PROTECTING EUROPEAN CITIZENS AGAINST INTERNATIONAL CRIME

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INTRODUCTION

At its meeting of 19 and 20 May in Madrid, Notre Europe's European Steering Committee devoted part of its discussions to the means of designing a European system for combating international crime. The debate resulted in a number of recommendations which open this publication.

The issue is often, quite wrongly, considered to be "technical". It is in fact an unavoidable pendant to establishing free movement of persons within the European area, itself one of European integration's major promises for ordinary citizens. It would be unimaginable for this gradually emerging area to result in increased scope for criminal activities, and for it not to provide citizens with serious reassurance that they are protected against such activities.

The topic cannot be addressed without accepting the need to depart from our customary Community approach: establishing an area of freedom, security and justice will necessarily give judges a direct role, in contrast to their traditional responsibility of interpreting Community law. Yet in all our democracies judges are *independent*. They can therefore be included in the system neither through a traditional Community approach nor via intergovernmental methods.

The European Steering Committee's thinking thus differs from previous analyses in that it aims first and foremost to be cautious and pragmatic. In this area more than in any other, the point is not to design *a priori* a supranational justice and investigation framework which would not tie in with our national systems, but to bring practitioners to work together, to generate trust gradually and build on this trust to propose together the steps needed to take the system forward. We believe this approach is both genuinely efficient and compatible with the rule of law applicable to all our democracies.

I am most grateful to Elisabeth Guigou for having accepted to steer this study and submit its conclusions to the European Steering Committee. Thanks are also due to the team of experts – Henri Labayle, Wolfgang Schomburg and René Wack – for having contributed their considerable experience to this endeavour. Lastly, I would like to thank Michel Debacq, technical adviser with the French justice ministry, and Jean Nestor, Notre Europe's Secretary-General, for having coordinated it within deadlines which were incompatible with the very idea of coordination. While the findings may not have exhausted the topic, we felt they were worthy of publication not to conclude but on the contrary to serve as introduction to a debate which is only just beginning.

Jacques Delors

CONTENTS

ANNEXES

PROTECTING EUROPEAN CITIZENS AGAINST INTERNATIONAL CRIME

The development of an area of freedom, security and justice outlined in the treaty of Amsterdam and, more recently, in the European Council conclusions of Vienna and Tampere has brought the judicial institutions onto the European stage.

The prospect – one of the major promises of the European integration process – has given rise to great expectations among the general public. It has publicly been called for by national judges, who are demanding to be given simpler and more efficient instruments. It is also the only possible way for a political community based on the rule of law to respond to the threats posed by economic globalisation and the easier movement of criminal activities and illicit funds it entails, and to the challenge of a large internal European market on the point of opening up to new members.

The instruments established to date have failed to overcome the barriers between national law enforcement systems, which criminals use to their advantage. The complex tangle of conventions on mutual assistance in criminal matters, which are not free of loopholes and contradictions, and the unwieldy collection of investigation instruments such as Europol, OLAF and customs and financial cooperation bodies all make for a less than satisfactory situation, which furthermore does not give judicial authorities the role they are entitled to in a system governed by the rule of law.

Yet an overall framework which is simple and efficient, which complies with the law and which is intelligible to ordinary citizens is within our reach.

I- A balanced overall concept

1) Emerging at a time when the European Union has undertaken to draft a charter of fundamental rights, the European area of security must be based on respect for legal values and must clearly provide that those responsibles for law are accountable to the judicial authorities and elected representatives.

2) This judicial Europe must not be designed as an additional framework on top of existing ones. Instead, with a eye to efficiency, it must give criminal judges the means to interpret the law more easily, avoid bureaucratic conflict between law enforcement officials and ensure that their action is legally and democratically sound.

3) The diversity of national criminal procedures is a fact which must be accommodated, along with the gradual harmonisation of rules on criminal matters and penal sanctions, if only within the framework of the Council of Europe The aim is not, therefore, to establish a supranational judicial and law enforcement system, but to intensify contacts between legal practitioners and law enforcement officials, encourage trust rather than rivalry, and harmonise where necessary while coordinating where the latter option is more effective.

4) We would be naïve to identify the borders of international crime with those of Europe, even after enlargement. The European judicial area must be understood as a framework open to all forms of international cooperation, and first and foremost those established within the Council of Europe. This will help it to establish its identity and effectiveness.

II- Decisions within our reach

II-1 Establishing operational cooperation between judicial and law enforcement authorities by incorporating Eurojust, the European judicial cooperation unit provided for by the European Council at its meeting in Tampere, into the treaties.

1) Establishing without delay a "round table" of magistrates responsible for facilitating contacts between national judicial authorities, providing prompt documentation on the rules of law applicable to each case, seeking solutions to divergences in the interpretation of these rules and to instances of inadequate cooperation, and establishing the headquarters of the European Judicial Network. Its operational framework would comprise documentation, translation and interpreting services, liaising with national and Community authorities (notably the Europol bureau and OLAF). Its task would be to provide the Commission, Council and Parliament with the various assessment factors required for giving a political impulse.

2) In line with needs, making it an instrument for responding to requests for assistance from Member States and allowing its national members to take an active part in prosecution procedures by acting as facilitators for their national authorities.

3) Considering the establishment of a special chamber within the CJEC with responsibility for settling disputes arising from the interpretation of agreements or failure to meet cooperation commitments, and the designation of competent national judges or jurisdictions in the event of a jurisdiction conflict on a given criminal case.

4) To achieve further progress, it would be necessary, while pursuing the harmonisation of criminal provisions and penal sanctions, to develop a common body of criminal law in specific areas where only common procedural provisions can allow efficient prosecution and investigation by a European prosecuting authority.

II-2 Giving it responsibility, from the outset, for guaranteeing the legality of the law enforcement system

1) Making Eurojust's scope coincide with the investigation scope provided for under police cooperation and the protection of the Union's financial interests. Europol and OLAF would thus be given a judicial extension, the absence of which is weakening their action today. This core could be extended to include issues relating to cooperation on combating organised crime and money laundering and the prosecution of serious crimes where the jurisdiction of several States are involved.

2) Asserting its duty to guarantee fundamental freedoms within the European law enforcement system as a whole, particularly as regards the management and non-dissemination of data files.

3) Establishing simple and transparent organic links between Eurojust, Europol and OLAF for the purposes of fulfilling these duties. This implies in particular that Europol should remain the organisation entrusted with intensifying contacts between national investigation authorities, in addition to its other tasks.

4) These tasks should enable Eurojust to become established as the appropriate body for initiating proposals on improving the fight against international crime and reporting to the democratic authorities on the functioning of the system as a whole.

In conclusion, we call for:

1) Europol to gradually become a body able to contribute in operational terms to investigations which involve cooperation between several Member States, to the exclusion of any other body

2) the treaties to provide for the prompt establishment of Eurojust as described above

3) without waiting for this institutional move, a provisional judicial coordination unit, comprising 15 magistrates appointed by the Member States, to be established without delay in Brussels as a precursor to Eurojust

GREATER EFFICIENCY IN COMBATING ORGANISED CRIME WITHIN THE EUROPEAN UNION

Henri Labayle
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The establishment of an area of freedom, security and justice decided at Amsterdam – and taken forward at Tampere – has placed the judiciary at the very heart of the European integration process. It is comparatively new for national judges to be in a position to take a direct part in the building of Europe, if we except their traditional powers as guardians of Community law.

This paradox of a judicial Europe in which judges have a very minor role is, of course, compounded by the widely observed and condemned growth in serious crime. Not to mention the spread of new forms of criminal activity, particularly in the field of illicit funds and money laundering, whose use of new communications technologies has caught the European Union by surprise. This new situation (I) requires a precise response (II) to which Eurojust can contribute (III).

I – A new situation

The new position of national judges raises a number of issues, relating to both principle and method. The development can no longer be seen merely as a knee-jerk reaction to the growing threat international crime is posing for the European Union (whether as a consequence of the globalisation of organised crime, the establishment of a single border-free market or the prospect of enlargement). It also responds to a structural need, over and above this functional requirement.

1 – While mutual assistance in criminal matters over the past 50 years has produced a valuable legal framework which can now serve as a legal basis for the continent as a whole, and while European police cooperation is moving into an operational phase with the establishment of Europol, European judicial cooperation has failed to develop at the same pace. The triptych formed by the development of a legal framework, police cooperation and mutual assistance in criminal matters is therefore not balanced, even if we rule out the hypothesis of a European judiciary.

That is one of the factors in the development of crime in the European Union. The late and slow enforcement processes, and the complexity which hinders the procedural security indispensable to any criminal prosecution process, make it easier for criminals to operate with impunity. And the traditional methods of mutual assistance in criminal matters are becoming increasingly inadequate for coping with the new forms of crime. The European Union has now become aware of this.

