.

3.4 The breakdown of mutual recognition: mutual trust vs. the resurrecting dominance of domestic procedures

Certain recent developments indicate that the EU is taking steps back in regard of the mutual trust model. It seems that the mutual recognition doctrine is being questioned by some member states in a fundamental way.40

The Council of the EU has – on a single but important stance, i.e. in the context of the EEW – broken with its former reasoning founding the separate regime for 32 offences not requiring any verification of dual criminality. Article 23(4) of the Framework Decision on the EEW leaves room for a declaration by Germany (which it has used) to reserve the right to make the execution of an EEW subject to verification of dual criminality in cases relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion or swindling, if it is necessary to carry out a search or seizure for the execution of the warrant. Such dual criminality checks will not be performed, however, in cases where the issuing authority has officially declared that its definition of one of the stated offences reflects the criteria set out in the German declaration, which – unsurprisingly – reflects the constituent elements the latter requires for the offence concerned. In other words, the Council has agreed to allow Germany to return to the traditional system of dual criminality for at

39 It should be noted in this respect that there are already legal instruments in place that provide extensive possibilities such as the Convention of 18 December 1997 on mutual assistance and cooperation between customs administrations (Napels II Convention), OJ C 24/1, 23.01.1998. This Convention – which can be applied between judicial authorities in criminal investigations (article 3) – not only provides that “the requested authority shall agree to comply a particular procedure in response to a request, provided that that procedure is not in conflict with the legal and administrative provisions of the requested Member State” (article 9, 6) but also foresees a far-reaching framework for using information in a broad sense (“...findings, certificates, information documents, certified true copies and other papers...”) acquired in the requested state as evidence in accordance with national law of the requesting state (article 14).

least some of the core crime categories featured in the 32-list, such as terrorism, by granting it the possibility of opting-out. In allowing the opt-out clause, which itself is clearly triggered by the growing distrust of at least one of the member states, the EU seems to have taken a retrograde step. The proclaimed mutual trust model, on which mutual recognition is based, has been confronted by a new realism. It seems that we are close to exhausting the momentum that 9/11 created, which led to the political success of the mutual recognition principle.

Further, it seems that, once again, the mutual recognition principle is unexpectedly – probably due to its original success – facing manifest reluctance to make it the general policy for third pillar cooperation, i.e. including in the sphere of police cooperation. The principle of availability, which the Hague Programme wanted to be applicable as from 2008, to the exchange of information relevant to law enforcement (services), does not encompass genuine mutual recognition of law enforcement decisions – as the EU has chosen to introduce it for judicial decisions in criminal matters only. On the contrary, mutual recognition is mitigated by a requirement for verification of equivalent access by the requesting authority and access by Europol within its competence. Here, the rationale is, therefore, distrust instead of blind confidence. This method of functioning does not even correspond to the essence of the forum regit actum rule. Like the gradual downfall of mutual recognition, illustrated above by the German reintroduction of a dual criminality check in the context of the EEW negotiations, this is a retrograde step.

Other illustrations of the recent resurrection of practices and concepts that, until recently, were perceived as incompatible with the mutual recognition principle, at least in its initial interpretation, may be found in the context of mutual recognition of custodial sentences and the mutual recognition of previous convictions. In the case of deprivation of liberty, member states should – according to the initial interpretation given to mutual recognition – have blind confidence in each other’s decisions involving deprivation of liberty. Consequently, the executing member state should not be put in a position in which it should opt for the lex mitior (the ‘mildest applicable’ law) principle, as it was traditionally supposed to do under, e.g. the European Convention of 28 May 1970, on the international validity of criminal judgments, or the Convention of 21 March 1983, on the transfer of sentenced persons. Instead, it should simply take account of the sentence or disqualification and execute it without attaching any further requirements. In this respect, it suffices to refer to the explanatory memorandum to the initial Commission proposal on the EAW. Under Article 4, paragraph 6 of the EAW framework decision, it is possible for the executing member state, where surrender is sought for the purpose of executing a sentence, to execute the sentence itself instead of surrendering the person concerned to the member state issuing the EAW (aut dedere aut exequi rule) – which means mutual recognition of the sentence pronounced in the issuing member state. The Commission has pointed out that, in such a case, the executing member state would not be allowed to adapt the sanction imposed to bring it in line with its domestic law. The text of the memorandum is crystal clear:

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“Where this Article is applied, the amount of the penalty cannot be amended, even if it is different from what would have been ordered in the executing State. The text does not take over Article 10 (2) of the 1983 Convention, the implementation of which is basically incompatible with the principle of mutual recognition. The executing State’s system of execution of sentences will apply.”

Contrary to the initial Commission standpoint (i.e., in designing the EAW as the first mutual recognition-based EU instrument), according to which the executing member state enjoys no discretion whatsoever to convert or adapt the sentence imposed by the issuing member state, at least two recent mutual recognition-based legal instruments spell out that a person, following execution of a sentence or disqualification in another member state, may not be treated more unfavourably than if he or she had been imprisoned, respectively convicted by the national authorities of the member state executing the sentence or disqualification concerned.

The first example can be found in Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.  

The text of Article 8, paragraphs 2-4, of the text reads as follows:

2. Where the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where that sentence exceeds the maximum penalty provided for similar offences under its national law. The adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State.

3. Where the sentence is incompatible with the law of the executing State in terms of its nature, the competent authority of the executing State may adapt it to the punishment or measure provided for under its own law for similar offences. Such a punishment or measure shall correspond as closely as possible to the sentence imposed in the issuing State and therefore the sentence shall not be converted into a pecuniary punishment.

4. The adapted sentence shall not aggravate the sentence passed in the issuing State in terms of its nature or duration.

However, as beneficial as the rationale of the proposed conversion and lex mitior rules may be, it is conceptually not compatible with the mutual recognition theory. As was pointed out, the European Commission – in the context of the EAW – explicitly recognised the ban of all procedures intended for the conversion of a foreign sentence or measure. In addition, the Commission has now even included a proposal in the above framework decision to also impose the lex mitior rule upon member states when they choose to execute the sentence themselves in the context of applying the aut dedere, aut exequi principle referred to above.

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43 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.
The second example was originally to be included in the proposed framework decision on taking account of convictions in the EU member states in the course of new criminal proceedings, in which the principle had been inserted that:

“If, under national legislation, convictions handed down in the other member states against nationals or residents are entered in the national criminal record, the rules governing entry in the record, modifications or deletion of the information entered may under no circumstances have the effect of causing the person to be treated more unfavourably than if he/she had been convicted by a national court.”

In the meantime, a political decision seems to have been reached that the matter concerned should be dealt with in the context of the negotiations on the proposal for a Council framework decision on the organisation and content of the exchange of information extracted from criminal records between member states, to which the phrase concerned would be copied.

In summary, there is a clear trend to return to the past – and to the lex mitior principle in particular as a core human rights characteristic of it – instead of further developing and enhancing the mutual recognition principle in accordance with the initial theoretical dogmas that marked it. At the same time, however, the observed trend marks a prominent resurrection of the domestic legal system (of the executing member state) as the point of reference, by which it could be argued that the essential mutual trust presumption on which the entire mutual recognition principle was built, has been substantially done away with.

It is clear that ‘mutual trust’ is “more of a stated intention than real trust that member states wish to carry through to its final consequences”. These developments strengthen the call for actions promoting mutual trust, which lies at the heart of the mutual recognition model. In this respect, EU action on procedural rights would have the potential of turning things back around. The only question is: what should this ‘action’ look like?

4 From minimum approximation to mutual recognition of procedural rights

4.1 Minimum approximation of procedural rights at EU level

In order to create a true basis for genuine mutual trust between the member states, and a solid foundation for mutual recognition, a binding common base of procedural minimum standards is required. The proposal for a draft framework decision on certain procedural rights in criminal proceedings throughout the EU was a first important step taken by the Commission. There remains controversy however as to whether there was a legal basis for the EU to legislate in this area. The Council Legal Service in its opinion of 30 September 2004 on the subject concluded as follows:

44 See: Art 6, para 2 of the proposed Framework Decision, Council of the EU, COPEN 46, 8652/06, Brussels, 16 May 2006.

45 M. De Hoyos Sancho, Harmonization of criminal proceedings, mutual recognition and essential safeguards, in M. De Hoyos Sancho (ed.), o.c., 42.
“Therefore, if the Council is of the opinion that the guarantees laid down in the proposal at Union level offer advantages because of the positive effect on mutual trust between member states and between courts and on the functioning of criminal justice systems, and that these measures do not go beyond what is necessary to improve judicial cooperation, the Union may adopt the proposed measures and Article 31 (1) (c) of the TEU is the correct legal basis for that.”

The Council Legal Service, therein followed by the Commission, thus agrees that as long as the main focus remains upon judicial cooperation in criminal matters, article 31 TEU can and should be interpreted broadly. This seems logical. Given the adoption of other framework decisions, there is nothing to prevent the Union laying down standards insofar as the essential aim is to facilitate mutual recognition.46 As such, the draft framework decision was a good initiative. However, it was insufficient to create the foundation of confidence it is striving for, due to its limited scope and the significant exceptions incorporated into the proposal.47 Encompassing only the right to information, the right to legal assistance (including free legal assistance) and the right to interpretation and translation, made the proposal support a noble cause. However, building mutual trust between member states requires more than a minimum amount of approximation regarding the rights mentioned. Of deeper concern are the exceptions that had been integrated into the preamble of the draft legal instrument, stating that the “proposed provisions are not intended to affect specific measures in force in national legislations in the context of the fight against certain serious and complex forms of crime in particular terrorism.”

Making such essential exceptions, specifically with regard to terrorism, leads to the belief that there is still no real acquis in respect of procedural safeguards. The Commission announced in its Legislative and Work Programme for 2009 (“Acting now for a better Europe”)48 that it would propose a new draft Framework Decision on procedural rights in July 2009. As indicated earlier, the proposal published on 8 July 2009 is very limited in scope, its (only) objectives being to improve interpretation and translation.

4.2 Approximation of procedural rights on a higher level

Due to their potentially exceptionally strong impact on the fundamental right to respect for private life, the field of (special) investigative measures – such as e.g. (house) search, infiltration, interception of telecommunications and having recourse to anonymous witness testimony and protection of and collaboration with witnesses – also requires a minimal level of approximation. In this respect, the steps to be taken towards approximation should at least incorporate the rich acquis of the jurisprudence of the European Court of Human Rights, which has ruled in many cases involving investigative measures and the right to private life and which has a substantial impact on domestic criminal procedure.

46 This view was also expressed in a Paper that was submitted by Justice, Amnesty International EU Office and the Open Society Justice Initiative for the experts meeting on procedural rights organised by the Commission on 26 and 27 March 2009.
47 Also see Ch. Brants, l.c., 110-116.
In the field of house search for example, The ECHR provides the minimum standard for safeguards. These include the level of certainty that evidence is on the premises to be searched; the time of day when search powers can be used; notification of the person whose premises have been searched; the rules applicable when the occupier of premises is absent; and the need for independent third parties to be present at the search. Within this framework, significant national variations in the safeguards exist. In 2004, the Belgian Government was convicted in the Van Rossem case for having violated article 8 ECHR for using insufficiently detailed arrest warrants. The case led to a change of the national rules on house search by the Belgian Supreme Court. Overall compliance within member states with these minimum rules would thus not only offer a basic procedural protection of those targeted by the search warrant, but would also facilitate the admissibility of evidence gathered through a house search in a cross-border context.

As is clear from the previous example, the ECHR acquis should constitute the minimum level of any approximation effort on procedural rights at EU level. For some member states, however, a meaningful and worthwhile measure would mean a measure that would not only be consistent (in the sense of not conflicting) with the ECHR but which would also go beyond the ECHR and add real value for those involved in criminal investigations or proceedings within Europe.

The mutual recognition principle should thus be combined with a legally guaranteed respect for procedural criminal law standards through a wider and more specific minimum approximation than envisaged in the draft framework decision on certain procedural rights, while still respecting the subsidiarity principle. This would serve a double cause. Firstly, subjects targeted in investigations with a cross-border dimension would be offered a higher degree of protection (at a minimum respecting the ECHR acquis). Secondly, judicial cooperation in the broadest sense (including the admissibility of evidence gathered abroad) through the mutual recognition principle would be facilitated, given the general focus on the ‘forum regit actum’ rule. Cooperation according to this latter principle can only be successful if the requesting state’s (forum) legislation or legal practice in respect of a certain investigative measure is not irreconcilable with the requested state’s (locus) fundamental principles of law. Such incompatibilities would considerably be avoided if those fundamental principles were approximated. Exceptions in this respect could be made for investigative techniques with a high sensitivity such as controlled deliveries or Joint Investigation Teams (JIT).

This conviction has inspired several preparatory legislative proposals, drafted by the Institute of International Research in Criminal Policy (IRCP). Two examples are elaborated below. The first relates to the aforementioned principle of availability.

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51 The current mutual legal assistance regime concerning a JIT still refers to the traditional locus rule (article 3(b) of the Council Framework Decision of 13 June 2002 on joint investigation teams, OJ L 162, 20.06.2002).
The other relates to (both procedural and non-procedural) witness protection and collaboration with justice.\textsuperscript{54}

The November 2004 Hague Programme introduced the principle of availability as the future principle for the exchange of law enforcement cooperation. It entails that information needed for law enforcement purposes should cross the EU’s internal borders without any obstacles. In essence it calls for a free traffic of information relevant for law enforcement purposes. The principle of availability has the power to transform mutual recognition as it subsists today in its – by means of the requirements of access by equivalent authorities or Europol only – mitigated form into a stronger concept of genuine mutual recognition.

The IRCP proposal sought to ensure that, by using a so-called pre-evidence warrant, member states would be able to exchange relevant information on available law enforcement measures, provided that they comply with specific safeguards. Firstly, the proposed warrant would only concern existing information, ruling out the possibility of requiring investigatory measures for obtaining the information.\textsuperscript{55} Secondly, the information would only be used in the pre-evidence phase.\textsuperscript{56} Using the information as genuine evidence would mean that one would rely on traditional mutual legal assistance schemes in order to request and receive the information required. Thirdly, the pre-evidence warrant would ensure maximum traceability of the information: by systematic logging of the information in the executing state as well as in the issuing state; by introducing a duty to list all information obtained using the pre-evidence warrant in the criminal file and actually adding to the file the information that has been used effectively, even if only as ‘steering’ information and not as genuine evidence in court. Compliance with the traceability duties would be subject to disciplinary, civil and/or criminal liability.\textsuperscript{57} Supplementary control would be provided by the introduction of the concept of ‘information DNA’, i.e., the complete historical trace to which a specific sample of information has been subject, that will be attached to the information, with a view to future access and use.

In the field of (both procedural and non-procedural) witness protection and collaboration with justice, the current EU/multilateral acquis encompasses only a set of mainstream ideas, non-binding best practices and soft law instruments. The three IRCP proposals on protected witnesses\textsuperscript{58}, anonymous witnesses and collaborators with justice\textsuperscript{59} have made a genuine attempt to update and upgrade these concepts into binding EU minimum standards, with a clear view on approximation of criminal procedural

\textsuperscript{55} G. Vermeulen, T. Vander Beken, L. Van Puyenbroeck and S. Van Malderen, o.c., p. 41.
\textsuperscript{56} Ibid., p. 26.
\textsuperscript{57} Ibid., pp. 44-46.
\textsuperscript{58} For a definition reference can be made to the Recommendation (2005) 9 of the Committee of Ministers of the Council of Europe to Member States on the protection of witnesses and the collaborator of justice, where a ‘witness’ is defined as “any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony (irrespective of his/her status and of the direct or indirect, oral or written form of the testimony, in accordance with national law) who is not included in the definition of ‘collaborator of justice’.”
\textsuperscript{59} In the aforementioned Recommendation (2005) 9 a ‘collaborator of justice’ is defined as “any person who faces criminal charges, or was convicted, of having taken part in an association of criminals or other criminal organisation of any kind, or in organised crime offences but agrees to cooperate with criminal justice authorities, particularly by giving information about the criminal association or organisation or any criminal offence connected with organised crime or other serious offences”. 

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law within the member states. The starting point used in the proposals is a maximum scope ratione materiae covering offences committed within the framework of a criminal organisation or participation in a criminal organisation, terrorist offences, offences relating to a terrorist group or offences relating to terrorist activities, offences within the jurisdiction of the International Criminal Court and the rest of the 32 offences commonly used in mutual recognition instruments, provided that they are punishable by a sentence involving deprivation of liberty for at least three years.

The link to the list of 32 offences is supplemented by an opt-out clause for member states implementing legal concepts in their domestic legal order – thereby ensuring respect for the subsidiarity principle – with the exception of offences committed within the framework of a criminal organisation or participation in a criminal organisation.

An important feature incorporated into the proposals is the obligation for member states to accept evidence gathered in another member state which makes use of protected witnesses or collaborators with justice, even where such use is related to offences which this member state has excluded from the domestic scope of the legal concepts concerned by use of the opt-out clause. However, the value of the evidence gathered in this way is different in each of the three proposals. In the case of anonymous witnesses, information provided by them in accordance with the proposed procedural guarantees should be accepted in another member state as supportive evidence, even where the information relates to one of the opt-out offences in the latter. When information has been obtained from a collaborator with justice, provided that the procedural guarantees introduced in the proposal have been complied with, it is proposed that member states accept such information at least as supportive evidence, but allows them to accept it as core evidence if they so wish. In the case of a protected witness providing information in accordance with the procedural rules and guarantees embedded in the proposal, full recognition of the information as evidence is required.

A second important innovation of the proposals relates to decisions not to prosecute (res iudicata) collaborators with justice. The ne bis in idem effect that is created by these decisions should be respected, regardless of the use of the opt-out clause by the member state for (certain of) the non-mandatory offences. This means that, according to the proposal, a collaborator with justice who has been granted immunity from prosecution in accordance with the proposal in one member state, may not be prosecuted by another member state for the offences for which he or she has been granted immunity from prosecution. This is the case even where the latter member state has chosen not to provide in its legislation for the possibility that the competent authority may grant immunity from prosecution, provided that the decision whereby immunity was granted bars further prosecution in the member state where the immunity was granted.

61 As defined by the Framework Decision on the fight against organised crime (Council of the EU, CRIMMORG 132 OC 597, 12279/06, Brussels, 28 September 2006).
63 G. Vermeulen (ed.), o.c., p. 240.
64 Ibid., p. 241.
65 See Court of Justice, 11 February 2003 (Gözüitok and Brügge), C-187/01 and C-385/01.
By integrating the two aforementioned characteristics, a minimum mandatory mutual recognition is assured. In order to enhance this minimum mutual recognition, specific minimum criminal procedural law guarantees have been similarly included in all three proposals. These encompass guarantees regarding the competent authorities, the granting and revoking of the status of anonymous or protected witnesses and collaborators with justice, the evidential value of evidence gathered using anonymous or protected witnesses or collaborators with justice, the rights of the defence and written agreement including the rights and duties in granting or revoking protection or benefits. Specifically, the principles of necessity and subsidiarity are recognised by opting for a well structured procedure verifying the need to rely on anonymous or protected witnesses or collaborators with justice. The rationale is logically related to the reliability of the individuals involved, the rights of the defence to challenge or question the witness, the costs involved and possible ethical issues that can rise as a result of using one of these possibilities.

The proposals, therefore, highlight the need for an approximation of minimum procedural rules. Complemented with a clear and comprehensive outline of minimum guarantees offered by the jurisprudence of the European Court of Human Rights, the proposals are believed to form a wide-ranging and effective instrument in strengthening the mutual recognition principle.

4.3 Towards genuine mutual recognition of procedural guarantees

The previously discussed options all imply establishing a binding minimum level of domestic procedural criminal law standards. These should be developed around the jurisprudence of the ECtHR, thus providing a solid base for mutual recognition. As explained above, this approximation effort should be done at a wider and more specific level than the current proposal for a framework decision on procedural rights. Another and final option concerns the question what should be done if, in respect of a certain investigative tool or method, the domestic procedural law of the requested state offers a higher standard than the requesting state (or vice versa). Should the lowest common denominator be applied? Or should the individual concerned be accorded the highest standard of protection?

In such cases, it should be considered to combine the option of approximation with a mutual recognition of domestic procedural criminal law standards which go beyond the binding minimum level. This combination of the safeguards of the member states' criminal justice systems would maximise procedural protection for suspects and defendants and would consequently enhance mutual trust between member states, facilitating the application of mutual recognition instruments.

An example of this idea can already be found in the EU acquis. Article 10 of the 2000 EU Convention on mutual assistance provides the legal framework for hearing a

66 Evidently, the specific conditions to grant or revoke the status differs in each proposal regarding respectively anonymous or protected witnesses or collaborators with justice. See G. Vermeulen (ed.), o.c., p. 247, p. 254 and pp. 261-262.
67 Evidently, the specific rules on the value of evidence gathered, differs in each proposal regarding respectively anonymous or protected witnesses or collaborators with justice. The relevant jurisprudence of the European Court of Human Rights was duly taken into account. See Ibid., p. 241.
68 The relevant jurisprudence of the European Court of Human Rights was duly taken into account. See Ibid., p. 241.
witness or expert by videoconference. With respect to the applicable rules, article 10 (5) (e) states that “the person to be heard may claim the right not to testify which would accrue to him under the law of either the requested or the requesting member state”. In other words, this article applies the ‘lex mitior’ principle concerning the rights of excuse regarding hearing by videoconference. This rule should be generalised at EU level by officially incorporating it into mutual recognition.

5 Conclusion

The underlying research question of this article basically deals with a comparison of the possible options to take legal action at EU level in order to provide suspects and defendants within the EU with a better procedural protection. At present measures in this regard at EU level are primarily concerned with the introduction of common minimum standards (cf. the proposal for a framework decision on procedural rights). It should be considered not only to continue these approximation efforts at a wider and more specific scale (meaning the adoption of rights that go beyond the minimum level and which take account of the specific characteristics of intrusive investigative measures such as house search or interception of telecommunications) but also to introduce a mutual recognition of domestic procedural safeguards. Through a profound legal analysis the authors see these options as a necessary counterbalance for the free movement of evidence within the EU that is currently being envisaged at EU level.

Guaranteeing an acceptable level of procedural protection to suspects and defendants throughout the EU by approximation of national legislations is, of course, not the only possibly effective measure to strengthen mutual trust within the EU’s common judicial area. Legal action on procedural rights at EU level should be combined with a wide range of actions: “from the simplest – training of legal agents, learning of foreign languages – to the administrative – creation of networks, establishment of liaison magistrates or contact points – to the most complex such as improvements in the inherent quality of national regulations and effective compliance with the judgements of the ECtHR...”. 69

Nevertheless, a combination of mutually recognised domestic procedural safeguards with a wide approximation of procedural rights would be an ideal solution, both in terms of enhancing judicial cooperation by strengthening mutual trust as of presenting suspects and defendants with an adequate level of procedural protection. Requests for legal assistance would be executed more easily, for the competent authorities within member states would be assured that their foreign counterparts are bound by the same minimum procedural rules. On top of that, mutually recognising domestic procedural safeguards that go beyond the binding minimum level would considerably strengthen the legal position of the persons concerned by offering them the best of two worlds according to the lex mitior principle. This would not be revolutionary since the EU acquis on mutual legal assistance already provides this (cf. article 10 of the 2000 EU Convention on mutual assistance on the hearing by videoconference). A generalisation of this rule would be an important step towards practical and

69 M. De Hoyos Sancho, l.c., 46.
effective procedural protection of suspects and defendants throughout the EU and would thus contribute to a stronger area of freedom, security and justice.

6 Main references


Shaping the competence of Europol.
An FBI perspective

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1 Introduction

The European Police Office (Europol) is the European Union (EU) law enforcement organisation that handles criminal intelligence. Its aim is to improve the effectiveness and cooperation between the competent authorities in the Member States in preventing and combating serious forms of international crime. Europol was not established to deal with local or minor offences, but to give a European dimension to the investigation of crime of a European dimension (Klip, 2009). The list of Europol-crimes has become longer over the years. The Europol Council Decision further extends the competence of Europol, as the existence of an organised criminal structure is no longer a limiting element (Dorn, 2009). The forms of crime over which Europol has competence are to be assessed by the competent national authorities in accordance with the national law of the Member States to which they belong. This often leads to the result that the competence of Europol is being interpreted in different ways throughout the EU. It has already been suggested for the sake of coherence to rely on uniform definitions for so-called ‘EU core crimes’ that would also fall within the competence of bodies and agencies dealing with security related issues (e.g. Europol, Eurojust, Frontex) (Vermeulen, 2002).

In two parts and a conclusion, this contribution will elaborate on the overall-question: How to shape the competence of Europol? The latter also in comparative perspective, by looking at the United States (US). Two research methods are combined throughout this contribution: a study of relevant literature and a critical analysis of relevant legal and policy documents, including the very latest.

The first part is devoted to the competence of Europol. The first section (2.1) introduces Europol and identifies three ‘eras’ for further analysis. In the second section (2.2) the extension of the competence of Europol is analysed for the pre-Convention era (2.2.1), the Convention era (2.2.2) and the post-Convention era (2.2.3). Our main questions are: Was there a trigger to extend the competence of Europol time and again? Was there a genuine ‘need’ to do so? In the third section (2.3) the definition of the competence of Europol is examined, or rather the non-existence of definitions of Europol-crimes (2.3.1). We ask ourselves the question: What could fill the absence of definitions of Europol-crimes? (2.3.2). The first part is used as a steppingstone for the second, comparative part. We compare EU law enforcement organisation Europol to its US counterpart, the Federal Bureau of Investigation (FBI). The only comparisons between Europol and the FBI that have been carried out so far mainly concern executive powers (Ellerman, 2002 & 2005), leading to the conclusion that Europol is in no way a European equivalent of
the FBI (Bruggeman, 2000; Corstens & Pradel, 2002), although the role of Europol in joint investigation teams could be a foretaste of an executive European Police Office (De Moor, 2009). The question of competence ratione materiae has hardly ever been raised, whereas a comparison in this respect could be very useful for the Europol-case. The first section (3.1) introduces the FBI with its dual responsibility for law enforcement and national security. The second section (3.2) deals with the competence of the FBI, which is responsible for more than 200 categories of federal crime. How is the competence of the FBI defined? is our main question. First some basic constitutional features of the US criminal justice system are given (3.2.1). Then the federalisation of criminal law is examined (3.2.2), as the extension of the competence of the FBI and the extension of federal criminal law go hand in hand. Mirroring the first part, both the extension (3.2.3) and the definition (3.2.4) of the competence of the FBI are covered.

2 The Competence of Europol

2.1 Introducing: Europol

The EU was originally established largely to promote the economic integration of its Member States. Economic integration, however, brought with it new opportunities for criminals, above all the ease with which they could cross national borders. Because crime was perceived to be organised increasingly at a European level, politicians agreed that an organisation was needed that could coordinate national law enforcement resources to effectively tackle crime on a pan-European level (Haberfeld, McDonald & von Hassell, 2008). The acknowledged forerunner of Europol was the intergovernmental cooperation under the umbrella of TREVI (Terrorism, Radicalism, Extremism and International Violence), which took place in the margins of the European Community from the mid seventies until the early nineties (Fijnaut, 1992; Anderson et al., 1995; Peek, 1998). To the attentive observer it came as no surprise when Germany proposed at the Luxembourg European Council of 28-29 June 1991 the creation of a European Criminal Investigation Office (Fijnaut, 1994). This had always been the dream of former German Chancellor Helmut Kohl, who was in fact promoting the idea of a European Federal Police, modelled after the American FBI. Half a year later, at the European Council of 9-10 December 1991 in Maastricht, a modified proposal was formally adopted that a European Police Office (Europol) should be recognised under the new Justice and Home Affairs Title (JHA) of the equally new Treaty on European Union (TEU) (Bunyan, 1993).

The TEU was signed in Maastricht on 7 February 1992 (OJ C 191 of 29.7.1992). It entered into force on 1 November 1993 and marked a new step in the European integration. The Treaty of Maastricht, which established the European Union (EU), divided EU policies into three main areas, referred to as ‘pillars’. The supranational first pillar (European Communities) was complemented by the intergovernmental second (Common Foreign and Security Policy) and third (Cooperation in the Fields of Justice and Home Affairs) pillars (Guild, 1998). Article K. 1 TEU, the core provision of Title VI (Provisions on Cooperation in the Fields of Justice and Home Affairs) provided that Member States would consider as a matter of common interest: “9. police
cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (Europol)”. In this provision there was no question of the assignment of executive powers to Europol (Woodward, 1994; Bruggeman, 1996). It has to be noted that it was not until the Council adopted the Joint Action of 10 March 1995 (OJ L 62 of 20.3.1995) that Europol – or rather its predecessor the Europol Drugs Unit (EDU) – was formally housed in the third pillar.

The initial legal basis of the EDU was the Ministerial Agreement on the establishment of the Europol Drugs Unit, signed in Copenhagen on 2 July 1993 (Bunyan, 1997). The TREVI-Ministers had in fact agreed on a step-by-step creation of Europol, beginning with a drugs intelligence unit, which would then be further developed. From 1995 to 1999 the EDU acted as a non-operational team for the exchange and analysis of information and intelligence, as soon as two or more Member States were affected, in relation to inter alia illicit drug trafficking, together with the criminal organisations involved and the associated money-laundering activities (Monaco, 1995). The objective of the EDU was to help the police and other competent agencies within and between Member States to combat these criminal activities more effectively. The Member States' liaison officers and the EDU analysts joined forces in The Hague (NL). The essential feature of the EDU was the fact that no personal information could be centrally stored, whether automatically or otherwise. Europol replaced the EDU on 1 July 1999.

The Europol Convention (OJ L 62 of 20.3.1995) was signed on 26 July 1995, to enter into force on 1 October 1998, after its adoption by the Member States in accordance with their respective constitutional requirements. However, it was not until 1 July 1999, following a number of legal acts related to the Europol Convention, that Europol commenced its full activities as the EU law enforcement organisation. Yet again, no executive powers. This also showed from the declaration on the police which is annexed to the Europol Convention and which only mentions databases, support of the national investigations, analysis of information, the development of preventive strategies... (Bruggeman, 1997).

Under the Europol Convention, the organisation was made competent to support law enforcement action against a whole 'shopping list' of crimes, where an organised criminal structure is involved and two or more Member States are affected (infra). Europol’s core task is to support the competent authorities in the Member States (mainly police forces, immigration and customs authorities) in their intelligence work. In addition to the facilitation of exchange of information and the development of criminal intelligence, Europol can assist with advice and training. The backbone of Europol is its computerized system of collected information consisting of an information system (IS), analytical work files (AWFs) and an index system. The national unit situated within each Member State liaises between Europol and the competent national authorities. Europol liaison officers are seconded by their national unit to represent the interests of the latter within Europol.

The Treaty of Amsterdam of 2 October 1997 (OJ C 325 of 24.12.2002) brought a new dimension to cooperation in the fields of justice and home affairs. With the gradual transfer of policy on asylum, migration and judicial cooperation in civil matters from the third to the first pillar, Title VI of the TEU was renamed “Provisions...
on police and judicial cooperation in criminal matters”. The aspirations were wider, as it was now the Union’s objective “to provide citizens with a high level of safety within an area of freedom, security and justice” (Article 29, § 1 TEU). This objective should be achieved through “closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol) in accordance with the provisions of Articles 30 and 32” (Article 29, § 2, first indent TEU). Article 30. 1 TEU emphasised the importance of operational cooperation between the competent law enforcement authorities in the Member States. Europol also sees its role of information broker confirmed. In addition, Article 30. 2 TEU foresaw new tasks for Europol. In any case, there was again no question of the assignment of executive powers to Europol (ZANDERS, 1999).

Within a period of five years after the entry into force of the Treaty of Amsterdam (1 May 1999 – 1 May 2004), Europol had to be enabled to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity. Moreover, Europol had to be enabled to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases (SCHALKEN & PRONK, 2002). In November 2002 a Protocol amending the Europol Convention in this sense was adopted, adding “participation in a support capacity in joint investigation teams” and “making requests to initiate criminal investigations” to the principal – information-related – tasks of Europol (OJ C 312 of 16.12.2002).


On the basis of this introduction, three ‘eras’ can be distinguished, for each of which we examine the competence of Europol more closely (2.2): the pre-Convention era (2.2.1), the Convention era (2.2.2) and the post-Convention era (2.2.3). Our main questions are: Was there a trigger to extend the competence of Europol time and again? Was there a genuine ‘need’ to do so?

2.2 Extending the competence of Europol

2.2.1 The pre-Convention era

As the blueprint for the EU began to take shape from the mid eighties, drugs became the primary rationale for a new security agenda based on the argument that the abolition of internal border controls would cause an explosive growth in drug trafficking (ELVINS, 1999). This argument has been remarkably influential, despite an almost total lack of supporting evidence or research (BENYON et al., 1993). Drug trafficking also provided the primary rationale for Europol during the pre-Convention era.
The EDU, which formed the nucleus of Europol, kicked off in the 1993 Ministerial Agreement with competence for illicit drug trafficking, the criminal organisations involved and associated money laundering activities affecting two or more Member States. Drug trafficking was too important an issue to ignore. A new organisation like Europol could not possibly stay away from drugs. However, it was envisaged from the outset that Europol would not be a single mission agency (Verbruggen, 1995). The confinement to drug-related crime and money laundering was seen to hamper the EDU (Bruggeman, 1996).

In anticipation of a Europol Convention, about which agreement could not be reached at that time, the Essen European Council of 9-10 December 1994 decided to extend the EDU’s initial competence to the fight against illegal trade in radioactive and nuclear materials, crimes involving clandestine immigration networks, illegal vehicle trafficking and associated money-laundering operations. Although the extension was formalised in the 1995 Joint Action, the fact that in the absence of agreement on a Europol Convention, the EDU had been set to work with an extended competence on the mere basis of legally non-binding agreements among Ministers was described as unsatisfactory (House of Lords, 1995; Klip, 1995).

The 1995 Joint Action was equally controversial. At a stroke the remit of the EDU had been extended from one area of crime to four, without any reference to the European or national parliaments and without any motivation whatsoever. It was a move described by EDU/Europol Director Storbeck as “a legally and politically relative simple extension of the ministerial agreement” (Bunyan, 1995, p. 4). The House of Lords noted in its 1995 report that “the crimes within the initial competence reflect preoccupations of several Member States and appear on the list not because they are the most serious offences but because they are particularly transnational in character” (House of Lords, 1995, p. 26).

From crimes involving clandestine immigration networks to trafficking in human beings proved to be a small step. A domestic scandal1 severely influenced the debate and served as catalyst to speed up the decision making process (Locher, 2007). During the informal JHA Council of 26-27 September 1996 Belgium put forward three initiatives concerning trafficking in human beings and sexual exploitation of children. The Irish Presidency took over the lead with a motion to extend the competence of the EDU (Flynn, 1998). After formal approval from the 28-29 November JHA Council, a Joint Action extending the competence of the EDU to trafficking in human beings was adopted on 16 December 1996 (OJ L 342 of 31.12.1996). For the definition of trafficking the Joint Action referred to the Europol Convention, which after much delay and redrafting had been signed, but had not yet entered into force at that time (infra).

The Joint Action bore in mind the wish of the European Parliament. In its Resolution of 18 January 1996 on trafficking in human beings (OJ C 32 of 5.2.1996) the European Parliament had hit a nerve, referring to the abolition of border controls in an internal area without frontiers in which persons – including human traffickers – are entitled to freedom of movement. Therefore, compensatory measures of police cooperation were

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1 In the summer of 1996, Belgium had been confronted with the Dutroux case, which revealed that young girls had been kidnapped, sexually abused and subsequently killed, and which raised suspicion about the activity in Belgium of (international) paedophile networks, involved in trafficking in children, inter alia for the purpose of sexual exploitation and exploitation of children in pornographic performances and materials.
also to be applied to trafficking in human beings as a serious form of international crime. Yet, under the Treaty of Maastricht trafficking in human beings – unlike drug trafficking – was not explicitly mentioned in Article K. 1 TEU.

2.2.2 The Convention era

The Europol Convention was drawn up in secret by members of the Working Group on Europol comprised of interior ministry officials and police officers. The European Parliament was not consulted under the Treaty of Maastricht at any stage during the two years of negotiations over the Convention’s content, although Article K. 6 TEU explicitly stated that the Council should “consult” the European Parliament “on the principal aspects of activities” to ensure its “views” are “duly taken into consideration” (Bunya, 1995). This, many Members of Parliament believed, was reminiscent of the pre-TEU days when negotiations were carried out by a small group of bureaucratic elites behind closed doors (Flynn, 1998).

Initial delays in the drafting of the Europol Convention were related precisely to unresolved dilemmas about Europol’s sphere of competence (Deenboer, 1995). The list of crimes capable of being brought within the competence of Europol was expanded greatly between the initial drafts and the final text of the Europol Convention. Europol would initially act to prevent and combat unlawful drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime (Article 2.2, §1 Europol Convention). This corresponded to the extended competence of the EDU. Within two years at the latest following the entry into force of the Convention, Europol would also deal with crimes (likely to be) committed in the course of terrorist activities. The reference to terrorism while it was included in the Maastricht Treaty (Article K. 1 TEU), was not included in the first drafts of the Convention. It was added at the insistence of Spain and Greece, two Member States with domestic terrorism. The two-year waiting period was a compromise, allowing Europol to have a warming up period in less stormy waters (Verbruggen, 1995).

The Council could also decide to instruct Europol to deal with other forms of crime listed in the Annex to the Convention. The list included 18 other serious forms of international crime, divided into three categories. The first category covers crimes against life, limb or personal freedom (murder, grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage taking; racism and xenophobia). The second category clusters crimes against property or public goods including fraud (illicit trafficking in cultural goods, including antiquities and works of art; swindling and fraud; racketeering and extortion; counterfeiting and product piracy; forgery of administrative documents and trafficking therein; forgery of money and means of payment; computer crime; corruption). The third category bundles illegal trading and harm to the environment (illicit trafficking in arms, ammunition and explosives; in endangered animal species; in endangered plant species and varieties; in hormonal substances and other growth promoters; environmental crime). The Standing Committee of Experts on International Immigration, Refugee and Criminal law (Meijers Committee) told the House of Lords the list of crimes was arbitrary and argued for an objective standard (House of Lords, 1995). Europol’s competence also extended to the related illegal money laundering activities and the related criminal
All the Europol-crimes must satisfy three criteria, equally defining the competence of Europol (Article 2.1 Europol Convention). As a first criterion, there should be factual indications that an organised criminal structure is involved. The Europol Convention leaves this notion entirely undefined (*infra*). Nevertheless, in the Convention era organised crime became the primary rationale for Europol (Gregory, 1998). The use – and misuse – of the notion ‘organised crime’ is well known and well documented (See Den Boer, 2002). The second criterion requires two or more Member States to be “affected” by the forms of crime in question. It could be that two or more Member States are confronted with a criminal phenomenon. It could also be that they are simply involved in any way (Zanders, 1999). Based on this broad interpretation a cross-border element would then not be a prerequisite. The second criterion is not even sufficient, the crimes should also justify a common approach by the Member States owing to their scale, significance and consequences. This third criterion is nothing but an application of the principle of subsidiarity to the Europol-case. It is the principle, defined in the Treaty establishing the European Community (TEC) (OJ C 325 of 24.12.2002), whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. When a criminal phenomenon or a criminal organisation can be tackled more adequately at the European level, this calls for police cooperation through Europol. The mere fact, however, that forms of crime are brought within Europol’s remit does not warrant a common approach as such, even more so, now the list of Europol-crimes has become longer over the years and remains largely undefined (*infra*).