The need for a reaction to this phenomenon is reflected in the treaty of Amsterdam, which provides for strengthened police cooperation in its Article 30 and a common legal framework complemented by expanded judicial cooperation in its Article 31. The European Council further strengthened this resolve in the conclusions adopted at its meeting in Tampere. Mentioning both the prospects for police cooperation and the need to "*reinforce the fight against serious organised crime*" (point 46), these conclusions have launched a new process.

2 – The new development was inevitable, for the lack of links between national law enforcement systems in a context of rising international crime must now urgently be addressed. The fact that judicial barriers remain after all other internal barriers have been removed is sufficiently shocking in itself to dispense with the need for further comment. Nor should the strong feelings on crime shared by all Union citizens be underestimated: whether in the form of attacks on individuals, paedophilia or corruption and organised crime, criminal activities prompt the same unanimous disgust among the public in all Member States.

The principle of subsidiarity provided for by the treaties justifies a common response. Since measures by individual States on their own are no longer adapted to the new situation of international crime, action on the part of the Union is necessary and therefore legitimate. As the principle can hardly be disputed, the main point at issue must be how to put this action into practice.

II – A necessary response

The matter has been under discussion for almost 20 years. From the initial proposals for a European criminal court to the cautious advances in intergovernmental cooperation, the European judicial area has taken shape very gradually. It developed outside the Community treaties at first, then in parallel (with the development of the Schengen system), and finally within a third pillar which was reviewed in Amsterdam. Each successive stage prompted controversy and opposition revolving mainly around the choice between a cooperative approach (involving coordination between national law enforcement bodies) and an integrationist approach (involving the establishment of a specific law enforcement system at Union level). Looking back, two definite conclusions may be drawn.

The Union's legitimacy in taking action in law enforcement matters – an area closely identified with national sovereignty – must first be firmly established. The lack of efficiency of the current system must also be demonstrated, and this will have a bearing on the response to be taken. Methodological quarrels and ideological options must therefore not be allowed to take precedence over rational analysis.

1 – The legitimacy of the European Union's action must be established at national level in the eyes of both public opinion and the law enforcement authorities. There is a wide gap between the expectations of the Union's citizens, as expressed by law enforcement authorities, and the malfunctioning system of mutual assistance in criminal matters at European level. Supervision on the part of judges, their central role in protecting individual freedoms, the balance they ensure between this protection and the interests of public order are factors which are all too often not included in the public debate. This debate tends to focus on operational data, the threats of modern crime and the issues involved in law enforcement, without taking due account of the role of the judge in democratic society, whether in terms of identifying the

priorities of a policy on crime or ensuring judicial control. This contributes to increasing the distrust and suspicion and the confusion with which Union action is perceived.
At a time when the European Union has undertaken to draft a charter of fundamental rights, this dimension of a judicial Europe must be addressed dispassionately with a view to gaining acceptance for mutual assistance in combating crime as a standard practice. The objective of establishing an area of security in Europe must not be pursued to the detriment of values such as the rule of law on which the Union is based. On the contrary. This means that a positive approach, expressed in terms of enhanced security and respect for individual rights, must be viewed as a factor for progress and no longer be presented as a brake to closer cooperation. Such an approach should contribute to removing the obstacles – which are sometimes purely psychological – to mutual assistance in criminal matters.

2 – Efficiency in combating crime in the European Union is necessary both to correct current shortcomings and generate added value for European citizens in the field of security.

2.a – The entry into force of the treaty of Amsterdam, the incorporation of the Schengen *acquis* into Community law and the conclusion of a convention which will enable Europol to begin operating are developments which now make it necessary to provide a response without delay. The confused legal and institutional situation prevailing today must be rationalised and made more coherent if the area created in Amsterdam is to be preserved and fostered.

The various "mother conventions" of the Council of Europe, simplified and adapted within the framework of the Union and the multiplicity of cooperation and coordination bodies, not to mention the emergence of would-be autonomous bodies such as OLAF, add up to a scattering of effort and cooperation frameworks which makes the whole less transparent and efficient. And those involved in combating crime on a daily basis are unanimous in their criticism of the system.

The fact that judicial responses are failing to keep up with the development of organised crime is a particularly complex issue, which cannot be resolved merely through the additional legislation and conventions some observers are calling for. In short, European society must not use law-making as a substitute for making the vital adjustments required. The priority should therefore be to put some order and unity into the current tangle of texts, in order to make it easier to apply judicial systems which are sometimes compatible or concurrent, or even contradictory or imprecise. Their use by law enforcement authorities must absolutely be simplified, especially by clarifying their interpretation and giving them a common reading. The experience of the Council of Europe in this respect is irreplaceable and must be drawn upon to ensure consistency in judgements.

Furthermore, specialisation in combating crime should not happen by chance but should be deliberately encouraged, since the increasing sophistication of modern crime requires an equivalent response in terms of law enforcement. The multidisciplinary approach and pooling of experience practised within Europol must naturally be replicated in the judicial field. Whether the solution involves procedures, instruments or subject matter (cross-disciplinary nature of approaches), the challenge posed by serious crime first and foremost calls for a considerable adaptation drive on the part of individuals and governments. The systems, however, do not necessarily need to be completely overhauled. However, the logics of the various national departments, bodies and legal systems must be reconciled well before the logics of the States themselves are considered, under pain of reproducing at EU level the

interdepartmental conflicts which often cripple law enforcement within the States themselves. Proper information and coordination are therefore essential.

The shortcomings noted must be remedied bearing in mind the need for rational and practical action principles. This concern for simplicity and subsidiarity will strengthen the legitimacy of the action.

2.b – Listening to the "field workers" – prosecuting and investigating officials and police forces – can be particularly instructive as to the needs to be met to improve efficiency. The call issued in Geneva by European magistrates worried about obstacles to their work and the numerous scientific studies carried out since, not to mention the various action plans to combat organised crime, all express the same criticism. What a judicial Europe needs is to be simplified and reorganised, not to be given an additional framework on top of the ones it already has. Law enforcement officials are mainly hampered by the confused legal context and procedural overloads, even if they do also sometimes complain about excessive judiciarisation which can sometimes look like procrastination.

Two pitfalls must be avoided in this context. The first delaying tactic would be to stress the operational nature of the fight against crime in order to avoid addressing the issues raised by law enforcement authorities. In this respect, the pragmatic advances made within the framework of both Schengen and Europol are no justification for further derogations to the crucial transparency and coordination required for mutual assistance in criminal matters. Far from creating an additional informal or parallel framework, we must build on the experience acquired so far and restrict the establishment of new institutions in order to collect all current efforts within a common working area. Eurojust could offer an appropriate solution in this context.

The second temptation would be to interpret the failure of the fight against crime as definite evidence of the incapacity of national law enforcement systems. Hence the need to build a new system at European level, as expressed in some current proposals. Things are probably somewhat more complex and we should take care not to overlook the fundamental reasons for successive delays. They are not exclusively legal in character. One is the specific nature of the judiciary and police forces in the context of European integration and their very particular significance in terms of national sovereignty. Other factors relating to the judiciary include its independence of opinion, which gives it a definite latitude in assessing the usefulness of mutual assistance in criminal matters. But that is not sufficient reason to ignore the considerable advantages of involving them in the Union's policy on law enforcement.

Because convincing is better than compelling and improving is often preferable to replacing, pragmatism demands that efforts to increase efficiency be primarily based on what already exists. We must therefore seek to achieve better involvement of the national law enforcement systems, which remain indispensable intermediaries. Since past attempts to improve their capacity for action have never truly involved anything other than traditional methods based on international criminal law, the European Union would be shirking its responsibility if it failed to address the issue. Time will tell whether the Union's response will bring a change in the system or, on the contrary, serve as justification in the event of failure.

A general and pragmatic approach must therefore be preferred to a system which would turn out to be too experimental or ambitious to succeed.

III – An overall concept

The Tampere conclusions have placed the issue in context: the establishment of Eurojust is a response to the need to "reinforce the fight" against crime. This fight involves a number of players and achievements which must be taken into account to ensure a methodical approach.

1 – The players involved

The Council meeting in Tampere identified a first list of participants in combating crime. These participants, Europol and the European Judicial Network, must be coordinated. There is also, of course, OLAF, whose action to protect the financial interests of the Union is directly relevant to a number of issues relating to organised crime. The operational link between these various bodies is a crucial point of the Union's action, but should not be the only concern.

Given the international dimension of combating crime and the security dimension of enlarging the Union, an approach in terms of concentric circles is necessary. In this respect, the Council of Europe is an indispensable partner, both on account of its membership (which makes it an ideal forum for exchanges with central European countries) and because it has undisputed and long-standing experience in the area of combating crime. It would therefore be ideally suited to become the "first circle" of coordination in criminal matters, if only merely to exchange information.

Before any ambitious building steps are taken, it is vital to identify the present and future players in the process and adopt a pragmatic approach by involving them from the outset rather than presenting them with a pre-established model which they would have to accept or refuse. The precondition, which offers the advantage of preparing for the future, is to first establish the minimum degree of trust without which nothing can be achieved. In line with the traditional logic of European integration, what is required is to identify the partners in establishing a *de facto* solidarity, which in this case involves combating crime. Only once this has been achieved can institutions be established and legislation adopted – if they are needed.