The Europol Convention had established an order of priority, which was disturbed at a number of occasions. The extension to terrorism was the first example. The two-year waiting period (*supra*) tested the patience of Spain. This had everything to do with the fact that the entry into force of the Europol Convention took longer than expected. Spain once again began to push for a more rapid inclusion of terrorism within the remit of Europol (Occipinti, 2003). The Council Act of 3 December 1998 (OJ C 26 of 30.01.1999) instructed Europol to deal with “crimes (likely to be) committed in the course of terrorist activities against life, limb, personal freedom or property”, as from the date of taking up its activities (1 July 1999) (Lavranos, 2003).

A Council Decision of 29 April 1999 (OJ C 149 of 28.05.1999) further extended Europol’s competence to deal with forgery of money and means of payment, one of the crimes listed in the Annex (*supra*). The trigger for yet another extension was the introduction of the euro. With the euro replacing the national currencies of the Member States the traditional (counter) argument of national sovereignty played to a lesser extent. In 2001 Europol and the European Central Bank even signed a strategic cooperation agreement, at the occasion of which Europol Director Storbeck said “organised crime was attracted by the idea of counterfeiting one of the two largest currencies in the world” (Europol, 2001).

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2 The euro (€) is the official currency of 16 of the 27 Member States of the EU. The euro was introduced to world financial markets as an accounting currency on 1 January 1999. Euro coins and banknotes entered circulation on 1 January 2002.
At its meeting on 15-16 October 1999 in Tampere, the European Council had called for special action against money laundering, which was seen to be at the very heart of organised crime (Document SN 200/1/99 REV 1). The Council was invited to extend the competence of Europol to money laundering in general (Tampere Milestone Nr. 56). In June 2000 the Portuguese Presidency introduced an initiative to this end (Council document 9426/00 of 26.6.2000). In November 2000 the first of three Protocols amending the Europol Convention was adopted. The so-called ‘Money Laundering Protocol’ (OJ C 358 of 13.12.2000) extended Europol’s competence to money laundering, regardless of the type of offence from which the laundered proceeds originate.

Instead of a further incremental extension of Europol’s competence (terrorism, forgery of money and means of payment, money laundering), the entire Annex was now brought within Europol’s sphere of competence. The motivation for this exponential extension was that criminals obviously ignored Europol’s competence (sic). Information concerning types of crime that fall outside the competence – to the extent it reached Europol at all – was to be regarded as excess information and as such unusable. Europol’s support to police authorities in the Member States was consequently impaired (Council document 5134/01 of 9.1.2001). The extension did not require amendments to the Europol Convention, but a Council Decision. The discussions within Council structures did however show a number of Member States in favour of an amendment of the Europol Convention, making Europol competent for international organised crime in general, without limiting the competence of Europol to an enumeration of forms of crime (Council document 11282/01 of 31.7.2001). The initial draft Council Decision of the Swedish Presidency (Council document 6876/01 of 8.3.2001) became a joint Belgo-Swedish initiative (Council document 9092/01 of 11.6.2001). The negotiations from the Europol Working Party (EWP) over the Article 36 Committee (CATS) to the Permanent Representatives Committee (COREPER) led to a political agreement by the JHA-Council of 27-28 September 2002 (Council documents 9093/2/01 of 5.9.2001; 9093/3/01 of 13.9.2001; 9093/4/01 of 20.9.2001; 9093/5/01 of 14.11.2001) and a formal adoption on the Council Decision of 6 December 2001 extending Europol’s competence to deal with the serious forms of international crime listed in Annex to the Europol Convention (OJ C 362 of 18.12.2001).

Halfway the Convention era the list of Europol-crimes had taken its final form. However, there remained room for manoeuvre with the first criterion defining the competence of Europol (supra). The Danish Initiative of 2002 proposed the deletion of the criterion that an organised criminal structure should be involved (Council document 10307/02 of 2.7.2002). The Europol Joint Supervisory Body (JSB) understood that practice had shown that some forms of serious crime did not fulfil this criterion. Its deletion would then prevent “that Europol is not competent in serious criminal cases that fulfil all the elements of serious international crime but lack a criminal structure. The serial rapist who victimises persons in different Member States but is not part of a criminal structure should be subject of the involvement of Europol in the joint efforts to stop him” (JSB, 2002, p. 4). The Danish Initiative also repealed the enumeration of specific crimes, claiming there was a need to extend Europol’s competence to serious international crime in general (Council document 10810/2 of 10.7.2002) (supra). The Danish Protocol of November 2003 (OJ C 2 of 6.1.2004) was less far-reaching eventually, only adding “reasonable grounds” to the factual indications that an organised criminal structure is involved and leaving the list of Europol-crimes intact (Floch,
2.2.3 The post-Convention era

In the post-Convention era serious crime is without a doubt the dominant theme, superseding organised crime (Dorn, 2009). The Commission took it one step further in its Proposal for a Europol Council Decision. The Council agreed (Council document 10327/07 of 4.6.2007), disregarding the German Presidency Proposal to add the criterion “when there are serious grounds to believe that these offences may be related to organised criminal activities” (Council document 7539/07 of 19.3.2007). The Europol Council Decision further extends Europol’s competence, as the existence of a criminal organised structure is no longer a limiting element. This would ease support provided by Europol to Member States in relation to criminal investigations where involvement of organised crime is not demonstrated from the start. Still, given the number of crimes (e.g. murder, grievous bodily harm, kidnapping…) that are more often committed outside an organised context, this is a significant change (Peers, 2007). Now “serious crime” has superseded “organised crime”, Europol joins in with its judicial counterpart Eurojust, which has a general competence for serious crime, particularly when it is organised (Art. 3 (1) Eurojust Decision) (OJ L 63 of 6.3.2002) (Brown, 2008). This enhances consistency within the third pillar (De Moor & Vermeulen, 2010).

All forms of serious crime that Europol is competent to deal with – other than organised crime and terrorism – are listed in the Annex to the Europol Council Decision. This list does not differ from the present enumeration. To join in with Eurojust, one would have expected “participation in a criminal organisation” to be considered as serious crime as well. Moreover, the offence “participation in a criminal organisation” also figures on the list of the 32 offences within the scope of the European arrest warrant (OJ L 190 of 18.7.2002), upon which the Commission Proposal was based. Remarkably enough, this means that Europol has competence over “organised crime” as form of crime, yet not over “participation in a criminal organisation” as criminal offence.

Now the extension of the competence of Europol has been covered, let us move to the definition of the competence of Europol (2.3), or rather the non-existence of definitions of Europol-crimes (2.3.1). We ask ourselves the question: What could fill the absence of definitions of Europol-crimes? (2.3.2).

2.3 Defining the competence of Europol

2.3.1 Problem identification

Although the Europol Convention defined the forms of crime, which Europol was initially competent to deal with (crime connected with nuclear and radioactive substances, illegal immigrant smuggling, trafficking in human beings, motor vehicle crime, illegal money laundering activities, unlawful drug trafficking), none of the forms of crime over which Europol subsequently gained competence have ever been defined. The Europol Council Decision does not remedy this shortcoming either. Instead the forms of crime are to be assessed by the competent national authorities in accordance with
the national law of the Member States to which they belong (Annex, *in fine*). This often leads to the result that the competence of Europol is being interpreted in different ways throughout the EU.

The Europol Information System (IS) (*supra*) is a painful illustration of the non-existence of definitions of Europol-crimes. The IS provides a general information exchange service available to all Member States through their liaison officers and the national units. It is used to store personal information about people who, under the national law of that Member State, are suspected of having committed a crime for which Europol has competence, or where there are serious grounds to believe they will commit such crimes. It allows Member States to search what is in practice “a central EU repository for serious organised crime” (*House of Lords*, 2008, p. 31). The IS is fed by input from the national units. Research has shown that officials responsible for the data transmission receive limited training on Europol’s sphere of competence and the functioning of the IS. If doubts arise as to the very scope of a Europol-crime, the national official can put a question to Europol; however this option is rarely used (*De Bondt & Vermeulen*, 2009). The consequences of the discretion of the Member States to assess the crimes within Europol’s competence in accordance with their national law are severe, as the same Europol-label (e.g. trafficking in human beings or any other of the Europol-crimes) has up to 27 possible different interpretations. We ask ourselves the question whether anyone knows what is actually in the IS.

### 2.3.2 Solution

What could fill the absence of definitions of Europol-crimes? Is there a solution? A careful analysis of legal and policy documents shows that there have been fruitless suggestions, originating both from within the Council and the European Parliament, to alter the situation.

The Swedish Presidency raised the issue whether definitions were needed for the forms of crime listed in the Annex (Council document 5555/01 of 22.1.2001). The Europol Convention (Article 43.3) did allow the Council to – unanimously – add definitions to the Annex. It was not a matter of legal basis, but a matter of policy choice. The initial draft Council Decision of the Swedish Presidency extending Europol’s competence to deal with all forms of crime listed in Annex, noted that this extension necessitated the addition of definitions to the Annex. For every form of crime listed in the Annex the draft suggested definitions, although the Presidency was of the opinion that only those forms of crime should be defined where doubts could arise as to the limits of Europol’s competence. Where the drafters got their inspiration from is difficult to ascertain, but at least not from the early days of the harmonisation movement. The joint Belgo-Swedish initiative no longer featured definitions, to the dissatisfaction of Germany that kept calling for definitions to be drawn up and included in the Decision (Council documents 9093/2/01 of 5.9.2001; 14196/01 of 4.12.2001).

The European Parliament also proposed an interesting amendment in its November 2001 legislative resolution (OJ C 140/E of 13.6.2002). If the Council would adopt framework decisions determining the constituent elements of individual criminal offences these should replace the corresponding provisions of the (Annex to the) Europol Convention. Following justification is given in the Turco Report (European Parliament document A5-0370/2001 of 24.10.2001): “in order to maintain in the
Union a clear, uniform legal framework of definitions of criminal offences laid down at European level, the framework decisions adopted by the Council must replace the corresponding provisions of the Europol Convention and the annexes thereto”. This explicitly joins in with the harmonisation efforts that have been conducted in the third pillar, on the basis of Article 29 seq. TEU.

The Treaty of Amsterdam brought a new dimension to both police (supra) and judicial cooperation in criminal matters. The debate on the need for common principles of substantive criminal law truly gathered momentum with the creation of the area of freedom, security and justice (De Bondt & Vermeulen, 2009). Article 29 TEU provides that this area of freedom, security and justice shall be achieved through closer police cooperation (supra), judicial cooperation and, where necessary, through approximation of rules on criminal matters in the Member States. According to Article 31. 1 (e) TEU, approximation shall be achieved by progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields or organised crime, terrorism and illicit drug trafficking. Article 34. 2 (b) TEU finally provides that the Council may adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions are binding upon the Member States as to the result to be achieved, but leaves to the national authorities the choice of form and methods, without entailing direct effect. Through the adoption of framework decisions the so-called ‘framework decision substantive criminal law’ came into being (Vermeulen & De Bondt, 2009).

The enumeration of the fields that should be subject of harmonisation was slightly deceptive, as the open-ended concept of ‘organised crime’ enabled the Union to strengthen its grip on practically all criminal law of the Member States (van der Wilt, 2002). The 1998 Vienna Action Plan (OJ C 19 of 23.1.1999), the 1999 Tampere Presidency Conclusions (supra) and the 2000 Millennium Strategy (OJ C 124 of 3.5.2000) further extended the scope to trafficking in human beings, especially the exploitation of women and the sexual exploitation of children, drug offences, corruption, counterfeiting of the euro, tax fraud, computer fraud, terrorist offences, environmental crime, cyber crime, money laundering, as long as these offences are linked to organised crime, terrorism and/or drug trafficking (Vermeulen, 2007). Research has nevertheless shown that the approximation process with regard to the constituent elements of criminal acts has extended way beyond the boundaries set by both the TEU and the principal EU policy documents (De Bondt & Vermeulen, 2009).

Did the forms of serious crime Europol is competent to deal with also become subject of harmonisation? Evidently. Between 2000 and 2008 Council framework decisions covered following Europol-crimes (in chronological order):

- Money laundering: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182 of 5.7.2001);
• Corruption: Council Framework Decision of 22 July 2003 on combating corruption in the private sector (OJ L 192 of 31.7.2003);
• Computer crime: Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ L 69 of 16.3.2005);
• Organised crime: Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300 of 11.11.2008);

These instruments offer harmonised minimum definitions for forms of crime both the Europol Convention and the Europol Council Decision leave (largely) undefined. The Europol Convention did define the forms of crime, within Europol’s initial competence by reference to certain international or European legal instruments criminalising the conduct in question. Its rationale lies in the fact that, unlike the authorities in the Member States, Europol does not work in the context of a national criminal justice system which has defined the conduct described. In this perspective reliance on a common binding instrument is a safe mechanism (Klip, 2009).

What was available as substantive criminal law ‘acquis’ at the time of drafting was used in the Europol Convention. Illegal money-laundering activities, for example, means the criminal offences listed in Article 6 (1) to (3) of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS no. 141, Strasbourg, 8.11.1990). Crime connected with nuclear and radioactive substances is defined with reference to United Nations (UN) and Euratom instruments. Where no common international or European ground could be found, the Europol Convention introduced its very own Europol-definitions (e.g. illegal immigrant smuggling, trafficking in human beings, motor vehicle crime), even though in the meantime some have been superseded and are no longer compatible with the new

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3 Europol has competence over ‘organised crime’ as form of crime, but not over ‘participation in a criminal organisation’ as criminal offence (supra). The 2008 Council Framework Decision precisely harmonises offences relating to participation in a criminal organisation.
harmonised offence definitions. The Europol-definition of trafficking human beings for example is no longer consistent with the EU-definition (Van Briel, Sneijers, Vereecke & Bosschem, 2002). Unlawful drug trafficking is somewhat particular. Although part of Europol's initial competence, it was only defined in 2003 by the Danish Protocol, with reference to the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UNTS no. 27627, Vienna, 20.12.1988).

What was not yet available in the early days of Europol, is now there for the taking: an impressive acquis of JHA substantive criminal law, consisting of – but not limited to – framework decision substantive criminal law. There are also other EU instruments and even JHA non-EU instruments, for within EU context approximation is also pursued via other instruments, originating from the EU (conventions, first pillar instruments) and also from other cooperation levels (Council of Europe, United Nations) (Vermeulen & De Bondt, 2009). This would allow to define up to 80-90% of the Europol-crimes, without even having to reinvent the wheel. We argue that formally recognising the readily available minimum definitions would not only be a safe mechanism for Europol, it would also be a coherent mechanism and a solution to the identified problem. It would in fact amount to another application of the subsidiarity principle, on top of the existing criterion that the crimes should justify a common approach owing to their scale, significance and consequences (supra).

When the minimum definitions for the Member States were to function as maximum definitions when shaping Europol's competence, we figure this would draw a clear(er) line between national and Union level (See for an interesting discussion De Hert, 2004). The implementation of the framework decision substantive criminal law has brought a layered structure to national substantive criminal law (Vermeulen & De Bondt, 2009). Within national substantive criminal law provisions one can identify an EU inspired component (notably a framework decision component), complementing more national components. The EU inspired component has been jointly identified by all EU Member States, as framework decisions fall under the third pillar unanimity rule. If Europol were to become competent only for the top layer, this could paradoxically strengthen its position. Less is in fact more. The national law enforcement authorities would of course remain competent for both the top and the bottom layer. Europol would remain the EU organisation supporting national law enforcement action, but only for the top layer. The competence over the top layer would thus not be exclusive but concurrent.

Using strict boundaries would facilitate the discussions to extend Europol’s powers, whether or not in the executive sense. We argue that the discussion on the definition of the Europol-crimes should be untangled from the question as to whether executive powers for Europol are desired, although in literature the former is seen as a prerequisite for the latter (Anderson et al., 1995; Benyon et al. 1993; Lavranos, 2003). Instead of talking in vain about executive powers, we believe there are more urgent matters. For example, Europol has to rely on the national units for its ‘feeding’. It is the task of the national units to supply Europol on their own initiative with the information and intelligence necessary for it to carry out its tasks (Article 4. 4, 1) Europol Convention). There is presently no right for Europol to claim information from the Member States. Perhaps if Europol’s competence was limited by agreed maximum definitions, such a right would be easier for the Member States to digest. In general, using strict bounda-
ries would simplify the facilitation of exchange of information and the development of criminal intelligence. In other words, it would simplify Europol’s core business.

To conclude our first part we remind that Europol was not established to deal with local or minor offences, but to give a European dimension to the investigation of crime of a European dimension (Klip, 2009). Our suggestion would be for Europol to do this on the basis of offence definitions which also have a clear European dimension. To support our suggestion we turn the US, where the FBI provides an interesting perspective.

3 The Competence of Europol in Comparative Perspective

3.1 Introducing: the FBI

With a population of some 306 million people, all of whom are under the authority of competing political jurisdictions at federal, state, county and local levels, law enforcement in the US reflects a structure more complex than in any other country (Inciardi, 2007). The dominant tradition in American law enforcement is local control. This localised approach to law enforcement was inherited from England during the colonial period (Walker, 1992). As a result American policing is characterized by fragmentation, variety and above all decentralisation. That is, there is no national police force per se.

The US Constitution does not provide expressly for the establishment and maintenance of police services, nor does it prohibit such services. The implied powers of Clause 18 (infra) of Article I, Section 8, which provides for the common defence and for the promotion of the general welfare of the people, has been interpreted as enabling the federal government to establish federal law enforcement organisations. Therefore, the US Constitution is the basis for federal law enforcement. However, this is not to be confused with the concept of source, which is the act or instrument by which a specific law enforcement agency is created. The source of all federal law enforcement agencies is US Congress. It is Congress that enacts appropriate legislation for an agency’s creation and maintenance (Waldron, 1976).

In the US there is no single federal agency responsible for the enforcement of all federal laws. There are approximately 50 federal law enforcement agencies. Most federal police agencies have limited powers and their investigative powers are narrow in scope. Federal law enforcement agencies can be found in the Departments of Justice, Treasury, State, Agriculture, Transportation, Interior, Transportation, Education and the US Post Office (Isb etson & Palmiotto, 2006).

The Federal Bureau of Investigation (FBI) is the primary law enforcement agency in the Department of Justice (Torres, 1985; DOJ, 2009). The FBI gives as date of its founding 26 July 1908. Yet, the formation of what is now considered to be the elite law enforcement agency dates back to the late 19th century (Deflem, 2006). When it needed agents to investigate violations of the few federal criminal statutes that existed, the Office of the Attorney General, created by Congress in 1789, borrowed Secret Service agents from the Treasury Department. In 1907 President Roosevelt requested Congress to create a new law enforcement agency in the Justice Department. When Congress opposed – out of fear of a ‘secret police’ – Roosevelt created the Bureau of
Investigation by executive order. Congress added the word ‘federal’ in 1935 (See for a brief history Theoharis et al., 2000).

Many consider the FBI to be a general agency because its responsibilities extend into all major areas of federal criminal law. However, as an investigative agency, it does not bear the general peacekeeping, traffic control and social service functions that occupy much of the effort of general police agencies at state and local level (De Feo, 1994; Walker, 1992). In addition to the traditional law enforcement responsibilities, the FBI also has significant intelligence responsibilities (Kolter, 2005; Poveda, 2007). In literature – both European (Verbruggen, 1995) and American (Vizzard, 2008) – it is seen as a problem that the FBI is a criminal law enforcement agency and an intelligence agency at the same time, reporting to both the Attorney General and the Director of National Intelligence. The traditional attitude of most countries is to give typical police tasks and intelligence functions to different agencies. The line between law enforcement and intelligence may not be a bright one, but nonetheless, they are distinct missions.

According to the FBI however, “History has shown that we are most effective in protecting the US when we perform these two missions in tandem” (FBI, 2004a, p. 23). “By definition”, investigations of international terrorism would be both criminal and intelligence investigations. They are criminal investigations since international terrorism against the US constitutes a violation of the federal criminal code4. They are also intelligence investigations because their objective is “the detection and countering of international terrorist activities” and because they employ the investigative tools that are designed for the intelligence mission of protecting the US against attack or other harm by foreign entities. Although terrorism had gradually developed as an FBI priority (infra), the events of 11 September 2001 have launched a new phase in the FBI’s development (Mueller, 2003). The US Patriot Act of 26 October 2001 removed the legal barriers between criminal and intelligence operations. The FBI formalised this merger by consolidating the separate case classifications for criminal international terrorism investigations and intelligence international terrorism investigations into a single classification (number 315) for international terrorism (FBI, 2008). The National Academy of Public Administration (NAPA) recently dismissed the division of the FBI into two agencies in a report entitled Transforming the FBI: Progress and Challenges (NAPA, 2005), although no supportive evidence was offered (Vizzard, 2006). For example, no comparison was made between the US and the United Kingdom with its MI5 security service. Unlike US counterpart FBI, Europol is restricted to pure law enforcement. Whereas the FBI has full investigative powers, Europol has none, although the role of Europol in JITs (supra) could be seen as a foretaste of an executive European Police Office (De Moor, 2009).

There is no Europol Convention-like ‘FBI Charter’ (Ellerman, 2004). Federal law gives the FBI the authority to investigate all federal crime not assigned exclusively to another federal agency (US Code, Title 28, Chapter 33 – Federal Bureau of Investigation, Section 533; Code of Federal Regulations, Title 28, Subpart P – Federal Bureau of Investigation, Section 0.85). Additionally, there are laws such as the Congressional Assassination, Kidnapping and Assault Act (US Code, Title 18, Section 351) giving

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4 We note that there actually is no federal code worthy of the name (infra). We also note that there is no single federal law making terrorism a crime, although there are various executive orders, presidential decisions, directives and federal criminal statutes addressing the issue of terrorism.
the FBI responsibility to investigate specific crimes. The FBI has special investigative jurisdiction to investigate violations of state law in limited circumstances, specifically felony killings of state law enforcement officers (US Code, Title 28, Chapter 33, Section 540), violent crimes against interstate travellers (US Code, Title 28, Chapter 33, Section 540A) and serial killings (US Code, Title 28, Chapter 33, Section 540B). A request by an appropriate state official is required before the FBI has the authority to investigate these matters. The FBI also has authority to investigate threats to national security in accordance with Presidential executive orders, Attorney General guidelines and various statutory sources (See Executive Order 12333; US Code, Title 50, Chapter 15 – National security, Sections 401 et seq. and Chapter 36 – Foreign intelligence surveillance, Sections 1801 et seq.). Threats to the national security are defined as: international terrorism, espionage and other intelligence activities, sabotage and assassination, conducted by, for or on behalf of foreign powers, organisations or persons; foreign computer intrusion; and other matters determined by the Attorney General consistent with Executive Order 12333 or any successor order.

The FBI’s dual responsibility also shows from its current priorities. There are three national security priorities (counterterrorism, counterintelligence and cyber crime) and five criminal priorities (public corruption, civil rights, organised crime, white-collar crime, violent crime). In 1998 the FBI established a five-year strategic plan to set investigative priorities in line with a three-tier structure. Tier 1 included those crimes or intelligence matters – including terrorism – that threaten national or economic security. Tier 2 included offences involving criminal enterprises, public corruption and violations of civil rights. Tier 3 included violations that affect individuals or property. On 11 September 2001 the prevention of further terrorism became the Bureau’s dominant priority. In May 2002 this prioritisation was formalised by issuing a new hierarchy of programmatic priorities, with counterterrorism at the top. The current priorities were developed by evaluating each criminal and national security threat according to three factors: 1) significance of the threat to the security of the US, as expressed by the President in National Security Presidential Directive 26; 2) the priority the American public places on the threat and 3) the degree to which addressing the threat falls most exclusively falls within the competence of the FBI (FBI, 2004b). The FBI has 15 investigative programs corresponding to the 8 priorities and mirroring the competence of the FBI (infra).

Next up, is the competence of the FBI (3.2). The FBI has a century of history as a criminal law enforcement agency (See FBI, 2008b). Initially, the competence of the FBI included only a limited number of criminal offences. Yet, the FBI would rapidly become the most important federal law enforcement organisation in the US, especially as the FBI was assigned to enforce new federal statutes. The extension of the competence of the FBI and the extension of federal criminal law go hand in hand. Before examining the federalisation of criminal law (3.2.2), we give some basic constitutional features of the US criminal justice system, or rather criminal justice systems (3.2.1). Mirroring the first part on Europol, we end by examining the extension (3.2.3) and the definition (3.2.4) of the competence of the FBI.
3.2 The competence of the FBI

3.2.1 Basic constitutional features of the US criminal justice system

Since the US has a federal form of government, there are two criminal justice processes – that of the federal government and that of the 50 states (Cole & Smith, 2005). Looking from the outside, this appears to be a “pagaille de confusion” (Blakesley & Curtis, 1992, p. 334). The situation in the US is complicated by the fact that governmental power, including the power to create and enforce criminal law, is divided between two sets of sovereign powers: the federal government and the 50 states (LaFave & Scott, 1986). It is a recognised constitutional principle, deeply rooted in the American criminal justice system, that the general police power resides in the states, not in the federal government (von Mehren & Murray, 2007). The careful constitutional limitation of the federal government’s power is part of a deliberate design. Historically, centralisation of criminal law (enforcement) power in the federal government has been perceived as creating potentially dangerous consequences and has therefore been avoided (ABA, 1998).

The federal government only possesses those powers expressly or impliedly granted by the US Constitution (Tribe, 2000; Choper, Fallon, Kamisar & Shiffrin 2001). Only five clauses suggest express criminal law powers. One is treason (Article III, Section 3, Clause 2). Counterfeiting is mentioned in Article I, Section 8 and so are piracy, the law of nations and military crimes. However, implied powers exist to establish crimes directly related to an express power (e.g. the power to regulate interstate commerce, to establish post offices, to tax, to prosecute war…) on the basis of the so-called ‘necessary and proper clause’: “The Congress shall have the power (…) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof” (Article I, Section 8, Clause 18).

The states have reserved all other powers which the US Constitution does not expressly deny: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people” (Amendment X).

3.2.2 The federalisation of criminal law

The ‘federalisation’ of criminal law – that is Congress’ increasing fondness for making federal crimes of offences that traditionally were matters left to the states – has been well documented and much lamented (O’Sullivan, 2006). The American Bar Association (ABA) Task Force on the Federalization of Criminal Law issued a report in 1998 that focused on – and criticised – Congress’ role in ‘federalising’ crime. It noted that the impetus for the increased federal presence did not appear to be grounded on considerations of respective federal and state competence: “New crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need” (ABA, 1998, p. 14). Scholars have recognised that a crime being considered for federalisation is often “regarded as appropriately federal because it’s serious and not because of any structural incapac-
ity to deal with the problem on the part of state and local government” (Zimring & Hawkins, 1996, p. 20).

Until the Civil War (1861-1865), only a small number of federal offences existed. Federal crimes were limited to those necessary to prevent injury to or interference with the federal government itself or its programs. After the Civil War, Congress expanded the scope of federal criminal jurisdiction to matters clearly within the police powers of the states (Schwartz, 1948; Beale, 1995). In 1872 Congress included an antifraud provision in the codification of the postal laws. Although Congress could point to its constitutional power to establish post offices, the concept of ‘mail fraud’ as a federal crime marked the first serious trenching on state criminal jurisdiction. At the turn of the century, Congress discovered the interstate commerce clause as a basis for federal criminal jurisdiction (De Feo, 1994), an important clause because it was also the major means to establish an economic union for free trade within the US. But it was misused (Hughes, 1997). The power to regulate interstate commerce was given a very broad interpretation. In short, “it affects interstate commerce if Congress says it does” (Hughes, 1997, p. 155). The ABA Task Force revealed a startling fact about the explosive growth of federal criminal law: more than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970 (ABA, 1998).

Unlike the states, whose codifications of criminal law, modelled after the American Law Institute Model Penal Code, resemble in substance the national criminal codes in Europe (Lensing, 1993), the federal government has never had a true criminal code. The closest Congress has come to enacting a code, was the creation of Title 18 of the US Code in 1948 (O’Sullivan, 2006). A 19-year effort (from 1966 to 1984) to develop and enact a federal criminal code ultimately failed (Joost, 1997). Title 18 is a compilation, rather than a code and has been described as “an odd collection of two hundred years of ad hoc statutes, rather than a unified, interrelated, comprehensive criminal code” (Rainer, 1989).

How many federal crimes are there at present? Getting an accurate count is not as simple as counting the number of federal statutes. As the 1998 ABA report stated: “So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes” (p. 9). While a count of 3,000 federal crimes was made in 1989 (Rainer), the ABA Task Force found this number outmoded by 1998 (ABA). A Federalist Society study estimated in 2004 that there are more than 4,000 federal crimes, some 1,200 of which are jumbled together in Title 18, with the remainder scattered throughout the remaining 49 titles of the US Code (Baker & Benet, 2004).

3.2.3 Extending the competence of the FBI

Federal law gives the FBI the authority to investigate all federal crime not assigned exclusively to another federal agency (supra). The FBI is responsible for over 200 categories of federal crime. Unfortunately, there is no list. The extension of the competence of the FBI and the extension of federal criminal law go hand in hand, as the FBI was assigned to enforce the bulk of these new federal statutes (Poveda, 2007). We illustrate this with the milestone extensions over the last 100 years.

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5 The US Code is the codification by subject matter of the general and permanent laws of the US. It is divided by broad subjects into 50 Titles and published by the Office of the Law Revision Counsel of the US House of Representatives. Since 1926 the US Code has been published every six years.
The FBI started off in 1908 with competence over antitrust matters, land fraud, copyright violations, peonage and some 20 other matters. The 1910 White Slave Traffic Act (Mann Act) put responsibility for interstate prostitution under the Bureau (US Code, Title 18, Chapter 117, Section 2421). The 1919 National Motor Vehicle Theft Act (Dyer Act) did the same for interstate car theft (US Code, Title 18, Chapter 113, Section 2311). Unlike the Mann Act, the interstate transportation of stolen vehicles really was a vital part of the problem, because it made apprehension of the criminals and recovery of the vehicles much more difficult (Bradley, 1984). A large number of federal statutes were adopted in the 1930s, none of which broke new theoretical ground, as the interstate commerce clause had become a well-established basis for federal criminal jurisdiction (Beale, 1995). Bank robbery, extortion and robbery affecting interstate commerce, interstate transmission of extortionate communications, interstate flight to avoid prosecution, interstate transportation of stolen property... What all these crimes had in common was an interstate nexus justifying federal intervention in general and FBI competence in particular. The 1934 Federal Fugitive Felon Act for example was only designed to provide a legal basis for FBI assistance in apprehending the fugitive (US Code, Title 18, Chapter 49, Section 1073) (Schwarz, 1948). During the same period Congress also enacted the Federal Kidnapping Act, in the commotion surrounding the kidnapping of the Lindbergh baby in 1932 (US Code, Title 18, Chapter 55, Section 1201) (Finley, 1940).

After World War II, the FBI further intensified its position, as it became responsible for the enforcement of hundreds of federal criminal statutes. In the 1950s civil rights violations and organised crime became matters of increasing concern. As in the past, lack of competence hindered the Bureau from responding to these problems (FBI, 2008a). It was under the 1964 Civil Rights Act and the 1965 Voting Rights Act that the Bureau received the authority to investigate many of the wrongs done to the African Americans in the South and elsewhere (Jeffreys-Jones, 2007). Under the existing laws the Bureau’s efforts against organised crime also started slowly. In the 1960s and 1970s Congress employed the power to regulate interstate commerce to tackle organised crime (See Bradley, 1984). The first of these was the 1961 Travel Act (US Code, Title 18, Chapter 95, Section 1952) authorising federal criminal penalties for interstate travel intended to facilitate gambling, narcotic traffic, prostitution, extortion and bribery – illegal activities frequently associated with organised crime. With the 1968 Consumer Credit Protection Act, Congress authorised criminal penalties for extortionate credit transactions (‘loan sharking’), providing a source of funds for organised crime (US Code, Title 18, Chapter 42, Section 891). Congress also enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) (Title IX of the 1970 Organized Crime Control Act). ‘Racketeering activity’ is an example of a compound offence, i.e. an offence that defines the violation of existing federal and state offences as elements of a new federal offence (US Code Title 18, Chapter 96, Section 1961). It is striking to read that RICO has virtually never been used in a case, which was not reachable by other means (both federal and state) on the books prior to its passage (Bradley, 1984). Though RICO ultimately generated more cases, the loan sharking provisions broke new theoretical ground as Congress criminalised a whole class of activity (loan sharking) based upon a finding that the class of activity ‘affected’ interstate commerce (Beale, 1995). The Controlled Substances Act, a comprehensive federal drug control statute, was enacted in 1970 on the basis of a similar finding. Moreover, Congress
noted that the possession and improper use of controlled substances also had “a substantial and detrimental effect upon the health and general welfare of the American people” (US Code, Title 21, Chapter 13 – Drug abuse prevention and control). Every drug crime that was an offence under state law could now also be tackled federally (Scott Wallace, 1993). The FBI however was not given the lead when it comes to the enforcement of federal drug laws. For years the FBI resisted pressure from Congress and the Justice Department and only became involved in drug enforcement in the early 1980s (Verbruggen, 1995). The FBI has concurrent jurisdiction with the Drug Enforcement Administration (DEA), another agency within the Department of Justice (Code of Federal Regulations, Title 28, Subpart P – Federal Bureau of Investigation, Section 0.85). The DEA is a single mission agency, dedicated to the enforcement of federal drug laws and policies (See DEA, 2003). The rivalry between the DEA and the FBI is legendary. At present the FBI acknowledges that the DEA is the US Government’s primary investigative agency to combat drug trafficking. The FBI also has an important role to play, but seeks to complement DEA’s efforts through an integrated approach (FBI, 2004b). The 1980s and 1990s brought increased public concern with violent crime and Congress responded with the enactment of a number of new federal offences, such as carjacking and new firearms offences. 

Enactment of each new federal crime conferred new federal investigative powers on federal agencies, notably on the FBI. Unlike Europol, dealing with a relatively long list of crimes as from 2001 already, the FBI was set up with a very limited number of offences it could investigate. Compared to Europol, there has been a gradual, rather than an exponential increase in the competence of the FBI over the past 100 years. The FBI has never taken the lead in drug enforcement, whereas drug trafficking provided the primary rationale for Europol during the pre-Convention era. In the Convention era this rationale was superseded by the notion ‘organised crime’. The extension of the competence of the FBI, as a correlate to the extension of federal criminal law, was carried out on the basis of interstate commerce, a notion as eroded as organised crime. The question we raised with regard to the extension of Europol’s competence, whether there was a genuine ‘need’ to do so, also proved to be a source of concern as to the extension of the competence of the FBI.

3.2.4 Defining the competence of the FBI

The reason for putting Europol in comparative perspective in the first place is to find support for our suggestion to shape to competence of Europol on the basis of offence definitions which have a clear European dimension, instead of leaving it up to the Member States in accordance with national law (supra). How is the competence of the FBI defined? is the main question of our second part. Our research hypothesis is that federal notions and definitions, emanating ‘federal competence worthiness’, shape this competence. We look beyond the obvious fact that the US has a federal form of government and that the EU can at the most be termed ‘quasi-federal’ (See Schmidt, 2006; Menon & Schain, 2006). Content-wise the resemblances are far greater, which makes we are not comparing apples and oranges. Today one can no longer maintain that criminal law in the EU is solely matter of national sovereignty (Tadic, 2002). The Treaty of Amsterdam has drastically increased the influence of the EU on internal decision-making and room for autonomy of Member States concerning co-operation
in criminal matters, notably the approximation process with regard to the constituent elements of criminal acts with a European dimension (*supra*).

Federal notions and definitions indeed shape the competence of the FBI. As mentioned earlier, the source of all federal law enforcement agencies, including the FBI, is Congress. Federal law gives the FBI the authority to investigate all federal crime not assigned exclusively to another federal agency. The source of federal substantive criminal law is Congress as well. Federal crimes, scattered throughout the US Code, are distinct from neatly codified state crimes, at least for their enactment and their enforcement. However, we have demonstrated that the substance of federal criminal law has come to duplicate much of state criminal law. Therefore, the boundaries between the federal top layer and the state bottom layer are not as strict as they would seem.

Federal substantive criminal law also presupposes ‘federal competence worthiness’. The erosion of the commerce clause, makes that this may not be the case for all 4,000 federal crimes. It is even particularly hard to find important offences because they are surrounded by trivial ones (*Joost*, 1997). Also within the competence of the FBI there are more significant crimes and less significant crimes in terms of seriousness (*Shapiro*, 1995). Misuse of ‘Smokey Bear’, the mascot of the US Forest Service, is a federal crime, for example (US Code, Title 18, Chapter 33, Section 711). The same goes for the crime of interstate transportation of a defective refrigerator (US Code, Title 15, Chapter 26, Section 1211). In both cases the FBI is competent. Nevertheless, this does not alter the fact that the FBI, being a federal law enforcement organisation, enforces federal criminal law. The enforcement of state law is left to state law enforcement agencies. In practice, most criminal conduct has always been – and still is – defined by state law, investigated by state agents, prosecuted by state prosecutors, tried in state courts and punished in state prisons. Federal law enforcement for criminal activity essentially local in character should generally not be undertaken. Translated into ‘Eurospeak’ this almost amounts to an application of the principle of subsidiarity. Subsidiarity is already the guiding principle for Europol and is ‘revamped’ in our suggestion (*supra*).

## 4 Conclusion

In two parts we elaborated on the overall-question: *How to shape the competence of Europol?* We devoted the first part of our contribution to the competence of Europol. We introduced Europol as the EU law enforcement organisation handling criminal intelligence and identified three ‘eras’ for further analysis: the pre-Convention era, the Convention era and the post-Convention era. We analysed the extension of the competence of Europol. Our main questions were: *Was there a trigger to extend the competence of Europol time and again? Was there a genuine ‘need’ to do so?* Drug trafficking provided the main rationale for Europol in the pre-Convention era. The EDU, which formed the nucleus of Europol, kicked off with competence for illicit drug trafficking. However, it was envisaged from the outset that Europol would not be a single mission agency. In anticipation of a Europol Convention, Europol’s initial competence was extended from one area to four – adding illegal trade in radioactive and nuclear materials, crimes involving clandestine immigration networks, illegal vehicle trafficking – without
any reference to the European or national parliaments and without any motivation whatsoever. The extension to trafficking in human beings was prompted by a domestic scandal, rather than responding to an identifiable need. In the Convention era, organised crime became the primary rationale for Europol. The list of crimes capable of being brought within the competence of Europol was expanded greatly between the initial drafts and the final text of the Europol Convention. The Europol Convention had established an order of priority which was disturbed at a number of occasions (terrorism, forgery of money and means of payment, money laundering). Instead of a further incremental extension of Europol’s competence, the entire Annex, including 18 other serious forms of international crime, was brought within Europol’s sphere of competence. Halfway the Convention era the list of Europol-crimes had taken its final form. However, there remained room for manoeuvre. In the Europol Council Decision the existence of an organised criminal structure is no longer a limiting element. This makes that in the post-Convention era serious crime is the dominant theme, superseding organised crime.