2 – The available instruments

The procedural diversity of national criminal law is something which must be taken into account, but the gradual unification of European criminal law is a fact which no longer needs to be demonstrated. This process of approximation in terms of substance mainly results from the main conventions adopted within the framework of the Council of Europe as well as from the knock-on effects of concurrent national systems, which are gradually converging through increased contact.

This unification process has an influence on the major options taken in the field of mutual assistance in criminal matters, as reflected in the texts on extradition, minor mutual assistance and the transfer of sentenced persons. However, it takes diverse forms depending on the bilateral and multilateral cooperation frameworks and the areas involved (ordinary crime, terrorism or financial crime). This can result in considerable complexity, at times bordering on chaos, where the practitioner has to make practical choices as to which texts are applicable, how any conflicts between them should be resolved and what scope they should be given.

If the fight against crime is to be reinforced, the use of these instruments must therefore be rationalised and simplified. Eurojust can and must contribute to the process by facilitating a common interpretation, thus removing a major obstacle to increasing the efficiency of

cooperation in criminal matters. This framework for exchanges must lead to a genuine European judicial culture. This is a major objective, long highlighted by practitioners, which will subsequently facilitate mutual recognition and acceptance of the rules of neighbouring law enforcement systems.

3 – Which areas should be covered?

This delicate issue should be addressed with a prime concern for simplicity and rationalisation. Where a criminal activity involves at least two Member States, the scope of Eurojust's action in terms of subject matter should be precisely identified to be efficient.

The most coherent option is to make Eurojust's scope coincide with the investigation scope provided for under police cooperation and the protection of the Union's financial interests. Europol and OLAF would thus be given a judicial extension, the absence of which is weakening their action today. Nothing would prevent this core from being extended to include certain issues currently addressed by the texts organising the cooperation on combating organised crime and money laundering, for instance within the Council of Europe.

4 – Practical arrangements

To ensure a pragmatic approach, the needs of those involved in combating crime should be properly examined before any response is provided: the need for information and communication, procedural efficiency and guaranteed fundamental rights are at the heart of the problem.

- Eurojust would basically consist of a "round table" of magistrates responsible for facilitating contacts with national judicial authorities, providing prompt documentation on the rules of law applicable to each case (agreements, national legislation), seeking solutions to divergences in the interpretation of these rules and complaints of inadequate cooperation, and establishing the headquarters of the European Judicial Network. Eurojust's operational framework would be responsible for translation and interpreting, for documentation and for liaison with national authorities, the Council of Europe, OLAF, Europol, and the Commission and Council. In this way, the expertise of the judges taking part in Eurojust would provide the basis for exchange, debate and the identification of a genuine policy to combat organised crime. And the link with the European Judicial Network would prove helpful in providing the Council, Commission and Parliament with reports and proposals on the various assessment factors required for giving a political impulse.

In short, the aim is to respond to the frequent calls for action to overcome the lack of communication currently hindering mutual assistance in criminal matters, which is sometimes the cause of unacceptable delay. Such a move would also allow the relationship between the judiciary and investigation authorities to be placed on a more formal footing.

The national authorities would naturally stand to benefit from this effort and would be able to request any legal, practical and procedural items of information needed. The privileged beneficiaries of this judicial expertise would of course be Europol and OLAF, which would thus be able to rely on Eurojust for the technical and judicial support they lack today because of their structure.

Under the system, the various parties involved would be required to provide Eurojust with systematic and prior information. This would be the condition or compensation for the latter's

activity. Liaison with the various national and European information systems, even through the national members, would be indispensable.

- The second strand of Eurojust's action could be to seek increased technical and procedural efficiency in prosecution.

Coordination and mutual information with regard to the conducting of and participation in investigations would be a useful first step. This would make Eurojust a focal point for cooperation between European judicial systems. If Eurojust is established on a simple basis, avoiding cumbersome procedures and hegemonic ambitions, it could thus become a much-needed clearing house for storing, exchanging and monitoring information on pending cases and for coordinating prosecution processes. This remit would imply that Eurojust should be in a position to respond to a request for intervention from a Member State or, conversely, to approach a Member State in order to participate in law enforcement coordination.

A second task could also be entrusted to the Eurojust members, in an individual capacity this time. They could act as interfaces between the national law enforcement system they belong to and requests for cooperation at Union level. In calling upon or being approached by other Member States for support, the national Eurojust member could take an active part in prosecution, by acting as a facilitator for his or her national authorities, by contributing to the coordination or even by being entitled to perform procedural acts. In this connection, diverse cooperation spheres at varying stages of development could be envisaged depending on the needs, issues and affinities of the systems involved. Whatever the operational remit of Eurojust, this national member would have direct competence only in his or her State of origin. However, the collegial nature of the network would make it possible to transfer any query immediately from one Member State to another.

- We should also stress the extent to which the development of serious crime has been helped by the indifference displayed by Member States, and even their reluctance to take action. This failure to comply with their commitments, in particular as regards cooperation, raises several specific issues. Firstly on account of the field itself, where efficiency often depends on speed and flexibility, and secondly on account of the parties involved. The independence of judges and decisions on whether to prosecute or not, for instance, raise issues which are very different from those relating to failure to comply with Community obligations in more traditional areas. It is therefore important to understand that Eurojust can and must be a forum which will examine and assess the way in which the Member States fulfil their commitments. Consultation, promotion, explanation and justification will all eventually have to be expected of those involved in combating crime.

There is no reason not to imagine that a procedure for the settlement of disputes between Member States, similar to that provided for under the third pillar, may eventually be established. A specially created chamber of the Court of Justice of the European Communities could make it possible, further to complaints brought before Eurojust, to settle disputes relating to the interpretation of conventions or inadequate cooperation arising among EU Member States and any other countries which have accepted this jurisdiction. This arbitration body would clearly have no competence to rule on criminal cases, but it would help to ensure that the key idea – that the security of each one of us depends on the cooperation of all – is guaranteed in judicial terms.
- The fulfilment of the last duty, relating to safeguarding fundamental freedoms, would be an inevitable corollary of the above-mentioned tasks. The most acceptable solution would seem

to be to restrict Eurojust's membership to representatives of the judiciary of each Member State, and to respect the principle of subsidiarity – whereby this member would act in accordance with the legal system in force in his or her country. As each Member State is supposed to comply with the rule of law, a precondition for membership of the Union, this approach would contribute to ensuring a minimum level of procedural security.

THREE PRINCIPLES OF REFLECTION

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From its origins onwards, the question of fighting organised crime is characterised by a number of constants which surface periodically with the debate on the European construction : diversity of national systems of repression, political and cultural particularities of politics on crime, hesitations linked to penal sovereignty of member States are some among many issues at stake. The impossibility of furnishing a satisfactory answer regularly obliges one to find subterfuges in order to avoid material impasses or political impediments encountered by the European Union. Proposing institutional paths, opening interminable negotiations reserved to those initiated, opening Pandora's boxes of national sovereignty and of the heterogeneity of penal law in Europe, thereby pointing to the spectres of supranational institutions - all these are tested recipes which leave the construction site sitting. Neither a citizen nor a judge, nor even a policeman can be satisfied with such a state of paralysis.

The debate which nowadays opens in Europe with regards to a European strategy of fighting organised crime perfectly illustrates the ambiguity characteristic of a European judicial space, just as the incomprehension of the public opinion during the Rezalah affair illustrated that same ambiguity in matters of ordinary crime. This ambiguity encourages intellectual contortions aiming - in the least - to avoid a dead end in the future, and - at the most - to put down the bases of all future progress. It equally leads one to refuse facing directly difficulties which are however perfectly identified by all concerned.

Which, then, are the principal impediments to consider in order to discern their passing or irreducible nature, and to adapt to the latter the responses of the European Union? Some have been perfectly identified. Others, on the contrary, are far from being settled and thus require genuine general awareness. One way to contribute to the current reflection on fighting organised crime is thus perhaps to outline a certain number of principles which are to guide the European Union in solving the problem. Half a century of collaboration in matters of repression has in fact not permitted Europe to construct a satisfactory whole based on minimal requirements of rationality (I), legitimacy (II), and thus of efficacy (III).

1. The principle of rationality

The fighting of organised crime (or its equivalents in matters of economy and finance) has witnessed multiple constructions and developments within a number of European structures since the 70s. The multiplication and proliferation of instruments and frames of action is such that one may seriously doubt the validity of a movement consisting solely of pursuing and adding an additional layer to the existing structure. Reason thus obliges one to avoid engaging blindly down the path which would ultimately make even more complex the

current disposition. Rationalising the procedures is nowadays a need ; becoming aware of this need should eventually lead to finding once more order and clarification. The suggestion of creating Eurojust may appear an answer to the disorder evoked.

The acknowledgement of failure which nowadays generally characterise the topic of European judicial space cannot in fact but be approved, seen the complex description of successive legal instruments available. The results for practitioners and for users become truly insurmountable, and justify largely the practice of partially taking position in public which is that of the judicial milieu following to an appeal from Geneva. Multiple reasons converge in giving place to this normative institutional haze. Two principal ones are here discerned : the search for a model, and the absence of a coherent action frame.

1.1 ***The search for an ideal model*** for mutual aid in matters of European repression - whether acknowledged or otherwise - has today perhaps become an actual brake to its very progress. Beginning the moment where the desire surfaced to be rid of classical modes of international penal co-operation, all strove to lay hands on the proposed solutions, thus engaging in sterile debate. The search for a model takes on different paths.

1.1.1 - The attraction of state models is the first factor of paralysis. The state-centrism which affects a number of structures currently proposed suffers from two inappropriate redhibitory vices : one of the two partners cannon effectively recognise himself in this "foreign" mould ; on the other hand, it is the very specificity of the idea of communal integration which is thereby negated. Such "vices" are particularly worrying when one poses the question of the respective positions to be occupied tomorrow by institutions as essential as the European Parliament, the Court of Justice, or the Commission. To ignore them - utterly or almost so - as is the case today, is equally unreasonable as to force upon them radical juridical transformation.

One may illustrate the example in many ways, going from the publicised proposition or a European "Procurator", to that of police models seeking to reproduce national choices of this or that system, be it British or Germanic. Are we certain that the future of the European judicial space finds itself half way between Kenneth Starr and Elliot Ness, and that these false originalities ultimately hide anything other than a desire of imperialism of such and such national system persuaded of its own excellence? The entire history of the European construction shows on the contrary that juridical crossbreeding and mutual borrowings have been essential to the success of the integration.

The same applies when one transposes onto the European frame the classical national splits between police and judicial action. In this novel space, some envision the unbinding of limitations imposed onto the internal order of things, while others intend on the contrary to reproduce onto this larger scale identical relations of power. This very fact partly explains the tacit agreement which currently accompanies the delicate implementation of Europol. Neither can it for much longer take the place of a genuine politics of repression. To this tableau must finally be added the considerable weight of sociological and cultural factors which make difficult - if not sometimes impossible - the comprehension of the other's system of repression. This obstacle is far from insignificant, for it largely depreciates the idea and the interest of co-operation, both in the eyes of the public opinion and in the mind of actors or decision-makers of this co-operation.

This state-centrism, which places the State at the centre of the political universe, today manages to largely pervert the debate on mutual aid in matters of European repression. It does so through a logic which directly associates the issue with the sovereignty/federalism frame of mind. Because it is characteristic of sovereignty, the right to punish thus becomes the stake of a political debate in itself futile for it is outdated. The need to address contemporary crime unfortunately fulfils the role of the Trojan horse for speeches toying with supra-nationality, thus ideally offering a pretext of paralysis to those opposed in the name of defending their sovereignty. Efficiency of repression or abandon of sovereignty - such would be the terms of the dilemma facing the member States. This particular choice is in fact perhaps itself outdated, on one hand because the European construction daily encounters serious doubts with respect to the notion of sovereignty which it undermines, and because on the other hand the police practices of informal co-operation undermine the opposition of these milieus...

1.1.2 - The disadvantages of penal-centrism which frequently characterises the European debate on judiciary space must not be neglected, either. The contemporary fight against organised crime certainly does require repressive reaction of the classical type. Yet, it perhaps equally evokes multidisciplinary approaches within which the juridical parameter should not exclude technical, administrative, sociological, economic and financial dimensions which one hardly finds in current European reflections - put aside an attempt here and there such as the attempt of French organisation. Hegemonic tendencies of each system thus obstruct a clear view of the given facts, and of the approach to be defined. The assessment of the reality of "organised crime" thus experiences statistical misreading and political phantasms which confuse the extent of the reaction to be undertaken.

To frame the public debate in other terms - rational and free of passion - is today perhaps a necessary threshold to cross in order to approach problems in their real dimension.

1.2 - *Defining a coherent frame of action* is equally an intellectual and practical need. Without repeating the established terms of discussion, the territoriality of penal law is nowadays an obstacle to the need of security felt by the European society.

1.2.1 - Besides being openly contested by the opening of interior borders, the mondialisation and technological developments, this territorial limit of juridical response poses the question - at best of its out-datedness, and - at least of its rearrangement.

An analysis of reality offers a plethora of different concentric circles at the disposition of European mutual aid in matters of repression. The real picture can further be completed by reducing the oppositions - stigmatised according to good manners - between harmonisation and co-operation in penal matters, by reminding that it is often a matter of simplifying and accelerating just as much as innovating, by insisting on the fact that the European integration is a process and not a fixed state or an episode seen as somewhat of a failure. Such reasoning is to be kept in mind if we are to prepare the ground for future progress. This train of thought reminds furthermore that the hypothesis of a European penal law isn’t necessarily doomed by a deepening of the co-operation. The process of harmonisation and of propagated institutionalisation of mutual European aid in matters of repression which accompanies the process of fixing the boundaries of sensitive issues of criminality illustrates the diversity and the compatibility of approaches.

The futility of school-like debates - following the logic of black and white – between a European penal law which would be reduced to a mere variation of the international penal law, and a penal law which would express the desire for federalism relies on an analysis of reality at its most genuine state. The failure of the approach which consisted in advocating either common judicial incrimination or an assimilation of crime as defined by internal law is hardly debatable. With regards to incrimination by assimilation, judicial failure of the protection of the EU budget – which ought to have been the simplest such protection to carry out – is witness of the little enthusiasm to engage along that path which poses moreover certain problems. With regards to common incrimination of what the media have been able to call "eurocrimes", despite the encouragement supplied by article 29 of the Treaty of Amsterdam which mentions in a timid way a certain number of criminal phenomena, one must acknowledge the absence of a judicial definition, indispensable to the exercise of repression. Even with such a definition, persisting differences in the perception of different States make repression impossible.

Progressive elaboration of a certain number of instruments certainly does show that judicial Europe is about to engage along new paths, as much in terms of quantity as in terms of quality. On one hand the list of criminal phenomena witnessing the beginnings of harmonisation is in constant evolution; on the other hand the appearance of real common strategies of fighting these phenomena is an indisputable fact. From "plans of action" to strictly judicial interventions and across programs of education and formation, of support and even assessment of national behaviours, what is taking form is a range of technical procedures which materialise a political will - imperfect perhaps, yet real. One can therefore not conclude that a specific European penal law does in fact exist.

The European ambition thus consists perhaps of the desire to distinguish itself form classical international repressive co-operation, without however automatically identifying itself with a State-type model. The exclusivity which still characterises member States with regards to their right to incriminate and to enforce a sanction suggests that less energy perhaps be wasted in trying to deprive them of it and to concentrate the efforts rather on indispensable limitation which must weigh them down in order to direct them to make use of this right when given a precise goal and context.

1.2.2. – The outlining and a material clarification of issues at stake with regards to organised crime are today a rational requirement. The notion of fight against "organised crime" constitutes a political goal but can hardly offer a technical base to a integrated frame of legal competence. Political rhetoric which stigmatises organised crime cannot on its own frame the action of the Union and to force the hand of the member States. An instrument newly introduced into the debate of European judicial space, Eurojust may prove decisive in bridging the gap between national systems and the European system in gestation.

From this point onwards, the definition of the frame of action of Eurojust proves to be a decisive question. Whether with regards to its institutional relations with existing instruments such as Europol and Olaf, or in terms of outlining its material rights with regards to those of the other two institutions, one must in either case rationalise, make legible if not simplify the entire scheme put in place by the European Union in order to react to serious forms of crime.

In hesitating to assimilate organised crime and criminality in the field of economy and finance because incapable of defining Mafia phenomena, cautious in approaching traditional

forms of crime such as blood crime or political crime, the European Union to this day refutes any clear engagement to a judicial regulation asserted to be its objective. The police action seems to suffice it for the time being, at the proclamation stage at least, since there again (and almost three years after Amsterdam) the operational character of Europol remains well below the expectations.

Such an occasion offers itself to begin to act differently.

2. The principle of legitimacy

The principle implies a number of ambitions unsatisfied with the European co-operation in judicial matters, whether it be in relation to necessary transparency of all public security policy or with regards to the needs of control which accompany such a policy in a Community based on law.

1. *The transparency of common action in matters of security* is by now a need difficult to either bypass or delay. From that point of view, the requirements of legitimacy advocated by the different national systems of repression leave in place cultural and political gaps which are far from being overcome. Nevertheless, it is simple to agree on a certain number of constraints which it is impossible to renounce in a Community based on law. "Legislative" legitimacy or "popular" legitimacy (of the people) which must surround the work of repression at the national level in order to be accepted ought not change in nature under the pretext that this mutual aid in repression would take place on a level surpassing that of the Nation-State – the level of the European Union. There again, posing the question obliges to respond in favour of an institution like Eurojust acting within an ambitious configuration.