Although the Europol-Convention defined the forms of crime, which Europol was initially competent to deal with, none of the forms of crime over which Europol subsequently gained competence have ever been defined. Instead the forms of crime are to be assessed by the competent national authorities in accordance with the national law of the Member States to which they belong. The non-existence of definitions of Europol-crimes leads to the result that the competence of Europol is being interpreted in different ways throughout the EU. The Europol Information System is a painful illustration, as the same Europol-label has up to 27 possible different interpretations. We asked ourselves the question: What could fill the absence of definitions of Europol-crimes? A careful analysis of legal and policy documents showed that there have been fruitless suggestions, both from within the Council and the European Parliament, to alter the situation. The European Parliament explicitly joins in with the harmonisation efforts that have been conducted in the third pillar, on the basis of Art. 29 seq. TEU. We endorsed this suggestion. We demonstrated how the forms of serious crime Europol is competent to deal with also became subject of harmonisation, through the adoption of framework decisions. These instruments offer harmonised minimum definitions for forms of crime both the Europol Convention and the Europol Council Decision leave (largely) undefined. What was not yet available in the early days of Europol, is now there for the taking: an impressive acquis of JHA substantive criminal law, consisting of – but not limited to – framework decision substantive criminal law, allowing to define up to 80-90% of the Europol-crimes. We argued for the sake of coherence to formally recognise the readily available minimum definitions. When the minimum definitions for the Member States were to function as maximum definitions when shaping Europol’s competence, we showed how this would draw a clear(er) line between national and Union level, although Europol’s competence over the top layer of substantive criminal law with a clear EU dimension would not be exclusive but concurrent. In general, using strict boundaries would simplify Europol’s core business (information-related tasks). It would also facilitate the discussions to extend Europol’s powers, whether or not in the executive sense.

To support our thesis we turned to the US, where the FBI provided an interesting perspective. We introduced the FBI, with its dual responsibility for law enforcement and national security. Then we dealt with the competence of the FBI. The FBI has a
century of history as a criminal law enforcement organisation and is responsible for more than 200 categories of federal crime. We gave some basic constitutional features of the US criminal justice system. We illustrated how the extension of federal criminal law and the extension of the competence of the FBI went hand in hand. The question we raised with regard to the extension of Europol’s competence, whether there was a genuine ‘need’ to do so, also proved to be a source of concern as to the gradual rather than exponential increase in the competence of the FBI. *How is the competence of the FBI defined?* was the main question of the second, comparative part of our contribution. We looked beyond the obvious fact that the US has a federal form of government and that the EU can at the most be termed ‘quasi-federal’. Content-wise the resemblances are far greater. We were largely confirmed in our views that federal notions and definitions, emanating ‘federal competence worthiness’ shape the competence of the FBI. Ergo, we were provided with yet another argument to also use European notions and definitions, emanating a ‘Europol competence worthiness’, to shape the competence of Europol. This would make all the more sense in the light of Europol’s change of status from intergovernmental organisation to Community agency as from 2010.

5 Bibliography

5.1 Legal and policy documents (in chronological order)


Council Decision of 3 December 1998 instructing Europol to deal with crimes committed or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property (OJ C 26 of 30.01.1999).

Council Decision of 29 April 1999 extending Europol’s mandate to deal with forgery of money and means of payment (OJ C 149 of 28.05.1999).


Council of the European Union (2001). Two draft legal instruments containing possible amendments to the Europol Convention as well as an extension of Europol’s mandate (Document 6876/01 of 8.3.2001).


Council Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ L 203 of 1.8.2002);


5.2 Literature (in alphabetical order)


Towards a coherent EU policy on outgoing data transfers for use in criminal matters?

The adequacy requirement and the framework decision on data protection in criminal matters

A transatlantic exercise in adequacy

Els De Busser
Gert Vermeulen

1 The need for coherency

Personal data or data that enable the identification of a natural person are due to their inherent link to the right to a private life, protected by a specific set of rules within the European Union (further: EU). These rules provide protection on the level of collecting these data and subsequently using them.

The origin of the EU’s data protection rules really lies in the first pillar where the creation of an internal market in the EC ensured the free movement of goods, persons, services and capital between the member states. Removing all obstacles to realize this free movement includes removing restrictions on trade. As restrictions are often the result of divergent national legislations, a certain level of approximation was considered necessary for the functioning of the common market. Including also the flow of personal data in the free movement of goods and services (De Hert, 2004, p. 7), harmonised rules were needed on the level of personal data protection. In order to protect these harmonised data protection systems, the same values should be sustained when transferring personal data outside the internal market and to third states or institutions.

Although the Council of Europe (further: CoE) took the lead in drawing up the standards, the consensus within the EU to copy and implement them, was in first instance broad. With the right to a private life protected by the European Convention for the protection of human rights and fundamental freedoms (further: ECHR), which allows room for derogating from it, a similar approach was taken to the data quality standards.

With its wide scope of automatic processing of all personal data, the CoE’s Convention for the protection of individuals with regard to automatic processing of personal data (ETS N° 108, 18 January 1981; further: data protection convention) served as a basis for copying the same standards in more specific instruments.

While data processing in the course of activities falling within the scope of Community law was governed by a set of binding instruments (Directive 95/46/EC,
To p i c a l i s s u e s i n e u a n d i n T e r n a t i o n a l c r i m e c o n T r o l

O.J.L, 23 November 1995, issue 281, p. 31-50) Directive 2002/58/EC on data processing in the telecommunication sector, O.J.L, 31 July 2002, issue 201, p. 37-47) and Regulation 45/2001 on data exchange between Community institutions or bodies or to third institutions or bodies, O.J.L, 12 January 2001, issue 8, p. 1-22), data processing by judicial and law enforcement authorities within the third pillar had to rely on national law or on the general data protection convention.

As part of an area of freedom, the need for an instrument on data protection in the third pillar was felt and expressed in the 1998 Vienna Action Plan and planned to be developed by 2000 (O.J.C 23 January 1999, issue 19, § 7 and § 47). Despite numerous efforts (see inter alia Council, 6316/2/01, 12 April 2001; Commission, COM(2005) 475 final, 4 October 2005 and Council, 7315/1/07, 24 April 2007), the Council has been working for more than five years on a proposal for a Framework Decision member states can agree on. Creating a coherent data protection instrument in the third pillar proved to be a challenge, not in the least because of the involvement of the member states in the decision making process (see also De Hert and De Schutter, 2008, p. 329-333).


The expectations were high as this new instrument was supposed to answer to the need for a coherent policy that is custom-made for the exchange of personal data in criminal matters. The need for coherency was particularly high when the transfers of personal data to third states or institutions was concerned. Protecting personal data that are processed within the borders of the EU includes protection for exchanging these data with third states or institutions as the recipients are not necessarily bound by the same data protection principles. The solution was found in requiring the receiving state or institution to provide in a level of data protection that was adequate in comparison to the EU standards so personal data could safely cross the external EU borders. However, legal instruments covering data protection do not provide in rules on this type of protection or are not generally binding throughout the EU. (see also De Hert and De Schutter, 2008, p. 309)

The need for a coherent policy on data transfers to third states or bodies was nevertheless not fully answered by the new framework decision. Its partial scope, the possible derogations to the requirement of adequacy, the lack of a uniform assessment and the effects of the new instrument on existing and future provisions, make the framework decision an inappropriate instrument for mending the inconsistencies in the third pillar’s data protection policy towards outgoing data transfers.

In agreements that have been concluded between the United States of America (US) on the one hand and the EU (Agreement 25 June 2003 on mutual legal assistance between the European Union and the United States of America, O.J.L. 19 July 2003, issue 181, p. 34-42), Europol (Agreement between the United States of America and the European Police Office, 6 December 2001) and Eurojust (Agreement between Eurojust and the United States of America, 6 November 2006) on the other hand, the adequacy requirement is losing its significance by a lack of application or by being
excluded from the agreement altogether. This is however not the case in every agreement with a third state.

The last and most recent negative effect on the adequacy requirement is visible in the preparatory future plans for the EU’s justice and home affairs policy for 2010-2014 (The Informal High Level Advisory Group on the Future of European Home Affairs Policy (“The Future Group”), Report, Freedom, Security, Privacy – European Home Affairs in an Open World, June 2008 and High-Level Advisory Group on the Future of European Justice Policy, Proposed Solutions for the Future EU Justice Programme, June 2008). These functioned as the travaux préparatoires for the so called Stockholm Programme (COM (2009) 262/4), the successor of the Hague Programme. Again with regard to the transatlantic cooperation in criminal matters the adequacy of the level of data protection in the US is assumed rather than thoroughly examined.

In this contribution the EU’s policy on data exchange in criminal matters to third states or institutions is first studied from the perspective before and after the framework decision on data protection in criminal matters. Secondly, the provisions of the framework decision that regulate the outgoing data transfer – including the effects on existing and future provisions – are examined. In a third and final part, the future of the adequacy requirement in agreements with third states and as included in the policy plans of the EU is reflected on.

2 Before the framework decision

Before the framework decision on data protection in criminal matters was developed, binding provisions on data protection were limited to the CoE instrument applicable to all automatic personal data processing or the EU’s first pillar instruments. The requirement to ensure an adequate level of data protection in the receiving state or institution is intended to protect the EU standards on data protection whenever personal data are exchanged with a national authority or an institution located outside the EU territory. With regard to data transfers to third states or institutions, this requirement has first been included in Directive 95/46/EC regarding data transfers for the purpose of activities within the scope of Community law. In 2001 the requirement was included in the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding Supervisory Authorities and Trans-border Data Flows (ETS, N° 181, 8 November 2001; further: the additional protocol to the data protection convention). Also specific data protection provisions in the relevant Eurojust and Europol instruments, provide in the requirement.

However, a general rule on ensuring an adequate level of data protection in the receiving state or institution was inexistent for the field of criminal matters.

2.1 Limited rules on data transfers to third states or institutions

The instruments that provide in rules on data transfers to third states are limited. The Council of Europe’s data protection convention encompasses basic rules for data protection in view of a trans-border exchange to a contracting party. All EU member states have ratified this convention. Thus, the exchange of personal data between mem-
ber states – with a view to the automatic processing of data – should run in accordance with the data quality standards provided by the data protection convention.

However, no rules are provided when sending data directly to a state that has not ratified the convention and is therefore not necessarily bound by the same principles. Only the indirect transfer of personal data is regulated as the convention foresees the situation in which a state party transfers personal data to a third state via the territory of a state party. In that case, exceptionally, the transferring state is allowed to lay down additional protective rules (prohibitions or added requirements of authorisation) if these serve the purpose of maintaining the level of data protection and avoiding the circumvention of the legislation of the transferring state.

Directly sending personal data from a state bound by the data protection convention to a state that is not party to the convention is regulated by the 2001 additional protocol. The instrument provides in an additional requirement that encompasses an examination of the receiving state’s data protection system. The system needs to be assessed on its adequacy in relation to the standards laid down by the data protection convention. However, it was not the additional protocol that introduced the adequacy requirement.

For activities within the scope of Community law, Directive 95/46/EC subjects the outgoing data transfers to the requirement of adequacy. No personal data can be sent to a state that does not pass the assessment of its legal framework on data protection. The prerequisite ruffled a few feathers in third states’ authorities (Boehmer and Palmer, 1993, p. 307-308; Bennet and Raab, 1997, p. 245-263 and Long and Quek, 2002, p. 334-337). In the cooperation with the EC, the entry into force of Directive 95/46 caused the US to take action in ensuring the protection of data received from the EC. The processing of data that is aimed at here is the processing for the purpose of trade with US companies. Data protection by US companies does not fall within the scope of a general legislation but is regulated by sector specific rules and self-regulation (Banisar and Davies, 1999, p. 13-14; Long and Quek, 2002, p. 330 and Levin and Nicholson, 2005, p. 362. See also C.A. Ciocchetti, 2008, p. 1-45). In order to make this system adequate, additional guarantees were needed in the shape of the so-called Safe Harbour compromise funded on the principles of notice, choice, onward transfer, security, data integrity, access and enforcement (Safe Harbour Privacy Principles issued by the US Department of Commerce, 21 July 2000). The compromise largely consists of a choice for private companies to either enter into a self-regulatory privacy program that meets the terms of these seven principles, either design their own self-regulatory privacy procedure on the condition that the Safe Harbour principles are complied with (Long and Quek, 2002, p. 325-344).

2.2 The adequacy requirement: not generally binding and diverse implementation

The provisions on requiring an adequate level of data protection in the third state concerned, are aimed at protecting the recognized standards outside the external borders of Europe. Assessing the standards utilized in the receiving state or authority can ensure an appropriate level of data protection after the exchange. This means that the basic principles for data protection valid in the EU are scrutinized as to the extent they are complied with in the receiving state or authority. Two points of view should be taken into consideration here, firstly the case in which an EU member state
authority wishes to send personal data to a third state or authority and secondly the case in which the EU bodies Europol or Eurojust want to make such transfer. In both cases, the assessment can be made on a case-by-case basis or for an entire state or institution.

2.2.1 Member states

When EU member states’ authorities receive a request from a third state or authority for personal data to be transferred, the adequacy requirement is applicable when the requested state has ratified the additional protocol to the data protection convention. This protocol specifies the necessity of an assessment of the level of data protection to be offered by the receiving third state or authority. However, this provision does not include detailed rules on how to carry out the assessment.

Nonetheless, it is clear that in order to maintain data quality standards when giving personal data into the hands of an authority that is not bound by the same standards, the criterion of adequacy functions as the umbrella concept of an appropriate level of data protection. The basic principles encompassed by the data protection convention – more specifically in Chapter II of the convention – must be taken into account while assessing the adequacy of the third states’ legal framework on data processing. Unfortunately, the explanatory report states that this clarification is only valid as far as these principles are relevant for the specific case of transfer (ETS no. 181, 8 November 2001, Explanatory report, §29).

This allows for differences in evaluation tools and methods as well as items – such as the data quality standards – included in the evaluation, to result in divergent outcomes depending on the state carrying out the assessment. From the point of view of the third state that requests personal data from two states that have ratified the additional protocol, this can lead to a different reply from each state (European Data Protection Supervisor (further: EDPS), O.J.C 26 April 2007, issue 91, p. 12 and EDPS, O.J.C, 23 June 2007, issue 139, p. 6). Hence, as long as no uniform checklist of the minimum provisions covered by an adequate level of data protection is available, this could lead to data-shopping.

To allow for some flexibility on the part of the exchanging states, the additional protocol provides in derogations from the adequacy requirement, that should be interpreted restrictively. National law must first of all provide in the transfer. Additionally, the transfer of personal data is only permitted when legitimate interests – especially important public interests – prevail over the lack of an adequate level of data protection. Not coincidentally, the explanatory report refers to the same interests based on which the right to privacy and the data quality principles can be lawfully derogated from (ETS no. 181, 8 November 2001, Explanatory report, §31).

Apart from the allowed derogations, in case an adequate level of data protection cannot be assured another possibility for exchange exists if the receiving state provides in sufficient safeguards such as the Safe Harbour compromise. The latter could nevertheless seem to amount to requiring adequacy. However, the safeguards could be limited to only the relevant elements of data protection (ETS no. 181, 8 November 2001, Explanatory report, §32-33). This means that the safeguards should be customized to the case – i.e. the tie between requested and requesting party which could be a contract
or an agreement between states or institutions – and do not have to encompass all principles included in the EU standards on data protection.

Nevertheless, so far only sixteen member states have ratified and are thus bound by the protocol. EU member states are only bound to comply with the adequacy requirement in criminal matters when they belong to this group of sixteen states or when they have provided this rule in their national legislation on data protection in criminal matters. The few member states that have – on their own initiative – widened the scope of their legislation implementing Directive 95/46/EC to include criminal matters, will also be bound by the adequacy requirement. Nonetheless, the requirement of checking the adequacy of the receiving data protection system is thus not a generally binding requirement in the EU.

2.2.2 Eurojust and Europol

The EU institutions involved in data exchange with the national judicial and law enforcement authorities, Eurojust respectively Europol, have developed their own data protection regulations. Equally here, the picture is diverse.

The Decision setting up Eurojust provides in the adequacy requirement for the data transfers to a third state or body (Council, O.J.L 6 June 2002, issue 63, p. 1-13). Without an assessment of this third state or third body’s data protection system, Eurojust is not allowed to transfer personal data. Referring to the data protection convention, the assessment of the level of protection shall be made in the light of all the circumstances for each transfer or category of transfers. In order to make a complete evaluation, all elements of the transfer should be included, i.e. the type of data, the purposes and duration of processing for which the data are transferred, the country of origin and the country of final destination, the general and sectoral rules of law applicable in the state or organisation in question, the professional and security rules which are applicable there, as well as the existence of sufficient safeguards put in place by the recipient of the transfer. The assessment is made by Eurojust’s data protection officer and only involves the Joint Supervisory Body (further: JSB) when difficulties are met during the process. The amended decision on strengthening Eurojust does not add to these provisions in order to improve the assessment (Council, 5347/09, 20 January 2009), even though the European Data Protection Supervisor has called upon the Council to use this opportunity to introduce the approval of the JSB in the procedure (European Data Protection Supervisor, 9013/08, 7 May 2008, §36).

In comparison with Europol, however, the set of rules governing the adequacy check for Eurojust’s third state transfers is not particularly detailed (Council, O.J.C 30 March 1999, issue 88, p. 1-3).

With the exception of urgent circumstances, a four-step filter needs to be passed to conclude an agreement with a third state or body. This filter starts with a report by the Management Board stating that no obstacles exist to start negotiations. The JSB needs to be consulted on this subject as well. During this stage, a first check of the third state or body’s data protection system can already be made as the JSB protects the rights of the individual regarding the processing of data by Europol.

Subsequently, a unanimous decision by the Council is needed (Council, O.J.C 13 April 2000, issue 106, p. 1-2). During this stage, a second check of the third state’s data protection is made as the Council should consider the law and the administrative
practice of the third state or body in the field of data protection, including the authority responsible for data protection matters.

In a third step, the Director will start negotiations, after which the Management Board and the JSB will need to give their approval to conclude the agreement in a final step (De Hert and De Schutter, 2008, p. 319-320).

The only cases in which this four-step approach is not followed, are the exceptional cases in which Europol’s Director considers the transfer of the data absolutely necessary to safeguard the essential interests of the member states concerned within the scope of Europol’s objectives or in the interests of preventing imminent danger associated with crime. The adequacy evaluation should be done by the Director and supervision is then limited to a post-transfer check and only on request of the Management Board and the JSB.

This implies the responsibility of the Director to evaluate the level of data protection supported by the third state or body before making his decision, instead of the lengthy four-step process. An explicit requirement to verify the adequacy of the receiving state or body’s data protection system is not included.

Providing in an option of a post-transfer check of adequacy as opposed to a prior evaluation by several bodies, means that in cases where the level of data protection would be considered not to be adequate, this could only affect possible future transfers to that same third state or body instead of blocking a currently planned transfer.

When the recently adopted Europol Decision (Council, 8478/09, 6 April 2009) enters into force, the four-layered adequacy check remains intact as a general rule for transfers to third states or bodies.

In exceptional cases however, the aforementioned implied adequacy check is given a new meaning. The obligation for the Director to consider the data-protection system of the receiving body in question should be carried out with a view to balance the data-protection level and the interests protected by the transfer. This means that the adequacy requirement does not need to be fulfilled, a fortiori is derogated from in an unspecified manner (EDPS, O.J.C 27 October 2007, issue 255, § 29).

2.2.3 Inconsistent requirement

Even with the sensitivity that is inherent to the field of criminal matters, the requirement of adequacy is not laid down for every transfer of personal data that can be made for purposes of prevention, detection, investigation and prosecution. In addition to the lack of a standard requirement for outbound data transfer, the adequacy rule is not uniformly employed either. The latter is visible on two levels. Firstly, a checklist of data protection rules that should minimally be evaluated while making the adequacy assessment is not provided by the EU. Secondly, while Europol has developed a multi-level adequacy assessment, Eurojust relies on its data protection officer. This means in practice that an individual can see his or her personal data transferred from a member state to a third state and being used in that particular third state for incompatible purposes. For example, an individual’s personal data on receiving a weapon permit in a member state could be transferred to the third state and used against this person in a custody case. Additionally, due to the lack of uniform assessment systems, this example could be reality when dealing with one third state but not with the other. Obviously, this opens the door to unjustified discriminating between identical cases.
The new framework decision on data protection in criminal matters could have ensured more coherency in the EU’s third pillar by answering to these concerns.

3 Inadequacy based on purpose deviation

One of the elements in need of particular consideration when assessing the adequate level of data protection is the compliance with the purpose limitation principle (article 13, §4 of the framework decision on data protection in criminal matters). The principle restricting the use of personal data to the purpose they were gathered for or a compatible purpose should also be complied with by the receiving state or authority. Given the – often significant – differences between the structure of states’ criminal justice systems and the competences of their respective authorities, living up to the purpose limitation rule is particularly important when transferring personal data to a third state. In view of the EU’s cooperation in criminal matters with the United States (further: the US) and the agreements concluded between the EU, Europol and Eurojust on the one hand and the US on the other hand, the adequacy of the American data protection level should have been tested, including the purpose limitation rule.

3.1 Purpose limitation to purpose deviation

Personal data should be stored for specified and legitimate purposes and not used in a way incompatible with those purposes. Thus, personal data should only be processed for purposes identical to the purpose they were gathered for or a compatible purpose. This principle of purpose limitation has been laid down in the data protection convention and was copied into Directive 95/46 for activities of Community law. Purpose limitation incorporates an aspect of foreseeability by the data subject who should be in a position to anticipate in which cases his or her personal data can be gathered and in which cases these data can be processed and by whom (European Court of Human Rights (further: ECtHR), Leander v. Sweden, 1987, § 48 and ECtHR, Rotaru v. Romania, 2000, § 46 and European Data Protection Supervisor (further: EDPS), O.J.C, 23 June 2007, issue 139, § 20; see also Bygrave, 2002, p. 337-341). In other words, personal data gathered for the purpose of commercial activities should not be used for purposes incompatible with commercial activities, such as prevention, detection, investigation and prosecution of criminal offences. If that is the case, the data subject did not have the opportunity to react – read: object – against the final purpose for which the data are processed. Still, in cases that this is necessary for a legitimate goal and laid down by law, the deviation from the original purpose is allowed.

The purpose limitation principle thus leaves room for the use of personal data for other purposes than the initial purpose, as long as there is compatibility between the two or as long as the conditions for allowed derogations are fulfilled. Nevertheless, this possibility is stretched to a point where there is no compatibility between the original purpose of gathering and the final purpose of processing the data (De Busser, 2009a, p. 163-193). This development to purpose deviation rather than purpose limitation seen in the EU’s instruments on data exchange between the law enforcement and judicial authorities of the member states as well as data exchange within the EU involving Europol and Eurojust.
In several legal instruments, personal data gathered for EC-related purposes are used in criminal matters. In administrative investigations conducted by the EC’s anti-fraud unit OLAF, personal data that are discovered should be secured and the case left to the competent judicial authorities. The OLAF decision thus provides a formalized purpose deviation from the OLAF investigation to national authorities (European Parliament and Council, O.J.L 31 May 1999, issue 136, p. 1-7). Even between Eurojust and OLAF an agreement on the transfer of personal data has been signed (Practical Agreement on arrangements of cooperation between Eurojust and OLAF, 24 September 2008). For both types of transfer of personal data from OLAF no lawful derogation to the purpose limitation rule can be called upon to justify the transfer between the first and third pillar.

Other paths have been opened for Eurojust as well as Europol to gain access to personal data that have not been gathered for the purpose of criminal matters. New developments in the Schengen Information System (further: SIS) – the so-called SIS II that should be operational by the end of 2009 – create opportunities for Eurojust, Europol and for law enforcement authorities to access the database that was originally designed for border management purposes (Council, 14914/06, 12 December 2006). Initially intended to broaden the capacity of the existing SIS in order to pave the way for new member states to join, the momentum was used to introduce new functions to the system including these new access rights (Council, O.J.L 7 August 2007, issue 205, p. 63-84). The requirements for a lawful derogation from the purpose limitation rule are however fulfilled.

In the same spirit, the Commission experienced the lack of law enforcement access to Visa Information System (further: VIS) as a shortcoming and a serious gap in the identification of suspected perpetrators of a serious crime (Commission, COM(2005) 597 final, 24 November 2005, p. 6). This was realized in the 2008 decision granting designated authorities and Europol access to the VIS even though it was designed to establish a common identification system for visa data in the context of a common visa policy for the member states, thus not for any purpose related to criminal matters (Council, Decision, O.J.L 13 August 2008, issue 218, p. 129-136). Additionally, due to the delineating of the authorities by means of a functional criterion, equally intelligence services could legally have access to VIS (EDPS, O.J.C 25 April 2006, issue 97, p. 9). The necessity requirement should thus be strictly complied with in order to fulfill the conditions of a lawful derogation to the purpose limitation rule.

Granting access to law enforcement authorities to the Eurodac database that was developed as a fingerprint database for asylum purposes, touches upon a similar issue (Council, 11004/07, 19 June 2007 and Council, 11004/07 COR 1, 2 July 2007; Standing Committee of Experts on International Immigration, Refugee and Criminal law, CM0712-IV, 18 September 2007).

Finally, the data retention directive of 2006 obliges telecommunication providers to save certain types of personal data for the purposes of investigation, detection and prosecution of serious crime (European Parliament and Council, O.J.L 13 April 2006, issue 105, p. 54-63). This equally means a transfer from the first to the third pillar demonstrating purpose deviation rather than purpose limitation.

It is thus a well-established development in the law enforcement and judicial cooperation in criminal matters between the EU member states, to move into the direction of purpose deviation. Even though purpose limitation is one of the basic principles of
data protection and should thus unquestionably be part of an adequate level of data protection in a third state, it is in the same way left when we look at the EU’s cooperation in criminal matters with the United States.

3.2 Adequacy of the American level of data protection

Concluding on the adequacy level of the US data protection system from an EU point of view is challenging due to the different structure of the American data protection system as opposed to the EU’s legal framework on data protection (see elaborately De Busser, 2009b, p. 282-291). Where the EU’s data protection standards are based on an umbrella instrument – the CoE’s data protection convention – that has been ratified by all member states, the US relies on a combination of sector specific legislation, self-regulation by companies and technologies of privacy (Banisar and Davies, 1999, p. 13-14 and Long and Quek, 2002, p. 330). Not only are data protection laws differently structured, also privacy policies in the EU and the US have slightly divergent political and social foundations (Whitman, 2004, p. 1151-1252). Even though the theories concerning these different mindsets could explain and illustrate the situation of data protection in transatlantic relations today and are therefore relevant, they are not the focal point of this contribution.

With regard to the quality of personal data as such, the US starts from the principle of accuracy, relevance and adequacy of personal data. However, the many exceptions to the rule and exemptions made from it, take away the quality of the data. For example, the US Privacy Act explicitly allows law enforcement and intelligence agencies to be exempted from the accuracy check of personal data, unless the data are disclosed to another person than an agency and the data are not asked by means of an request based on the Freedom of Information Act (5 USC §552a; 5 USC §552 and Department of Justice, Overview of the Privacy Act of 1974, 2004 edition, www.usdoj.gov/oip/04_7_1.html). Thus, for an interagency transfer of data, the accuracy standard can be disregarded. Furthermore, the necessity of these exceptions is not motivated and the conditions for lawful derogations are not met.

With regard to the quality of the processing of personal data, the purpose limitation principle does not appear in the US data protection legislation as a general binding rule. This is not problematic as such since many separate provisions apply. However, similar to the EU legal instruments on cooperation in criminal matters, many examples of purpose deviation can be found. Yet, the US deviates from the purpose limitation principle in a different way than the EU. Where the EU opens the use of data after they have been gathered, the US lowers the standards at the moment of data collection.

Firstly, data can be gathered for intelligence purposes and subsequently used for law enforcement purposes. This way, evidence can be introduced in criminal proceedings when it was in fact gathered by using the lower standard of intelligence investigations. The use of administrative subpoenas and national security letters are examples of this technique. For administrative subpoenas, only the possibility of judicial review and a reasonability standard are required (C. Doyle, 2006, p. 2-3). For national security letters, judicial review is not even provided. As long as there is reason to believe that the person or entity on whom information is sought was or may have been a foreign
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power or an agent thereof (Department of Justice, Office of Legal Policy, 13 May 2002, p. 7 and C. Doyle, 2008, p. 1-5).

Secondly, investigative techniques that were originally meant for criminal investigations opened for intelligence investigations. This method equally means the use of a technique that, due to its privacy violating character, should be subject to the constitutional requirements of the Fourth Amendment. Nevertheless, the standard is reduced and the data can eventually be used in criminal proceedings. A physical search of private premises should be conducted by applying the Fourth Amendment’s rules, however this is brought under the scope of Foreign Intelligence Surveillance Act (further: FISA) (50 USC § 1801 et seq.). The same is valid for the collecting of business records and other tangible objects, by means of the so-called Patriot Act amending FISA (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (Patriot Act), Public Law no. 107-56, October 26 2001).

Additionally, the US has a well-established tradition of sharing data among agencies and authorities. An example of this information sharing environment can be found in the Intelligence Reform and Terrorism Prevention Act of 2004 (Public Law no. 108-458, 17 December 2004) and in the notorious FISA. The latter opened up the wall between the intelligence community and law enforcement authorities by providing in the use of the results from warrantless electronic surveillances for the purpose of criminal proceedings (See also Vervaele, 2005).

With just a few examples shortly assessed from an EU point of view but based on earlier research (De Busser, 2009b, p. 282-291), we demonstrate the lack of an adequate level of data protection in the American system of personal data processing for the purposes of the detection, investigation and prosecution of criminal offences. It is therefore remarkable to see that the EU, Europol as well as Eurojust have rubber stamped this requirement of adequacy instead of making a comprehensive and thorough examination.

### 3.3 Transatlantic purpose deviation

The EU, Europol and Eurojust have concluded agreements with the US covering the exchange of personal data in criminal matters. The heightened attention for international cooperation in criminal matters after 9/11 had profound consequences on the EU-US relations in the shape of these new instruments. One would thus expect that the adequacy requirement should be complied with and that an assessment of the level of data protection in the US should be available for these agreements. However, this is not the case. On the contrary, the adequacy requirement was negotiated off the table in all three instruments.

The first outcome of the need for data exchange in the transatlantic connection, were the 2001 and 2002 Europol – US agreements. Without any conclusion on the adequacy of the US data protection system, Europol started negotiations assuming that the US was an adequate partner regarding personal data protection. The Europol Joint Supervisory Body (further: JSB) even stated that Europol was unable to express an opinion on the adequacy of the US data protection regime (Europol JSB, 26 November 2001, p. 2). Still, agreements between Europol and other third states – Australia,
Canada, Croatia, Iceland, Norway and Switzerland – include an adequacy assessment. This was therefore not done for the US.

On the contrary, the 2002 Europol-US agreement included a provision that received an interpretation was not seen before in instruments on cooperation in criminal matters. The provisions stating that a ‘party to which a request for assistance under the agreement shall endeavor to limit the circumstances in which it refuses or postpones assistance to the greatest extent possible’ should – in accordance with the explanatory note – be interpreted as a prohibition on ‘generic restrictions’ (Council, 13696/1/02, 28 November 2002). The adequacy requirement as one of the basic requirements of the EU data protection framework, more specifically the transfer to third states, is hereby negotiated out of the scope of this agreement.

In addition, the 2002 agreement concerned the exchange of personal data between Europol and the US and included a purpose limitation provision that was much wider than what the EU was used to (Supplemental Agreement between the Europol Police Office and the United States of America on the exchange of personal data and related information, 20 December 2002). Especially the interpretation given to the provision in the exchange of notes – including immigration and confiscation proceedings – substantially widened the possible use that could be made of exchanged data (Council, 13996/02, 11 November 2002).

In the 2006 Eurojust-US Agreement (Agreement between Eurojust and the United States of America, 6 November 2006) similar developments are seen with regard to the purpose limitation principle as well as with regard to the adequacy requirement. Since Eurojust has cooperation agreements with states that have ratified the data protection convention – Iceland, Romania, Norway and Croatia – the adequacy requirement was not necessary to fulfill here. However, this was not the case for the US. The cooperation agreement between Eurojust and the US needed to be complemented with a decision on the adequacy of the American data protection level. Yet, no adequacy assessment was made which seemed to not even make the Eurojust JSB bat an eyelid (Joint Supervisory Body of Eurojust, Activity Report 2006, p. 7).

A similar widely formulated purpose limitation rule was applied in the EU-US mutual legal assistance agreement of 2003. Based on articles 24 and 38 TEU, this was done for the first time as a group of member states rather than as separate states (O.J.L 19 July 2003, issue 181, p. 34-42). This agreement should – together with the bilateral written instruments developed by the member states – enter into force in 2009.

The adequacy requirement did not make it into the text of the agreement. One could state that the additional protocol to the data protection convention did not enter into force before 2004 and there were no other binding instruments applicable to the EU member states at the time that prescribed this condition for exchanging personal data in criminal matters. However, the adequacy requirement was already included in the additional protocol that was opened for signature in 2001. Thus, the negotiating parties could have anticipated to it and could have included it in the discussions on the content of the mutual legal assistance agreement. Additionally, the requirement was well known from data exchanges outside the field of criminal matters, such as the aforementioned Safe harbour Principles following the Directive 95/46/EC. In spite of many assessments on data protection systems of other third states, the US seems to continuously escape this additional safeguard by acquiring the assumption that its data protection is satisfactory by EU standards.
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The purpose limitation rule was equally in this agreement widened to include other purposes. Not included in any of the existing bilateral mutual legal assistance treaties (further: MLATs) between EU member states and the US, the wider rule will replace the existing use limitation provisions in these agreements and will be introduced in the relations with member states that did not have an MLAT with the US yet. The speciality rule that was a traditional part of the MLATs and protected the states’ interests is pushed aside (Vermeulen, 2004, p. 103). However, the data subject’s interests cannot be considered to enjoy a high level of data protection either due to width of the new rule. In accordance with the new rule, data can be used for unspecified purposes if the requested state – not the data subject – gives its consent. The necessity of this exception to the purpose limitation rule is not clarified.

Purposes for which data can be used are equally widened in specific agreements that have been concluded in order to make the transfer of data between US authorities and EU companies possible. Data gathered for commercial purposes in the EU and transferred and used by US administrative authorities in the fight against terrorism and the financing of terrorism, was the issue in both the case on the transfer of passenger name record (further: PNR) data and the SWIFT case (see also De Busser, 2009a, p. 187-191). In both cases, the relevant US authorities agreed to make commitments regarding the protection of the received data. However, the sharing of data with authorities is a possibility with regard to PNR data (Council, 13738/06, 11 October 2006 and Council, O.J.L 4 August 2007, issue 204). The EU agreed to the undertakings by the US on sharing the received data with authorities competent for public security related cases, without a clear necessity indication. In the SWIFT case, the EU also agreed to allow for the data transfer to the US Treasury under the condition of a specific purpose limitation that keeps the use of the data within the limits of terrorist financing investigations and prosecutions. However, it is still an administrative authority receiving commercially gathered personal data for the purpose of criminal investigations and prosecutions.

Purpose limitation is thus not a principle that is equally valued in the EU and in the US. The High Level Contact Group (further: HLCG), a group of senior officials from both sides established to enhance the transatlantic data exchange for law enforcement purposes, attempted to lay down common definitions on key principles (Council, 9831/08, 28 May 2008). The HLCG agreed on the principle that personal data should be processed for specific legitimate law enforcement purposes, in accordance with the law and subsequently processed only insofar as this is not incompatible with the law enforcement purpose of the original collection of the personal information. However, the group overlooked the fact that the term ‘law enforcement’ encompasses a different landscape of authorities in the EU than it does in the US. The US interprets law enforcement to include border enforcement, public security and national security purposes as well as for non-criminal judicial or administrative proceedings related directly to such offences or violations (EDPS, 11 November 2008, p. 13 and 9831/08, 28 May 2008, p. 4). The title ‘common principle’ is therefore quite inappropriate.

3.4 Inadequate transatlantic cooperation in criminal matters

Similar to the evolution visible in the EU Legal instruments providing in judicial or law enforcement data exchange, the EU-US cooperation in criminal matters moves
into a clear direction of purpose deviation rather than purpose limitation. Still, it is remarkable that this cooperation was established in the first place due to the lack of an examination of the American level of data protection. The adequacy requirement was not complied with in the three agreements that have been concluded between Europol, Eurojust and the EU on the one hand and the US on the other hand. A fortiori, the prerequisite that should safeguard our data protection standards in criminal justice systems that are not bound by the data protection convention, is eliminated from these agreements in favour of what is called a smoother exchange of data. Even where the requirement is lived up to in the relations with other third states, the US receives the ‘approved’ rubber stamp without passing the test of providing in adequate data protection. There is thus no coherency in the application of the adequacy requirement. On the contrary, demanding an adequate level of data protection seems to function as an obstacle rather than as a mechanism of protection, at least in the transatlantic relations in criminal matters. This means that the safeguarding of the European standards on data protection is not appropriately protected in outbound data exchange.

4 The significance of the adequacy requirement in the framework decision

The new framework decision on data protection in criminal matters includes provisions on data processing within the external borders of the EU and provisions on transfers of personal data crossing these borders (O.J.L 30 December 2008, issue 350, p. 60-71).

Four conditions are provided in the framework decision for allowing a transfer to a third state of body. Firstly, the transfer needs to be necessary for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties and secondly, the receiving authority should be responsible for these tasks. Thirdly, the providing member state needs to have given its consent. Fourthly, the third state or body needs to ensure an adequate level of data protection. The latter can however be derogated from.

The content of the instrument is on several aspects rather disappointing from a data protection point of view. With regard to the quality of the processing of personal data, the applicable provisions have been widely formulated and seem to aim for purpose deviation rather than purpose limitation (De Busser, 2009a, p. 163-201). With regard to the transfer to third states or institutions, the adopted provisions confirm the incoherence in the judicial and law enforcement cooperation in criminal matters between the EU member states on the one hand and third states or institutions on the other hand.

This incoherence is substantiated by means of three aspects of the framework decision: the limited weight that is attached to the adequacy requirement, the limited scope of the instrument and the effect that the framework decision has on existing and future provisions on data transfers to third states and institutions.
4.1 The weight of the adequacy requirement in the framework decision

Article 13 of the framework decision on the transfer to competent authorities in third states or to international bodies provides that the third state or international body concerned ensures an adequate level of protection for the intended data processing. Nevertheless, more requirements – that cumulatively need to be fulfilled – apply.

Earlier drafts of the provisions on the transfer to third states and bodies included the requirement of consent by the transmitting member state or authority as the only requirement to be fulfilled (Council, 7215/07, 13 March 2007). The Council however paid attention to the remarks made by the European Data Protection Supervisor and raised the conditions to a level much more in line with the provisions of the additional protocol (EDPS, O.J.C, 23 June 2007, issue 139, § 27-28). Consent of the state from which the data were obtained was made one of the four conditions to be fulfilled subject to derogations. The other two conditions include the purpose of the exchange for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties and the responsibility of the receiving authority or body for these tasks.

Not responding to the concerns of the EDPS, the framework decision does not encompass more detailed indications of how to – uniformly – assess the adequacy of a state’s data protection legislation, than the circumstances given by the additional protocol to the data protection convention.

Similarly, the lawful derogations from the adequacy requirement are a copy of the latter. Based on its origin in the additional protocol the legitimate prevailing interests should refer to article 8, § 2 of the ECHR and article 9, § 2 of the data protection convention, including state security, public safety, health and morals and the economic well-being of the state. Obviously, these leave plenty of room for more specific interests of the state to fit in one category or the other. Specifically the interests of state security can – nevertheless legitimate and prevailing – cause a shift of personal data gathered for criminal purposes to use for administrative purposes. This can be done while jumping over the requirement of an adequacy check, thus releasing the data into a legal system of which the data protection provisions are possibly not adequate in comparison to the EU standards. This provision in particular is in need of more clarification by means of an exhaustive list, a supervisory authority that judges the legitimacy and the prevailing force of a specific interest or by laying down standards on when to consider an interest as prevailing over the adequacy check of a data protection system.