This means openly asking the question of the place of parliamentary and judicial institutions in defining penal politics, in elaborating laws and establishing the control of their application. If police action is freeing itself of constraints to a larger extent than is the case with judicial action, it is not thereby the less subject to constraints in all of the member States if it wishes to legitimate the legitimate use of constraint which it holds.

One of the debates which affect the development of European co-operation in this matter – in all its facets – features precisely the gap which exists between the sentiment of criminal threat, amply diffused in the public opinion, and the absence of democratic public debate on the principal options to be defined and applied. The tendency of the professional milieus to take over the terms of the debate, and the consequent confiscation of the technicality of the questions and the solutions thus reserve to a small number of initiated persons the privilege of deciding on the principal options. The tendency is yet another, more discreet, way of assuring the preservation of sovereignties in the name of seeking efficiency. A number of demands which characterise repressive co-operation are explained in this manner, from police desire of an informal co-operation and the establishment of networks, to the very classical argument of necessary pragmatism when it comes to action in the field. The development of European mutual aid in repression illustrates well this tendency through multiple forms of action which it privileges and through its indisputable taste for non constraining judicial instruments. What results is a certain yet discreet development of a

reduced mutual aid in its mere technical dimension, deprived of a political debate on its goals and its means, which for these exact reasons finally perfectly suits its initiators.

It isn't certain that the stage of development achieved by the space of liberty, security and justice will durably content itself with this state of affairs. The nature of the questions posed and the obstacles to be overcome – in terms of rethinking the sovereignties as well as in terms of public freedoms – most certainly requires a reflection which integrates the parameters of legitimacy of the common action within the construction of the whole.

This realisation inevitably induces one to rethink the role of Parliaments as well as that of the judge. Neither one can either absent themselves nor be marginalised within the structure which is to be realised on the European level for they are omnipresent in the national dimension. Any common conception of the creation of a European politics of crime or of a co-ordinated reaction requires that they be integrated to a greater extent than is the case today. There again, the idea of Eurojust may help enlighten the whole under a different light.

2. *The theme of democratic control* of the entire apparatus blends similar reflections even though it intervenes towards the end of the procedure. Whether the matter be that of judicial control or of parliamentary control, the failures presented by the current construction must be compensated, if not erased, by propositions which are to be put in place. The political image of Europol like that of European security is in fact far from being as positive as estimated by its advocates. From there on, and without falling into the trap of state-centrism denounced earlier on, it seems difficult to imagine anything new without re-evaluating the natural place of the democratic representative and of the judge.

2.1 – It is easily imagined, in terms of defining penal politics as well as controlling what has been created, what a revolutionary impact such an approach may have in a European Union which in its entirety is designed so as to protect the exclusivity of its member States. However, both in terms of protection of facts or more generally that of individual freedoms in the search of a juridical basis appropriate to repressive action, reorienting considerably current practices seems unavoidable – be it in the sense of Europol compromise, meaning through control of national organs, or in the sense of an increased intervention of the European Parliament.

The intervention of the judge in such a context equally deserves particular reflection. One may, there again, refer to a certain number of tracks laid down on the occasion of Europol-related debates, in what concerns more particularly the settling of divergences which will inevitably arise from different partners. If the choice of arbitration or of negotiated settling prevails, it obviously will not entail consequences required by a judicial regulation in terms of institutions or authority of decisions made.

All else are issues posed by the questions of the place of the judge in managing an investigation, and those of his role in guaranteeing the rights of individuals in question.

2.2 – In what concerns the first one, it seems that all debate on the operational nature of Europol or on the materialisation – under whatever form chosen – of the desires for co-ordinating repressive pursuits in Europe entails a re-evaluation of the position of the judge.

This debate has occurred within member States with respect to National Units of Europol and its continuation at the European level is inevitable, even though it is but

prospective given the competencies of Europol today. The first justification proposed aims in the right direction : minimal procedural security is indispensable under the threat of annihilating the efforts of common pursuit. Repressive efficiency is thus conditioned by a minimal judicial presence which is to guarantee the viability and the fairness of investigations and of the accepted procedural paths. Another just as strong explanation adds to the argument. If it is true that the States intend to co-ordinate their approaches to large-scale crime, it is understood that minimal strategic reflection is indispensable even if one does not wish to openly acknowledge the search of a penal politics.

The judicial institution must be present in the short term in the use of the range of available means of which the judge alone disposes, or in the long term with an eye on a global, co-ordinated approach to a precise phenomenon of crime. In all member States and in all democracies this form of reflection is undertaken by the judge.

The debate is ancient, well known and presented in the recommendation number 25 of the action plan of fighting organised crime. Its detractors may wish to limit police co-operation to a strictly operational level, disconnected from all political option and of all mutual judicial aid procedure in the technical sense ; yet, this sentiment appears today to be shared by a majority concerned.

At this stage of reflection, one need hardly add a whole different argument : that of protection of individual freedoms, confined by all juridical national systems to the judicial institution. There again, whether the question is that of controlling the failures of obligations to which subscribe member States or that of allowing suspected individuals to exercise their rights, the presence of the judge seems indispensable even if the range of his interventions may eminently vary. One may thus question, besides, the viability of diplomatic solutions which today fragment jurisdictional intervention in the Union in the face of the fundamental principle of equal access of citizens to justice.

3. The principle of efficiency

Once it has been framed by those preceding, it is this very principle that is at the heart of all reflection and reasoning. One cannot in advance but adhere to the reasoning proposed by W. Schomburg concerning both the limits of the European juridical co-operation - at the reading, more precisely, of the work of the Council of Europe - and the vision he proposes of a shared penal sovereignty rather than an exclusive or abandoned one. To this respect, the “minimal base” would seem to be one of a structure of exchange, of information and of interpretation of laws in power. This base would not be, however, but a starting point, for it is first of all permitted to question the indispensable nature of a judicial presence if we are to stay at this level, and secondly and most of all because the question of articulating between police and judicial action remains entirely at that very level.

One must add to this more precise overall picture the fact that the construction as envisaged can obviously not be conceived in an already defined and known frame – that of the principle of subsidiarity and of national administration of European politics… In other words, the competencies of Eurojust must be outlined, and its means of action detailed. One should thus keep in mind that one hand Eurojust will not have the right to intervene but exceptionally, where for example national action proves to be helpless, and that on the other hand that Eurojust will necessarily have to rely on national actors of repression which are the ordinary actors of judicial life. This means therefore that we are opting for a path different

from the classical path of federal justice. Still from the same point of view, Eurojust may appear a reasonable compromise and not a revolution of the institutional architecture of the Union.

3.1 *The definition of functions confined to the future entity* obviously determines the field of competencies which it will be attributed. One guesses easily that the latitude of action which will be acknowledged it will depend on the field of action assigned it. From that point of view, the conclusions featured in Tamper allow for a clarification more important that it may seem. It thus appears as premature to imagine that the task of judicial integration would be assigned to Eurojust, via for example a right of exterior intervention or via activities of control or of jurisdictional appeal. In fact, two principal hypothesis can here be evoked.

3.1.1 – One mission of repression co-ordination is evidently necessary, at least in order to make up for the silence of current realisations, from Europol to RJE (European Judiciary Network), as far as goes the question of assuring the efficiency of repression in the face of criminal activities of an international dimension or that of justifying a common reaction. The causes are well known and their reality shall not here be pondered.

Half way between national pursuit and repressive integration, repressive co-ordination between the different actors of the pursuit is useful in two important ways. One practical benefit refers to the fact that such a co-ordination allows to overstep national impediments and cases of technical, political and cultural incomprehension. Another political benefit follows ; it allows to find again the effective solidarities dear to the functionalists, by permitting to speak a common language and to adapt identical behaviours when facing problems. By accustoming to work in group and to the confrontation of ideas and methods, this stage which may be simply transitory should certainly not be neglected. It reveals interesting possibilities on the technical level as well as in terms of conception of a politics of crime.

In such a context, an entire range of more or less ambitious procedures may be explored. One may thus envisage that, to the likes of propositions made by the Portuguese presidency, formulas going from a European team of magistrates of liaison, institutionalised and thus breaking away from the idea of the bilateral, all the way to the embryo of a team of operational magistrates which would be the final step. In this frame of mind what is absolutely necessary is to think further from what is already in existence, that is to say further from the already ancient institution of magistrates of liaison or the European Judiciary Network (RJE), under the threat of having to interrogate oneself on the very utility of Eurojust.

This is to say that the competencies acknowledged to Eurojust must surpass simple mutual informing between magistrates in presence, and equally imply a follow-up of the investigation in course. This follow-up may go anywhere from minimal information to invitations addressed to the State in question to open up investigations or even pursuits. These invitations may or may not imply an element of constraint, as one can also envisage that in case of ignoring the invitation the State may be compelled to explicitly justify its refusal. Since analogous institutions are already in existence in certain member States, to accept such a principle would not be out of reach for the States of the Union. An important threshold of quality would finally be overstepped if we were to agree to a level of co-ordination where the magistrates of Eurojust would themselves and directly be able to exercise such a right.