As a copy of the additional protocol to the data protection convention, the comment that these derogations are broadly formulated is equally valid for the framework decision as well as for the protocol. Nevertheless, the protocol is in general applicable to all automatic data processing and was not designed to protect personal data in criminal matters. Furthermore, where the states ratifying the additional protocol are bound to provide in the adequacy requirement, they have the discretion to determine derogations to the rule. Therefore, implementing the principles from the protocol in criminal matters, the derogations of the protocol leave too much room for avoiding the adequacy assessment. Particularly since the significance of purpose limitation is considered as one of the basic data protection principles supported by the EU and encompassed by an adequate level of data protection, the use of these derogations can have wide-ranging implications.
Thus, the structure and content of article 13 of the framework decision is not new, neither surprising. What is surprising, however, is the fact that these provisions are limited to data transmitted or made available by a member state to another member in order to transfer them to a third state or body. It is therefore not aimed at, neither does it include, data that were gathered by the transmitting member state itself.

Together with the effects of the framework decision on the existing and future provisions on outgoing data transfers, the content of article 13 results in anything but a substantial adequacy requirement for the third pillar.

4.2 The scope of the framework decision

The formal scope of the framework decision is identical to the Directive 95/46/EC as it includes the processing of data wholly or partly by automatic means, and to the processing otherwise than by automatic means, of personal data which form part of a filing system or are intended to form part of a filing system (article 1, §3). The definition of ‘filing system’ is evidently identical to the one included in the Directive.

The material scope however, covers a part of the exceptions in article 3 §2 of the Directive and has been delineated by means of a functional criterion. Instead of delineating the authorities that are or are not included, for example law enforcement authorities or judicial authorities, the competent authorities are defined by Title VI of the TEU and the authorities that are authorized by national law to process personal data within the scope of the framework decision (article 2, h). This refers to authorities that are competent to process personal data for the purpose of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties.

Which activities are exactly included in the prevention, detection, investigation and prosecution of criminal offences and the execution of criminal penalties, is not provided by the definitions of the framework decision. Nevertheless, the link with criminal offences ensures that also the processing of personal data proactively can be included.

After elaborate discussions the Council decided to limit the Framework Decision to cross-border exchange of personal data and not include domestic exchange (Council (Justice and Home Affairs), 12604/07, 18 September 2007 and EDPS, Press release, 20 September 2007, www.edps.europa.eu). The resistance of a number of member states – lead by the United Kingdom – to the application of the framework decision to domestic data processing, finally made the Council give up on its original scope as no consensus would be reached (Council, 12154/07, 4 September 2007, p. 2 and Peers, 2007, p. 2).

This means that data that have been collected by the member states’ authorities do not fall within the scope of the framework decisions and thus are not subjected to the adequacy requirement when this member state transfers the data to a third state or body. Instead, the transfer of these data is subjected to national law. Only in case the member state concerned has ratified the additional protocol to the data protection convention or has included the adequacy requirement through an implementation of Directive 95/46/EC in criminal matters, should the adequacy requirement be applied to the outgoing data transfers.
Therefore, the framework decision creates a discrimination between the personal data that have been collected by the member state and the personal data that have been transferred or made available by another member state. Data included in criminal investigation files can consist partially of nationally gathered data and partially of received data. When data from the file are requested for the purpose of a criminal investigation or procedure in a third state, the data that are included in the file have to be distinguished regarding their origin. Thus, data in the same file can be subjected to two different sets of data protection rules. In case the receiving criminal justice system is evaluated as being inadequate, the nationally gathered data of the same file can be exchanged where the received data can not.

This distinction could even create grounds for an evaluation of the framework decision by the Court of Justice by means of a prejudicial question and the competence of the Court to rule upon the validity of framework decisions (article 35, §1 TEU). By analogy with the case brought before the Belgian Constitutional Court by the non-profit organization ‘Advocaten voor de Wereld’ regarding the European Arrest Warrant, the framework decision on data protection in criminal matters could be judged on this discriminatory aspect (Court of Justice, C-303/05, 3 May 2007). Because the distinction made between nationally gathered data and data received or made available by another member state is not objectively justified, the Constitutional Court could refer the case to the Court of Justice. In the case regarding the European Arrest Warrant, the relevant difference – requirement of double criminality for all offences not included in the list in framework decision on the European Arrest Warrant – was according to the Court objectively justified due to the seriousness of the offences included in the list.

A distinction based on objective aspects of the data cannot be made with regard to the personal data gathered nationally or received from another member state. On the contrary, limiting the scope of the framework decision was a choice inspired by national policy. Applying the instrument only to cross-border exchange was the adamant position of ‘a substantial number of delegations’ of the member states (Council, 12154/07, 4 September 2007).

4.3 Effects of the framework decision on existing and future provisions

Similar to the instruments applicable on data exchange between member states, the entry into force of the framework decision on data protection in criminal matters also has significant effects on the instruments on the exchange of personal data with third states.

Article 26 of the framework decision lays down the general rule that existing bilateral and multilateral agreements between the member states or the Union on the one hand and third states on the other hand, are unaffected by the framework decision. Future agreements should comply with the new instrument, specifically with article 13 on transfers to third states and international bodies. This particular article will nevertheless also play an important part in the existing bi- and multilateral agreements as the requirement of consent in the provision – §1, c) or §2 as appropriate – must be applied to these agreements as well.

The already concluded instruments will still be applicable in their original form, even though with the addition of a consent requirement. This means that no agreements need to be renegotiated and obtained clauses will remain in force. Besides the
significance for the political ties that the member states as well as the Union have built up with third states, legal certainty is ensured by not touching acquired rights and obligations after the adoption of the framework decision. The addition of the consent requirement means that with regard to the concluded data exchange by virtue of existing bi- and multilateral instruments, the member state that supplied the data now also needs to give its consent for the transfer to the third state. However, the requirement can be derogated from in cases in which the consent cannot be obtained in good time and the transfer is essential. The necessity is motivated by the prevention of an immediate and serious threat to public security of a member state or third state or to essential interests of a member state. Due to the width of this derogation, the consent requirement is thus not the type of additional requirement that would impede the functioning of an already existing agreement. Therefore, the relationships of data exchange with third states that are effective at the time of the entry into force of the framework decision are secured.

The requirement of ensuring an adequate level of data protection remains untouched where it has been included in existing agreements. As mentioned before, the requirement has not been included in all legal instruments related to data exchange in criminal matters.

Also unaffected by the framework decision, is the additional protocol to the data protection convention. This means that the adequacy requirement the ratifying states are bound by in their data exchange with states not bound by the data protection convention, stays afloat pursuant to recital 41 of the preamble.

Important to note is that article 26 of the framework decision explicitly refers to ‘obligations and commitments incumbent upon Member States or upon the Union by virtue of bilateral and/or multilateral agreements with third States existing at the time of adoption of this Framework Decision’. Consequently, it is not necessary for the agreements to have entered into force then. The obligations or commitments merely need to ‘exist’, which is a legally vague and undefined term. As obligations or commitments cannot exist without the agreement being concluded, it would have been a much clearer rule to include the prerequisite of a signed agreement.

By only including member states and the Union, this means that the agreements concluded between Europol or Eurojust on the one hand and third states on the other hand, are not encompassed by the rule in article 26. Thus, these remain unaffected in their existing as well as in their future agreements with third states.

5 The future of adequacy: from Vienna to Stockholm via Washington

The history of the adequacy requirement dates back to the creation of the internal market and the aforementioned Directive 95/46/EC. In criminal matters it has not been made a generally binding prerequisite for outgoing transfers of personal data. Recent developments have shown that this is not likely to happen in the future, even though significant efforts have been made to create a data protection framework for the third pillar. Nevertheless, in the judicial and law enforcement cooperation in criminal matters between the EU, Eurojust and Europol on the one hand and the US on the other hand, the adequacy requirement has become discredited.
5.1 From Vienna to the Hague

The first call for a harmonisation of data protection rules under the title of judicial and police cooperation in criminal matters was made in the Vienna Action Plan in 1998 (O.J.C 23 January 1999, issue 19, § 7 and § 47). Even though these plans were accompanied by an Italian initiative covering the same ideas on harmonising data protection in the third pillar, the first attempts to develop a legal instrument on data protection in criminal matters failed.

After the European Council refreshed the Council and the Commission’s memory in the Hague Programme, an Action Plan was set up to submit proposals for ensuring ‘adequate safeguards and effective legal remedies for the transfer of personal data for the purpose of police and judicial cooperation in criminal matters’. The new proposal drafted by the Commission in 2005 (Commission, COM(2005) 475 final, 4 October 2005), failed to resolve a number of crucial questions. A new proposal was therefore presented by the German presidency in April 2007 (Council, 7315/1/07, Proposal for a Council Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, 24 April 2007). Nevertheless, the adequacy requirement did not undergo significant changes in these proposals. With the exception of the draft proposal of March 2007 where briefly the consent requirement was included as the only condition for making outgoing personal data transfers in criminal matters. In the following draft text the adequacy requirement was already restored in its former configuration as one of the conditions to be fulfilled.

Notwithstanding the current structure of the article on outgoing data transfers, the three aspects as examined above demonstrate that the adequacy requirement as it is included in the new framework decision does not entirely suit data protection in international cooperation in criminal matters to the best of its abilities. Looking at the manner in which the adequacy requirement is used in agreements with third states that cover data transfers in criminal matters, the picture is equally alarming concerning the transatlantic cooperation.

5.2 The transatlantic journey

The cooperation in criminal matters between the EU and the US earns a specific spot in the discussion on the adequacy requirement. Before the conclusion of the 2003 agreement on mutual legal assistance in criminal matters between the EU and the US, the cooperation between judicial and law enforcement authorities in criminal matters was regulated by bilateral mutual legal assistance treaties (MLATs). None of these MLATs include the adequacy requirement. The entry into force of the 2003 mutual legal assistance agreement could have changed this as new bilateral instruments needed to be developed in order to interpret the existing MLATs in the light of the agreement.

Research has shown that the American system of data protection in criminal matters is as such not fully compatible with the EU standards on data protection. The lack of generally binding rules on purpose limitation and data retention combined with the tradition of data sharing amongst government agencies, result in a data protection landscape that is too divergent from the EU legislation to be labelled as adequate with-
out guaranteeing additional safeguards (De Busser, 2009a, p. 175-191. Regarding the differences between both systems see also Whitman, 2004, p. 1151-1221 and Harris, 2007, p. 796-799). Nevertheless, this did not withhold Europol, Eurojust and the EU from concluding agreements covering the exchange of personal data with the US authorities.

5.3 Adequate transatlantic alliances in the future?

Approaching the end of the Hague Programme in 2010, the German presidency set up two informal working groups at ministerial level to discuss a successive plan on the future of European area of freedom, security and justice. The Informal High Level Advisory Group on the Future of European Home Affairs Policy (Future Group Home Affairs) on the one hand and the High-Level Advisory Group on the Future of European Justice Policy (Future Group Justice) on the other hand, considered the main challenges the EU would face in the period 2010-2014. These preparations would lead to the new Stockholm programme, the successor to the Hague plan that should be concluded during the Swedish presidency in the fall of 2009 (Vermeulen, 2009).

At that given time, the Council discussed the Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters and due to the focus on information exchange in the Hague Programme, the subject of data protection received much attention in both reports. The report of the Future Group on Justice continued largely along the data protection lines the EU had set out before. Introducing new ideas on transatlantic cooperation, including convergence of the different legal frameworks of data protection, the Future Group makes the assumption that the US endorses a data protection system that is compatible with the EU’s data protection regime. The Group goes as far as having a strong statement registered on a ‘Euro-Atlantic of cooperation with the United States in the field of Freedom, Security and Justice’. This implies an intense cooperation with a criminal justice system that is still fundamentally different from the EU’s criminal justice systems. In the preparatory report by the Future Group on Home Affairs already politically departed from the assumption that the US criminal justice system, including its data protection system, is sufficiently compatible to organize the same type of cooperation that exists between EU member states in the relations with the US. This means that the adequacy of the US data protection system is merely assumed, rather than thoroughly examined.

The Future Group introduced the concept of a Euro-Atlantic area of cooperation with the US in the field of freedom, security and justice. The Group hereby believes that the same principles that are applicable in the cooperation between EU member states, can be copied to the EU-US cooperation (Vermeulen, 2009). This would imply the application of the principle of mutual recognition to the EU-US relations. The basic conditions for mutual recognition – mutual trust and common minimum standards – are thus equally assumed, rather than thoroughly examined. In addition, these prerequisites for the principle of mutual recognition are not necessarily fulfilled in the internal cooperation between EU member states (Vernimmen-Van Tiggeelen and Surano, 2008). As stated above, the current state of the art shows that the US are not compatible on a data protection level with the EU, even though the Future Group’s reasoning was based on compatibility between both systems.
Chapter 2.3 of the Stockholm programme ends in a similar reasoning, by stating that the EU – US cooperation on data protection could serve as a basis for future Agreements. Taking a closer look at the content of Chapter 2.3 on protection of personal data and privacy, two statements are particularly eye-catching. On the one hand the Chapter highlights the need for a comprehensive protection scheme covering all areas of EU competence. On the other hand the Chapter ends with an impressive statement that bilateral and multilateral instruments could be based on the example of the EU – US cooperation in data protection. Based on these statements, one could reason that the EU’s internal data protection is in need of improvement as basic principles need to be restated whereas the data protection in its transatlantic relations should serve as an example for international standards on data protection. The combination of these two statements included in the Stockholm Programme amounts to a glorification of the Agreements concluded between the EU and the US on the exchange of personal data.

In view of the research set out above, the word ‘example’ is a strong and rather inappropriate word to use in this context. In order to use it rightfully the basic standards of data protection applicable in the EU should have been complied with in the cooperation with the US on data protection. Earlier research has proven that this is not entirely the case (De Busser, 2009a, p. 175-191). The essential element of the (application of the) adequacy requirement has also been examined in the transatlantic relations in criminal matters and resulted in a similar negative answer. The adequacy requirement is not consistently applied in the EU’s law enforcement and judicial cooperation in criminal matters with third states.

According to the Stockholm Programme the ‘Union must be a driving force behind the development and promotion of international standards for personal data protection and in the conclusion of appropriate bilateral or multilateral instruments. The work on data protection conducted with the United States could serve as a basis for future Agreements.’ The question whether the EU – US cooperation in criminal matters should serve as a role model for data protection, should be answered in a negative manner. Without a solid check of possible inconsistencies between the EU level of data protection and the level of data protection of the US, personal data can now be transferred with American law enforcement and judicial authorities and be fairly effortlessly shared with other agencies in the US. If this picture would function as an example for future bilateral and multilateral Agreements with other states, the data protection standards laid down by the widely ratified data protection Convention will be breached by a number of states. If this cooperation implying the elimination of the adequacy requirement would function as an example for future bilateral and multilateral Agreements, the additional protocol to the data protection Convention loses its meaning.

Obviously not every third state will apply specific rather than general rules on data protection and not every third state has a tradition of data sharing, encouraging the creation of Agreements based on the example of the Europol – US Agreement, the Eurojust – US Agreement and the EU – US Agreement, is not consistent with the idea of a stronger framework of data protection.
6 Conclusion: coherency with a twist

The adequacy requirement is not a general condition for data transmission, which is an out of the ordinary way of working in criminal matters. Coherency is traditionally the key word in the third pillar due to the risk of *forum shopping*. In the case of personal data exchange, an incoherent data protection policy would potentially result in *data shopping*. Furthermore, it could result in cross-pillar data shopping when the adequacy requirement is not uniformly applied in the first and third pillar. The reality of purpose deviation in the EU’s legal instruments intensifies this concern.

Due to the sensitivity of judicial and police cooperation in criminal matters, especially in cooperation with third states or institutions, it is at all times advisable to allow for a common attitude towards sending personal data with a view to inserting them in a criminal procedure. More specifically, a common attitude in protecting the use of the personal data after they have been transmitted – the adequacy requirement – is necessary in order to effectively protect our own EU standards. Independent from the question whether the EU lives up to its own standards, the data protection rules the EU lays down are thus not satisfactorily safeguarded in the cooperation with third states or institutions.

Furthermore, the differences between the assessment involved in fulfilling the adequacy requirement as implemented by Eurojust and Europol, add to the diversity of a safeguard that should protect all personal data originating from the EU.

With Eurojust, Europol and the national data protection regulations being excluded from the scope of the new framework decision on data protection in criminal matters, this instrument has only added to the lack of coherency in this field. The same instrument has provided in the adequacy requirement but failed to make this a strong prerequisite in the relations with third states or institutions by including derogations that can be fairly effortlessly used to circumvent the assessment of an adequate level of data protection.

Nevertheless, even when an adequate level of data protection is laid down as a *conditio sine qua non*, it is not always applied. The agreements the US concluded with Europol and Eurojust are good examples. In particular because this requirement was complied with in the relations with other third states, increases incoherency. Both Europol and Eurojust support more lenient standards in their cooperation with the US than in their cooperation with other third states. The US was in fact labeled as supporting an adequate level of data protection, where the necessary confirmation for this label was not provided and cannot be provided.

Data protection provisions in future agreements with other third states could potentially suffer when the new partners in the negotiation demand the same lenient rules from Europol or Eurojust in order to obtain an easier exchange of data.

The EU has not developed cooperation agreements of the same type with any other third states, but was equally accommodating to the US in pushing aside the adequacy requirement. This equally weakens the position of the EU to demand compliance with its data protection standards in future agreements of this type. The risk of negotiating basic data protection rules in the cooperation with third states and institutions thus increases when no coherent policy is developed on the protection of the EU’s data protection standards in outgoing data exchange.
In the future plans for developing further cooperation with third states, the trend continues. Especially with regard to the transatlantic cooperation, the label of an adequate partner for cooperation in criminal matters is strong. So strong that plans for a Euro-Atlantic zone of cooperation have surfaced in which the cooperation with the US would run along the same lines as the cooperation between the EU member states. Disregarding the basic principles required for this type of cooperation and the fact that their fulfilment is equally within the EU incomplete, does not bode well for the coherency of future policy plans for judicial and law enforcement cooperation in criminal matters.

There is thus a significant need for a common attitude on the requirement of an adequate level of data protection within the EU as well as in the EU’s relations with third states and institutions.

Regardless of the EU pillar that encompasses the specific exchange of personal data, the adequacy requirement should be applied by all member states and by the EU institutions and the EU itself in their relations with third states, including the US. Ensuring coherency means a genuine assessment of the adequacy of the third state’s data protection level rather than rubber stamping a state as being adequate without thorough evaluation. Ensuring coherency also means developing a common assessment method, equally in a cross-pillar fashion. This common attitude should equally be sustained regardless of the fact whether the exchange of personal data encompasses the exchange of domestically gathered data or data received or made available by another member state. However, it is clear that the more recent legal instruments covering judicial and law enforcement data exchange between the EU member states and in the transatlantic cooperation in criminal matters as well as the most recent framework decision on data protection in criminal matters, do not answer to this need for coherency.

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The international private security industry as part of the European Union security framework: a critical assessment of the French EU presidency White Paper

‘Je n’ai jamais compris que l’on oppose l’État et le marché’.
Nicolas Sarkozy

Marc Cools
Dusan Davidovic
Hilde De Clerck
Eddy De Raedt

1 Introduction

Criminological scientific research is often the result of public and/or private astonishment. On Monday 15th December 2008 the ‘livre blanc’ or white paper – ‘La participation de la sécurité privée à la sécurité générale en Europe, Private Security and its role in European security’ – was presented to the public and the press at ‘Place Beauveau’ in Paris by Michèle Alliot-Marie, the then French Minister of Interior, Pierre Monzani, the then director of INHES and Marc Pissens, president of CoESS. The presentation was held during the first organized European Summit on Private Security or ‘1er Sommet européen de la Sécurité Privée’. The summit was called the first one, because it was first time officially endorsed by a standing European Union presidency.

It immediately took our scientific interest and raised some research questions which are to be answered here. These questions are multiple. Firstly, how did this white paper get into the priority list of the French EU presidency if it was not mentioned before? Knowing the French, rather unfavorable, attitude towards private security, then there surely must be a much broader reason. We are trying to argue that the security discourse of the French president Nicolas Sarkozy had to do with it. As a second research question, were are also examining the impact of INHES and CoESS in producing this white paper and give a brief summary of it. The last section is reserved for comments and we will conclude it with ‘another’ critical assessment based on a scientific, political and economic point of view. Also the possible impact of this withe paper for the future EU presidencies held by e.g. Sweden (2009), Spain and Belgium (2010) will be researched as much as possible.
2 The French EU presidency, the private security in France and the security discourse of Nicolas Sarkozy

In order to answer the first research question we will reflect on the French EU presidency, the private security in France and the security discourse of Nicolas Sarkozy. The presidency is an important institution in the EU and the key player in keeping the expanding European Council machinery under control (Devuyst, 2002). Until January 1993 the presidency was held by the member states in alphabetical order, with a tendency of the same state always holding the so-called shorter presidency in the second half of the year. It stopped in 1998 and now we have a ‘Troika’ of presidencies including one larger member state. A presidency manages the business of the Council, it convenes meetings, establishes the agenda, drafts compromise texts from the chair, represents the European Council and speaks for it before other European institutions. It is a political fact that the presidency tries to secure agreement on as many issues as possible due to its increasing public prominence (Brainbridge, 1998). It is not our purpose to write an extensive contribution on the French presidency as such, but we will concentrate on the work done towards the private security and its role in the European security framework.

In 2008, between July and December, France had the presidency of the Council of Ministers and of the European Council. Some EU presidencies wrote history. At Fontainebleau in 1984 the deduction on agricultural subsidies was decided, in 1991 in Maastricht the EU chose the euro for its currency and in Berlin 1999 a blueprint for a European budget became reality. Also Lisbon in 2000 and Brussels in 2005 became important presidencies due to their social and enlargement agenda (Eppink, 2007). The EU can only exist when it is guided by a ‘strong political leadership’ (Van Miert, 2000) as it was also foreseen in the rejected European Constitution with his chairman of the European Council (Dehaene, 2004). Europe moved from a strict economic community to a political union which makes the comments of politicians even more important.

The French EU presidency was especially known, and will be remembered, by the worst credit, financial and economic crisis since the 20s of the last century. N. Sarkozy, the sitting president of the Republic of France, and chairman of the presidency acted as almost everybody expected him to act. He did so with a sense of entrepreneurship, animation and above all he proved himself to be a coach for the European Union. Typically for his ‘business style’ he took care of the continuity, timing and willingness to make a deal and he tried to be successful (Mongin, Vigarello, 2008). Nowadays, the international organized political right and left (Duhamel, 2009), and the individual European citizen tend to agree he did a splendid job as the chairman of the presidency towards this global financial and economic issue by guaranteeing people’s savings and credit and bank business.

In the ‘MPFUE’ or ‘Mission pour la Présidence française de l’Union européenne’, M. Alliot-Marie wishes to take advantage of this EU presidency to add a significant impetus to the European cooperation in the field of security. In particular: practical action in the prevention of terrorism, taking measures to combat illegal or harmful content on the internet in its fight against cybercrime, the prevention of drug and drug production, use and trafficking as well as building a rapidly responsive Europe to restate its attachment to ensuring a balance between security and the protection of
The international private security industry as part of the European Union security framework

civil liberties (Alliot-Marie, 2008). It is important to notice that the private security industry as such, is not being involved or mentioned in this priority setting.

The French Fifth Republic, irrespective of its regional decentralization, is and remains a very centralized state. Society, market and state are interwoven and can rely on an ‘army’ of public servants as ‘new state nobility’ and a performing state-owned security system (Stols & Vermeulen, 1998). This security framework is concentrated around the national police (‘police municipale’ and ‘police judiciaire’), ‘Gendarmerie’ (Lizurey, 2006), a ‘CRS’ or ‘Compagnies Républicaines de Sécurité’ (Le Texier, 1981) and an intelligence community (Direction de la Surveillance du territoire’ and ‘Direction générale de la sécurité extérieure’) still functioning in the spirit of Joseph Fouché (Soulez & Rudolph, 2000). The state as an economic participant in itself (Chalmin, 2000) never gave that much room for the development of a real free industrial market and/or important influence of (neo)liberal thinking (Ortolan, 1990; Denord, 2007).

The birth of the French private security is related to the close relationship between J. Fouché and Eugène Vidocq in setting up the first private intelligence office in 1832. Next to a proper business interest it was especially the state-owned security framework that profited from this private intelligence agency by obtaining information on citizens (Kalifa, 2000). A paradox in public-private security cooperation became the father of the private security industry in France. Later on in history the French leading political leftist elite and its scientific researchers would always distrust the private security. Private security, reduced to a private militia discourse, was seen as a political and oppressive tool in the hands of the powerful business classes (Ocqueteau, 1997, 1999). As far as we can expect now, since 1983, the current French private security industry has been under strict governmental control (Cools, 1999) and only became a tolerable partner in the concept of plural policing (Monjardet & Ocqueteau, 2004) due to severe lobbying of the sector themselves without any public debate on the role and impact of the private security in the French (in)security issues (Ocqueteau, 1999). It is clear that the French private security industry has always been only the little, tolerated auxiliary brother in the security framework.

It is not possible to discuss this white paper on private security in Europe without referring to N. Sarkozy as the chairman of the presidency and his views on crime and security as such. Crime and security are and will always be political issues (Nijboer, 1993). A lot of us, who were not so familiar with French national politics, knew not that much about N. Sarkozy before his appointment as French Minister of Internal Affairs on two occasions and the sometimes outspoken negative reactions he provoked in different (inter)national political (Emptaz, 2003) and societal (Friedman, 2005) scenes before (Chevrillon, 2007) and after (Liêm, 2008) his being president elect of France.

For the French left he became and still is the perpetrator of a ‘liberticide’ and a ‘Sarko facho’. The laws he guided through the parliament as a Minister of Interior in 2003 on internal security (‘la loi sur la sécurité intérieure’), in 2006 against terrorism (‘la loi relative à la lute contre le terrorisme’) and in 2006 on immigration (‘la loi sur l’immigration’) never got the approval of the French left (Gambotti, 2007). His actions are seen by them as successful communication skills without operational results (Mouhanna, 2007) and which are just hardening the justice system (Portelli, 2007).

Nevertheless, he became famous through his courage in dealing with a hostage taking. On 13th May 1993 he was a young mayor at Neuilly when Eric Schmitt, alias the ‘human bomb’, took some preschoolers and their nurse hostages at the ‘Commandant
Charcot School’. N. Sarkozy negotiated with him and succeeded in releasing the children, the nurse and a fire brigade doctor. From that moment on a new French political star was born (van der Roest, 2007). N. Sarkozy would never quit the security issue as part of his system of values consisting of order, dignity, justice, merit, labor and responsibility (Sarkozy, 2007). These values, rather than being well-defined and clear written ideas, are representative of the French right wing democratic political hemisphere (Rémond, 2005). During his being at ‘Place Beauvau’, a trampoline for future French Presidents (Recasens, Décugis & Labbé, 2006), and with the support of the police and intelligence community, he introduced e.g. the zero tolerance policy, the severe punishment approach to convicted criminals and a tough reaction towards the so-called ‘banlieue’ or suburbs uprising (Duplan & Pellegrin, 2008).

In his own political writings, used as a way to communicate with the French citizens and in his preparation for the French presidential elections of 2006 and afterwards, he saw the solving of the (in)security issue as a necessity for proper democratic behavior, structures (Sarkozy, 2001) and change (Sarkozy, 2004). He reacted especially against violent (Sarkozy, 2001) and sexual crimes that were treated with banality (Sarkozy, 2007) by the judicial system and put victims in the core of his vision. His security policy would express the ‘Sarkozy-ism’, pragmatism and efficacy (Rudolph, Soulez, 2007) in its most ideological way (Mongin, Vigarello, 2008). He also introduced a national security strategy including the national defense, the homeland security, the foreign affairs policy and an economic policy (Sarkozy, 2008).

His local French presidency also concentrated on (in)security topics and the intelligence community (Denéce, 2008). In his then government four ministers were responsible for security-related departments. Brice Hortefeux, who worked with N. Sarkozy for more than 30 years (Reinhard, 2007), became Minister for immigration, integration, national identity and co-development. Rachida Dati, a so-called ‘beurette’ of Moroccan-Algerian origin (Dati, 2007) was appointed to the Ministry of Justice and M. Alliot-Marie, former Minister of Defense (Alliot-Marie, 2005) to the Interior. Hervé Morin became Minister of Defense. In June 2009 N. Sarkozy reshuffled his government. B. Hortefeux became Minister of Interior and M. Alliot-Marie took office at the Ministry of Justice. R. Dati moved to the European Parliament (Branca, 2009).

3 The genesis of the white paper by INHES and CoESS and its content

In the second research question we will describe the roles and functions of INHES and CoESS in the genesis of the white paper and summarize its content. INHES (National Higher Institute for Security Studies) was created in 2004 by N. Sarkozy. Based in Paris the institute tries to reach all security professionals in order to generate a security culture towards threats and risks. They do so by educating and training or by providing education and training of auditors for the public and private security function. The works and publications for the Minister of Interior cover a broad range. They include crime statistics, victim surveys, civil security issues, economic impact studies, risk analyses and decision making tools for the police and gendarmerie.

The training department collaborates in partnership with universities, private research institutes, and the CNRS or ‘Centre National de la recherche scientifique’ (National Centre for Scientific Research). The valorization takes place through differ-
ent series of publications such as the review ‘Cahiers de la sécurité’, (security cahiers) the collection ‘La Sécurité aujourd’hui’ (security today) and the collection ‘Études et recherches’ (studies and research).

The national delinquency observatory OND or ‘Observatoire national de la délinquance’ (Rudolph, Soulez, 2007) guarantees his strategic independence by an orientation council, the ‘Conseil d’orientation’. This board counts members from the civil (national and local politicians, university researchers, the media, the professional orders and the private business world) and public society (defense, interior, finance, transport, cities, scientific research, overseas and education). The main task is publishing crime statistics.

The department responsible for economic security and crisis management or ‘Sécurité économique et gestion de crise’ is a strategic economic intelligence unit which deals with economic competitor security topics and crisis management in close contact with civil security organizations (Monzani, s.d.).

CoESS or Confederation of European Security Services is based in the Belgian place Wemmel near Brussels and was founded in 1989 by a joint initiative of several national associations of private security companies belonging to EU-member states (France, Germany, Italy, the United Kingdom, the Netherlands and Spain). From its start, CoESS has therefore been a European umbrella organisation for national private security associations, representing today 31 national federations in 28 European countries. The federations speak on behalf of some 50,000 private security companies, employing about 1.7 million workers. This form of affiliation remains CoESS’ major objective and was recently confirmed in the newly adopted statues at the extraordinary general assembly in Istanbul 2002 and revised in Stockholm 2006.

From the early years of its existence on, CoESS has focused on the European Social Dialogue, through the establishment of very constructive contacts with the European trade Union UNI-Europa and through the recognition, by the European Commission, as a European sectoral social partner, in accordance with the European Treaties. In the first decade of its existence, the major activities and results were achieved by CoESS through the ‘European Social Dialogue’ (Olschok, Waschulewski, 2009).

Seven years ago, CoESS reorganized its structure, functioning and ways of representation. The objective of this reorganisation is to allow CoESS to expand and become more active both in horizontal and vertical way. The ‘European Social Dialogue’ will remain important but other fields of actions have been opened. As for its vertical development, CoESS has the mission to become the sole and unique European organisation representing all European countries (EU, candidate countries and non-EU countries), all branches of industry (cash-in-transit, CIT), airport security, cash processing, security training, bodyguarding, beat patrol, commercial manned guarding, in-house manned security, event security, crowd control, door supervising, alarm monitoring, CCTV monitoring and mobile alarm response, private investigation), guarding, cash-in-transit, monitoring and airport security), through representative, well-functioning and active national associations.

The purpose of CoESS is to ensure in Europe the defence of interests of the organisations and national companies that provide security services in all their forms and to represent these joint interests, in particular, through involvement in the work aimed at the harmonisation of national legislation concerning the activities of its members (De Clerck & Cools, 2009).
The EU is based on liberty, democracy, respect for human rights and fundamental freedoms and the rule of law in which an area of freedom, security and justice is created. This means provisions on visas, asylum, immigration etc. and providing citizens with a high level of safety (supranational first pillar) as well on provisions towards police and judicial cooperation (intergovernmental third pillar) in criminal matters (Devuyst, 2002, De Bondt & De Moor, 2009). To be complete we can add the common foreign and security policy as the intergovernmental second pillar. In our view the private security industry is a first pillar topic. The proof is given by the Court of Justice in six judgments against national restrictions which infringe the free movement of workers, freedom of establishment and the freedom to provide services (Peers, 2006).

The white paper as such researches the private security participation in the general security policy in Europe. In the first part of the white paper the fragmented landscape of the private security in all member states is subject to quantitative research and the second part focuses on the qualitative role played by the commercial security sector in the overall security provision.

However private security has become a major contributor to overall security policy, recognized as a highly professional and trustworthy sector, the sector in itself is neither homogenous nor clearly defined. The industry differs in terms of structure, command, aims and methods. It also comprises a large range of activities. The scope of the paper is therefore restricted to contract-based human surveillance, being the most important activity. Given the difficulties measuring the size of this fragmented sector, the figures should be treated as estimates. Nonetheless they were sufficient to abstract overall tendencies and to give an insight into the main characteristics that define the sector.

Firstly, the paper looked at the relevant figures state by state and secondly by comparing the national figures for private and public security agents. By adding these two numbers together a reference value, the overall level of security investment on a national basis is acquired. The highest private security workforce (ratio of the number of private security agents per 100,000 inhabitants) is reached in Hungary, the lowest in Austria. Twice as high as the European average are Poland, Ireland and Luxembourg. In general those figures have nothing to do with cultural or national explanations but all with the market dynamics such as the emergence and consolidation of effective demand. In comparison to the public workforce there are one and a half times as many public security employees in Europe than private security employees. In short, European countries can be placed in four major categories. Six countries have more private security agents than public officers. These countries are: Estonia, Hungary, Ireland, Luxembourg, Poland and Slovakia. Three have more or less identical numbers. Lithuania, the Netherlands and the United Kingdom. Twelve have as many private agents as public officers. It is the case in: Belgium, the Czech Republic, Denmark, Finland, France, Germany, Greece, Latvia, Portugal, Slovenia, Spain and Sweden. Four countries have marginal private workforces compared to public workforces. Austria, Cyprus, Italy and Malta.

Seven European countries have total combined private and public security workforce of more than 700 security professionals per 100,000 inhabitants. They include: Cyprus, the Czech Republic, Hungary, Ireland, Luxembourg, Poland and Portugal. Five countries have a total combined private and public security workforce of less than 420 per 100,000 inhabitants. Namely Austria, Denmark, Finland, the Netherlands and
Sweden. The other 13 countries have accumulated ratios of between 500 and 700 security professionals per 100,000 inhabitants.

However the overall amount of private security agents and their relation to the public police force hasn’t evolved in the same way for all countries, a national or cultural issue doesn’t provide us with an explanation for the differences. The research puts forward three reasons for a rise in the EU, as elsewhere in the world since the explanation provided is transcultural. New forms of property, especially the mass private property and a rise in mass consumer goods, together with a congested public police service and the fiscal crises for states, caused demand for security to increase creating more possibilities for private security to intervene.

The research on the statutory regulations adopted by the member states discovers an extremely broad scope of private security activities. Apart from Belgium, the United Kingdom and Slovakia, which all have defined private security activities in great detail, we can have a minimum or a maximum scope. The limited scope includes: surveillance of personal assets and property, personal protection, cash-in-transit, access control and designing, installing and managing alarm systems. In some countries there is a more maximum scope similar to certain kinds of privatizations. Scholarly examples are e.g. Spain where the metro is considered to be a private space. In Austria private security agents are controlling access to and patrolling motorways and in Italy the management of the urban CCTV systems is entrusted to private companies. In Hungary public buildings are protected by private security companies. In Germany the private security industry is entrusted to deal with minor traffic accidents and in Sweden the private sector offers: ambulance services, patient transportation, road assistance and fire brigade services. The United Kingdom has gone the furthest in delegating its public services to the private sector. It even touches the prison service. The private security companies are involved in escorting and transportation of detainees, physical and mental health care, education and reininsertion measures for prisoners.

Most legislation in the member states towards the private security was introduced in the 1990s and in Eastern Europe at the end of the 1990s. Only Italy has had a legislation since 1931 and Sweden since 1974. One can discover three types of legislative provisions, placed on a spectrum from the most flexible to the most restrictive. Strict legislative provisions are in Belgium and Spain that copied the Belgian legal framework. Portugal did in their turn copy the Spanish model. Also Hungary, Romania, Slovakia and Sweden have the same type of statutory framework for the profession. All aspects of the profession are covered down to the slightest detail. Austria, the Czech Republic, Cyprus and Germany are on the other side of the legislative spectrum. France and the United Kingdom are located between these two. The statutory framework is developed according to need, however avoiding precise defining of all technical aspects.

All member states, with the exception of Ireland, require approval of the public security sector. The authorities responsible for granting approval differ between the justice or the interior department or even the national or local police. In Spain the license is given by the justice department, in Hungary, Romania and Slovakia by the interior department and in Belgium by both. Sweden knows the provincial government that determines whether to grant the license. Employees are everywhere subject to conditions on age and good moral character. Some member states add more requirements: nationality of the national country or of another member state, medical and health in Portugal, Romania and Slovakia. In Spain there are language require-
ments for the Basque and Catalan regions, Greece and Spain know regulation on military service. The last country puts even a minimum height on the candidates. Double-jobbing with the private investigation sector is forbidden in Belgium, the Netherlands and Spain and with the arm sales in Belgium and Portugal. There has also been an incompatibility with previous occupations in the public security sector in recent years in Belgium, France and Portugal. Exams organized by the public sector exist in Belgium, Spain and by the private sector in Germany. With a few exceptions, company directors are generally subject to the same obligations.

We can also notice a varying level of training. In almost all the countries, with the exception of Germany, private security agents must receive training before being allowed to work. The length of the training varies widely. The longest is in Hungary (320 to 430h), Sweden (40h), Spain (180h), Latvia (160h) and Romania (90 to 360h). The middle ranking countries are: Portugal, Denmark and Finland, each prescribing between 100 and 130 hours of training. The others, Slovakia, France, Belgium and the United Kingdom have the shortest training obligations varying between 32 and 90 hours. In Spain and Romania the training is done through a state intervention which is not the case for Slovakia, the United Kingdom and France. Sweden really has ‘training institutes’ set up by the private sector and approved by the public authority. Carrying weapons is prohibited in Denmark, Ireland, the Netherlands and the United Kingdom. In the countries where it is authorized, all member states require both individuals and companies to hold a gun license and foresee training in a technical and practical way. Finally, the use of attack dogs is generally authorized.

In the second part of the white paper the role of the commercial security sector in overall security provision is researched. Interactions between public and private security are particularly frequent and varied. There are four models describing relationships at any given time for any particular activity: cooperation, competition, coexistence and planned coexistence. Cooperation is considered to be the assistance of private security agents, complementing public police force, by taking over ‘non core’ police tasks. In reference to the cooperation different approaches are discovered. First the generalized cooperation. This approach based on complementarity is pervasive throughout Europe. Joint meetings are held and operations are discussed. Second, or integrated cooperation, means complementarity, cooperation and subordination to state forces. In reality it means signing of protocols to organize collaboration, to determine areas for joint action and to establish confidence. With this form of cooperation public security forces aim to include the private security sector in a functional security management. Third, strategic cooperation is seen in Sweden. The cooperation is run through consultations and by this the government acknowledges that private security provides additional services and can possess limited police powers to specific missions and areas of activity. E.g. protecting accidents, emergency hospital departments, metro surveillance and settling neighborhood disputes. In the United Kingdom the public-private partnership is a fundamental part of the crime prevention policy. In Romania and Spain there is a collaboration agreement for dealing with minor offences. In Slovakia it is allowed for the private security sector to monitor and question offenders and check their identity. The fourth way of cooperation is locally delegated cooperation. This is especially the case in Germany. Private security is not subordinate to the public security but agreements are negotiated between them taking into consideration different prerogatives related to specific problems. There is of course also an oppor-
tunistic way of cooperation. In Romania the private security is also there to combat crime as such and can be involved in the maintaining of public order. Private and public security agents act or intervene together. The last, e.g. in France, the cooperation is ad-hoc and/or rare. As a conclusion, all the researched countries believe that this trend is set to increase in the future.

Competition emphasizes the transfer of police tasks to the private sector which results in the private sector encroaching on territories and functions that were previously the exclusive domain of a public police force. In the United Kingdom the prison sector knows this competition. In Romania the completion is seen in the equipment which is of better quality as it is the case for the public sector. In Slovakia the police attempt to hold on to certain activities considered lucrative.

The coexistence indicates that private and public security operates in very distinct areas and therefore feel that they have few occasions to work together. The private security is mainly operating for businesses and private individuals. The last model or the planned coexistence is also known as a government control model. In Spain it is stated that private security is subsidiary, complementary and subordinate to the public security. It is also the issue in Portugal and the former Eastern countries where an atmosphere of mistrust towards the private security exists. The sector is strictly regulated and is placed under governmental authority for performing certain tasks.

The white paper researches the main issues hindering effective partnerships as well. They can be general or specific to certain countries. We start with the general ones. Due to the highly competitive market existing of large multi-national companies, medium-sized and small businesses, operating in different niches forces companies to lower their prices. With unfair dumping of prices in Hungary, undeclared work in Romania and use of false independent contractors in Belgium companies try to destabilize the market by unfairly improving their market position. This does not improve public-private partnerships. The job of a private security agent shows a lot of downsides such as night and weekend work, routine tasks, difficult working conditions etc. The decisive factors here however are low salaries which originate a worryingly high level of turnover. In the long run this hinders and weakens the profession causing lower quality and a negative image. The pressing need for social harmonization together with the state ambiguity towards their procurement policy on buying at the lowest prices puts pressure on the companies’ market position as well as on the wellbeing of the employees. Attempt of some private security guards to go beyond their legal authority are also not that positive for generating public-private partnerships.

The state monitoring of the private security companies does not provide sufficient safeguards against salary cutting and reducing service quality. In France and in the United Kingdom private security companies condemn the inadequacies of government control. Also the shortage of private security employees in Spain and Slovakia and the fact of the existing unarmed security couriers in the United Kingdom are seen as negative towards public-private partnerships (Livre Blanc, 2008).

4 A critical assessment of the white paper

Due to the fact that private security in France has always been a more or less tolerated and auxiliary partner in the national security framework we tried to explain the genesis
of the European white paper as being partly the result of a personal political interest of N. Sarkozy in crime, security and intelligence related issues. The European private security industry by its interest group CoESS succeeded in convincing the French President to add private security in his EU presidency priorities list (De Clerck, Cools, 2009). This white paper needs to become subject to ‘another’ critical assessment.

4.1 A critical scientific reflection

We are fully aware of the fact that the white paper never intended to be a scientific or academic paper taking into consideration the criminological research on private security topics done in the EU as so far (Christie, 1993; South, 1988; Jones & Newburn, 1998; Shapland & Van Outrive, 1999; George & Button, 2000; Button, 2002; Wakefield, 2003). It is certainly obvious for CoESS as an employers interest group without any intended scientific goals at all. Nevertheless, M. Pissens always showed and proved his interest in the scientific evolution of knowledge towards the private security industry (Cools & De Clerck, 2009; Cools & Verbeiren, 2004). Since the paper has the goal to outline a vision and have it validated as an approach that can make a real contribution to the future sector, it can however be seen as a missed opportunity not to involve the existing scientific discourse (Johnson, 1992; van Steden, 2007). Not only would they be able to give insights on a broad scope of aspects, they would also be able to put the facts in a critical point of view. Independent scholarly research is the key element towards validation. Also INHES cannot provide the necessary insights from scholarly perspective. However one could expect and hope for an independent and scientific view, regarding the funding context and the policy-supporting goals of INHES (Rigouste, 2009). Of course, the most important thing is the fact that the white paper has been written and that the contents are relevant and adequate for further scientific research. Another scientific outcome, as discussed further in this paragraph would have been possible.

From a scientific point of view one of the main criticisms regards the figures. In the study we can find figures dating back to 2004 and 2005. Meanwhile CoESS itself published new and more current figures in December 2008. In Europe 1,360,000 private security employees are active, which is indicative of 1 for every 362 citizens. For the public security sector the ratio is 1 to 259 and the ratio for the public versus private stands at 1.40. Also, the number of private security companies increased to 42700. This change was added to the white paper with an erratum. In our view it remains a missed opportunity to be not that accurate and up-to-date on the day the white paper was published.

We also lack proper scientific criminological references in the white paper. The broad private security industry is no longer under-researched by criminologists and other social scientists (Verhage, 2009). Referring to non-scientific and older sources could have been avoided if more (specialized) scientists as such had been engaged in the research and final writing of the white paper. A lot of scientific material is to be found in Belgium, Germany, the Netherlands and the United Kingdom. Furthermore, the fact that A. Bauer (Livre blanc, 2008) stresses the need that the industry should get rid of its fragmented representation and to implement strict ethical rules is quite outdated. When he remarks that the sector has to become more visible and work to rebuild its credibility in the public eye he neglects for example the recent conclusions...
of the study made by the Belgian APEG-BVBO, member of CoESS. This study concludes that 80% of the Belgian citizens feel themselves more safe in companion of a private security guard and value the guards as being highly professional (Apeg-bvbo, 2008).

In addition, the reasons put forward to explain the growth in private security are limited and very one-sided. Only three explanations are dealt with. There has been little to no attention for broader social, political and economic tendencies in current societies. Furthermore, they are posed to be appropriate for Europe as well as the world, since they are transcultural. Since national countries around the world are not all faced with the same contextual building, it is hard to believe that Western countries would have the same explanatory model as e.g. the African or Asian continent. In this matter, again, a scholarly approach could have given more explanatory insights. The description of the German situation is completely wrong and can be stressed as an enormous scientific error. Germany does not know a extremely defined broad scope of private security activities (Lievens, 2008).

Another objective deals with the lack of a proper methodological explanation. One cannot find a single and simple methodological approach in the genesis of the white paper. Also, the limits of the research are subject to critical reflection. In the second part of the white paper the private security industry is reduced to the task of human surveillance and excludes the in-house security and rapidly developing services where human and technological elements are fully integrated. Only 8 countries were subject to this research.

In the second part of the white paper only a limited number of models that would make discussion on the public-private partnerships possible, is used. We lack the other scientifically known models, next to the used and rather old-fashioned junior-partner-ship and loss prevention model such as the integrated security concern approach, the international model, the police complex and the public-private divide model (Cools, 2002) and last but not least the multi facet model (Van der Burght, s.d). The scientific outcome of the French EU presidency white paper is just limited to a certain fact telling and providing us with figures.

4.2 A hard political fact for the future

In the preface to the white paper N. Sarkozy made a political statement towards the private security which he never did before in that way. Before this he already recognized the importance of the private security sector without going into detail as such (Rudolph, Soulez, 2007). In his legislative work he developed a rather positive vision towards the private security industry (Brajeux, 2007). Going back to the private security industry once again makes the white paper in itself political quite original and important. His view starts referring to the need of change in Europe also in the domain of protecting people’s persons, property and freedom. He equally states the emerging growth of the private security, in different ways, as a good cause for the protection of citizen’s security and creation of new wealth in the form of jobs and businesses. In his reflection on Eastern Europe he makes a point that supply and demand for security is more urgent and quality-focused than ever due to a gap created by an inevitable reduction in state spending and sharing of missions between different segments of the security market.
Next to this, and taking into account different cultures and laws of the member states, N. Sarkozy wishes to harmonize labor regimes and dialogue in order to coproduce public-private solutions. He even goes that far in defending a European-wide legislation for the private security industry. Finally he argues the fact that all players must strive to organize the sector, promote its economic expansion and to harmonize European laws in the benefit of the citizen’s security. The reference to this harmonization can fit in the vision of both CoESS and UNI-Europa and their social dialogue (Adriaenssens, 2005).

Also M. Alliot-Marie made her point public. Private security as such has its place in the security chain, and the time has come to recognize the role private security plays in the protection of citizens. A daring statement, as we are aware now, for the former French Minister of Interior.

4.3 The visionary and brave private security industry in Europe

From an economic point of view, M. Pissens sees the white paper as a tool for promoting awareness on a large scale within the framework of a strategic vision at EU level to everyone’s benefit. Private security delivers vital services and plays a key role in national and global security policy. That is why the EU institutions need to think of a service or central unit that will oversee all security policies and initiatives in which the private security already plays a role. This is not a new plea launched by CoESS but it is visionary in the context of the existing and fragmented EU security framework. On another occasion he stressed the importance of the booming EU policies and strategies in the field of security and their capability to create an added value and progress in preventing risks of all kinds, only if and when they are integrated and coordinated. All contributors (academic, technological and human) need to support this approach to reach a win-win situation (Pissens, 2008). Claude Tarlet, Vice-President of CoESS, reflects on the economic value of the sector and the need of a social dialogue with the European Union and UNI-Europa pertaining key issues such as: professional training, operating conditions, modernization of working methods, standardization of legislation, ethics, health and safety in the workplace. It can be seen as quite brave of the sector itself to recognize market failures such as: dumping, undeclared work and the use of false independent contractors. By expressing their future vision in this white paper the private security industry shows again their willingness to be and to become a professional industry in generating employment and welfare.

4.4 ‘Another’ critical criminological farewell

As indicated before there is a growing intellectual interest by criminologists in researching the private security industry. When it comes to the EU it is often limited to an overview of different national regulations (Born, Caparini, Cole & Scherrer, 2006) and its assessment (Button, 2007). The white paper does not give a lot of additional criminological knowledge. It can be assessed as just another overview. When it comes to a critical criminological approach, it is first necessary to strip the traditional meaning of the so-called new (Taylor, Walton & Young, 1973) or critical criminology (Taylor, Walton & Young, 1975) introduced as a skeptical and engaged study of the lawmaker instead of the lawbreaker (van Swaaningen, 1999). This radical criminology as a result
of the ‘sixties’ (van Swaaningen, 1997) has gone through an evolution towards a critical and negative socialist (Taylor, 1981) analysis of market-liberalism (Taylor, 1998), the market society and the private security industry (Taylor, 1999). It is time to add ‘another’ critical reflection (Cools, 2005).

All criminological knowledge is by definition ideology-driven. An objective and neutral criminological body of knowledge does not exist (Cools, 2004). Our ‘other’ critical reflection is using criminological insights with a strong belief in human freedom and responsibility, entrepreneurship and the welfare creating and distributing free market. This will lead us to another criminological enterprise towards the white paper. The conclusions of the white paper, taking into consideration some particular differences in the member states, are prominent. The private security industry in Europe is an emerging market and a well-organized industry with the existence of quality barriers for entering the profession. This generates an added value to the EU security framework and to the free and responsible individual EU citizen.

The white paper also breaches with the intellectual ‘68 approach and its old-fashioned progressivism as a softer form of totalitarianism (Goldberg, 2007). The use of the taboo word fascism to define the security discourse of N. Sarkozy is just an heritage of this ‘68 distorted thinking (De Meyer, Schamp & Thevissen, 2008) without any scientific value. N. Sarkozy always wanted to turn the page of ‘68 (Charaudeau, 2008) and to reinstall the individual responsibility as a rupture with the past. In his society of individuals there is a lot of room for the free market and a new way of thinking on security within the framework of the human rights including the human rights of crime victims (Bergounioux & Werkoff-Leloup, 2006). His reasoned plea for private security can be seen and discussed in this context. The white paper has also the potential to go beyond the traditional French criminology researched by lawyers, historians, sociologists (Robert, 1994) and government bureaucrats (Kaluszynski, 2006) and to discover new ideas in the old writings of Gabriel Tarde (Paramelle, 2005) and his interest in economic thinking (Latour & Lépinay, 2008) in order to set the French criminology open for a law and economics approach in reflecting on crime and private security. Within the reasoning of a law and economics approach even a non regulated private security is possible. In reference to Gustave de Molinari, Murray Rothbard and David Friedman using natural law and the non aggression axiom, a self owner’s model becomes possible. The free market, driven by the invisible hand of Adam Smith, will always generate a win-win outcome to private protection agencies and arbitration firms (Cools, 2004).

But the final research question still stands. Will this French EU presidency initiative have an heir in the forthcoming EU presidencies as they are already known till 2017? It is of course impossible to look into the future which does not mean that we can’t approach the EU with some realism (Eppink, 2009) in its further deconstruction of the old nation states, privatizations (Attali, 2006) and novel surveillance techniques (Rees, 2003) to come. Our farewell looks positive. The EU work program for justice and home affairs during the French, Czech and Swedish presidencies (Swedish Government Offices, 2008) and the ‘Future Groups’ (Vermeulen, 2009) did not mention the private security industry as such (Future Group, 2008). But after the French EU presidency we know for sure that the Swedish EU presidency will present an updated version of the white paper in collaboration with CoESS and the Swedish private security employer’s organization ‘Almega’. This white paper, entitled ‘Private Security in
Europe: Public-Private Security Partnership as a Way to Future Developments – Focus on a Nordic Model’ will consist of two parts. Part I will comprise an update of the European private security landscape and part II will focus on a Nordic Model of public-private security partnerships as well as on the best practices in the private security industry. On December 8, 2009, the second European Summit on Private Security will be held in Stockholm supported by Swedish Prime Minister Fredrik Reinfeldt. The Nordic private security model (Denmark, Finland, Norway and Sweden) with their cornerstones, similarities and differences will be examined and analyzed in depth. Proposals about the way forward, possibilities to expand the private security landscape in Europe through strengthened public-private partnerships are the expected conclusions (Lindström, 2009).

It is also foreseen that the Spanish EU presidency will not engage itself in the sector and that the Belgian EU presidency in 2010 will reexamine the white paper initiative. A third white paper will be published in November or December 2010 with an update on the European private security landscape and the Belgian approach to public-private partnerships (De Clerck, 2009). From a scientific point of view we can only hope for a more profound and closer endorsement of other existing critical criminological knowledge. CoESS proved to be an efficient interest group and their engagement, e.g. in the European Security Research and Innovation Forum, will guarantee their input, financing and valorization of new research in the entire EU security framework.

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The anti money laundering complex on a crime control continuum: perceptions of risk, power and efficacy

Antoinette Verhage

1 Introduction

In 2006, our research started with the aspiration to study the fight against money laundering in Belgium, and in particular the position of the private sector (the financial institutions) in this fight.

We started this research from the central hypothesis that two constructions form the basis of the fight against money laundering. Firstly, an AML complex has evolved as a result of regulatory and legislative initiatives. This AML complex consists of both the public and private actors that are engaged in anti-money laundering. A second construction consists of the commercial or entrepreneurial approach of anti money laundering. An industry of compliance support has emerged, providing services to the AML complex, such as training, software and advice.

Based on this central hypothesis, we posed three research questions: 1) How does the anti money laundering battle function from both a law-abiding (AML complex) and a commercial (compliance industry) perspective. Do we actually see an AML complex and a compliance industry. 2) Secondly, which interactions do we see between this AML complex and the compliance industry? Are these constructions mutually reinforcing? 3) And thirdly, how does the position of the compliance officer (a bank employee responsible for the implementation of AML legislation) function between these two perspectives? With regard to this last research question, we aimed to expose the commercial versus crime fighting – dilemmas and the paradoxical position of the compliance officer – a bank who reports their own customers is bound to have some commercial dilemmas and conflicts with a number of principles of banking.

In this research, use was made of both quantitative and qualitative methods, although the core of the research was built around the qualitative phase. The quantitative phase consisted of a standardised questionnaire that was sent to all Belgian compliance officers in the spring of 2007. This questionnaire (n=74) led to a first insight in the profile and practice of compliance officers, the dilemmas they are confronted with and the functioning of the AML complex. Based on the results of this questionnaire, interviews were conducted with compliance officers, police services, the regulator and the FIU (n= 32). Furthermore, a number of interviews with members of the compliance industry were conducted (n=6). During the finalisation of the research, three more interviews were conducted with compliance officers and a member of the

1 Anti Money Laundering
2 With help from Febelfin, the Belgian professional association for financial institutions.
compliance industry, both to check the results of this study and to provide some form of feedback to the respondents.

The empirical results of this research have led to a confirmation of the research hypothesis, and an insight into the ‘world of compliance and AML’, how compliance is strived for, which kind of obligations banks are supposed to fulfil, how decisions are made during money laundering investigations, and what the extent of cooperation between public and private actors in the AML complex is it also showed us the role of the compliance industry, trying to push banks further and further into more AML investments to cover as many risks as possible. Our research has therefore shown that there indeed are interactions (even mutually reinforcing interactions) between the AML complex (consisting of the public and private actors in AML) on the one hand and the compliance industry (providing services for AML on a commercial basis) on the other hand. The simple presence of an array of services within the compliance industry promotes the use of these services (Verhage, 2009d). After all, banks are well aware of the AML and compliance ‘benchmark’ that exists. This benchmark represents both the level of compliance and AML investments by banks and the threshold within banks for money laundering attempts (the level of AML defence). “The benchmark is what happens in the market”, one of our respondents stated (Verhage, 2009a). Banks have stated that they aim to find the mid-position with regard to this benchmark: from an entrepreneurial point of view, it is not interesting to be at the top of AML, nor to be at the bottom. By offering services and promoting AML as a concept in a competitive framework, the compliance industry pushes banks toward more investments in AML and hence raises this AML/compliance benchmark. This is also successful because of the regulator’s obligation to make use of the services of the compliance industry. After all, one of the obligations is to have a monitoring system put in place within the bank, allowing for a structural and continuous monitoring of suspicious transactions. As a result, banks are obliged to make use of these types of software, developed by entrepreneurs. This is a mutually reinforcing interaction between the AML complex on the one hand and the compliance industry on the other.

In earlier contributions on the empirical results of this research (Verhage, 2009e; Verhage, 2009b; Verhage, 2009a; Verhage & Ponsaers, 2009) we have pointed out that there is no substantial proof that the AML system has had huge effects with regard to the amount of money that is laundered – although we must emphasise that there is no proof that it does not work, either. This results in the conclusion that the AML system – although implying huge costs for both public and private actors engaged in the AML complex – functions without an accurate view on efficacy or the possibility of making a cost-benefit analysis (Naylor, 1999, Alldridge, 2008).

We have also discussed the virtual absence of actual feedback between the parts of the AML complex. Public and private actors in AML seem to work rather separate, leading to mutual misunderstandings. Compliance officers state that they receive little information on both the way in which they should carry out their AML task, and on their performance of this task. As feedback from the regulator and the FIU on how AML is carried out within the bank is very modest, and information from the FIU on which criteria to use for monitoring and investigating transactions is virtually absent (apart from the general feedback through the annual report), compliance officers are often forced to make use of their own assessments and criteria (Verhage, 2009c). This may lead to a system that continuously confirms its own analyses. As such, we have
suggested that the AML system is likely to result in a self-fulfilling prophecy, finding
the same usual suspects over and over again.

Today, after four years of being submerged in the world of compliance, monitoring
systems, indicators of suspicious activity and anti money laundering jargon, we aim to
draw a number of more general conclusions. In this article, we want to take a few steps
back in order to gain a more panoramic perspective on the functioning of the AML
complex. Instead of repeating the main conclusions that were drawn in earlier arti-
cles on this research\(^3\), we aim to draw more general conclusions. We hope do this by
paralleling the battle against money laundering with the fight against criminologically
more traditional types of crime. By making an analogy with both types of approach,
we hope to make clear that the fight against money laundering represents a unique
and one of a kind approach to serious types of crime, which has not only resulted in
an encompassing international system, but also has shifted the approach to crime and
the way in which crime control deals with concepts such as risk, privacy and private
responsibilities.

2  Factors typifying the AML approach

In criminology, attention has long focused on traditional crime, the usual suspects and
established crime control organisations. Criminological research has a long tradition
of studies on the public police, the judiciary and criminal procedures, and traditional
crime such as juvenile crime or petty crime. Corporations as crime fighters, combined
with a focus on financial crime, have long staid out of scope with regard to crimino-
logical interest (Cools, 2005, Ruggiero, 2000). We have called this focus a ‘criminologi-
tical tunnel vision’ (Verhage, 2009). Times have changed, and criminology has to open
its horizon to other fields, phenomena and providers of security. Criminology has
been forced to leave the vision of governmental monopoly on crime control as other
actors (for example regulatory agencies, private security) have taken up a part of secu-
ritv governance (Hoogenboom, 1994; Bayley & Shearing, 1996). This also implies that
more traditional approaches within criminology need to broaden their scope when
looking at more recent types of crime and crime control. Conventional instruments
of criminology need to expand and adapt, in order to grasp these new realities. This
implies that when we want to draw parallels between anti-money laundering on the
one hand, and the approach of traditional crime on the other hand, we need to take
into account the differences that may occur. In order to structure this comparison, use
can be made of criminological theory on the conceptualisation of crime. One of those
theories that is applicable here, is the realist school in criminology.

Traditionally, when studying a criminal phenomenon, four central dimensions
are emphasised as playing a role in the conceptualisation of crime: offender, victim,
state (or formal control), and the public (or informal control) (Young, 1992). These
four dimensions, the four corners of the square of crime put forward by the realist
school in criminology, represent correspondingly the action and the reaction to a
criminal phenomenon. Each of these factors may influence the form and shape of the

\(^3\) see bibliography
phenomenon, and interactions between the factors result in changes in the crime rate (Young, 1992).

Not only have the four factors (offender-victim-state-public) changed in terms of appearance and impact (for example, in money laundering, the offender and the victim are not that easy to identify), we also see a number of other dimensions that influence the way we need to deal with money laundering and its combat. We therefore aim to broaden this approach with a number of elements.

First of all, the diversity of motives underlying the formal control of this phenomenon forces us to adopt a more broad perspective with regard to this dimension of money laundering. Both crime-fighting objectives and financial issues have played a role in the establishment of an anti-money laundering regime. It may be apparent that Ferguson is correct in stating that behind every important historical phenomenon lies a financial secret (Ferguson, 2008). As we and others have argued before (Levi, 1997, Unger, 2006, Verhage, 2009e), in AML, the financial context has not only been influential with regard to the extent to which the phenomenon was criminalised, but has also determined the extent to which control agencies (in this case, banks) are willing and able to control crime. Moreover, it is partly as a result of economic rules of nature that the AML culture has spread this quickly: by excluding banks who are not complying with AML legislation from entering the US financial market or executing transactions in US currency, profit- and reputational motives have urged banks to meet these terms (Helleiner, 2000). Furthermore, the financial motive behind anti-money laundering has influenced the public perception of the necessity to fight this phenomenon. It may be clear that the public perception of the phenomenon of money laundering has had a huge impact on the attempts to control this type of crime. As we will discuss later, the fact that policymakers as well as mass media have portrayed money laundering as a very distressing and threatening crime (with regard to economic stability and integrity), has added to the relatively silent acceptance of this encompassing approach (Alldridge, 2008).

Secondly, the interpretation of formal control, traditionally assigned to the state, has seen a remarkable shift in AML. Within anti-money laundering, private actors are the gatekeepers of the system, controlling and determining the input of the AML system. The government has outsourced its responsibilities to private actors, resulting in a different perspective on formal control and its effects on crime. Although ‘new’ actors in policing, such as private security services and private investigation may find a place within the traditional approach, the compliance officer is very difficult to fit in a traditional public versus private scheme. As a result of the diversification in policing actors and the multilateralisation of policing in general (Favarel-Garrigues, 2008), combined with the insertion of the compliance officer as one of those actors, the boundaries are no longer as clear as they used to be (Bayley & Shearing, 1996; Jones & Newburn, 2002). Actors of formal control have been privatized and private actors have received ‘public’ tasks (tasks in a general interest). In our research, we have therefore portrayed the compliance officer as the actor that bridges the world of private interests (the bank and the compliance industry) on the one hand and that of public interest (the AML complex) on the other hand.

Thirdly, the specificity of the phenomenon of money laundering in itself presents the traditional approach with a number of problems. Money laundering is not only a flexible type of crime, as we will discuss later, resulting in different interactions
between the four basics of the square. As a result of this flexibility, formal control may influence the manifestation of the phenomenon more than its occurrence, resulting in changed techniques or methods. Furthermore, as Naylor (1999) notes, a rise in formal control may lead to even a higher value of the transactions with regard to money laundering. Whereas in burglary, prices may drop as a result of higher risks of getting caught, within enterprise offenses, criminal entrepreneurs may choose to insert more ‘defensive layers of intermediation’ (Naylor, 1999), resulting in higher prices associated with the increased risk. Moreover, money laundering is a specific type of crime as it lacks a physical victim, which puts the traditional perpetrator-victim relationship in a different perspective.

Fourthly, the type of (formal) control also influences the perspective on money laundering. In AML, a proactive approach is adopted, in contrast with reactive methods that are often used in traditional crime and policing (Ponsaers, 2002). Anti-money laundering is one of the best examples of a risk-based approach and the concept of ‘risk’ plays a vital and critical role. Although the factor ‘risk’ is unavoidable in any contemporary crime control method (Ericson & Haggerty, 2002), the risk-orientation and the translation of those risks into scenarios within AML, demands a different vision on the interpretation of ‘formal control’. Risk implies bringing the future into the present (Crawford, 2009). Moreover, within AML, compliance officers are pro-actively detecting transactions based on information from the past, making use of scenarios that are developed with regard to future transactions based on knowledge from earlier transactions.

This risk-orientation has effects on the way in which formal control should be democratically supervised, mainly with regard to basic rights such as privacy and due process. Public oversight is difficult, as compliance officers often work behind the scenes and because the public is not informed on the application and content of anti-money laundering standards and norms. The norms are not communicated which also raises questions with regard to due process.

To summarise, money laundering is a crime in which a physical victim is absent, the mechanisms of control are not the traditional ones, in which the state is both victim and regulator, and in which private organisations can act both as instruments for crime, victims of crime and as policing agencies, the boundaries become very vague. In this article, we try to partly unravel and clarify these margins. In the following paragraphs, we discuss these elements of influence on the phenomenon of (anti) money laundering with a view on describing the effects of these influences in terms of efficacy of the system.

3 Diversity of interests at the introduction of AML

The first factor of influence on the specific place of AML in comparison with ‘traditional’ types of crime, is the diversity of interests that have led to the implementation of the anti-money laundering system. In the fight against traditional crime, such as burglary or violent crime the underlying motives for trying to prevent crime or to detect the perpetrator are rather clear: the (moral) condemnation of these crimes is obvious and shared throughout the community. In money laundering, however, motives for fighting crime are not that
unambiguous. They include both motives with regard to fighting crime or limiting power, and financial/reputational interests.

3.1 Crime fighting and power limitation

The rhetoric of the need to fight money laundering started in the late 80s in the spirit of the War on Drugs (Hawdon, 2001). One of the aspects of the War on Drugs in the USA was an emphasis on the large profits that were made in the drug industry (Thony, 2002). Money laundering was depicted as a major threat to society and the economy: (organised) drug crime was said to lead to large amounts of illicit money\(^4\), which did not only lead to rising panics on the expanding underground economy (Naylor, 2007), and the increased power of criminal elements in the formal economy (Masciandaro, 1999) but also instigated a sense of urgency with regard to exploring new methods in fighting this crime. The result was an international spreading of the AML ‘hymn’ (van Duyne, 2009), imposed on national states, enforced internationally by the FATF and by rules of competition between financial institutions and countries.

By fighting money laundering – policy makers stated – organised (drug) criminals could be excluded from the regular financial system or detected when trying to access this financial system. This should prevent crime from being profitable, limit power accumulation in the formal economy (Verhage & Ponsaers, 2009, van Duyne, 2006) and prevent organised crime from diversifying and growing (Masciandaro, 1999). This same rationale was used in the Belgian implementation of AML in the early 90s: “Money laundering is a necessary result of a number of crimes that provide advantages for their perpetrators and is an important driving force for the development of crime, not only nationally, but also internationally and even globally\(^5\).

In this sense, money laundering also impedes legitimate corporations in their daily business. After all, by entering the formal economy, organised crime can make use of all possibilities in the upper world, resulting in unfair competition towards other corporations (Ponsaers, 2009). For example, if organised crime groups are allowed to buy property with criminal money in order to launder the proceeds of their crime, this could result in higher property prices and unbalanced market. Following Gresham’s law, bad money would drive out the good money (Coggan, 2002). The anti money laundering complex is designed to limit this power accumulation. The mobilisation of (among others) financial institutions, as one of the power players in society (Morris, 2009) and one of the gatekeepers to the formal economy, makes the system even more encompassing.

3.2. Financial stability and trust

Apart from these crime-fighting and power-restriction motives, we also see a number of economic motives that have stimulated the development of the AML system. During the financial crisis in the 80s (and again today) it became clear that instability may have serious consequences for the economy at large. It is therefore of great importance

\(^4\) Stemming from this condemnation, the UN Drug Treaty (19/12/1988) was adopted, as well as the Council of Europe’s treaty of 8 Nov 1990 regarding the confiscation of the proceeds of crime.

to control the flows of money that enter the financial system in order to make sure that there is relative stability (Bartlett, 2002). As money laundering may disturb this stability, states have an interest in establishing access restrictions in trying to prevent money laundering. Secondly, banks' associations with money laundering may lead to a loss of trust from the general public, with detrimental economic effects. This implies that striving for a stable economy also entails making sure that financial institutions are not associated with criminal activities.

Initially, financial institutions were stimulated to develop deontological principles that should allow them to prevent illegal activities by their clients (BCBS, 1988). By that time, central banks had also realised that money laundering may harm public confidence in banks and have a serious impact on the stability of a financial institution. The impact this may have on reputation and therefore commercial activity may be clear. In order to prevent losses from fraud, banks are therefore encouraged to implement “ethical standards of professional conduct” (BCBS, 1988). The results of failing to implement these ethical standards have become clear during the last months, in which massive losses have struck the public.

Furthermore, banks have their own financial interests at heart; ever since the AML legislation came into place, they have an important interest in preventing any association with money laundering (or terrorist financing, an ever larger reputational risk since 2001). Reputational damage could not only lead to losing customers (as the credit crunch has shown, trust of the general public can be lost quite quickly, leading to bankers publically apologising for their mistakes (De Standaard, 28/04/2009)), but also, and most importantly, to the loss of trustworthiness with regard to other banks – and the current crisis has shown how important trust between financial institutions actually is. Compliance officers in our research have also emphasised that this interbank trust is very important.

These different motives may make clear that AML had to serve several purposes. AML regulation and legislation, as is generally the case, have tried to balance these motives and interests (Coyle, 2004), and comprise both crime fighting interests and economic interests. This balance of interests is illustrated by the Belgian legislator who initially limited the amount of predicate crimes out of concern not to burden the financial institutions excessively and the discussion that took place with regard to the rules of discretion and non-interference that are usual when doing business with banks as a client. The Belgian government has searched for a compromise between the “good functioning of the financial system” and the efficacy of the judicial system regarding serious types of crime. These considerations show that the Belgian legislator was aware of the impact of this reporting system on the financial institutions as a whole. Already at the genesis of the AML complex, we see the balancing of economic motives and crime-fighting objectives surface. Typical is also that many scholars have questioned these objectives (Naylor, 1999 and 2007, van Duyne, 1997 and 2006, Levi, 1997 and 2001, Harvey, 2007). This diversity in motives underlying the implementation of AML legislation and regulation is not unique to the Belgian context.
tion of AML, makes clear that, in comparison to traditional crime, the different players in the system have different interests at heart when implementing AML measures.

4 The interpretation of ‘formal control’ in AML

Since the implementation of EU Directive 91/308/ECC in Belgian law in 1993, the Belgian AML system consists of both a repressive and a preventive pillar; the repressive approach involves the confiscation of the proceeds of crime, while the preventive pillar has introduced a monitoring and reporting obligation for private institutions. Reports of every “suspicous” transaction need to be made to the FIU (Financial Intelligence Unit), an administrative institution that filters the reports before sending them to the public prosecutor’s office.

In comparison to traditional types of crime, where the state’s apparatus (one of which is the public police) is given the central role in crime fighting, this is a striking difference. Whereas in other areas the state is rather clear in defining its boundaries between public and private crime control (specifically in Belgium, where private security is very strictly regulated – see for example Cools, 2005), within AML, these boundaries are not so clear. AML can be considered as an institutionalisation of a whistle-blowing system for banks with regard to their customers. Although this may seem as a paradox, there are some obvious reasons for the engagement of private organisations in this fight against money laundering.

4.1 Why private organisations?

By introducing the reporting requirement for suspicious transactions to the FIU, the legislator has chosen for a clear responsabilisation of the private sector. The case of anti money laundering shows that the state has been able and willing to regulate the national financial structure (Sica, 2000). Although regulation of financial institutions is not a new phenomenon (from the earliest days of market economies governments have regulated solvency and integrity of banks (Kay, 2003)), AML regulation has introduced a whole new area of banking obligations and a new role for compliance officers in crime control.

The involvement of private organisations in the fight against money laundering was inspired by a number of motives. First of all, money laundering is an inherent international phenomenon, taking place on international financial markets. As most law enforcement methods are still virtually confined to national borders, in contrast to the financial industry, the engagement of this private sector would allow for a more transnational approach to money laundering, enabling the tracing of cross-border flows of money within the same financial institution. The emergence of money laundering and its recognition as a threat to the financial system, has led to the acknowledgement that regular investigation methods were deemed inadequate. As such, anti money laundering has attuned itself to the general trend of globalisation, internationalisation and diversification of crime control (Findlay, 1999, Alldridge, 2008).

Secondly, as money laundering is often carried out through the use of financial intermediaries, which is almost a condition sine qua non for the concealment of funds and the international transferring of money, financial institutions are ultimately qualified for tracing these flows of money. Banks are designed to transfer money from A, where the money is, to B, where the money is needed (Ferguson, 2008). Not only are banks the vehicles that are used to carry out the crime, they are also the ones that actually meet the customers and therefore have first-hand information at their disposal. Customers may for example try to use the bank by depositing cash funds on a bank account, by transferring money through several international banking systems, in order to conceal its origins, or by lending money from banks based on illegally earned capital. All charges may be linked to money laundering. Banks may therefore be considered as complicit to these acts if they cooperate – which also reveals their motivation to detect these crimes. From this follows that financial institutions can also be seen as an appropriate mechanism for preventing and detecting these crimes.

Police services would have more problems in gaining insight in client’s financial background, investments or assets, for three reasons. First, they lack proximity to the client – they would not be able to ask the client questions at the time of disposal of the money in the bank. And second, privacy legislation would probably interdict their access to this kind of information in cases where knowledge of a criminal act not yet exists. Compliance officers, have received an exception to the privacy legislation in their investigations of potential money laundering cases (Van Raemdonck, 1996-1997). We may even wonder whether the instalment of compliance officers to do these types of investigation was not inspired by this circumvention of privacy issues. This becomes even more questionable when we take the new bill on AML into account, allowing banks to exchange client-information between themselves on a large scale10.

And thirdly, banks have maximum knowledge of their customers, which enables them to distil ‘normal’, routine activities of these clients from unusual transactions and cash flows, resulting in a fundamental investigation of these activities. Taking these considerations into account, financial institutions are best qualified for monitoring transactions and customers. How are police services supposed to monitor all transactions by clients, not knowing the backgrounds of this client and the relation of this transaction with regard to other transactions? Knowing that a large bank processes on average between 250,000 – 450,000 transactions a day, the capacity this would take from a police force, to monitor all transactions by all banks, would be enormous. Furthermore, banks already have a lot of private information at their disposal, and are able to make use of their knowledge on the client in assessing the level of risk that this client or the transaction may represent. After almost eight years of investment in AML compliance in Belgium, we can also state that most banks have gathered an expertise on (anti)money laundering. According to our respondents, this acquired expertise of compliance officers sometimes contrasts with the knowledge of the average police officer on financial crime, which may lead to miscommunications.

Today, banks are one of the main responsible organisations for reporting suspicions of money laundering. Although financial institutions only make up 25,9% of all

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To p i c a l i s s u e s i n e u a n d i n T e r n a T i o n a l c o n T h e e n M a k l u r e p o r t s t o t h e B e l g i a n F I U, r e p o r t s s t e m m i n g f r o m b a n k s h a v e t h e h i g h e s t p e r c e n t a g e o f 's u b s e q u e n t r e p o r t s ' t h a t a r e s e n t b y t h e F I U t o t h e p u b l i c p r o s e c u t o r ' s o f f i c e (6 4 . 7 % o f a l l f i l e s ), a n d a r e w o r t h 7 9 . 3 % o f t h e t o t a l a m o u n t o f m o n e y t h a t i s c o n s i d e r e d a s ' c r i m i n a l ' i n a l l r e p o r t s t o t h e p u b l i c p r o s e c u t o r ' s o f f i c e (C T I F - C F I , 2 0 0 9 ) .

T h e s e o b s e r v a t i o n s h a v e r e s u l t e d i n a n A M L s y s t e m i n w h i c h p r i v a t e e n t r e p r e n e u r s ( c i v i l i a n s ) h a v e b e c o m e t h e p r i m a r y i n s t i t u t i o n i n c h a r g e o f t h e i m p l e m e n t a t i o n o f p u b l i c p o l i c y g o a l s o n m o n e y l a u n d e r i n g , r e s u l t i n g i n a m a s s i v e a n d p e r v a s i v e ' p r i v a t e - p u b l i c s e c u r i t y q u i l t ' ( L e v i , 2 0 0 2 ) . P r i v a t e o r g a n i s a t i o n s a r e t h e g a t e k e e p e r s t o t h e p r e v e n t i v e A M L s y s t e m a n d a s s u c h d e t e r m i n e t h e i n p u t o f t h a t s y s t e m . W i t h i n b a n k s , t h i s o b l i g a t i o n h a s b e e n i n s t i t u t i o n a l i s e d b y m e a n s o f t h e c o m p l i a n c e o f f i c e r s , s o m e t i m e s a l s o r e f e r r e d t o a s ' b a n k i n g d e t e c t i v e s ' ( K o c h a n , 2 0 0 6 ) . T h i s p u b l i c - p r i v a t e d i v i d e i n f i g h t i n g c r i m e i s v e r y s p e c i f i c f o r t h e A M L a p p r o a c h .

4 . 2 T h e ' b a n k i n g d e t e c t i v e s ' : c o m p l i a n c e o f f i c e r s a n d t h e i r d i s c r i t o r y p o w e r s

I n B e l g i u m , t h e l e g i s l a t o r h a s c h o s e n f o r s y s t e m o f a b s o l u t e s u b j e c t i v e r e p o r t i n g ( c o m p l e m e n t e d b y a n u m b e r o f i n d i c a t o r s , s u p p o r t i n g t h e i d e n t i f i c a t i o n o f s u s p i c i o u s t r a n s a c t i o n s ) , r e s u l t i n g i n a n o v e r a l l l o w n u m b e r o f r e p o r t s ( i n 2 0 0 8 , a t o t a l o f 1 5 . 5 5 4 r e p o r t s w e r e s e n t t o t h e F I U b y a l l r e p o r t i n g i n s t i t u t i o n s – ( C T I F - C F I , 2 0 0 9 ) ) . T h i s i m p l i e s t h a t s u b j e c t i v e d e c i s i o n s a r e m a d e b y t h e b a n k , b a s e d o n t h e k n o w l e d g e o f t h e c u s t o m e r ' s e c o n o m i c a c t i v i t y a n d u s u a l c o n d u c t .