The tracks of such a search show well the futility of adopting strategies of rupture which intend firstly to institutionalise, hoping that functionality will follow, as illustrated by certain propositions for which making penal law uniform represents the final goal. The question here posed is of acting in a different manner.

Functionalist techniques may not suffice on their own and an objective of a political nature ought first of all to be agreed upon. A range of procedures may alternatively be available, or may successively follow, aiming obviously to compel national apparatuses to put their resources at the disposition of the common objective.

3.1.2 – A mission of judicial regulation is more ambitious to conceive and it probably implies in very near future a change in reasoning. This mission would consist of two different facets : one would concern relations between Eurojust and other actors of pursuit, and the other would intend to regulate its relations with the internal level of pursuit.

The rationalisation of relations between the European actors of mutual repression aid is a major file of which only two aspects will be here invoked. The risk of complexity and of technocracy must be assessed in its face value by avoiding to create yet another parallel structure of harmonisation and of information which would instinctively function by affirming its legitimacy with regards to the existing entities, thus generating classical power struggles. Transposing internal force relations of the justice/police kind to the European level is obviously advisable. The need of face-to-face situations between the different levels of co-operation inside and outside the European Union (Europol, Olaf, RJE, Council of Europe) is thus currently considered a priority…

Eurojust can offer this occasion of contact, with the establishing of structures of common work (localisation, information circuits, common secretariats) as well as through work directives or through criminal orientation privileging collaboration with Europol, without changing the Treaty. The initial scheme thus corresponds well to the philosophy which is to be expressed, under the condition of its enrichment.

A certain number of orientations pointed out during Tamper indicate well that such is the sense of the evolution, particularly as concerns "*the co-ordination between the national authorities in charge of pursuits*" (which implies that Eurojust be the point of contact), "*the co-operation with the European Judicial Network*" and "*the simplification of judicial commissions*" (they too thus being made into a point of contact). Remains to interrogate those concerned about the role of Eurojust in operational matters, which inevitably poses the question of its relations with Europol.

From the beginning, the idea of "judicial pending" of Europol had dominated the debates. The co-ordination work which would be administered to Eurojust and which would consist of informing, inciting and inviting (see propositions of the Portuguese presidency) would mean that this apparently technical task would take on a whole different meaning - that of a judicial regulation of pursuit. This legitimating of the judge is absolutely essential for it commands and justifies the extent of powers which could be assigned him. Without having to, at this point, treat in detail the document of the presidency, the attributes of co-ordination, of orientation, of establishing common teams and even of intervening directly, cannot be explained and justified politically but on the basis of the following : the judge is necessarily the interlocutor of this stage of the pursuit.

That is also the idea of judicial regulation which explains that the ways of advanced articulation with national magistrates are today being explored. Without the worry of auto-limitation in the observations, the hypotheses of intervention on the territory of a member State or those of compelling technical centralisation of pursuits with which Eurojust is entrusted are clearly proof of a perspective advocating judicial integration in the long run. The limitation imposed remains perhaps that of a federal-type justice, including the field of protecting the rights of those amenable (justiciable), emanating from a different order of thought. This limitation nevertheless compels one to question the place of the judge in a security space being built, and to this respect it imposes a minimalist reflection proposing alternative solutions.

3.2 – *The field of competencies* perhaps poses less problem in terms of content. Reasoning takes a different turn from the moment tasks which efficiency commands be or not be assigned to Eurojust are preliminarily defined. The responses then equally allow to clarify the question of relations with satellite entities.

3.2.1 – A minimalist scenario which would simply perceive in Eurojust a reception structure, of the mail-box or centre of information exchange kind, hardly claims an outlining of competencies. Deprived of compelling prerogatives and of operational vocation, the future structure could be invested with a rather vast material competence in as much as such an acknowledgement would hardly have injurious consequences to speak of.

To this respect, recapturing the conclusions of Tamper which mention “serious forms of organised crime” may serve as guide in spite of the great distrust of the nature of the concept and the determining of its degree of “seriousness”. The impossibility of grasping exactly this concept points back to the great economic and financial delinquency, and to the dimension of inter-frontier crime, since common action in 1998 mentions a criminal participation implicating at least two member States, and claims already the establishing of co-ordination of repressive action. One is nevertheless aware that this alignment leaves on one hand very open the possible reactions to these serious forms of crime claiming repressive collaboration, while on the other hand it does not allow exhaustive re-attachment with what is already in place, be it in the Council of Europe, Europol or Olaf.

3.2.2 - A more ambitious approach must thus be conceptualised. It may be carried out in two stages. The first stage would consist of a quasi-mechanical alignment on the subject of defining the jurisdictions of Europol and Olaf. The evident advantage is that it rationalises the present by adding a judicial pending to the mutual policing aid, and marking the future by implying that all progress of one will automatically be followed by progress of the other. Since mutual policing aid is focused precisely on a certain number of criminal behaviours and that specific protection of financial interests of the Union is organised in a particular way, it would be beneficial to proceed to an alignment of the jurisdiction of Eurojust in those two fields? There again, the principle of effectiveness deserves to be placed forward on order not to leave room for any suspicion of judicial imperialism.

Judicial co-ordination must correspond to specific stages of police or administrative investigation more to guarantee a procedural security and an orthodoxy of pursuits than to make up for the gap which separates it form other forms of mutual aid.

The general mechanism of devolution of jurisdiction must nevertheless find a way to fit into a scheme of simplification and of respect of jurisdiction reserved by member States in

conformity with the principle of subsidiarity. This requirement at its turn creates a delicate problem, which remains unsolved. Such criminal behaviour belonging to the field of repressive mutual aid of the classical type and which we intend to simplify or accelerate, at what instance does it risk to find itself responsible before a repressive centralisation on the part of Eurojust? Such is the major persisting ambiguity which can only be settled politically.

THE RÔLE OF THE JUDICIARY: NECESSITY AND TASKS OF EUROJUST

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A European house is taking shape within the framework of the European Union. Now that executive and parliamentary institutions have been set up, it is time to provide the judiciary too with an apartment in this European house so that it can perform its function as a monitoring and ***balancing third power*** *in fighting crime as well. The furnishings must be largely for it to decide. Only its powers and duties must be defined whilst maintaining subsidiarity. The following paper will therefore merely address the salient points, as well as the need for the setting up of a* ***permanent European judicial Documentation and Clearing House "EUROJUST"*** *as agreed in Tampere**.

Europe does not need mere conventions (of which we have already a surfeit) in the penal field. What we need is ***functioning permanent enforcement mechanisms*** *in the daily application* ***of these conventions*** *in order to combat crime effectively, especially where the timely response to serious crime is concerned.*

It should be emphasised that it is not primarily combating crime against the financial interests of the European Union ("eurocrimes")that is at stake here (that is first of all the purpose of the "Corpus Juris" in its revised version and the task of OLAF) but ***the combating of serious everyday transnational crime****, regarded increasingly by EU citizens as a direct threat against which they expect effective measures to be taken by the countries of Europe.*

In the TEU provision has to be made for a specific criminal law chamber for the ***Court of Justice of the EC*** *in order to have the speedy proceedings envisaged in Art. 6 ECHR, where a consensual decision has not been possible:*

- *preliminary rulings (already in Art. 35, para 7, sentence 2 TEU) and in future*
- *binding decision on where jurisdiction lies in cases of concurrent jurisdiction*
- *enforcement of obligations of states stemming from conventions ratified*

Finally it has to be taken into account, that in the framework of a ***European Charter on Fundamental Rights*** *there must be provisions too granting the individual the same Basic Rights that he has in national criminal proceedings, in order to ensure that the individual does not remain a mere object of dealings between states.*

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* The following contribution – prepared for „Notre Europe" - reflects the personal view of the author only

** See: Presidency Conclusions of the Tampere Summit – SN 200/99 CAB D – of October 15/16 1999 No.46

Summary of the Salient Points concerning EUROJUST

EUROJUST is **not a communitarised body**, but exercises the interests of the judiciary at Community level where national efforts and existing co-operation models have not produced sufficient results. What Europol does in investigating facts, EUROJUST must do in applying and upholding law as a separate entity.

Articles 29 and 31 of the Treaty of Amsterdam provide the legal basis and mandate for this **Round Table of European Crime Fighting**.

The purpose of this new form of judicial co-operation is to make the **practical application of existing conventions on fighting transnational crime** more effective (provide the added value). The need to do so arises in particular from the necessity to understand the respective criminal codes of others and bridge language barriers. The solution is for the representatives of all the national legal systems (at least) within the EU to interact constantly with each other. Who such a representative of a national judiciary should be is determined by the respective national code of procedure, the respective stage in the proceedings (preliminary investigation, judgement hearing, enforcement proceedings) and - ad personam - the sending state.