T h i s ' i n t e l l i g e n t r e p o r t i n g s y s t e m ' t h a t i s a p p l i e d i n B e l g i u m , h a s t h e a d v a n t a g e o f a l i m i t e d n u m b e r o f r e p o r t s w h i c h a l l o w s t h e F I U t o m a k e a m o r e t h o r o u g h f i l t e r i n g o f t h e c a s e s t o b e s e n t t o t h e p u b l i c p r o s e c u t o r . A s t h e p r e l i m i n a r y i n v e s t i g a t i o n o f s u s p i c i o u s t r a n s a c t i o n s i n B e l g i u m i s c a r r i e d o u t b y t h e b a n k ( i . e . t h e c o m p l i a n c e o f f i c e r s ) , a l o t o f t i m e a n d e f f o r t i s a l r e a d y i n v e s t e d i n t h e f i r s t p h a s e o f t h e A M L c h a i n , i m p l y i n g s e r i o u s f i l t e r o n t h e c a s e s t h a t u t t e r l y r e a c h t h e F I U .

O u r e m p i r i c a l r e s u l t s h a v e s h o w e d t h a t g e n e r a l l y , c o m p l i a n c e o f f i c e r s a r e i n f a v o u r o f t h i s s y s t e m o f i n t e l l i g e n t r e p o r t i n g : i t g i v e s t h e m r o o m f o r d i s c r e t i o n , a l l o w s t h e m t o k n o w t h e i r c u s t o m e r s a n d a l s o r e p r e s e n t s a n i n t e l l e c t u a l c h a l l e n g e ( V e r h a g e , 2 0 0 9 a ) . H o w e v e r , t h e r e a r e a l s o d o w n s i d e s t o t h i s s y s t e m . A f t e r a l l , i t a l s o i m p l i e s t h a t t h e c e n t r e o f g r a v i t y o f t h e A M L s y s t e m – t h e r e s p o n s i b i l i t y f o r m o n i t o r i n g , i n v e s t i g a t i n g a n d r e p o r t i n g , l e a d i n g t o t h e n e e d f o r i n v e s t m e n t s i n m e a n s , t o o l s a n d e x p e r t i s e – r e s t w i t h t h e r e p o r t i n g i n s t i t u t i o n s , w h o a l s o f e l l t h e b u r d e n o f b e i n g s a n c t i o n e d i n c a s e o f n o n - c o m p l i a n c e o r – e v e n w o r s e – c o m p l i c i t y o r c o l l u s i o n . I n t h e i n t e r v i e w s , t h e r e s p o n d e n t s o f t e n r e f e r r e d t o t h e p o s s i b i l i t y o f t h e s e s a n c t i o n s a n d t h e f a c t t h a t s e v e r a l c o m p l i a n c e o f f i c e r s w e r e a c c u s e d o f c o m p l i c i t y w i t h m o n e y l a u n d e r i n g . W e m u s t n o t e h o w e v e r , t h a t w e w e r e n o t a b l e t o f i n d a n y i n f o r m a t i o n ( e . g . i n t h e m e d i a ) t o c o n f i r m

11 Programmwet van 27 april 2004, B.S., 8 mei 2007
12 Not all countries have decided to work like this; in the US, the cradle of the AML system, a combination of two methods is used, one based on objective measures (automatic reporting), the other one based on subjective assessment by reporting institutions. First of all, a CTR (Cash Transaction Report) needs to be sent to FinCEN (Financial Crime Enforcement Network) every time a cash transaction of more than $ 10.000 is carried out. For example, in 2006, over 5 mln CTRs were filed. GAO (2008). Next to these CTRs, and becoming more and more important in fighting AML, a SAR (suspicious activity report) has to be made whenever a transaction meets specific requirements (GAO, 2009). This implies a subjective decision by the bank, based on the knowledge of the customer’s economic activity and usual conduct. The combination of both an objective reporting standard and a subjective reporting system, results in very high numbers of reports to be analysed by FinCEN
these statements. The FATF evaluation of 2005 mentions that the Belgian regulator had sanctioned at least 7 banks (since 1996) for not complying with AML regulation (FATF, 2005).

The implication of this ‘intelligent reporting system’ is that compliance officers have a specific amount of discretionary powers (room for decision making) during their activities. We may note that the compliance officer has more discretionary power at his disposal than the regular police in Belgium, where discretionary room has not been officially acknowledged (Ponsaers, 2002).

This consideration touches upon the main delicacy of this function. Working for a commercial entity, while carrying out a public task implies several difficulties. In our survey results, several respondents acknowledged the fact that commercial versus law abidance appraisal may sometimes result in dilemmas. As such, they did not only refer to discussions with commercially oriented colleagues, but also with regard to the decision to report (or not), as both decisions may lead to reputational damage (Verhage, 2009e and 2009c). Compliance officers are therefore continuously balancing on a tight rope, trying to assess the potential consequences of their decisions. In addition, within the system of ‘intelligent reporting’, one of the compliance officers stated: “Every bank wants to be the most intelligent”, referring to the fact that banks are looking for the optimal cost-benefit equilibrium in compliance and AML.

5 The specificities of the phenomenon of money laundering

There are several reasons why money laundering, as a criminal offence, is difficult to map and detect for governments and police services. First of all, compared to traditional crime where a victim reports a crime to the police, in money laundering, the focus is on detection of the crime. Furthermore, the expertise and skills that are needed to recognise transactions as linked to money laundering are rather specific. In comparison with traditional types of crime, the required know-how and expertise of the investigator is of more specialist nature. Secondly, adding to this specialist dimension, is the fact that fighting money laundering has not grown bottom-up. The fight against money laundering started on an international level. And thirdly, money laundering is a highly flexible crime, making detection and prevention subject to changes in methods and expertise.

5.1 (Lack of) historical knowhow

Money laundering is a quite recent crime. It was not until the late eighties that states have started to criminalise the laundering of proceeds of crime. Before this period, governments implicitly ‘allowed offenders to enjoy the fruits of their crimes’ (Stessens, 2000). Although this is far from unique (regularly new types of crimes are inserted in penal law, such as racism (van den Wyngaert, 2003), in comparison with traditional crime, this recentness of money laundering is a large hindrance, as we have gained relatively little evolutionary knowledge on the phenomenon. In criminology, although fraudsters were always in some way subject of study, most of the attention went to visible, traditional crime ‘the nuts, sluts and perverts’ (Cools & Haelterman, 1999). This is a second explanation for the scarcity of insight into the phenomenon of money
laundring. It seems as though the system remains focused on the old stereotypes of crime, in order to protect reputational interests optimally.

5.2 Different origins of criminalisation

Money laundering is not only more recent than other types of crime, the way in which money laundering became a criminal act, also differs rather fundamentally. In the case of money laundering, an international impetus has forced national states to criminalise the act of money laundering. In most other types of traditional crime, we see that criminalisation has started on the level of the state, in a bottom-up approach, resulting in several states criminalising acts such as theft, robbery or assault at more or less the same time. This implies that while other crimes were internationally considered as impermissible, and therefore internationally seen as 'crime', money laundering became a crime as a result of international – first US- later also European legislation (Alexander, 2007). Through an international condemnation of this crime, nation states were obliged to adapt their penal laws, inserting the crime of money laundering. The EU Directive in 1991 (91/308 ECC) introduced the anti money laundering standards to the European sphere, indicating several obligations for all partners in the framework of a preventive approach of money laundering. The influence of the international, and for Belgium, the European legislation can be considered as predominant with regard to the prevention and punishment of money laundering.

This difference becomes even larger if one considers the difference in skills needed to carry out several types of crime. As Gottfredson and Hirschi point out, for most types of crime no special skills are required. In crimes of ‘personal violence, assault, rape and homicide’ (Gottfredson & Hirschi, 1990), all is needed is either strength or weapons. In money laundering however, special skills are needed; one needs to know how to access the financial system, how to circumvent controls themselves, or know and hire people that are able to do it for them. The latter may imply the use of representatives of the formal economy, who have access to knowledge and tools to launder money. This difference in skills needed, is another reason for the difficulty in studying the phenomenon of money laundering; not only is our knowledge limited in time-span, the complicatedness of a successful, undetected money laundering scheme requires trained professionals with an expertise in money laundering techniques and methods.

5.3 Flexibility

Thirdly, money laundering is a highly adaptable and flexible crime, able to adapt quickly to new controls and legislation, in order to make sure that detection is very difficult. New legislation and new types of monitoring or control (such as the ever-expanding list of institutions that are obliged to report) will immediately result in modifications in the modus operandi, looking for new lines of least resistance. This implies that detecting money laundering needs alertness and quick exchange of information whenever new technologies are detected. In other types of crime we also see this flexibility – burglars who learn ways to deal with new types of alarms, for example – but the difference is that in money laundering, which is an international phenomenon, this adaptation has a very high speed and far more possibilities. In contrast to crimes that take place in the
informal economy, in which we see a high level of inflexibility (Shapland & Ponsaers, 2009), money laundering takes place by means of the formal economy.

Precisely this allows for the use of all possibilities and resources that the formal economy provides for; actors of the formal economy (such as lawyers, accountants, etc) and their expertise, are out on the market and can be hired. This results in a very flexible way of not only dealing with new regulation, but also the ability to hire new experts or gather new knowledge on money laundering techniques. We will return to this later in discussing displacement effects.

6 The autocracy of ‘risk’ within the AML complex

In earlier articles, we have discussed the application of the rational choice approach in anti-money laundering (Verhage & Ponsaers, 2009). One of the dangers of the situational prevention approach that is often related to this theory is the high authority that is attributed to ‘risk’. “Situational crime prevention may be understood as quintessentially actuarial (...) Its concern is with crime control as risk management” (McLaughlin et al., 2003). Risk has become a central concept within the battle against money laundering. Not only have regulators and banks chosen for a risk-based approach in AML (instead of a rule-based approach – (CBFA, 2005)), trying to detect those transactions and clients that may pose the highest risks, we also see a high level risk orientation with regard to the effect of AML on banks in general.

6.1 The risk-based approach in AML

Related to the first risk orientation, our empirical results have shown that this risk-based approach of AML unavoidably means the use of criteria and profiles 13. The risk-based approach results in focusing on the identification of high-risk and/or suspicious categories, scenarios and profiles, potentially impacting basic human rights in view of a higher degree security for all (Zedner, 2003). Clients and client-groups are classified into risk profiles (high-medium-low), and their transactions are monitored on the basis of criteria and scenarios. Transactions are screened on ‘atypicalities’ and ‘suspicious’ behaviour in relation to or in comparison with previous behaviour, on the destination of the transaction, the country of origin, etc. These scenarios are partly provided by the compliance industry, but are also based on the expertise of the compliance departments. However, the information that is used by both, stems from the same sources such as FIU reports or FATF typologies (Verhage, 2009c). It seems as though this results in the use of rather stereotypical images of money laundering, based on earlier discovered money laundering schemes. The focus is inevitably aimed at the past and at those transactions that are historically linked to money laundering.

The same observation was made by Levi, in 2002: “although expensive software throws up more sophisticated methodologies to pursue, we note the same criteria of suspiciousness – out of context behaviour largely by the usual suspects – that the police use, only operated this time by bankers” (Levi, 2002). The bias and stereotypes in the system

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13 Scenarios are used for monitoring transactions. These scenarios are built on parameters that are derived from previous money laundering cases, parameters such as many international transactions, sudden changes in total assets, etc. (see for more details: Verhage, 2009c)
(Naylor, 2007), based on a lack of up to date intelligence, might lead to a fake success of AML. Although some financial institutions try to invest time and effort in proactive projects, this is not feasible for every bank as the means for compliance are often limited. The result is that the AML system functions merely on the basis of previous cases, and might be putting specific clients and transactions under a microscope, looking for the usual suspect, while completely surpassing what is outside the scope of the ‘usual suspects’. One of the examples in this respect is the FIU annual report, in which cash transactions, real estate transactions or shell companies are typified as suspicious (CTIF-CFI, 2009). By principally looking at those elements that were found in earlier money laundering cases, the focus remains on traditional types of money laundering which are not likely to lead to the discovery of new money laundering techniques. Even more, it could well be the case that by focusing on these stereotypical cases, looking with a tunnel vision, only the small fishes are caught, while the sharks remain out of scope. The focus on private customers in contrast with corporate clients, is one of the many examples of this tunnel vision. Nonetheless, we see the same narrow focus in the reports of the FIU, in which mainly cases of private customers are discussed, very rarely corporations. Broadening the scope possibly will imply that this predisposed view on money launderers and the bias regarding money laundering possibilities could be corrected.

The vagueness of money laundering, the fact that ‘dirty’ money may look and act exactly the same as ‘clean’ money makes it very difficult to identify. This contrasts with other types of crime where the good in itself can be identified as illicit relatively easily as is the case in drug crime or prostitution. This fact, in combination with the ambiguity of the legislation trying to prevent money laundering, leads to the fact that detection is rather difficult and that criteria, hence reporting decisions, will always be subjective. Even more, every banks decides on its own criteria and scenarios, which implies a differential and diverse approach to money launderers. The assessment of these criteria, is noted as one of the problems within the application of situational crime prevention: there is a danger that success or failure will be determined through “struggles over the status of criteria” (McLaughlin et al., 2003).

How are banks supposed to choose these criteria? How should they build their scenarios? Is it up to banks to decide which criteria determine whether a client or transaction is suspicious or is this a task for the authorities? After all, it is on the basis of these criteria and the scenarios they are combined in, that transactions are screened, on the basis of which alerts go off, client-investigations are carried out, and clients are potentially excluded from banking services.

If we compare this approach to the proactive investigation by the police services, we see an enormous difference with regard to suspects’ rights of defence and privacy. In case of police proactive investigations, there not only has to be a ‘reasonable suspicion of (future) criminal activity’, this investigation also has to be approved beforehand by the public prosecutor’s office. This implies that there have to be some grounds on the basis of which the public prosecutor can decide to allow a proactive investigation. At the time of the introduction of proactive investigations as a police task in the code of criminal procedure, a number of discussions arose with regard to precisely these issues. Discussions focused on the question of allowing the police this much room for

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14 or the federal public prosecutor (art. 28bis Code of Criminal Procedure)
manoeuvre, even though there is no knowledge of any criminal fact (yet). What does this imply for basic human rights and how can we prevent abuse of this discretion (Vanderborght, 1999)? In light of this discussion, it seems rather paradoxical for a government to ask banks – citizens – to carry out a continuous and large-scale screening of their clients, based on obscure guidelines, without any democratic control on the process. Apparently, anti money laundering floors these objections, and privacy and legal certainty are considered as subordinate to crime fighting (cfr Levi, 2002). “Due process is giving way to system rights. That is, suspects’ rights are being eroded in favour of surveillance system-rights to obtain knowledge of suspects. Rights are not only shifted away from the suspect, they are disconnected from the centralized, unitary entity of the state” (Ericson & Haggerty, 2002). We think that future research should focus on these issues from a more comparative point of view.

6.2 AML as a risk for banks

Money laundering has become one of the liabilities for banks in general and compliance officer in specific, resulting in massive investments in compliance staff, tools and systems. There is a large supply of compliance and AML related services on the market (the compliance industry), and banks are very willing to make use of these services, as these promise to cover their compliance and regulatory risk optimally. The compliance officer, who carries responsibility for AML implementation, has to work within this risk-orientation. Not surprisingly, the discourse of compliance officers is also highly risk-oriented, focusing on limiting risks for the bank. In this respect, compliance officers are in a dual position; both reporting and non-reporting may pose risks for their financial institution. In case of reporting, a client may file a complaint against the bank if the public prosecutor decides not to prosecute the case, while in case of non-reporting, a regulatory sanction, combined with reputational damage may hang over their heads. (Levi and Reuter 2006, Harvey 2009). No wonder that compliance officers decide to investigate potential money laundering cases rather thoroughly, as this may limit their risk, either way. The emphasis on preventing ‘bads’ (while trying to fight crime and prevent money laundering from a more moral point of view) results from the juxtaposition that each bank and compliance officer finds himself in. Still, the focus on preventing ‘bads’ (Ericson & Haggerty, 2002) – such as negative publicity, loss of clients, liability – may lead to a negative, defensive impulse when combined with very little information on how to make decisions in specific cases or a lack of support or feedback from the authorities (as established during the research (Verhage, 2009a). There is a possibility that in this configuration, risk avoidance (the ‘umbrella system’) becomes the priority, instead of detecting crime. One of the dangers of this risk-avoidance approach is the fact that every actor shifts responsibility for reporting

15 According to Stessens (2000, 173), France has introduced a system for banks to cover themselves against prosecutions in this respect. By cooperating with the authorities banks no longer liable to sanctions. In case clients sue the bank for suffering loss as a result of a suspicious transaction report, the bank is able to recover the loss from the state. In Belgium, a analogous proposition was made (Verslag van de commissie voor de financiën van de staat – 1991-1992, 468-2 pp 35-6,) but this has not been implemented.

16 Strangely, since all our respondents mentioned the lack of feedback from the authorities, in the FATF evaluation of 2005 it is stated that feedback to the reporting institutions is considered to be sufficient (FATF, 2005).
to a lower rank in the AML chain, while responsibility of the outcome of reporting is shifted upwards in the chain, by a defensive reporting strategy.

This risk orientation is not symptomatic for anti money laundering, however, nor for private organisations involved in crime fighting. There is a general tendency, resulting from the pluralisation of policing and the introduction of new actors in the landscape of policing, towards loss-prevention and risk minimisation (Garland, 2001). Police also look for ways to cover the risks they are confronted with, by gathering more information and become information dealers by transmitting this information to other institutions that are trying to assess their risks (Ericson & Haggerty, 2002). This shift in policing results in police services becoming crime risk managers (Ericson & Haggerty, 2002). Garland has characterised this trend as a type of policing that is centred around an ‘economic’ style of reasoning (in contrast to a social style), built on economic forms of calculation (risk factors, crime costing, cost-benefit) that are translated into criminological practice (Garland, 2001). Ericson and Haggerty also warned about the potential dangers that may inherent to this approach, namely stereotyping, inclusion of the wrong criteria and exclusion of people: “the concept of risk (...) turns people, their organizations, and their environments in myriad categories and identities that will make them more manageable(...) People, organizations and environments are sorted into whatever categories will fit the practical purpose of the institutions that wishes to make them predictable (Ericson & Haggerty, 2002). The merit of this approach however, lies in the evolution from a reactive to a proactive approach of criminal investigations.

7 Thoughts on efficacy of the AML complex

Discussing effectiveness of the AML approach in terms of amounts or volume of laundered money is difficult because of the lack of conclusive statistics (Harvey, 2004, Van Duyne & Groenhuijsen, 2005). In view of the limited information on the statistical results of the AML system (van Duyne & de Miranda, 1999; Levi & Maguire, 2004; Harvey, 2007), we here make some general deductions that can be made on the basis of our research. This however, does not alter the fact that the problem remains that any result is very difficult to measure. After over 15 years of AML, and millions of investments by private and public organisations, this is a worrying conclusion.

7.1 Effects?

First of all, the level of efficacy of the AML system depends on the type of goal that is evaluated. As the AML system combines several interests, each of which striving for another objective, evaluation is not unambiguous. What is certain, is that the battle against money laundering has changed the policing landscape thoroughly, inserting a new type of public-private divide (and not public-private cooperation) on a global scale (Verhage, 2009a). Statistics on prosecution and conviction, however, are modest, not only in Belgium, but also in other countries (Levi, 1997; van Duyne & de Miranda, 1999; Verhage, 2009b). Nonetheless, in the evaluation that was carried out in 2005 by the FATF, it is concluded that the system can be seen as effective with 800 convictions for money laundering in 4 years: “Ces chiffres permettent de conclure à l’effectivité du système répressif Belge en matière de lutte contre le blanchiment de capitaux” (FATF, 2005).
What we see as the outcome of the AML complex is actually a very small proportion of the input of this complex. After all, only a minor percentage of reports ends up in the penal chain (the FIU dismisses 68% of all reports – Verhage, 2009 b). The chances (or risks) of ending in court are therefore relatively small (11% of the FIU cases end in a judicial decision). The AML complex is characterized by a large dropout throughout the process, which however says nothing about the effort that is invested in this process.

As we are unable to rely on statistics with regard to efficacy of the preventive system, we are forced to make use of other information on effects. From our interviews we derive that the financial system has indeed closed its ranks and made it much more difficult, if not impossible, to enter a bank with a suitcase of money and deposit it on an account, no questions asked. As a result of the AML system, potential launderers will have to go through more trouble to get their money cleaned and will therefore either have to take more risks or have less ‘clean’ money at the end of the laundering phase.

Banks have proven to be loyal reporting institutions during the last 6 years: we see a steady rise in suspicious transaction reports by financial institutions since 2001, which however stabilises in the last four years (CTIF-CFI, 2008). During our research, respondents also stated that if a bank was known for its associations with criminal funds, other banks would react to this (Verhage, 2009e). From this we derive that the financial sector has adopted a self-regulating approach with regard to noncompliant banks (of course, also because these latter banks are unbalancing the competition in the market). The other reporting institutions, such as insurance institutions and leasing companies seem to stay behind in this respect (FATF, 2005).

However, we do not know how much flows of illicit money are prevented through a general preventive effect of the AML system, nor do we know how many specific clients were prevented from entering the formal financial system, by means of exclusion criteria (blacklists, high risk profiles, cash-related corporations, etc.). We assume that the amount of cash that is offered to banks, has decreased as a result of AML legislation. We may also assume, that as a result of grown expertise and professionalism within the compliance sector, ‘typical’ money laundering techniques and schemes are detected. This not only implies that there has been an effect with regard to the soundness of the financial system as a whole, but also suggests that know how on the subject of money laundering in general has probably increased. The AML system has resulted in the widening of the scope of investigations, not only with regard to financial crime, but also in relation to predicate crimes.

7.2 Crime control and hence displacement?

Apart from the discussion on the efficacy of the system, there are some signs of crime displacement with regard to AML. One of the problematic aspects of situational crime prevention is the problem of crime displacement.

The formal financial system, built around the financial institutions, has increasingly fortified AML efforts, making access to the financial system progressively more difficult. As a result, we might suppose that they have succeeded in making money laundering by use of financial institutions, more complicated. Specific clients are

excluded from financial services (for example people on the so-called politically exposed persons lists) or selected for monitoring based on their ‘risk profile’, and transactions to particular countries will be either forbidden or followed with prudence. As a result, criminals will have to look for other ways to launder their money. After all, there are no signs that drug markets have reduced as a result of AML (van Duyne & Levi, 2005; European Commission, 2009) – leading to the suggestion that drug crime has not diminished either, although figures on this are not available. Even more, Reuter and Trautmann note in their report for the European Commission that in spite of the fact that the AML system was originally set up with the aim to combat drug crime, the number of seizures related to drugs have been modest in relation to estimations of the volume of the drug trade (European Commission, 2009).

Apart from drug crime, there is no evidence for a shrinkage of the volume of the informal economy – on the contrary, some authors suggest that the volume is increasing (Schneider & Enste, 2000). Prices in the underground market are said not to have increased (van Duyne, 1997). These findings would imply that the need to launder money has remained unchanged, to say the least. Based on estimations of the extent of the informal economy and the amount of money that needs to be laundered, we might even suggest that the necessity for money laundering has grown.

As a result of the earlier discussed flexibility of money laundering, the displacement effect in money laundering may even be larger. When burglars are deterred by an alarm, they will go to houses with no alarms (Verwee et al, 2007). In money laundering, the same applies: when a certain country or bank has a less strict AML policy, money launderers may turn to these countries for their money laundering acts. However, in contrast with burglary, this is not the only reaction. Another way of dealing with more strict regulations is by developing even more complicated money laundering schemes, which are very difficult to detect. This consequential ‘moving up’ in knowledge and the investment in more and more profound expertise may be difficult to keep pace with.

This entails that those crime entrepreneurs who are in need of legitimate money, will try to find other ways of laundering. Some authors point at the use of Hawalla systems in this respect (van de Bunt, 2008) or at the techniques of cash transfers by physically carrying it from country to country. The CTIF-CFI-report on 2008 notes an increase in reports by exchange agencies and casino’s, also institutions under the obligation to report to the FIU in case of suspicious transactions (CTIF-CFI, 2009). The options are virtually endless: offshore financial centres or tax havens still provide lots of opportunities for money launderers, Western Union, Second Life,...

It may be clear that in comparison to the financial institutions, the other reporting institutions, such as casinos or exchange offices – although known for a substantial amount of reports to the FIU – have invested less in AML, which will probably result in a higher vulnerability (misbalancing the playing field in AML between institutions). The question is, however, whether we can expect these other (non)financial institutions to invest as much effort, time and means in AML as the banks have done. Specifically considering that their interests in AML might be slightly different in comparison to the financial institutions, who have a large interest in complying with AML legislation. This displacement effect is in our view intrinsically linked to crime prevention from a situational point of view, specifically when dealing with a highly flexible and adaptive type of criminal phenomenon. As long as causes of these crimes are not tackled, there will always be new methods and new ways in which this crime can be committed. In the
case of money laundering, the cause of the crime is the fact that a lot of money is earned by predicate crimes and the need to make use of this money in the formal economy. Any intervention aimed at the prevention of this use in the formal economy, will therefore result in other laundering methods, if the predicate crimes are not tackled.

Summarising, we might state that, while the process effects of the AML system have been very far-reaching – AML has changed the way in which financial institutions work and think – the impact effects with regard to the outcome (in terms of prosecutions or convictions) seem to be modest, although we must note that until today, we have no instrument for measuring the whole outcome, that also takes the preventive effect into account (Reuter, 2009).

8 Discussion: the place of AML on a crime control continuum

In conclusion to this article, we aim to discuss the place of the AML complex in relation to the battle against other types of crime, by means of examining its position on a spectrum of crime control, taking into account its characteristics, the public-private divide and its relation to the penal system. We hope to have made clear that the AML system takes up a very specific place in comparison to traditional types of crime control. In this paragraph, we focus on a number of reasons: firstly, AML is imposed regulation which results in an emphasis on self-protection, secondly, the public-private divide in AML is no longer clearly delineated and thirdly, to enhance crime control, AML know-how is needed, but may conflict with privacy interests.

8.1 AML as imposed regulation

In AML, financial institutions have been mandated to act as a tool of crime control, involuntarily engaged in a costly fight against crime, of which they are not a victim, but the instrument. Money laundering as such does not harm them, which implies that – strictly speaking – they have no concern in preventing it. Of course there is a moral impetus, and the introduction of AML legislation has resulted in the fact that in case of non-compliance, there will be (reputational) harm. This does not alter the fact that banks are mandated to fight money laundering in a public interest, without having specific investigative powers or authority, without receiving basic tools, and run the risk of being sanctioned in case of non compliance. By consequence, AML is not self-regulation, but imposed regulation. This implies that banks will have their own agendas and strategies in the implementation of this legislation, also related to the threat of sanction that is linked to non-compliance. This contrasts highly with the private security industry, who take up security tasks out of self- (commercial) interest. Furthermore, while private security shifts the costs of crime prevention towards the victim (either the company that hires private detectives, or the citizen who hires a private guard) (McLaughlin et al., 2003), AML shifts these costs towards the vehicles of crime\(^{18}\) (KPMG calculated that AML costs, 2007). Of course, in turn, banks (the vehicles) may shift these costs to their clients.

\(^{18}\) KPMG calculated in 2007 that costs of AML for banks are high and keep rising (58% in the last three years) (KPMG, 2007)
It may be clear that without AML legislation, and the stick of regulatory sanctions, the appeal of a bank to perform AML monitoring would be very low, which makes the threat of sanctioning a necessary part of the deal. Within AML, the carrot that usually comes with the stick (Braithwaite, 2002), is lacking. An example of a carrot in this respect, could be the provision of information to (pro-actively) handle AML responsibilities or make AML-related decisions with regard to trespassing customers. The AML construction of today however, implies that the financial institutions’ AML policy is not purely aimed at fighting crime, but also – and primarily – at safeguarding themselves from regulatory sanction. Moreover, we also see some elements of private justice in AML, as banks decide on the effect of their investigation for their clients. In a self-protective reflex, financial institutions will get rid of clients who may pose a risk for the bank.

8.2 Public-private divide

Financial institutions are obviously not the only private organisations that carry out in-house investigations on rule-breaking or crime. We refer for example to private investigation units, whose existence within large companies has been documented before (Cools et al, 2005). The vastness of monitoring is not exclusive for AML either; there are corporations that monitor cashiers’ transactions or telecom use by clients, through software. However, the main difference is, that those corporations carry out those monitoring tasks by free will, in their own interest. After all, they are the actual victims of internal fraud or malevolent clients. Private investigation can therefore be considered as a self-imposed regulatory system, based on voluntary initiatives.

Police investigations, carried out in the interest of the general public, mostly investigating crime in which there is a direct physical victim, find themselves at the opposite end of the continuum. They work within a penal context, with a criminal justice objective of fighting crime. They have an official mandate to react to complaints by the public, and have the tools (among which the monopoly on the use of force) to perform their investigations.

Although some of our respondents have spoken of an ‘outsourcing’ of tasks by the government (Verhage, 2009e), AML is strictly speaking not an example of privatisation of law enforcement tasks: there simply never was a public monitoring system. AML is therefore not a task that has been ‘taken over’ by private corporations (which is the case for guarding services or body guarding). As such, the AML complex constitutes a unique example of a public-private divide (or collaboration nolens volens) that does not result from a withdrawal by the state, but a pro-active involvement of the state that nevertheless has resulted in putting the responsibility for monitoring transactions and identifying customers in the hands of the private sector, the latter not having asked for this responsibility.

8.3 Knowhow and cooperation

The absence of flexible cooperation (Verhage, 2009a) between the authorities on the one hand, and compliance officers on the other, results in a relatively static AML system, which may get in the way of efficacy. In AML, compliance officers often lack official investigation tools, resulting in monitoring systems and that are mainly based on
formerly discovered cases. AML unavoidably has to fall back on historical transactions and a-typicalities that were established in the past. One possible way to remedy this static method and the orientation on the past, is by enlarging knowledge and knowhow on money laundering. As AML is a system that is obliged to work on the basis of the philosophy of target hardening and rational choice, the increase of expert knowledge is needed to raise the chance of getting caught (Pheijffer et al, 1997) – at least temporarily. Increasing know how on the way in which crimes are perpetrated is essential to recognise more transactions and perpetrators as suspicious, in any case until the latter have developed new methods. This could be achieved by developing a patrimony of knowhow, built on the strategic knowledge of both public and private actors within the AML system, a patrimony that is flexible, up to date and characterised by rapid information exchange on new money laundering methods and techniques. However, are a number of remarks need to be made with regard to this type of information exchange. Rules need to be made with regard to the privacy issues in this respect. After all, strategic information on methods does not have to imply that names or identities of suspects are exchanged. They are, after all, still suspects, and banks are not allowed to inform them on this status either. In this respect, the FIU seems to be best qualified to play a pivotal role in this. The FIU is the centre of information gathering and can therefore use this position to communicate their knowledge to all actors in the AML complex. Such an information exchange may also result in a better-founded, more balanced and less arbitrary risk orientation within AML. When banks are better informed of where they need to look and which indicators they need to search for, privacy issues can be dealt with on the basis of knowledge instead of potential risk.

These observations lead us to the following continuum, in which private interests are placed against public interests, police investigations against private investigation and self-regulation against the penal system. AML is situated at the right-side of the spectrum, leaning towards the penal system and the public interest, but carried out by private actors.

9 In conclusion

From this continuum, we derive a number of conclusions. We note that that AML constitutes a new and unique position in the landscape of policing and fighting crime.
‘Policing the money’ has become a new proliferation of the multilateralisation of policing (Favarel-Garrigues, 2008). The compliance function can be considered as an extension and an outpost of the traditional police services, with its own deontology, expertise and working methods, and has found its place between private policing and public policing. All this demonstrates that there is all the more reason to broaden the scope of traditional paradigms, within crime control and criminology. Criminological visions and theory need to adapt to the development of ‘new’ types of crime and crime control, to play a role in the acquisition of knowledge on these new phenomena. After all, AML illustrates that public and private policing have become interchangeable and intertwined, that victims and perpetrators are not always so easy to differentiate, that public and private interests sometimes are entangled and, finally, that while we are policing the money, we need to be aware of the danger that basic rights such as due process and privacy are mystified.

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Police officers’ views and fears about some criminals’ threatening reactions to police investigations

Fien Gilleir

1 Introduction

The police as an investigation service are charged with the duty of the fight against criminal organizations that, by striving for power, can disrupt the entire society. Since the nineties, the Belgian police have a legal framework,¹ which allows them to make use of special police techniques in order to engage the fight against organized crime in a more effective way. Thanks to a more proactive approach, the first successes in the fight against organized crime were scored. However, from a tactical point of view, a whole set of counterstrategies were developed on the side of the criminal environment to reduce this extremely undesired interference of government to a bare minimum. Despite a lot of efforts, one realized on different stages of the criminal justice system the paralysing effect that criminal organizations could exercise. For that reason, from the police point of view, one pleaded to obtain far-reaching power of criminal investigation and more effective tools in order to face those bothersome counterstrategies, on the one hand, and in order to respond to the potential techniques the underworld could apply, on the other hand. But, as one actor carries much weight in order to neutralize the other, the conflict between them seems to polarize, which carries the risk that the display of power sooner or later degenerates and the democratic principles of the democratic society may belong irrevocably to the past.

The main aim of this article is to gain a thorough image of the way in which members of criminal organizations avail themselves of the technique of ‘intimidation and violence’ against police officers. Police officers as a victim of intimidation is a subject that is often ignored by researchers.

The main focus of the present research emphasizes the need to analyse intimidation as an interaction between the criminals, on the one hand, and the police on the other hand. Special attention is paid to the position of the police officers, who, because of their crucial function in the criminal justice procedure, hold precarious positions. Police officers are working in the frontline of a public service with a repressive task in regard to criminal activities. It is inherent in their job to be confronted in a direct way with people who have malicious intentions. Within that context it is definitely of major interest to analyse how the interactions between police officers and criminals take place. Which forms of intimidations take place? What is the result of harassment at the level of an individual police officer? In this article we pay attention to the subject of organized crime and the work of frontline police officers.

Therefore, we made use of the ‘reports about organized crime’ collected by the Belgian Federal Police, as a basis for the empirical data. The items we examined are numerous. By means of ‘reports about organized crime’ and thanks to some privileged witnesses employed at the management level of the Belgian Federal Police, we were able to make a selection of 29 criminal records (from the 56 cases), where the presence of this counterstrategy was reported. These resulted in 36 in-depth interviews, spread over eight court districts in Flanders as well as in the Walloon provinces. On the basis of those data, we tried to refine the form of the image of organized crime.

2 Focus on the notions of ‘organized crime’ and ‘counterstrategies’

2.1 The phenomenon of organized crime

In Belgium, the growing awareness of the serious threat of organized crime found expression in the plan against organized crime during the second legislature of the then prime minister Dehaene. The concern with regard to this subject was revealed in a few legislative initiatives that were intended to respond to certain counterstrategies. This turned, amongst others, into a few laws that were enacted in order to facilitate the registration of testimonies with the aid of audiovisual media concerning witness protection, concerning the anonymity of witnesses, etc.

Fijnaut was the first Dutch researcher who used the notion of counterstrategies for the time of the Dutch parliamentary commission Van Traa. He described counter-strategies as: ‘the whole of methods and means, applied by criminal organizations in order to insure the continuity of the organization and to hide there (criminal) activities against the performance of the government or, after an intervention of government to slow down the (criminal justice) procedures or undermine them and to escape the evocation of assets’ (Fijnaut et al., 1995–1996). In this context, these actions seem to make part of an intentional strategy in order to neutralize the efforts of the authorities.

Sometimes one notices a distinction between whether the counterstrategies are used in an offensive or in a more defensive way. To quote Fijnaut: ‘The use of offensive counterstrategies (…) makes the difference between the goats and the sheep’.

Until 2005, the use of counterstrategies was a substantial component of the definition of a criminal organization. After then, however, the Belgian legislation on organized crime underwent an important shift. Under current law the use of counterstrategies is no longer required to speak in terms of ‘organized crime’. This remarkable change means an important extension by which a lot of other, less-violent types of criminal activities can be pursued on the same legal grounds as a criminal organization. The aim of this contribution is not so much to zoom in on the definition of criminal organizations, but rather to reflect about the way in which the notion of counterstrategies can be seen in relation to organized crime. More specifically, in the first instance, we were curious to know why criminal organizations decide at a certain moment to mercilessly

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2 Actieplan van de regering tegen de georganiseerde criminaliteit, Parl.St. Senaat, 1997-1998, 326/5, 24
4 Ibid.
5 Wet van 8 april 2002 betreffende de anonimiteit van de getuigen, B.S., 31 mei 2002
strike a police officer. Furthermore we have tried to answer the question of whether the use of intimidation can be seen as a deliberated strategy or rather as the result of complex interactions with investigation services. Without having the intention to deny the seriousness of organizational crime, the use of offensive counterstrategies is seen as one of the most problematic aspects of organized crime (Baard et al, 2009).

In particular the evil intention, the intentional character of the threats and/or the use of violence against the authorities who are the central target, makes the use of this counterstrategy very worrying. It is about the capacity of an organization to protect itself against the actions of the authorities to clip its activities (Verbruggen, 1997) and the willingness and the possibility of its members to take violent actions. Although the former definition seemed to suggest that those actions make part of a very explicit eye intention to obtain a specific goal and that this behaviour ensues from an intentional strategy to neutralize the efforts of the government, we would like to find out whether it is indeed the result of a deliberated strategy or not.

2.2 Counterstrategies

2.2.1 Intimidation, threats and violence

Scientific research in relation to intimidation within the context of organized crime is rare. Most of the studies concerning organized crime focus on a macro level (for example, threat analyses discuss problems at a broad, societal level) and existing studies about intimidation generally zoom in on the status of the victim, which means that the psychological point of view is discussed. From the conclusion that the implications on a micro level (the personal, individual consequences) are often overlooked, this research therefore tries to fill a gap by making a link between victimization, on the one hand, and the refinement of the building of image on organized crime on the other hand.

One can distinguish different forms of intimidation, depending on their manner, but also depending on the scale with which one asserts one's influence. We only discuss those types that can have certain relevance in relation to the influence of criminal organizations.

Different categories of intimidation

A lot of factors can deter people from cooperation with criminal justice services. A strong attachment to the community they live in, a lack of confidence in the criminal justice system, the minimizing of the offence, etc. could play a significant role in the decision whether one is willing to cooperate with the criminal justice services. Some authors (Finn & Healey, 1995; Maynard, 1994) use the terms community-wide or cultural intimidation to point out the consequences on a macro level. But intimidation, or the perception of it, comes in many forms. People can be intimidated in ways other than by violence and the harasser may not be the offender himself or herself but the offender’s family or friends. The form of intimidation discussed so far relates to specific incidents and is sometimes referred to as case-specific intimidation, which will be the central scope in this contribution.
Sometimes, one can decry a distinction whether a counterstrategy is used in an offensive or rather in a defensive way. Defensive counterstrategies are measures used by criminals in order to hide their illegal activities. Some examples of such measures are the use of front offices, the use of non-traceable equipment (prepaid card in mobile phones), communication in code language, etc. Offensive counterstrategies, however, are assumed to be more active; they suppose an intentional way of acting which makes it much more difficult for investigation services to determine criminal actions and hinders them form making punishment in a subsequent stage possible. It is clear that the use of violence and intimidation belongs to the second category, because this behaviour contains an explicit intention, on the one hand, and assumes a determined action on the other hand. The relevance of this subdivision into two subcategories is a bit arbitrary. The use of defensive counterstrategies is not only the rule rather than the exception (almost all criminals make use of false identity documents, pseudonyms, cash money, or try to screen their modes of transport), but the same counterstrategy can, in the first instance, be used in a defensive way and at a later stage become an offensive action. The ‘omertà’, for example, can obtain a very intimidating character at the moment a member of a criminal organization decides to cooperate with the criminal justice agencies.

The context of intimidation: ‘fear’ as the central mechanism

The capacity of a criminal organization to protect her against attempts of government to curtail her power, as well as her preparedness and the possibility of her members to take violent actions when necessary, is perhaps the most important aspect. This element does raise questions about the reason why criminal organizations decide at a certain moment to strike mercilessly at the state services. Can the use of intimidation be seen as a deliberated strategy, or is the use of violence rather the result of complex interaction with the investigation services? And if so, which motives are of important interest?

According to the foreign literature about intimidation some authors argue that ‘fear’ (Cusson, 2001, as cited in Gomez del Prado, 2004, 192) is the central mechanism that plays a key role. Fear, as such, results from different causes. There’s the fear of being caught by the police, the fear of ending up behind bars, etc. According to Cusson (2001) it is the explicit will of the criminal that the experience of being frightened changes to the camp of the enemy. In addition to this, the use of violence corresponds with the last phase, namely applied as an ‘ultimo ratio’. In case of the Mafia, for example, her members will first use other methods, such as corruption (Bottamedi, 1997). Insofar as these strategies do not serve her purpose, the use of violence is found to be necessary. In brief, fear is the outstanding source of inspiration to incite others to action (motive) on the one hand, or – on the contrary – to prevent others from do something (brake) on the other hand. According to this point of view, the use of intimidation, threats and violence can be seen as a clear expression of opposition against the legal deterrence, used by the police.

Against the outside world, the use of violence can be interpreted to obtain two important goals. First, we notice the realization of profit. The use of violence allows criminals to assert their powers. To act in a violent way can put down possible rivals. Furthermore, the use of violence offers a certain manner of protection: it eliminates
those who form (in)directly a threat for the continued existence or it can give others the motives to grass on someone. But, in the second instance, one can also use violence inside the organization as well. The ‘omertà’ for example can obtain a very intimidating character at the moment a member of a criminal organization decides to cooperate with the criminal justice agencies.

A matter of perception

Fear is the central mechanism that plays an important role in the decision not to cooperate within the context of a criminal procedure (Cusson, 2001). Sometimes people feel threatened although at first, there does not seem a very clear reason for it. As already mentioned above, intimidation is mainly a question of perception. But, the substantial importance is not whether there exists a real threat or not vis-à-vis a person, or whether it is only a wrong subjective experience: the problem is in its consequences. After all, the outcome of intimidation always turns out badly on the side of the criminal justice system. In both cases the victim will have serious doubts about his further cooperation.

Nature and scope of the phenomenon

Distinguishing these different forms of intimidation has important implications for measuring the extent of intimidation and harassment. However, because of the subjective experience, it is not easy to gain insight into the nature and scope of the phenomenon. In the first instance, victims are afraid to report threats and resist reporting crime by fear of reprisals. In most of the cases also the initial crime stays unknown to police agencies. By its consequences, because of the fact that the use of intimidation is often very effective, one can assume that a lot of crimes stay unknown (dark number). Nevertheless, some parameters exist that can give a possible indication about the nature and the extent of intimidation. A study of the Home Office within the context of the British Crime Survey (Tarling, Dowds & Budd, 2000) and a similar estimate obtained from an internal study conducted by the Crown Prosecution Service (Maynard, 1994) showed that in one per cent by both studies, victims or witnesses do not report the offence in the first place because of direct intimidation or because of indirect ‘community-wide’ intimidation. In summary, threats can be so menacing that people resist reporting it, for fear of reprisals.

In terms of their consequences, this implies that the harm on the level of society will have a great impact. But, besides the impact on a macro level, one must admit the consequences on the level of the single policeman.

Consequences

At an individual level, the experience of being undermined by fear of intimidation can generate stress, feelings of being unwell, etc. But, in the long run, the consequences can affect the whole social order: intimidation can disrupt our entire society. One runs the risk that this will give rise to a climate in which hardly anyone is willing to cooper-

6 http://www.homeoffice.gov.uk/rds/pdfs/occ-victandwit.pdf
ate with criminal justice services, with that major consequence that this creates an open field for members of criminal organizations. The democratic principles, which are nonetheless considered to be of paramount importance, are put at risk, which gives criminal organizations the possibility of growing to become a state within a state (Verbruggen, 1997).

2.2.2 Special category: police officers

The risk of being intimidated is usually only evident where the victim has some knowledge or information about the perpetrator(s). From that point of view it is evident that police officers hold a specific position during a criminal procedure (Brå, 2008). Given their sweeping powers to investigate criminal cases, the mandatory to use of violence and given the fact that the police dispose of crucial information for the purposes of the criminal justice system, one could easily argue that police officers hold a precarious position in relation to offenders who have their own conflicting interests. The main focus of this contribution relies on this type of ‘targeted violence’.

3 Empirical research

The main purpose of this study was to gain insight in the interactions between police officers and members of a criminal organization in the actual records of organized crime in Belgium. This exploratory study with a strong empirical component relies on literature, interviews and reports. In the first instance we held a short review of literature about organized crime, on the one hand, and about threat and risk management in the broader judicial context, on the other hand. The second phase consisted of a field-study within the context of the Belgian Federal Police organization. By means of ‘reports about organized crime’ and thanks to some privileged witnesses employed at management level in the Belgian Federal Police, we found respondents about 29 criminal records (out of the total amount of 56 cases whereby the presence of this counterstrategy was reported) willing to cooperate. The police officers were reached either through contacts within the police authorities or via the survey where an introductory letter requested interviewees. This resulted in 36 in-depth interviews, spread over eight court districts in Flanders as well as in the Walloon provinces. Given the personal touch that is inherent in the experience of intimidation, what really matters is paying attention to the contextual facts. After all, by analysing the underlying situation into human interactions, it can help us to understand the reason for being, the aim and the risks for threats. To gain insight into the moment whereat an organization made use of violence during a criminal procedure we asked the respondents to tell their story chronologically: from the start of the initial investigation until the end (reference to the Public Prosecutor, sentencing by the Correctional Court). Although we are aware of some important methodological restrictions (lack of reliability because of memory dysfunctions by the head of the respondents, which could be due to the method of retrospective questioning), this method of working created the opportunity to isolate some triggers, in case the use of violence follows as a reaction. A concrete trigger could be a sneered remark towards a suspect, a certain investigative act (a house search,) etc.
The way in which this selection took place made us able to search for an answer to the question why some criminal organizations decided to make use of violence and/or intimidation at a certain moment, but not why other organizations with a similar profile under the same conditions did not act intimidatingly. The question arises whether the profile we obtained can be found to be representative for all criminal organizations or not. After all, our research is confined to cases in which intimidation was reported among the majority of the organized crime cases dealt with by the Belgian Federal Police; where no intimidation or violence was reported, it is not even mentioned. Furthermore, we are aware of the fact that our research design holds another important restriction: the purport of this article mostly relies on the reflections of police officers. Because of reasons of feasibility we could not interview members of a criminal organization themselves. However, this would probably give us more insight into their motives for the use of intimidation.

Although we achieved a lot of information by word of mouth from the key-respondents, we must admit that in some cases we experienced a certain restraint in talking at full length. According to us this can be attributed to the fact that in some cases the interview took place in the presence of someone's superior. Given the situation that this matter is a bit delicate to talk about (a lot of the interviewees were a victim themselves) combined with the current culture of machismo which is nowadays still typical for the police as a workplace, we had the impression that this had an unintended influence on the tenor of an answer.

4 Research results

4.1 The criminal organization

The question as to whether there is a relation between the nature of the illegal activities and the use of violence can be answered affirmatively. By telling the story chronologically, we discovered that, in the overwhelming majority of cases, the use of intimidation followed as a reaction to a certain action by the police officers. However, within this rather restricted research design, we were not allowed to predict to which degree the initial activities could be an indicator for further violence. Excepted in two cases, the reported behaviour followed on earlier criminal activities whereby violent behaviour clearly existed. This finding led us to a consideration of how far a violent crime already can be seen as a manner to intimidate someone. Furthermore, the fact that no specific trigger could be isolated in these cases, the findings gave rise to the assumption that the use of violence had more to do with ‘gamble’ rather than that it could be interpreted as the expression of an explicit intention. From that point of view, we could argue that criminal organizations that tend to make use of violence are in a certain way the weakest, because of their strong visibility. One could say that catching the attention is not beneficial to their affairs. Organizations that handle this in a more subtle way, however, try to possess the nation instead of combating it. It is very striking that, in two cases the ‘reports about organized crime’ did not mention the initial criminal activities as violent (financial/economical crime); the violence was attributed to the profile of the members of the organization. In just those two cases the suspect was already known by the police for his aggressive behaviour. Only in very few
cases the interviewees could not describe an immediate cause for the use of violence. According to them, the violent acts were very unexpected and disproportionate and were, at the same time, due to the pathological profile of one of the members. In most of the cases the key respondents recognized furthermore the fact that the importance of some ‘unwritten rules’ could not be underestimated. Behaving oneself with a form of mutual respect (being polite, etc.) is perceived as essential in the interaction with members of criminal organizations.

One must acknowledge that the possibilities to identify certain personal details of police officers are countless.

4.2 Violence and intimidation

4.2.1 The nature of intimidation

Whether considering the intimidation of police officers, much of the harassment reported to us took the form of verbal abuse or threats, though a relatively small proportion of those intimidated experienced physical attacks or damage to property. Numerous police officers told us that the use of contra-observations is a common practice. It would appear that actors with links to organized crime rarely use violence and criminal damage, and prefer more subtle forms of influence, such as harassment, compared with the persons who, in general, use unlawful influence (Brå, 2008).

Furthermore, on the basis of the interviews we can indeed confirm that intimidation crystallizes around two poles (Gomez del Prado, 2004). On the one hand, one can decry the vague, diffuse threats (making insinuations about the private life of a police officer), on the other hand, compromising someone is another tactic in order to destabilize a policeman (systematically institute legal proceedings). ‘The fact that some “prospects” keep shadowing me while I’m doing my job doesn’t really worry me. The idea that some guys are hanging around about my house and keeping a tail on my wife and children however, fills me with dread’ (A police officer).

4.2.2 Potential reason(s) for intimidation?

In the overwhelming majority of cases the intimidation could be seen as a reaction on a certain action of the police: some police officers mention that the intimidation occurs immediately after an interrogation, after a large-scale check of vehicles, etc. These are all occasions whereby a face-to-face confrontation is inherent in the mode of contact. These kind of interpersonal events give the criminals the possibility to observe and identify some characteristics, which increases the risk of intimidation. However, according to the opinion of the respondents, there are also other police actions whereby a direct confrontation between suspect and investigator was out of the question and could be identified as a potential ‘trigger’ for harassment. The confiscation of extralegal capital gains, for example, was mentioned several times. The presence of threats could be attributed to the fact that the criminal organization had a lot of (financial) interest to defend. In this way, the use of intimidation could be seen as an ‘ultimo ratio’ in order to protect their benefits. Again, this indication throws

7 A prospect is a member of a criminal motorcycle-gang
doubts upon the assumption that the use of violence by criminal organizations is the result of a deliberated strategy.

4.2.3 The police officer’s response

Our scope was to explore in more detail some experiences of intimidation. It is often thought that intimidation occurs because offenders want to deter police officers from providing evidence to support a prosecution case. However, our findings suggest that intimidation is far more complex than this. The relationship between the police officer and the offender can be complicated by a history of abusive interactions, so that, whatever the circumstances, it is rarely as simple as the scenario of: police catches criminal; offender intimidates police. If a police officer does decide to take action, intervention implicates a direct confrontation with the offender. This course of action may result in harassment by the offender.

Being the victim of threats often creates a very stressful situation (Reiser & Geiger, 1984; Territo, & Vetter, 1981). The knowledge of a ‘worst case scenario’ whereby someone or one’s fellows sooner or later can be the target of violence, sometimes mentioned as ‘emotional terrorism’ (Lavigne, 1999), can dominate someone’s stem of thought. It is not unlikely that this hinders someone in executing their daily activities. In the professional sphere the implications of threats are countless. In short, we can decry two opposite coping strategies to handle the awareness of threats: avoidance of contacts with criminals, or – on the contrary – forcing the fight (to make a career or from a strong sense of justice) (Reiser & Geiger, 1984). One can say that those different reactions are the result of their police discretion. In the first instance, the effect of intimidation is generalized and affects in a direct way their discretionary power (Gomez del Prado, 2004). In the short term the possibility exists that an individual police officer is no longer motivated to do a profound investigation in a criminal case, by which the fight against organized crime is no longer pursued. In the (middle) long run there is also another risk. The fact that one labels certain criminal organizations as violent leads to the situation where it becomes very difficult to find police officers who are willing to engage themselves in investigating those heavy criminal cases. One respondent admitted that he suffered from depression because of the omnipresent tension of menaces that became too much too handle for him. Another interviewed police officer declared that his family life was on trial for months. ‘One day my wife noticed a strange car near our house, with two men looking at her. A week later I received an envelope from an unknown sender with pictures of my wife when she was picking up our kids from the school. Now she’s begging me to search for another job because she doesn’t want to put our family life at risk, just because of my job. But, what can I do?’ (A police officer).

At the time the interviews took place, some policemen applied for a transfer to another judicial district. This decision was based on their experience that ‘you must not catch thieves in your own backyard’, said a policeman. A certain geographical distance between the workplace, on the one hand, and the place of residence, on the other hand, seemed to be a logical solution for them in order to decrease the risk for intimidation. But some officers abandoned their resolution to continue their fight in full force against criminal organizations and answered with determination being discouraged because of fear. ‘I try to avoid investigations in search of some ethnic minorities like the Albanian mafia. I know they’re very violent. They have no fear at all. The same counts
for those Roma-people in the city. The risk that you become beaten by a baseball-hat is too big if you enter their trailer camp.’

Of course, a discouraged reaction from the part of governmental services leads to a triumph for the criminal organizations, because they see themselves acknowledged as the invincible party. This makes them able to obtain more knowledge, power and means to realize their interests. But, not every police officer will, once confronted with threats, act as a victim in the meaning of being discouraged for engaging him in a grim struggle. We can decry a lot of motives that make police officers pursue their (own?) undiminished fight. ‘Despite all the threats, as a policeman it’s my duty to persevere with the fight against ‘the enemy’ (A police officer).

Nevertheless, acts prompted by personal motives can carry a great risk. The fact that a police officer assumes an obstinate attitude can result in an increased chance to go far beyond his legal pale (Goldsmith, 1996). His emotional involvement will make him unable to conduct an inquiry from a certain distance. Because of his feelings of anger, frustration, powerlessness, the objectivity of the investigation will be postponed. As a consequence, the inclination to exceed his authority is not inconceivable and it will be a welcome argument from the position of the defence (Gomez del Prado, 2004). Moreover, when there are raised systematic questions about exceeding the policeman’s competences, he can no longer count on the righteousness of his colleagues. Although it is not a direct manner of intimidating someone, on the basis of the empirical data it became clear that a handful of policemen were frightened, because of more subtle and less visible techniques used against them (‘fear of litigation’, Gardner and Scogin, 1995). From the side of the criminals, an approved method in order to destabilize the behaviour of one single police officer is to lodge a complaint with the Comite P, the internal inspection service of the police. Several of the interviewed respondents had been subjected to an internal investigation. Although the result of the investigations came to nothing, they all became strongly aware of the fact that it undermined their credibility and professionalism.

Another pitfall in interaction with members of criminal organizations is the fact that – because of a grim struggle some policemen fight against some criminals – they lose their respect and could (unconsciously) assume a provocative attitude, which increases the chance of escalation.

Many of the interviewed respondents took some measures in order to protect themselves (carrying their weapon at home, systematically taking another way to their house, etc.). Because they could not appeal to a sound risk analysis, they make an assessment of possible threats on their own, based on their earlier experience and prejudices. Notwithstanding the fact that there exist some indicators to predict whether a first contact can result in violent acts (Calhoun, 2001) these results cannot be transposed to the very specific context of organized crime, because of their own rationale with objectives that are current. The lack of an effective risk analysis, however, holds also the risk that police officers build their image on a wrong basis and are insufficiently aware of the actual possibility of threats.

Furthermore, a certain discrepancy could be noticed between the experiences of fear of intimidation from the street cops, on the one hand, and the opinion about the ‘real’ threat according to some management cops. A much heard criticism in the story of the interviewed frontline policemen was the lack of understanding concerning the fear of intimidation, from the side of their supervisors. The latter policemen seemed
to minimize the effect of a permanent fear on the level of the individual police officer. Moreover, one suggested that the officers who admitted suffering from the fear for intimidation were too sensitive.

**Policy implications**

Because of the fact that violence seemed to be triggered by a police action, we could argue that the use of ‘meaningless’ violence is seldom. This conclusion holds an important implication for the police: one has to be anxious about the fact that a certain action can result in a reaction from the opposite party. To be conscious of their own contribution to this interaction is an important fact to prevent escalation. In this context it is important that police officers are well aware of their legal rights to exert their authority. Also the fact that a lot of police officers wear a uniform contributes to the visibility of what has a baleful influence on the chance of being contra-observed. The making of a thorough risk analysis in order to predict the probability of intimidation can be a very helpful instrument. Besides, a practical education in order to learn to deal with criminals can be helpful as well. Furthermore, the registration of charges with a ‘code’ (anonymous) instead of the name of the police officer can be effective in protecting personal details. The importance of such preventive measures cannot be underestimated: once the feeling of a certain threat is experienced, it is not only quite late to react, but perhaps the most problematical part is due to the fact that there exist insufficient legal grounds to pursue acts as contra-observations and menaces.

5 Conclusion

The effect of intimidation on police officers within the context of organized crime is often ignored in academic research. For a long time, the use of counterstrategies has been inherent to the definition of criminal organizations.8 In this contribution we have argued that it is precisely the use of intimidation and/or violence against government authorities, as an expression of the explicit willingness to destabilize the society, which distinguishes organized crime from organizational crime. The presence of threats has a serious influence on the population’s willingness to report criminal offences to the police. Given their far-reaching competences in criminal investigations, police officers hold a precarious position. This empirical research painted a global picture of intimidation by criminal organizations against police officers. On the basis of reports on organized crime and in-depth interviews held with some privileged key figures, we could identify different forms of intimidation and discovered varied reactions on it. The interviews show that, usually, intimidation takes the shape of ambiguous threats and engaging in legal proceedings against the police. Although it is hard to measure the scope and nature of the phenomenon, the feeling of being intimidated results in certain occupational hazards, which can have serious implications. This can be in regard to the (private and professional) position of a police officer, as well as in relation

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to a broader societal context. As a consequence, efforts need to be made to improve the provision of help.

It is striking that, according to the opinion of the interviewed persons, in the overwhelming majority of cases where the use of intimidation occurred, it was experienced as a reaction to a certain action of the police. These findings seem to suggest that the use of intimidation cannot be seen as a deliberated strategy, but rather the result of a complex interaction (reciprocity) with investigation services whereby the protection of their benefits and revenge seem to be important motives of members of a criminal organization to make use of threats. Despite the fact that we did not pay attention to other counterstrategies, such as bribery, misdirection through informants or counter-surveillance, on the basis of this research we cannot say with certainty that intimidation is only used by the weaker or less professional criminals, although however within the UK context, the literature generally suggests that exercising violence is a sign that violence is ‘bad for business’, because it leads affiliates, subordinates and other criminal groups to be very wary of one, and attracts too much attention (Pearson and Hobbs, 2001). Because of the research design the inverse reasoning (violent crimes as a predictor right away for later aggressive behaviour) could not be made. Furthermore, in cases of financial/economical crime, the use of violence was not a distinctive characteristic for the organization as such, but could be due to the pathological profile of a member.

In terms of intimidation we have asked officers to speculate on why the intimidation they experienced occurred. However, it is likely that the reality is more complex than simply offenders wanting to deter police officers from bringing evidence to the court. At several points there is still speculation about the motives of criminals, however, because of the short period of time, the use of secondary sources was not realistic. The findings on the link between police attitude, job experience and intimidation warrant further consideration for policy development

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1 Introduction

Obtaining confessions from suspects has long been a favourite technique for solving and proving crimes as a criminal defendant’s confession can provide convincing evidence of his guilt (Brooks, 2000). Hence, when the government has an interest in establishing a suspect’s guilt, it has a strong incentive to interrogate the suspect in a way that it produces a confession. Thus, both in the West and in the East, in all ancient autocratic regimes, under many early systems of criminal procedure, torture has been part of the ordinary criminal procedure and was regularly permitted to be employed to investigate and prosecute routine crime before the ordinary courts (Langbein, 1977; Zuo and Zhou, 2002). However, as time evolved, especially after World War II, the principle of respect for personal integrity was written into some of the most basic documents of international law, and torture and similar abuses were unequivocally and absolutely forbidden by the laws of nations that deem themselves civilized (Levinson, 2004). Thus, although state has the responsibility for detecting those responsible for crimes and subjecting them to the criminal justice process, individuals must be afforded protection against police interrogation practices that are abusive and overreaching. Importantly, many international instruments were also created in the effort to make the struggle against torture and other ill-treatments more effective, and among these, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) which was adopted by the General Assembly on 10 December 1984 and came into force on 26 June 1987 is regularly celebrated as the most important one (Nowak, McArthur & Buchinger, 2008). Nevertheless, torture, the most unequivocally banned practice in the world today, continues to be systematically practiced in many parts of the world (Nowak et al., 2008). Given the increasing reports on torture and massive ill-treatment worldwide, considerable attention is being paid to the situation in China. In Western eyes, China is a police state with law enforcement machinery that is repressive, and the 1989 Tiananmen incident greatly reinforced this image (Cao & Hou, 2001).

Chinese scholars have acknowledged the widespread use of “torture” – physical force or psychological duress – by law enforcement in general and by the police in criminal interrogations in particular. Over the last 15 years, Chinese academics have created a vast literature on police torture in the process of criminal interrogation.

9 The human right to personal integrity is usually defined as the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Art. 5 The Universal Declaration of Human Rights (UDHR); Art. 7 International Covenant on Civil and Political Rights (CCPR).

10 China ratified the CAT in October 1988, and demonstrated its strong commitment to oppose torture consistently and to fulfill its obligations under the CAT conscientiously (Zhe, 2005).
In this study, we review research articles on “torture”, “criminal interrogation” and related topic published in Chinese language academic journals over the past 15 years (1994-2008) as well as recent literature on Chinese policing and criminal procedure in English, mainly written by Chinese authors, with a view to summarize the current knowledge of what actually happens with regard to police torture in criminal investigations and what is known about its causes. The study concludes by suggesting some research directions for the future.

This review reports on a selection of the 1082 articles analysed and therefore cannot be called all inclusive and comprehensive. Nevertheless, in our selection, we have tried to grasp the diversity in all the academic literature studied and have discussed the major trends based on the analyses made.

2 Police torture in criminal investigation

2.1 Definition

“Torture” is an abstract word that is made concrete by the knowledge and imagination of the reader. Indeed, it can be applied in extraordinary as well as ordinary situations. However, the focus of this study, as stated in the introduction, is on the most obvious place to look for it—police interrogation practices, where the police adopt “torture” as a method to coerce confessions or information from a criminal suspect.

Then, the question turns to which acts belong to the category of torture in criminal interrogation. A slap in the face? Sleep deprivation? Cutting off an ear or a hand? John H. Langbein (1977) supplies illustrations of medieval forms of torture—images of interrogations in chambers furnished with implements of pain—that probably conform to one’s basic image of the practice. Modern experience, however, has led us to wonder whether this limited view is adequate to capture how states organize torture today. Article 1 of the CAT is the first provision in an international treaty that defines torture, and it provides a fairly precise definition of torture that separates illegal practices into two categories—torture and cruel, inhuman, or degrading treatment or punishment which does not amount to torture. According to Article 1 of the CAT, to classify an act as torture, the pain of suffering inflicted must indeed be severe. If torture is the inflicting of severe pain, as the Convention defines it, a slap in the face and sleep deprivation listed above do not unequivocally rise to the level of torture.

Chinese law, however, defines torture in a broader sense than the CAT. Unlike Article 1 of the CAT that distinguishes torture and other ill-treatments according to the

11 Electronic versions of these articles can be accessed through China National Knowledge Infrastructure (CNKI) on-line documentation page on the web at URL http://www.global.cnki.net/.
12 This review includes a wide range of studies in terms of levels of analysis and basic questions. More specifically, Law discipline-based journals such as Law Science, Global Law Review, Legal Forum and Hebei Law Science; police-oriented journals such as Policing Studies, Journal of Chinese People’s Public Security University (Social Sciences Edition) and Journal of Fujian Public Security College; procuratorate-oriented journals such as Journal of National Procurators College and People’s Procuratorial Semimonthly; and Interdisciplinary Journal journals such as Legal System and Society and Journal of Political Science and Law are included. Accordingly, authors of these selected articles are from a wide variety of fields, including academic scholars, police officers, procuratorates and government officials.
pain of suffering, Article 43 of the Criminal Procedure Law of the People’s Republic of China (CPL), Article 22 (4) of the Police Law of the People’s Republic of China (PL) and Article 247 of the Criminal Law of the People’s Republic of China (CCL) do not draw a line between “torture” and “other acts of cruel, inhuman or degrading treatment”. It is also worth noting that, in accordance with this broad scope of torture, Article 247 of the CCL further specifies that when torture does not cause “injury, disability or death”, the appropriate sentence should be less than three years of prison incarceration or criminal detention, and when torture leads to “injury, disability or death”, the judicial officer can in serious cases be punished by life imprisonment or death penalty. Chinese law thus uses a rather broad definition of torture, not requiring the action of the police to be “severe” or reach a certain level of intensity.

According to Xiaoyong Liu (2005) the police understands torture as “any painful means, physical or mental, to get the truth form a suspect” (pp.14-16). This includes forms of techniques that do not leave any physical traces. Some of them include implicit threat—having crying issue from a suspect’s wife or mother-in-law from a neighbouring room (p.16), whereas others—such as keeping food and drinks from the suspect (p.15)—do not.

Chinese academics define torture as any act by which corporal treatment or quasi corporal treatment is inflicted on a suspect or a defendant to coerce confessions by judicial officers (Wang & Chai, 2005; Zhe, 2005; Xu, 2008). Corporeal treatment refers to physical coercion inflicting pain directly on the body, such as beating, electric shock or being kept hanging for hours by the arms. Quasi-corporeal treatment refers to physical or psychological coercion inflicting pain (physical or mental) indirectly on the body, such as through sleep deprivation, deprivation of food and drink, exposure to cold or heat, forcing to stand for days at a time or to be made to sit in uncomfortable positions (Xu, 2008; Gai & Li, 2007; Lin, Zhao & Huang, 2006). As this definition does not distinguish between more and less abusive forms of it, Lin, Zhao and Huang (2006) have stated that attention should not be centered on classic brutal abuses alone; ‘untypical’ methods, such as standing in the sun for a long time can be cruel enough (p.123). Clearly, Chinese legalists stick to the due process requirement of voluntary confession as a basis for limiting certain techniques. The interrogation practice should adhered to the rule that any valid confession must be “voluntary” and thus cannot be the result of coercion (Mou, 2005). Thus, torture is torture, no matter what techniques it is, it says in effect (Lin et al., 2006; Yang & Zhang, 2003). The most prevalent torture practice, lengthy questioning by relays of police officers (Wu, 2006b), could brutally accomplish the same results as the more abusive practices. Both practices enable the police to exploit the suspect’s vulnerable position, allowing them to compel him to incriminate himself.

13 First, Article 43 of the CPL provides “Judges, procurators and investigators...shall be strictly forbidden to extort confessions by torture (xingxunbigong 刑讯逼供)”. Second, Article 22 of the PL provides “People’s policemen should not extort confession [from the suspect] by torture or subject criminals to corporal punishment or maltreat them”. Additionally, torture is enacted as a crime under the CCL, “Any judicial officer who extorts confession from a criminal suspect or defendant by torture... shall be sentenced to fix-term imprisonment of not more than three years or criminal detention. If he causes injury, disability or death to the victim, he shall be convicted and given a heavier punishment in accordance with the provision of Article 234 or 232 of this law” (CCL, Art. 247).

14 “A term of criminal detention shall be not less than one month but no more than 6 months” (CCL, Art. 42).
Hence, considering that this article is based on a review of Chinese academic literature, the term “torture” will refer to the following broad concept: any act by which corporal treatment or quasi corporal treatment is inflicted by judicial officers on a suspect or a defendant to coerce confessions.

2.2 The phenomenon

For obvious reasons, obtaining the information necessary to determine the true extent of the torture based on which a confession has been obtained in a criminal interrogation, is nearly impossible. For evident reasons, interrogation remains for the most part shrouded in secrecy. Most interrogation occurs in the bowels of a police station, off tape, unscrutinized by the public, the media, or the criminal justice system. Although it is often intentionally hidden from view, during the last 15 years, a growing body of academic literature on abusive police practices in criminal investigation, media accounts, as well as official statistics, indicates that a substantial number of police confessions based on torture, have in fact occurred.

According to the fourth report from the Chinese government to the CAT, between 1999 and 2004\(^\text{15}\), there were 541 cases involving 566 persons who were sentenced by extorting confessions through torture.

However, as Ma and Peng (2006) have observed, the existing official statistics only document the tip of the iceberg. In fact, most torture cases are not reported or prosecuted unless they result in death or detectible serious injury (Ma & Li, 1999; Wu, 1998). Clearly, Ma and Peng are not alone in suggesting that torture confessions occur with greater frequency than officially reported. Many Chinese scholars, relying on different sources like interviews with present and former law enforcement officers or individual field observations, have made the alarming assertion that the tortured confession problem is widespread in China. Zhou (2006) claimed that “it is certain that confession by torture still occur regularly in criminal investigation...it is an unwritten rule in law enforcement” (p.117). Yang and Zhang (2003) referred to this “unwritten rule” of using torture in criminal interrogations as a “subculture” in law enforcement. According to Hu, S. Y.,(2007), Senior Procuratorate of the People’s Procuratorate of Guangdong Province, “Extracting confessions by torture is a national wide problem...and this problem is even more alarmingly in certain places” (p.109).

These claims hold up under scrutiny as there is sound empirical proof that torture practices are not used only in exceptional cases. Liu, L. and Liu, C. (2004) was particularly struck by the result of an earlier study which was based on questionnaires sent to 200 college students who were criminal investigation majors and had attended internship programs in the Public Security Department. To the question: “Is torture a common phenomenon in the criminal interrogations you have attended?”, 95 per cent of the students chose the answer “very common” (Liu & Liu, 2004). In recent research, the result of a survey, involving 487 police officers in Hunan and Hebei province of China, showed that 51.6 per cent of police officers considered interrogational torture an exceptional practice which happened from time to time. However, it should be noted that 38. 9 per cent of the police officers considered interrogational torture to be a common phenomenon, which happens regularly (Lin, Yu & Zhang, 2006).

\(^{15}\) Chinese version of fourth periodic report, pages 36-40.
2.3 Evolution of torture techniques

The torture techniques change over time. During recent years, media accounts of miscarriage cases generated increasing public concern about the problem of torture in criminal interrogation (Wu, 2006b). Such scandals, together with the rise of “human rights” norms generally, and a more strict monitoring particularly, have lead to the evolving of torture techniques from swifter, more painful techniques to more time-consuming and clean techniques (Ma & Peng, 2006). In outlining the evolution of torture techniques, Ma and Peng (2006) have identified three main stages: in the first stage, which started in the early 1980s and continued until the end of 1990s, corporeal treatment such as beating and electric shock, were the major torture techniques that were used. At times, the police even tortured the suspect in public, using the bodies to advertise state power and to deter others from similar behaviour. In the second period which lasted until the end of the 20th century, the police favoured causing pain that intimidated the suspect alone. In contrast to ordinary forms of direct physical abuse, more covert interrogation practices employed by the police—exposure to heat or cold, for example, or deprivation of sleep, food and drink—were used to leave few or no signs of injuries on the suspects. Comparing to corporeal techniques, these techniques are more time-consuming but can still produce the same coercive effects without impairing the police’s ability to obtain confessions. Notably, the police who favour painful coercion also used and combined clean techniques to avoid raising too much alarm. Finally, there is the current era, the beginning of the 21st century to the present, in which interrogation practices involving physical brutality and scarring techniques became even less common. The police may leave scars as they pursue these aims, but these tend to be incidental.

Some other studies have also shown that the police tend to more covert coercion nowadays. The trend has involved moving away from brutally scarring violence towards other forms of clean torture (Liu & Zuo, 2005; He, 2006). Wu and Ma (2008) found the most common torture methods are relay interrogation, deprivation of sleep, food and drink, exposure to cold or heat, forced kneeling and slapping in the face.

Although it may be true that the police increasingly tend to use clean techniques, there is at least one pocket of cases demonstrating that the “classic brutal techniques” are used “when necessary” (He, 2006). By examining a collection of torture cases that resulted in death in the Zhejiang Province over the last ten years, Dong (2004), Chief Police Inspector of Zhejiang Provincial Public Security Department, has cited numerous examples from these cases, including some that involved the use of clubs, leather belts, electronic wire, or using the “water cure,” which involves pouring water slowly into the nostril of a suspect.

2.4 The role of police stations

Interrogational torture has an elective affinity to certain conditions of time and space. It has been frequently alleged that police interrogational torture takes place in pre-trial detention (Huang, 2002; Tao, 2005). However, “pre-trial detention” is too broad a word to capture the real scope of the problem. According to many scholars and procuratorates, empirical evidence shows that police interrogational torture is most likely to occur at the police station at the basic level (paichusuo) in which the police conduct...
lengthy interrogations employing a range of torture tactics (Zhao, 2006; Zhu, L. B., 2006). In a study of a collection of torture cases result in death, Dong (2004) found 73 per cent of these cases occurred at these police stations at the basic level. Because these studies indicated the importance of interrogation in the police station, further studies were commissioned into police interrogation practice happening before the suspects’ being put into custody or arrested. Based on data of 60 criminal cases in 2004 from a Chinese district court, Ma and Peng (2006) found that 85 per cent of the suspects either confess or make incriminating statements to the police before being moved to the detention house, and 91 per cent of those first confessions happen in police premises. A subsequent study examined the “clue function” of interrogation in facilitating criminal investigations using data from 80 criminal cases from three Chinese district courts for the year of 2003 and 2004 (Liu, 2008). By analyzing the frequency and the time taken for interrogations, both before and after custody, the study showed that the suspects’ confessions in the pre-custody stage have an important “clue function” to the criminal investigation. Liu further stressed the importance of interrogation in the police station and investigation of crime: in the great majority of cases, the police can rely on the suspects’ confessions to get most evidence before the suspects are taken into custody or are arrested.

2.5 Weak victims

Scholars have observed that possible victims of torture generally fall into one social category: the lowest level. Lu (2006) found that torture was disproportionately applied against the poorer and weaker members of society, including those least likely to be represented by counsel. In the study of 100 cases of interrogational torture, Wu (2006b) asserted that torture was especially likely to be employed on the weakest member of the community. Wu further pointed out that those torture victims had been “labelled” by the society and no longer seemed to have rights that police feel bound to respect. In reserving their abusive interrogation practices for suspects viewed as societal outcasts, the police showed a disdain for the rights of the weakest members in the lowest socio-economic groups. This observation was also confirmed in another similar study. Through deeply analyzing 20 cases of tortured confession in recent years, Chen (2007) indicated that all the torture victims had a lower social status, and the majority were farmers. He concluded that farmers are disproportionately at the receiving end of police brutalities.

2.6 Wrongful convictions

Torture tests endurance rather than veracity, so innocent persons might yield to the pain and torment and confess to actions that they never did (Liu & Zou, 2005; Li, H. L., 2007). Certainly, no one would deny that torture can serve to intimidate or generate false confessions in many cases, which, in turn, can lead to wrongful prosecution, conviction, and incarceration of the innocent. Therefore, based on the assertion of a widespread torture problem in criminal interrogation, one would expect to see hundreds, if not thousands, of wrongful convictions happening each year. The articles reviewed, however, provide a more nuanced picture.
Ma (2006) asserts that police-induced false confessions are rare. As already discussed, the main purpose of using torture in criminal interrogations is to coerce confessions. If torture never achieves its purpose and, indeed, is harmful not only to the victims but even to the police themselves, then the obviously question is why any rational police would ever engage in it. Actually, the police are aware of the danger of coerced evidence, and make special efforts to try to make tortured confession reliable (Gai & Li, 2007).

In practice, the use of torture is governed by various rules, thought to minimize the possibility that false statements would be elicited (Ma & Peng, 2006). First, torture is not supposed to be used to wring out an abject, unsubstantiated confession of guilt. Rather, torture is supposed to be employed in such a way that the accused would also confess to details of the crime—information which “no innocent person can know.” Further, the information admitted under torture will be investigated and verified to the extent feasible. For example, if the accused confesses to a murder, he is supposed to be asked where he put the weapon. If he says he threw it to the river, the police officer is supposed to send someone out to find it, so that when fetched, it could corroborate the confession. Finally, the requirement that the police verify the inter-relationships of all the evidence is universal and actual corroboration is required. Ma and Ni (2002) argue that, when properly utilized, currently “torture” interrogation technique does not necessarily lead to miscarriage cases.

For a variety of reasons, these arguments are inadequate. The reliability of confessions extracted under torture depends considerably upon the prohibition of suggestive questioning (Ma & Peng, 2006). The interrogator is supposed to elicit evidence, not supply it. Especially, if the accused has been “identified” by the victim or eyewitnesses but was still innocent, the interrogator’s suspicion might be enough to let him adopt any means to elicit the answer he wants to hear (Ma & Peng, 2006; Chen, 2007). Additionally, in some jurisdictions the requirement of verification was not enforced or was enforced indifferently (Chen, 2007). Modern technology would probably allow the police to do a better job of winnowing suspects. There is, however, no escape from the reality that information extracted under torture comes with no guarantee of reliability. As Cui (2003) points out, “Although confessions elicited by torture are not always false, wrongful convictions, with no exception, are all because of torture” (p.26).

3 Explaining torture

Literature on the causes of police torture in criminal interrogations covers a wide range of topics in terms of levels of analysis. Indeed, complex social phenomena can rarely be the direct consequence of any singular factor. Rather they are the product of various overlapping and reinforcing forces. Despite the breadth in terms of phenomena, we have discerned general patterns in the scholarly literature on this domain and have organized these accounts under three, obviously linked, dimensions: the law, the organisation and structure and culture.
3.1 The law

The traditional Chinese criminal justice system which was dominated by the ideology of “crime control” emphasizes substantial justice and truth-finding (Wan, 2005). In the long history of Chinese crime control, there were few safeguards to protect the suspect from the state, if it were to abuse its powers. Notably, from the Zhou dynasty (1066—256 B.C.) to the Qing dynasty (1644—1912), torture was permitted to be employed against suspects to investigate and prosecute crime before the courts (Yan, 2004). Even after the founding of the People’s Republic in 1949, China went through a historical vacuum with regard to Criminal Procedure Law for almost 30 years. Only in 1979 China had her first Criminal Law and Criminal Procedure Law (CPL 1979) in place, and this marked the beginning of China’s legal redevelopment (Ma, 2003). However, due to unavoidable historical limitations, the rights of the suspect were still marginalized by CPL 1979 (Fu, 1998). In an effort to progress towards judicial democratization and fairness, China revised CPL 1979 in 1996. The existing CPL, however, in many aspects, is criticized for not finding a balance between law enforcement and individual rights. Most prevailing interpretations of the police abuses emphasize the gaps or ambiguities in the CPL. More specifically, it is commonly held by legal academics in China that the lack of adequate safeguards of the suspect’s procedural rights at the investigatory stage have resulted in the problem of widespread police interrogational torture (Wu, 2001; Zheng, 2004; Zuo, 2005; Bi, 2007).