Only a permanent assembly of such liaison jurists acting as a Round Table of European Crime Fighting can ensure **a suitably rapid response** - as, say, when monitoring the controlled delivery of drugs. Where encroachment upon the rights of the individual (deployment of under-cover investigators, communications surveillance etc) - as is necessary in such cases - is concerned, national codes of procedure provide for varying degrees of judicial intervention, depending on the extent of the encroachment. Here, it is quite possible for prosecutor, judge or police officer to meet when such decisions have to be reached ad hoc at the preliminary investigation stage. It must be left to each country to decide whether to furnish its judicial liaison officer with such powers, or whether only to grant him authority to obtain the decision of the national judge/prosecutor otherwise competent as quickly as possible.

A permanent, multi-lateral unit is superior to any bi-lateral solution both in terms of effectiveness and cost. The most serious offences in particular are not merely bi-lateral. It is **less expensive** to delegate a judicial liaison officer to a central - but not centralised - unit, instead of posting such a liaison officer to each of the other Member States - the situation aspired to in the EU so far. It goes without saying, of course, that the large Community Member States in particular are free to avail themselves of this bi-lateral solution in addition - in, perhaps, other spheres of law as well.

At the same time, EUROJUST is to perform the **function of intermediary**, as when it is a matter of determining who is competent in cases of concurrent jurisdiction. Parallel criminal persecution or even charges resulting in the application of the principle of *ne bis in idem* in another EU Member State out of ignorance must be avoided. Where there is provision in legal assistance conventions for the setting up of joint investigation teams, this is the proper place for doing so, the team's composition (whether prosecutor or police officer) being governed by the respective national legal system.

This is also where the necessary **exchange of judges and prosecutors** (at least) within the EU Member States can be co-ordinated (concept of “Euro-justice”).

EUROJUST can also serve as the headquarters of the **European Judicial Network** (EJN).

EUROJUST can serve for **enhanced vocational training** of judges/prosecutors in the field of judicial co-operation in criminal matters.

Practitioners working with EUROJUST can contribute their experience to **analyse the necessity of new (or outdated) of norms** on co-operation in criminal matters.

Lastly, there is to be judicial **monitoring** of action taking by bodies such as Europol (see in particular the expansion of its functions under Article 30, para. 2 of the Treaty of Amsterdam) and OLAF, such as all national legal systems make provision for, but there is to be co-operation as well. Here, too, the issue is not one of majority decisions, but of transposing national monitoring systems already in existence onto the European action level already set up. To give an example: Europol's analysis provides grounds for an initial suspicion. A decision has to be taken whether to hand over the case to a national judicial system and, if so, which. Another issue is how to transform an intrusive European-level measure into one under a national legal system. (Example: OLAF would like to have a search conducted in Member State X and needs a search warrant there).

This new dimension of permanent judicial co-operation will constitute **a significant new step on the road to a European Law Enforcement Area**. The constant competition amongst the criminal codes will lead de facto to harmonisation on the level of the national criminal codes that have proved to be best in every-day practice.

Given these tasks, EUROJUST **cannot be confined to "serious organised crime".** This political term "organised crime" is acceptable for the purpose of achieving a political objective. In judicial and criminological terms it is just as inappropriate as the political fiction of a compensatory measure for the "gradual abolition of checks at common borders" (see: Schengen Implementation Agreement - SIA). A serious crime committed by an individual offender must not fall through the net of European co-operation. Equally, however, there has not been a significant fall in the number of arrests as a result of the abolition of checks at common borders under Schengen. On the contrary: planning criminals do not cross controlled checkpoints; instead they are more likely to be caught by search methods in border areas (as described in Article 39ff, SIA, which will have in any event to be revised with a view to enhanced effectiveness).

EUROJUST's task therefore depends on its function in a particular case.
- if judicial assistance conventions are to be applied, the latter determine the level of intervention themselves.
- if t is a matter of providing documentation or information, there can be no limit.
- where it is a question of monitoring Europol or OLAF, whatever task these are currently performing will determine EUROJUST's rôle.

This guarantees that EUROJUST does not have a mandate to deal with minima; its **confinement to "serious crime"** alone has been set out elsewhere and is easy to interpret in relation to the respective task.

To be sure, EUROJUST must be conceived in a manner that does **not run counter to the endeavours of the Council of Europe**. The latter's activities throughout the Continent give it a strategic superiority in fighting crime, since it covers the entire field of crime with the aid of its conventions with currently 41 European - and in some cases non-European - states.

EUROJUST is designed solely for consensus solutions. In the event of a dispute, a **court** with authority to resolve disputes at European level is called for, such as Article 35, para. 7, sentence 2 of the Treaty of Amsterdam vests in the Court of Justice of the European Communities in connection with disputes regarding the interpretation of conventions in the sphere of criminal law. There is no comparable competence in determining the place of jurisdiction mentioned above in the event of competing jurisdiction which is the province of the judiciary and not - as is currently de facto the case - of the executive.

To be sure, Article 6 of the European Convention on Human Rights insists upon judgements being delivered with all possible speed - especially in detention cases. This can not have been expected of the Court of Justice of the European Communities hitherto. **A chamber specialised in criminal law should therefore be maintained at the European Court of Justice.**

The **rôle of the individual** in these proceedings requires clarification. Today, it is common to the European concept of justice that the decisions to be taken in this regard are no longer those between states alone. However, in a major section on procedure mentioned above, the Treaty of Amsterdam treats the individual as a mere object. This brings us to the following pictogram to work with following the network of sources of applicable law in Europe from the outset, leaving aside on purpose sources of minor importance in this field such as the OECD.

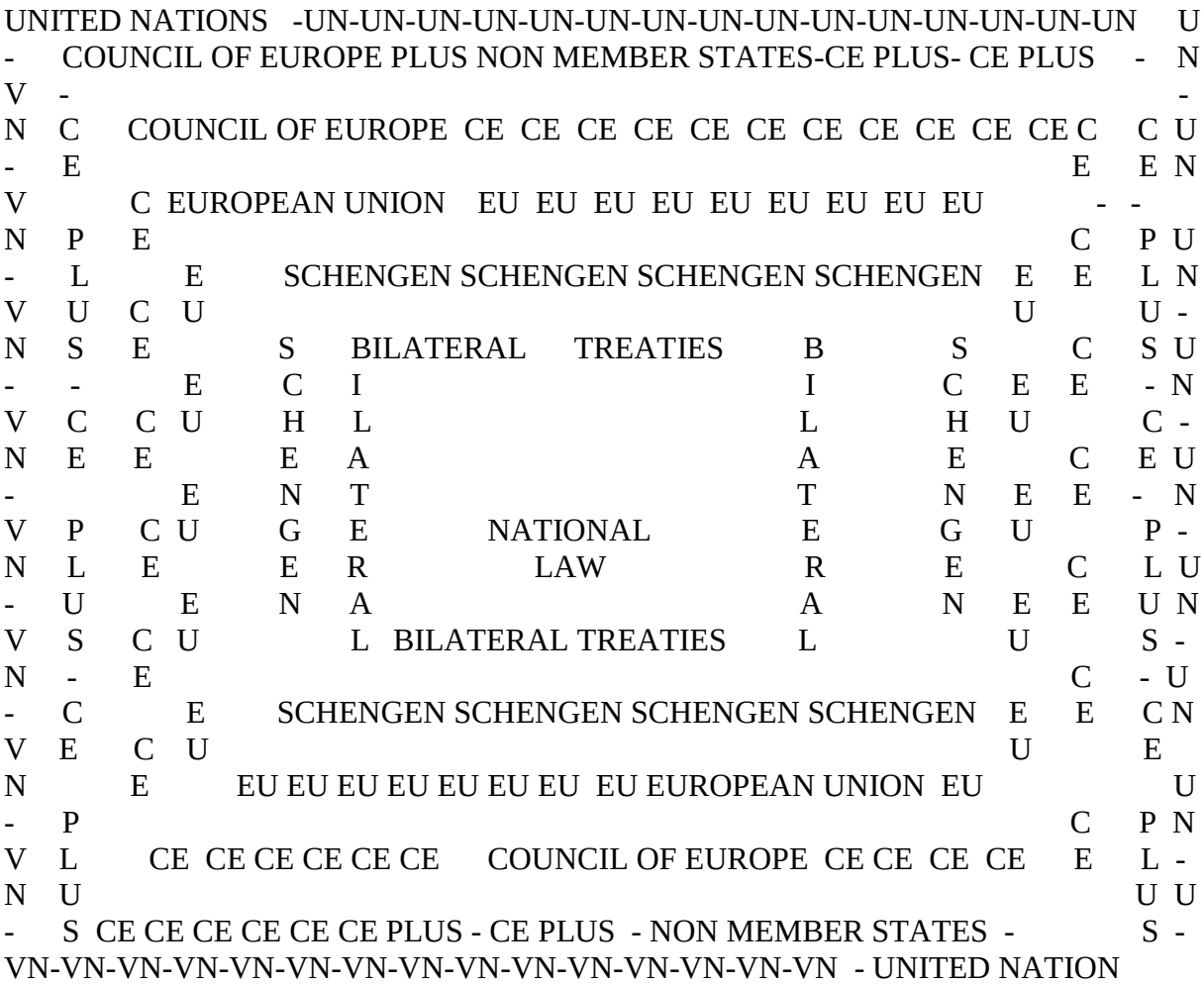
Judicial Documentation and Clearing House
(EUROJUST)