3.1.1 Interrogation in secrecy

Though police torture in criminal investigations is part of the dim and dark history of Chinese criminal investigation, today’s China, by virtue of provisions of criminal procedure and criminal law, is seriously against the practice wherein suspects or the accused should be forced, by actual or metaphorical “arm-twisting”, to respond to police questioning. The CPL declares that “the use of torture to extort confession and the collection of evidence by threats, enticement, deceit or other unlawful methods is strictly prohibited” (CPL, Art. 43). Further, torture is a crime. The CCL stipulates that any judicial officer who extorts confession from a criminal suspect or defendant by torture is subject up to three years’ imprisonment. If the use of torture results in serious injury or death, the responsible persons can be given a heavier punishment in accordance with the provision on assault or murder. Aggravated assault and murder can in serious cases be punished by life imprisonment or death (CCP, Art. 247, 234, 232). The stiff penalties, however, have not had a deterrent effect on the judicial officers. Many scholars have acknowledged that the present legislative restrictions sometimes provide inadequate restraints on pernicious interrogation practices because of the difficulty in determining what transpires during police interrogation (Huang, 2002; Li, 2003; Zheng, 2004; Bi, 2007).

Absence of neutral actors

One of the reasons leading to this low visibility lies largely in the places where the interrogations take place. Under the CPL, the police are given the power to interrogate a suspect under two circumstances:
(1) The police may interrogate a suspect after he or she is detained or arrested and taken into police custody (CPL, Art. 65, 72); and

(2) The police may summon a suspect who need not be detained or arrested to a designated place in the city or county where he or she stays for interrogation, or the suspect may be interrogated at his or her residence (CPL, Art. 92).

In the first situation, generally speaking, the suspect who is detained or arrested must only be questioned in the detention house. If in the second situation, the CPL grants the police the discretion to decide the interrogation places. Since the CPL contains no guidelines as to choosing the summon locations, the police in almost all cases choose to summon the suspect to the police station or to some covert locations rather interviewing he or she at home (Wu, 2006b; Bi, 2007). It has been argued that since the detention house and the police station are both “police territory”, it cannot be wrested from police control, and there is enormous scope for police abuse. Especially, it has been frequently alleged that the detention house is potentially most coercive for the suspect based on the following reasons: Firstly, the detention house, which is under control of the public security organ rather a genuine third party, is secretive and dark corner of criminal process that are in practice almost impervious to external scrutiny. Hence due process safeguards for suspects in the detention house are much weaker than they appear, and could not avoid the police’s manipulation of custodial conditions and interrogational violence. Secondly, concerning the interrogations in the detention house, the CPL only requires the police to interrogate a suspect within 24 hours of the detention/arrest, but rules about refreshments and rest breaks for the suspect are not laying down (CPL, Art. 65, 72). These are grim consequences, and interrogations may take place overnight (Huang, 2002). Hence some scholars have asserted, making the rights of suspects dependent on the police or custody officers, but not on a genuine third party, does not subject the behaviour of the police to proper control and scrutiny (Hu & Jin, 2001; Chen, 2006).

Low visibility of interrogation process

The CPL confers powers on the police to interrogate, but also seeks to protect suspects from the abuse of such powers by granting to suspects certain rights and protections. First, to guarantee the suspect’s defence rights, the police may begin interrogation only after the suspect is given the opportunity to make an initial statement with regard to his guilt or innocence (CPL, Art. 32, 93). Secondly, the suspect can refuse to answer questions which are irrelevant to the case (CPL, Art. 93). Thirdly, the use of torture, threats, enticement, deceit or other unlawful methods to coerce statements is strictly prohibited (CPL, Art. 43). Fourthly, to avoid the police’s over-enthusiasm in eliciting confessions, the law of proof no longer requires confessions in securing conviction (CPL, Art. 46). Finally, the CPL requires that the written record of the interrogation is checked by the suspect with the aim of ensuring that the court is provided with an accurate record of what was said by both the police and suspect during interrogation (CPL, Art. 95).

1 Ministry of Public Security: Regulation on the Procedures of Handling Criminal Cases by Public Security Agencies. Article 145
However, because the police have the sole responsibility for implementing procedural safeguards, the protections provided by the CPL have often been illusory (Li, 2003; Zheng, 2004; Bi, 2007). Under the CPL, a suspect does not have the right to have an attorney present during interrogation. Consequently, the criminal interrogation process, except in exceptional cases, only involves two parties: the police and the suspect (Wu, 2001). Under such circumstances, written records of interrogation are crucial because they are the only way to know whether unnecessary pressures were imposed on suspects to confess. Unfortunately, a written record of interrogation, which is often referred to as “police creative works”, is considered to be notoriously inaccurate (Chen, 2001; Huang, 2002; Zhao, 2008). It is hardly realistic to expect a police officer to record the torture part of the interrogational process (Ma & Ni, 2002), and it is almost impossible for a suspect to correct or refuse to sign the record (Zhao, 2008).

Due to the low visibility of the interrogation process, most suspects who had claimed that their confessions had been extracted by torture have not been able to present evidence of the prior practices of the police. Clearly, in determining whether a suspect will be able to sustain allegations of police brutality, the presence of injuries is crucial. After the long period of police custody, however, most minor injuries have recovered (Wu, 2006a). If the suspect has no discernible or obvious injuries, the judge hearing the suspect’s motion to suppress his confession, is likely to believe denials of abuse by the police rather than the suspect’s claim that he was subjected to torture but the wounds had already healed during the long period of police custody or that the police had used clean torture techniques that left no marks (Huang, 2002; Liu, 2007). As Wu (2006a) pointed out, even if the suspect can show injuries that appear consistent with his claims of police torture, police testimony establishing another plausible explanation for the suspect’s injuries will provide trial judges with a sufficient basis for rejecting the suspect’s allegations.

3.1.2 Right to silence

In addition to the low visibility of interrogation process, another problem frequently mentioned in relation to torture is the principle of presumption of innocence, related to the right to remain silent. A number of scholars have pointed at the link between the absence of informing suspects of the right to remain silent and the police tendency to use torture (He, 2006; Wan, 2006; Bi, 2007). It is common practice in many western countries that the interrogating officers are required to inform suspects of the right to remain silent before beginning an interrogation (Wan, 2006; Wu, 2007). The CPL, however, requires that at the interrogation a suspect “shall answer questions asked by investigators truthfully” (CPL, Art. 93). Although there is no provision in the law as to the consequences that follow from a continued exercise of silence, such as the suspect would be punished if he refuses to answer the relevant questions, or the court would draw adverse inferences from his silence, the practical effect of the imposition of this obligation is that it has made some officers feel justified in using torture to force suspects to admit their guilt (Wu, 2006; He, 2006).
3.1.3 Legal counsel

The CPL permits lawyers’ involvement at the police investigatory stage, but neither the CPL nor any supplementary regulations contain sufficient procedural safeguards to ensure that the lawyers discharge their duties properly (Fu, 1998; Ma, 2003). In the law, after the first time the suspect is interrogated by the police or from the date coercive measure were used on him, the suspect can retain a lawyer to offer legal advice, or to serve as the representative in the proceedings to file petitions and complaints and apply for a bail (CPL, Art. 96). However, this provision is subject to exceptions in special circumstances. Article 96 of the CPL states that if a case involves state secrets, the suspect shall obtain the approval of the investigation organ to retain a lawyer, and where the lawyer is allowed, he may not meet or correspond with his client without further permission of the investigation organ (CPL, Art. 96). In addition, the police may be present during the lawyer-suspect meetings “according to the circumstance of the case and necessity” (CPL, Art. 96). “Necessity” is subjected to the police interpretations, so the police in almost all cases choose to be present during the meetings between a suspect and his lawyer (Ma, 2003; Gao, 2007). While the CPL provides only the police to be present at a lawyer-suspect meeting, Article 14 and 16 of the Regulation on Lawyers’ Participation in Criminal Procedure Activity issued by the Ministry of Public Security further restrains the lawyer-suspect encounter by granting the police the power to stop lawyer’s “unlawful” conduct or even suspend a lawyer-suspect meeting on the grounds that the lawyer had violated the rules of the meeting place. Facing the restrictions, which were set by the police using their statutorily granted supervisory authority, criminal lawyers often find themselves treading on thin ice, having to inch forward step by step with great difficulty (Chen, 2006; Liu, 2007; Zhao, 2008). Under such circumstances, if the victim of police torture wants to discuss with his lawyer about filing petitions and complaints against the torturer, it is very unlikely that a victim of interrogational torture is given the opportunity to have a thorough discussion with his lawyer about filing complaints against the torturer (Chen, 2006).

Moreover, the most troubling aspect of the rights to counsel provided in the CPL is that it makes it a criminal offence for a lawyer to “help the suspect to conceal, destroy or falsify evidence or to tally their confessions; or intimidate or induce the witnesses to modify their testimony or give false testimony; or conduct other acts to interfere with the proceedings of the judicial organs” (CPL, Art. 38). Accordingly, Article 306 of the CCL states that, “If, in criminal proceedings, a defender or agent ad litem destroys or forges evidence, helps any of the parties destroy or forge evidence, or coerces the witness or entices him into changing his testimony in defiance of the facts or give false testimony, commits the crime of falsification of evidence.” These two articles are comparable to a Damocles sword hanging above the head of lawyer in such a situation (Chen, 2006). According to Xiong (2009), the current CPL as a whole, comparing to the former 1979 CPL, is “one step ahead, two steps back” with regard to the criminal defence. In Fu’s (2006) study of 70 cases of prosecution of lawyers from 1984 to 2006, he found falsification of evidence under Article 306 is the offence that defense lawyers are most frequently charged with in the post-reform era. One of the chilling effects of these two provisions is that many lawyers are reluctant to take on criminal cases (Chen, 2006; Liu, 2007). More than 70 percent of all criminal cases are processed without lawyers appearing in court on behalf of the defendants (Wu, 2006b).
3.1.4 Exclusionary rule

According to Chinese law, confession evidence secured by torture is inadmissible in court, this seeks to regulate police interrogation. Although the CPL itself contains no exclusionary rule, the relevant regulations issued by the Supreme People’s Court state that “the confession of the defendant cannot be used as the basis in deciding a case if it is verified that they are elicited by torture, threat, enticement, deceit or other unlawful means”. This provision, however, has been criticized widely for its “incompletion”, because, under this provision, on the face of it, the court can exclude simply confession evidence, but not any other evidence obtained as a result of the tainted confessions (Liang, 2002; Luo, 2002; Yang & Zhang, 2003; Zhe, 2005). As Wu (2006b) asserted, “given the fact that torture is ordinarily used to lead to other evidence rather than a simple statement, this provision by excluding confessions only is not sufficient to stop pernicious interrogation practices” (p. 157).

In addition, even considering the rule of exclusion of illegal confession alone, this rule appears all too often illusory with the inadequacies of procedural safeguards supposedly underpinning it (Chen, 2005; Han, 2005; Hu, 2005; Wu, 2006a). For instance, if individual suspects claim their confessions were extracted by torture, there is no provision as to whether the court should undertake wide-ranging scrutiny of the circumstances in which the prosecution evidence was obtained, or whether it requires the police or the procuratorate to prove that the confession was not obtained by oppression, or as a result of anything said or done which might have a seriously detrimental impact on the fairness of the proceedings. Without clear and effectively sanctioned rules, it has been recognized that, in most cases, the courts are reluctant to dig deeply to verify the claims of suspects, but have held that all such defenses as being “unfounded” solely on the basis of the police’s “no-torture” written statement (Chen, 2005; Han, 2005; Liu, 2007; Zhang, 2007).

3.1.5 Conclusion

The phenomenon of pervasive interrogational torture underlines a fundamental weakness in Chinese criminal procedure designated to regulate police interrogation practices. Even if the CPL provides guidelines about the content of police interrogation, the guidelines will be effective in practice only if some mechanism is provided that will eliminate the inherent limitations of the fact-finding process. Police who are willing to employ abusive interrogation practices will generally also be willing to lie about employing them. When this occurs, the existing litigation process cannot be expected to do an adequate job of determine what took place during a secret interrogation.

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2 Supreme People’s Court: The Explanation of Problems about Executing Criminal Procedure Law of PRC. Article 61.
3.2 Organisation and structure

3.2.1 Daily operation of the police force

Although some aspects of the problem of interrogational torture are specific to the criminal justice system, and are either concerned with the technical aspects of the legislation or with institution-building, some studies have indicated that many of them have little to do with the criminal justice system as such. Rather, torture, as an extreme means to get evidence, implies the weakness of the daily operation of the police (Hao, 2004). Specifically, the daily operation of the police is undermined by the shortage of budgeted in the police force, poorly trained police officers; the police force is undersized and it functions using underdeveloped investigative methods:

First, the lack of a budget for police investigative work is considered a longstanding problem in China (Han & Liu, 2006; Zhu, X. Q., 2006; Wang, P., 2007). A number of scholars have observed that present day China, which is still a poor country in the process of transition and development, cannot provide a solid financial basis for a “physical evidence centred” investigation model (Ma & Peng, 2006; Zhu, X. Q., 2006; Wang, P., 2007). Contrary to this point, Chen (2007) argued that the importance of increasing national investment in criminal investigation has never been fully recognized by the Chinese government. Clearly, since the advent of an open economy and a reform policy, China has experienced a significant rise in crime as well as an accompanying change in crime patterns (Wang, 2001; Liu, 2004; Chen, 2007). To meet these crime challenges, there was an urgent need in practice to increase investigative investment in personnel and technology. The fact, however, is that the Chinese government’s financial input in the case of criminal investigations did not increase correspondently (Han & Liu, 2006; Chen, 2007). An example was given by Ma and Peng (2006), who report a police officer saying that the annual budget for investigation uses was only € 600 per person. Due to the limited budget, some forensic techniques of crime procedure, like DNA testing, cannot be employed, and the police officers also avoid long-distance tracing as much as possible. Therefore, if police officers fail to unearth, recover, procure, amass, sort, compile, test, evaluate and arrange numerous “clues” to form a strong “evidential basis” as compelling proof of the offenders’ guilt, they will rely on the investigational model of “from confession to evidence” to find sufficient objective evidence to conclude a case. This model which could make a great contribution to the information flowing into the investigation can save the legal system a great deal of time and money (Liu, 2008). However, as a freely and voluntary confession is indeed not easy to be secured, torture often appears in this “Over-reliance on confession evidence” model (Wang, 2007; He, 2006; Liu and Liu, 2004).

Second, the lack of competence of the police in criminal investigative work is also a considered a salient problem (Wang, 2006). There was a perceived gap between the investigative expertise required and actual detective practice: the Chinese police, generally, are considered to lack investigative skills and are not offered much help to

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3 According to Hao (2004), there are three main reasons why suspects confess: there is plenty of evidence against them; the police make suspects believe that they have a sufficiently strong case against them; sincere remorse. He further points out a relatively strong evidence base and a professional interrogator are the single most important reasons for success.
bring themselves up to date (He, 2005; Wang, P., 2007). Not only is there not enough training offered by the government, but there is also a matter of entry standard, which has not kept up with general improvement (Hao, 2004). Some scholars assert that the poor educational standards of recruits (Lv & Zhang, 2000)—in particular the shortage of graduates—and the lack of training lead to incompetence in criminal investigations in which the police officers often fail to discovery or even incidentally destroy forensic material, such as fingerprints, shoe marks and DNA, available on the crime scene (Tang, 1999; Yao, 2004).

Finally, in many cases, there is simply not enough physical evidence for the police to find. The relationship between the police’s failure to find enough physical evidence and their lacking of professionalism, some studies suggested, should not be overstated (Zuo & Zhou, 2002; Yang & Zhang, 2003; Wu, 2006b). As Su (2005) explained in a thoughtful article, “Judicial tragedies ... are avoidable in a society [Chinese society] with low level of science and technology” (P. 108). It is argued that the lack of wider adoption of proactive methods and intelligence-led models means that the investigation function in Chinese police force is, compared with the situation in other developed western countries, relatively immature (Zuo & Zhou, 2002). In many cases contemporary reactive techniques may not be capable of producing the required evidence (Cui, 2001; Liu, 2004; Wu, 2008). Common crimes such as bill fraud, conspiracy and extortion often present officers with a crime scene that yield no fingerprints, no eyewitnesses and no forensic evidence.

In those circumstances in which there are large number of cases to process and limited resources to process them, Xiaoqing Zhu (2006), vice procurator-general of the Supreme People’s Procuratorate, maintains that the police are often unable to solve crimes in the absence of a suspect’s incriminating statements. And he further demonstrates that “interrogation is still playing an important role in current investigative works” (P. 16) But the problem is, as some studies showed, torture often appears in conditions where the interrogator is incompetent in persuasion, the evidence base is weak and the suspect is reluctant to talk (He, 2005; Tian, 2007; Chen & Lan, 2008).

3.2.2 Structure of the criminal justice system

The pervasive phenomenon of interrogational torture can also be attributed to the “system” of criminal justice that allows it to exist. Most scholars have concluded that the root problem of the widespread employment of torture in criminal interrogation without significant problems for such an extended period to the fact that China whose legal structure relies on an inquisitorial system fails to separate powers to achieve a “fundamental balance” in criminal justice among these three actors: the Public Security Organs, the People’s Procuratorates and the People’s Court (Chen, 2000; Chen, 2007; Liu, 2007). As Chen (2000) observes, vertically speaking, Chinese criminal procedure has a “streamlined-production” structure in which the courts are plagued by problems of lack of independence, limited authority and powers, so the Chinese courts cannot effectively guard against the state abusing its powerful position to prove a case against an individual citizen in order to fulfil its duty of enforcing the criminal law.

Enforcing the criminal law is crucial to every society, but the pursuit of the ultimate social goals of criminal justice must be qualified by the goal of avoiding miscarriages of justice: the guilty should be punished and the innocent left alone (Sanders & Young,
Based on different ways in approaching a rational fact-finding, the criminal justice system has been classically divided as being either adversarial or inquisitorial (Jorg, Field & Brants, 1995). Damaska (1986) departs from this classical classification by distinguishing these two categories in terms of its purpose: conflict-solving or policy implementation. The adversary model regards the criminal process as a visible vehicle of conflict-solving for the state to implement policy, while the inquisitorial model is geared toward the implementation of policy may also served as a vehicle for conflict-solving. Most importantly, these two systems also express different ideologies of how power should be allocated in society. Damaska emphasizes the importance of hierarchical structures of authority to processes of state accountability in inquisitorial systems.

In 1979, after the Cultural Revolution, China adopted the inquisitorial model to rebuild its criminal justice institutions (Davidson & Wang, 1996). It reflected China’s hierarchy structure of authority: a one-party political system, a tradition of centralized government, and a highly politicized and centralized police structure. Although the 1996 legal reforms were intended to transform a traditional inquisitorial system of justice into a more adversarial legal process, the organizational fundamentals—the hierarchical ordering of criminal justice functions—remained unchanged (Chen, 2000).

According to the philosophy of inquisitorial justice, the state can be largely trusted to conduct a neutral investigation into the truth (Jorg et al. 1995), and the fundamental characteristic of the pre-trial process in China is the degree to which all parties, especially the police and the people’s procuratorate, cooperate in investigating crime and bring the case to court (Chen, 2006; Huang, 2006; Ren, 2007;). “Respect the facts” is the key word here (Long, 2004). The police and the procuratorate, which shoulder dual responsibilities of not only having to seek the truth, but also protect the rights of the accused, are expected to carry out a fair investigation by collecting various kinds of evidence, including evidence in the defendant’s favour (CPL, Art. 14, 43). Compared to the adversarial system, due to the faith in the integrity of the state and its capacity to pursue truth, the need for safeguards, for example defense lawyers, is reduced (Chen, 2006). Additionally, as the court reforms in 1996 started to push a hands-off approach to case adjudication, the courts no longer conducted or participated in any pre-trial investigation focusing solely on the review of evidence given in the court and the application of the law (Fu, 1998; Lu & Drass, 2002). Thus, the police and the procuratorate began to play a dominant role in the pre-trial criminal investigation (Zuo, 2005; Chen, 2006).

Concerning the dominant role of prosecution in the pre-trial stage, literature delvers much criticism on the absence of any independent element. Those critiques can be divided, roughly, into two groups:

First, the current criminal justice structure is considered to have failed to provide effective restraints, particularly institutionalized legal restraints, on the power of the police, which indirectly leads to the widespread of interrogation torture (Chen, 2000). According to the CPL, the police enjoy broad power to conduct criminal investigations. Except for arrest which can only be made after approval from the people’s procuratorate, all the pre-trial compulsory measures, such as detaining, summoning and searching are decided, executed and prolonged by the public security organ themselves without the need to seek any forms of judicial approval. As such, some studies...
indicated, this reflects the system’s inherent weakness, because it gives the police force opportunities by aggressive using of their powers of detain, coupled with interrogation (Li, 2003; Zheng, 2004). As Montesquieu (trans. 1989), in his famous work, The Spirit of the Laws, assumed, men will likely abuse power if no constraints exist on their ability to exercise it. Given the high likelihood that the police may do everything possible to facilitate the collection of evidence, especially under tremendous pressure from the Chinese government wanting a decrease in crime to reinforce legitimacy (Dutton & Tianfu, 1993; Hu, M., 2007), many scholars argued, this self-policing mechanism cannot serve as a real safeguard against police misconduct (Ning, 2002; Zheng, 2007). Empirical evidence shows that using torture to force suspects to talk is considered by many police officials as a quick solution to accomplish the tasks settled by the local government of producing a high clear-up rate (Mao, 1999; Wang, 2002; Yang, He & He, 2006). In addition, it was pointed out, because of the common interests between the police agencies and their officers, the internal supervision fails in fighting police abuses. It is common practice in police agencies that the police chiefs turn a blind eye to their officers’ abuses during criminal interrogations (Huang, 2002; Cui, 2003). As a recent survey of police officers reveals, 45 per cent of the officers admitted that the use of torture in criminal interrogation were permitted or were carried out with the acquiescence of the police chiefs (Lin, Yu & Zhang, 2006).

Second, the people’s procuratorates, as a supervision organ, has also been reported to fail to respond with vigour due to its simultaneous task of crime control (Ren, 2007; Man, 2008). According to the law, the procuratorate is authorized to supervise investigations conducted by the police (CPL, Art. 8). A People’s procuratorate must ascertain whether the investigative activities have been lawful through approval or denial of a proposed arrest and by reviewing the case before making a decision on whether or not the suspect should be prosecuted. (CPL, Art. 137). The procuratorate has the power to investigate cases where the police may have committed a crime, for example, by torturing the suspect (CPL, Art. 18). However, all too often, the supposed safeguard against oppressive police practices offered by prosecution control of the investigation and the complaints process is a little more than a façade. Wu (2006b) provides several examples where, when the procuratorate did act upon clues or complaints, the way in which they acted, whether or not to file a case concerning police torture, was decided according the working rules listed below: First, if the interrogation does not result in death or detectible serious injury, the case will not be reported; Secondly, if the evidence to prove the fact that the suspect has committed the crime is verified and sufficient, even if torture is involved, generally, the case will still be processed for prosecution. Finally, in those case resulting in “serious results”, in most instances, Politics and Law Committee\(^4\) would first mediate on the conflict between the police and the victim and then decide whether or not to file a police torture case. In fact, police officers have sometimes received disciplinary sanctions, but rarely have they been prosecuted (Su, 1994; Si, 1998; Wu, 2001). Clearly, in most instances, the best predictor of what will

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4 The local politics and law committee (zhengfa wei) is a department of the Local Chinese Communist Party Committee. The main function of the politics and law committee is to assist the works of the local courts, the procuratorates, and the police by providing guidelines, and it is not supposed to interference with those three organs’ daily operations (Chen, 2007). However, at the level of everyday experience, party organizations and individuals persist in influencing and interfering with the judicial process (Liu, 2007, Chen, 2007; Han, 2005). According to Su (2007), these interventions are mainly driven by “local interests” rather than the Party’s or particular party organization’s will.
be deemed unacceptable is still the reliability principle. Liu’s (2007) explanation for the infrequency of punishment is that the people’s procuratorate has intimate connections with investigation organs and is charged with the task of combating crime, which compromises its neutrality.

For reasons discussed previously, the presupposition that the inquisitorial system is fair and legitimate has been undermined. Without the intervention by any judicial power, it was alleged, such unequal distribution of power at the pre-trial stage put the rights of the suspect under high risk of power abuse by the state’s investigators and procuratorates (Zhang, 2006; Wang, Z. Y., 2007). Moreover, many scholars have shown that the lack of “equality of arms” to the suspect to guard against or uncover wrongdoing prior to conviction is a further cause of the ingrained pattern of interrogational torture (Tao, 2005; Wan, 2005).

Seen in this way, the pre-trial criminal investigation resembles a conveyor belt in its operation, and some scholars have argued that there is a no party contest in the court as well, and the truth-finding process simply continues in court (Chen, 2000; Liu, 2007). The courts, in general, are plagued by problems of the lack of independence, limited authority and powers (Zhang, Han & Tan, 2007). As the judicial reform removed judges from involvement in criminal investigation at the screening phase of the process, the judges were expected to become neutral arbitrators, who decided a case based on the evidence given in court. However, under the current situation, when most defendants have no professional defence attorneys to defend them (Lu, 2006; Wu, 2006b), when the great majority of citizens are unwilling to come forward as witnesses (Wan, 2007), and when the courts with limited authority to conduct judicial review (Han, 2005), the trial process aimed at hearing powerful arguments on both sides degenerates into sheer formality. Additionally, as Yi (2008) argued, the checks and balances function of the court tends to be further undermined by the political-legal system of the Chinese Communist Party (CCP). Party organs, however, are rarely involved directly in deciding the outcomes of specific criminal cases. Rather, interference by the local governments is much more common. Knowing that the local government’s eager for stability, the judges who are selected by the local people’s congress and receive their salaries and other welfare benefits from the local governments are aware that a finding that the police employed brutality towards a suspect in interrogation may let the guilty go free, and this result may create unfavourable results for their careers (Han, 2005; Liu, 2007). Thus it is not surprising that, in the absence of compelling evidence, the judges generally refuse to credit suspects’ claims that their confessions were extracted through torture. Furthermore, by analyzing most recent interrogational torture cases, Wu (2006b) discovered that legal authorities also showed a leniency towards the police involved in interrogational torture cases, and the punishment rarely corresponded to the severity of the crime. For all these reasons, the courts’ impervious reaction to the claims of abuse, unfortunately, exacerbates the aforementioned interrogational torture problem.

In sum, the existing checks and balances system as a whole is reported as dysfunctional. The uncontrolled powers of state’s investigators and procuratorates at the criminal pre-trial stage have resulted in the ingrained pattern of police abuses in criminal investigations. Furthermore, due to the lack of independence, limited authority and powers, Chinese judges under the existing criminal justice still play a major role in legitimizing the current legal system. Under those circumstances, police
abuses, especially police interrogational torture, are said to occur but go unreported or evoke mild punishment, and this climate of impunity has rendered the human rights safeguards in criminal procedure meaningless.

3.3 Culture

In addition to the discussion focusing on loopholes or shortcomings in the law and the ineffective mechanisms for controlling state powers, many scholars have noticed the cultural support in the background and compliance on which the persistence of police interrogational torture depends. In Chen’s (2003) arguments, while interrogational torture is absolutely coercive and cruel, its exercise depends at almost every level on many forms of cooperation and consensus. This view seems to have been verified by a growing number of empirical studies.

3.3.1 Communitarian society

Research based on interviews with police officers report that Chinese police do not generally think of themselves as evil but rather seem to feel that the behavior of “coerced confession” is justified and they regard themselves as the guardians of the interests of society in combating crime and criminals (Wang, 2002; Wu, 2006b). Notably, some senior ranks also share a similar view that the ends – getting the bad guys – justify the means (Yang & Zhang, 2003; Lin, Yu & Zhang, 2006). Even more worrisome, police officers who accomplished the ends by torture tactics were protected, praised, rewarded or promoted (Cui, 1998; Wu, 2001).

Although virtually everyone continues to ritualistically condemn torture in public, the deep conviction, as reflected in the following empirical evidence, is in many cases not to be found behind the strong language. According to Wu’s study (2006b), media’s accounts of abusive police practices either in general or in specific cases have generated increasing public concern about police’s use of torture in interrogation in recent years, but it seems that the citizens only showed their sympathies to those who were innocent but not to the ones with “real guilt” (Wu, 2006b; Liu, 2007). One typical example is the Liu Yong case. Liu Yong, a Chinese mafia kingpin, was sentenced to death by the Tieling Intermediate People’s Court of Liaoning Province on April 17, 2002, but during the second court procedure on the case on August 15, 2003, the Liaoning Higher People’s Court awarded a two-year reprieve on his sentence. The court attributed the alteration to “the possibility of police’s use of torture during Liu Yong’s interrogations cannot be excluded.” This revised verdict made waves across the country, leading to a strong resentment among the general public. Eventually, the Supreme People’s Court retried the case and sentenced Liu Yong to death (Liu, 2007). Additionally, in terms of the public perception of police interrogational torture, a survey conducted in 2006 shows that the public’s attitude towards police interrogational torture is tolerant even supportive (Lin, Zhao and Huang, 2006).

More generally, in a collectivism context, the Chinese public shows more concern for public security rather than individual rights and give high priority to stability (Lin, Yu & Zhang, 2006). A massive sample survey conducted in 2005 throughout March and July questioned about 4000 people including judges, procuratorates, lawyers and the general public (Ma & Peng, 2006). The final conclusion of this survey was that there
is still a big gap between the legal sense of Chinese citizen and the requirements of the rule of law. When asked which one they thought was more important, effective crime control or suspect rights protection, 90 per cent of the people chose the former. More specifically, the severe strike campaign practice, which is often considered as harsh, arbitrary and extralegal, is very popular with the people. This is largely attributed to the high crime rates in the post-reform period and strong public outcry for more punitive measures towards offenders (Dutton & Tianfu, 1993; Luo, 2002; Jing, 2007).

3.3.2 Traditional Chinese values

Seen in this way, the majority of the scholars tend to see a fundamental conflict between traditional Chinese values that emphasize harmony, order and collective interests, and human rights, which mostly pertain to values such as dignity, equality, individual rights and the rule of law. Are Confucian collective values considered incompatible with the idea of human rights? Several accounts are offered by Chinese scholars.

First, the Confucian idea of the individual existing only in the context of society, as well as the importance of the community and duty has prevented giving importance to the idea of a completely autonomous individual (Jiang, 2003; Fan & Zhang, 2004; Yan, 2004; Li, N. L., 2007). The concept of ritual propriety (li), which is one of the core values of Confucian thinking, was argued has led to a conception of the self that is always seen in its social context. Ritual propriety (li) refers to ritualistically proper behavior in all circumstances of life, spanning from ordinary daily activities to special ceremonies. According to ritual propriety (li), the family code is a parent’s (especially a father) authority over children, a husband’s authority over his wife, and the veneration of age were the fundamental values of traditional family systems (Grant, 1989; Ren, 1997; Yan, 2004). A related moral code is that a family’s interests should always be more important than an individual’s interest. Thus, individual rights, interests, and privacy got little attention in traditional China (Jiang, Lambert & Wang, 2007). As Twiss (1998) demonstrates, in Confucianism a human is a social being, that duties of an individual toward its community are of a primary importance, and that social relationships are fundamental to communal flourishing.

Second, Confucianism with its emphasis on a hierarchical (e.g., filial piety) order in society, group orientation, and morale, rather than on legal-based behavioral principles leaves society open to authoritarian and despotic rule (Chen, 2003; Liu, 2007; Zheng, 2007). As mentioned earlier, the rules that define family life are mainly hierarchical and reciprocal. Importantly, Chinese family relationships were perceived as model relationships for other social settings, and these relationships were extended to society and state affairs (Ren, 1997; Chen, 2003). For example, the emperor, as a father in the family, had an absolute authority over his ministers, lower-level officials, and citizens. Thus, “the government was nothing but a projection of the patriarchal family, and the virtue which justified the sovereign's holding of the throne was a projected family ethics, there could never be a government of laws as practiced in the West, but a government of men” (Ren, 1997, p. 25). While constrained to some extent by moral norms and social expectations, the ruler remained the ultimate authority who had the power to promulgate and change laws, and remained above and beyond the law. In this sense, the citizens may sometimes “serve as ideological sanction for wielders of despotic authority” (Kwok, 1998, p. 91).

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Finally, Communitarianism and collective values that encourage confessions, may make the rights to silence in criminal procedure meaningless (Li, 2002; Bu, 2003). Traditionally, confession with sincere remorse is strongly encouraged in a communitarian context because of its correctional value for the offender and restorative value for society (Haley, 1994). A cultural expectation in China is that individuals should be submissive to legal authorities and exhibit sincerity in their repentance for unlawful actions (Lu & Miethe, 2003). Denial, in the communitarian context of traditional China, reflects badly on an individual as it signifies one’s refusal to take responsibilities for one’s action (Chu, Bodde & Morris, 1973). If the suspect is reluctant to confess, this moral responsibility of the suspect, however, may consequently make the interrogator feels justified in coercing incriminating statements from the suspect (Bu, 2003).

It seems that Confucianism is especially helpful for underpinning a strong government, especially the current Chinese government, because it emphasizes a morality that accepts hierarchical structures (Zhao, Zhang & Li, 2005; Liu, 2007); it stresses harmony and cooperation and can therefore be used to reinforce the state nationalism; it has traditionally served the interests of the authority and has always looked for official integration into the state (Yan, 2004); and, more importantly, it has never been successful to adequately address the need to protect individuals against the state (Zhou & Lu, 2002).

Traditional Chinese values, which stress community, order and harmony, have a tendency in prioritizing public interest over that of individuals. Since 1978, several important factors, such as the economic reform and “open door” policy, have led China to a trend toward a more individualistic society. It is worth noting, however, that the traditional culture preference putting great emphasis on community related values remains evident due to the influence of deeply rooted Confucianism and the traditional moral order. As Ma (2003) put it, “In the criminal justice practice, this cultural preference probably has fostered and helped to justify the belief that even legally guaranteed individual rights can be disregarded and sacrificed for the interest of society in crime control and crime prevention” (p. 508).

4 Discussion

This literature review shows that Chinese legal scholars have devoted considerable attention to the subject of police interrogational torture and have provided rich information on the phenomena. However, it is also clear that the published studies in the area have showed a number of serious limitations.

First, it seems that the Chinese criminal law system has been subject to particularly scratching criticism, in part because legal scholars are measuring the legal system against the standards of an idealized version of “due process” standard that does not exist in reality anywhere and looked at criminal defence in common law jurisdictions to study how the rights of an accused could be better protected in China. It is noted that most of the studies have concluded with recommendations for grafting important adversarial elements, such as the presumption of innocence, the privilege against self-incrimination and the conception of impartial passive judge, onto what remains an essentially inquisitorial structure. The difficulty with these proposals is that they were not grounded in a proper theoretical understanding of adversarial philosophy.
accordingly failed to resolve the contradiction, for example, between supporting both the inquisitorial idea of the investigating interventionist judge and the adversarial ideal of the impartial passive judge. Misreading rationality underlying the adversarial procedures is likely to lead bad policy choices. In this way, scholars are likely to be either too pessimistic or too optimistic—either there is no fundamental change or Chinese criminal legal system will finally be liberalized (Fu & Chang, 2008; Tan, 2008) if the ever-expanding list of rights is “realized” on the paper.

Second, it is often claimed that police torture generally takes place in pre-trial detention and the detention house is potentially most coercive to the suspect. One problem with these overly generalized approaches is they would present a wrong image that the checks and balances mechanism within the police force as a whole is a failure, overlooking differences between and within forces. The literature review also shows that a limited number of studies based on empirical evidence have recognized that interrogational torture is most likely to occur in the basic-level police stations. Zhu, L. B., (2006), who is the lecture in the Sichuan Police College, explained why the police favoured more to interrogate suspects in the police station than in the detention house, and one of the reasons is the relatively open environment in the detention house with police officers from another force around makes the interrogator feel uneasy to adopt extreme interrogative tactics towards the suspect. This point is also confirmed by the police interviews in the Ma and Peng’s study (2006). It is crucial to recognize such differences, avoid over generalizations and support the arguments with empirical evidence.

Third, in nowadays discussion on protecting suspect’s rights in interrogation cases, most proposals are from “top-down” perspective, trying to solve the system’s problems, and very little has been “bottom-up”, taking account of law enforcement’s interest in finding evidence and obtaining confessions. Hu (2008) was actually aware of the problem posed by the fundamental dilemma of “truth” and “justice”, “As the legislation becomes more strict on interrogation but there is still no improvement of the methods used to find evidence, facing the high pressure of solving crimes” he wrote, “the police will continue to rely on confessions to obtain useful evidence” (PP. 40-41). Hence it is important to remember many of the more successful reform initiatives have been bottom-up proposals from those in the trenches who are confronted with practical problems in their daily work. Zhuhai Municipal Procuratorate’s practice is a good example here. By changing officers’ attitudes and approaches towards the suspects and their relatives, the local procuratorates have witnessed the increasing number of confessions with sincere remorse (Fan & Zhang, 2002; Fan, 2004). This successful experience suggests that there is ample scope for crime reduction by paying more attention to the social and cultural context.

Fourth, in order to find a balance between the state and the suspect, most Chinese legal scholars favour the idea of comprehensive institutional reforms to reinforce judicial independence. Of course, how power is to be controlled and allocated in a state is the key to individual rights protection. It is worth noting, however, that it is unlikely that the Chinese criminal justice system will take a complete turn towards a system that is based on the separation of powers model. Rather than racking one’s brains to propose a purely new system to restrict state power, it might be more useful to try to figure out some necessary institutional changes to realign power between the branches of the criminal justice system to ensure the rights of the suspect a fair trial.
Fifth, the scholars’ arguments of Confucianism values may impede the promotion and protection of rights and the individual rights would be better protected by Western idea of human rights remain contested. There is good reason to sceptical about the potential danger of ever expanding state power being strengthened by collective Confucianism thinking could lead to the insufficient protection of individual rights. However, it seems this account is strongly influenced by the Western philosophy of “a neutral state”, because traditional Chinese culture actually considers the state interference, which is represented by defining substantive moral agenda for society, is necessary. Specifically, most Chinese citizens do not view the police as a force limiting their freedom, but a service resource that they rely on (Jiao, 2001). In addition, for scholars advocating autonomy and authority-challenging individuals, it bears noting that the danger of achieving the goals, such as standard-setting and consciousness-raising, by at the expense of the values that a communitarian society embedded in. Given the fact that the high crime rate in the post-reform period resulting in strong public sentiments for great punitiveness toward offenders, raising more “self-centred” awareness among citizens in a still collective society giving high value to stability is most likely to intensify social cleavage rather than alleviate it. As Peerenboom (2002) rightly argues, “it may be too late for Western liberal democracies and the USA in particular to turn back the clock and avoid some of the extremes of radical diversity, autonomy, and individualism. But it may not be too late for China” (p.546). Hence, Wong’s (2007) advocacy for a more inside-out and a bottom-up approach in Chinese policing study is also valid here. Considering that there is still no meaningful consensus on human rights (Peerenboom, 2002), and the rich spirit of humanism (Xia, 2001) in the Chinese tradition, it is reasonable for Chinese citizens to aspire to an alternative vision of human rights which includes both hierarchical and egalitarian aspects. In a recent empirical research of the relationship between Chinese traditional values and Western human rights, Kaempfer (2006) also expressed her belief that Chinese traditional values have something to offer to the broader discussion of human rights.

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