Directorate of EUROJUST (and Head of EJN)
Administration
Information Technologies Internet, e-mail
Vocational Training
Analysis of Co-operation

Department I	Department II		Department III
Liaison offices **(independent, national liaison officers)**	Language Services		Documentation **(International Law, National Law incl. Jurisdiction)**
	Interpreter	**Translator**	
Austria			***Austria***
Belgium			***Belgium***
Denmark	**R**		***Denmark***
Finland	**O**		***Finland***
France	**U**		***France***
Germany	**N**		***Germany***
Greece	**D**		***Greece***
Ireland			***Ireland***
Italy	**T**		***Italy***
Luxembourg	**A**		***Luxembourg***
The Netherlands	**B**		***The Netherlands***
Portugal	**L**		***Portugal***
Spain	**E**		***Spain***
Sweden			***Sweden***
United Kingdom			***United Kingdom***
Council of Europe (Representatives of Non-EU Member States co-operating in single cases)	DATA-BASE (Applicable law, jurisdiction and register of serious transnational criminal cases)		**Liaison Office Council of Europe** (Elaboration and Documentation of international conventions on assistance)
Liaison Offices **Commission and Council of the European Union**	Liaison Office **OLAF**	Liaison Office **EUROPOL**	Liaison Office **United Nations**

THE NETWORK: EUROPEAN CO-OPERATION IN CRIMINAL MATTERS

SOURCES OF APPLICABLE LAW IN EUROPE



Legende :

VN: Conventions on mutual assistance in criminal matters in the framework of the United Nations (e.g. on Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20.12.1988/in future: on organized crime)
CE - PLUS: Conventions applicable not only in member-states of the Council of Europe
CE: Conventions of the Council of Europe with additional protocols
EU: Conventions of the European Union
SCHENGEN: Conventions only applicable between the group of "Schengen" (1998: Austria, Belgium, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Portugal, Spain)
Bilateral: Bilateral Treaties in addition to Conventions mentioned above
National: The national legislation on International Co-operation in Criminal matters filling also gaps of the Conventions; e.g. in Germany: Gesetz über die Internationale Rechtshilfe in Strafsachen (Law on International Assistance in Criminal Matters), Strafprozessordnung (Code of Procedure), Strafgesetzbuch (Penal Code)

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Initial Position

1. "*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*"[1].

This is true not only of the European Union but, first and foremost, of the whole continent, united by the European Convention on Human Rights (ECHR) and related conventions that safeguard the cultural heritage of European democratic societies. The rule of law, national and transnational commitments to human rights and genuine 1democracy, including the division of powers, (Montesquieu must not be left out of the picture on the pretext that two or more jurisdictions are involved) **must be regarded as an inalienable part of this European heritage.**

2. An overall harmonised body of common **European substantive criminal law seems neither feasible nor desirable**, given the need to maintain national and regional particularities (e.g.: the Law on abortion, Narcotics Law, the approach to juvenile delinquency or maximum sanctions).

Nor is it possible to forcibly impose **harmonisation of procedural law** within a reasonable period of time (to mention just a few topics: admissibility of judgements in absentia; the rôle of public prosecutors, investigating judges and police forces in the initiation of proceedings and during the stage of examination proceedings). Harmonisation will to some extent occur of its own accord as a result of competition between the systems and increased practical co-operation in criminal matters.

3. **European jurisdiction**, i.e. a supra-national approach, could be possible, as shown on a global level by the examples of the ad hoc courts in The Hague/Arusha or the permanent International Criminal Court (ICC) based on the Rome Statute[2]. This would mean having overall jurisdiction, with public prosecutors of its own, these also to be supported by national prosecuting authorities through vertical legal assistance. Why, for example, should infringements of specific (not only financial: OLAF) European interests ("eurocrimes") not also be combatted de lege/pacta ferenda at a European level through its own system of prosecution, with its own jurisdiction? Why should jurisdiction in cases like that of Abdullah Öcalan or those of government-generated crime not be entrusted to a European Criminal Court (ECC)? Indeed, the idea of setting up an ECC should not be set aside. For the time being, however, it seems - unfortunately - to be more or less wishful thinking**,** bearing in mind the problems at EU-level).

On the other hand, an **ECC would not provide a remedy for the problems caused by serious day-to-day transnational crime**, or for crimes against national interests only (but needing assistance from abroad), which of course never will or can be entrusted to a transnational jurisdiction.

4. The result of these preliminary considerations seems to be that, in the foreseeable future, a practical solution lies in mutual co-operation only. In Europe, practical legal co-operation in

[1] Quotation from: "PRESIDENCY CONCLUSIONS , EUROPEAN COUNCIL, Tampere, (15 AND 16 OCTOBER 1999)" sub-para. 1
[2] ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT of 17 July 1998=http://www.un.org/icc

criminal matters rests primarily on an ever-tighter network of multi-lateral agreements. **Europe is condemned to make the a p p l i c a t i o n legal co-operation feasible, stringent and effective continent-wide** – without gaps or blank spaces on the map.

5. **Assistance in criminal matters is (and must remain) a matter for criminal justice.** Between states it is a foreign policy matter in terms of international law. Nevertheless, practice - and this is a major advance - permits of more direct contacts between the competent judicial authorities. Where direct judicial contacts function, there is no need for help from the EJN or EUROJUST. There is no doubt either that the competent authorities may avail themselves (!) of police channels - where this is admissible.

6 The objective set out in para. 4 above cannot, of course, be achieved without re-thinking and re-defining the spirit and the merits of **the principle of sovereignty.** This is a sound approach, of course. It seems to be contrary to the spirit of our times to even slightly touch on this principle, and this because of the separatist tendencies in Western European states on one hand, and the pride of emerging democracies to have restored or achieved sovereignty on the other. Therefore a lot of convincing has to be done: After all, co-operation in the penal field also serves the purpose of safeguarding sovereignty, especially against "Mafia-type" organisations that threaten governmental structures in European countries. It has to be pointed out that co-operation in this sense is far more than the mere exchange of information and evidence and the transfer of persons. Standing united under the shelter of enhanced mutual co-operation to a certain extent guarantees the existence not only of emerging democracies, but also of well-established ones. Furthermore: **The support of the concept of "European interest" in the fight against crime is of benefit to all European countries.** "Giving up" positions presently regarded as part of national sovereignty in favour of enhanced co-operation in criminal matters will be rewarded by a stabilisation of national sovereignty. In other words:

'A new, broader definition of national interest is needed in the new century, which could induce States to find greater unity in the pursuit of common goals and values. In the context of the many challenges facing humanity today, the collective interest is the national interest'*(Kofi Annan* in *The Economist of 18.09.1999)*

7. Taking these considerations into account, one has to concentrate on improving re-defined legal co-operation in criminal matters in order to :
- **identify** misleading developments and **past mistakes,**
- take care of the **needs of practitioners** working in this field
- ask whether or not rules of **common interpretation and enforcement** of co-operation tools provided by penal conventions are desirable and feasible
- **seek solutions**
    - in cases of concurrent jurisdiction
    - in cases where States neglect their obligations under existing conventions
    - in cases of concurrent/conflicting conventions : CoE (Mother) conventions, EU conventions, Schengen Implementation Agreement, United Nations or OECD conventions providing for different solutions/obligations of States

- The rôle of the individual in this co-operation in criminal matters and enforce human rights guaranteed in criminal matters by Art. 6 ECMR; this is also valid concerning the envisaged Charter on Human Rights for the European Union,

- prepare **European answers** to global challenges arising in the near future.

Identification of Problems

Before I touch upon institutionalisation, let us examine the current position regarding European co-operation in criminal matters, so as to highlight the problems to be solved.

European Conventions in General

Misleading criminal-geographic approaches.

8. ***"Crime knows no frontiers"***, not even those of Communities/Unions such as the European Union. This principle is neither new nor outdated. However, it is totally neglected when drafting new or on-going conventions limited to areas/regions/communities or Unions of States not designed and structured for the fight against transnational crime.

9. It is without doubt a fact that, since the end of the last millennium, one can observe a **migration of crime** - from East to West, and to a certain extent from South to North as well - due to patent economic problems. Crime cannot therefore be tackled without the active participation of the countries in which these crime phenomena originate, whether they be members or not of the European Union - which for the time-being is primarily designed to be an economic and monetary union rather than anything else.

The nucleus of conventions in the combat against transnational crime in Europe must be (or become again) the Council of Europe working continentwide if it is to be combatted rather than molly-coddled even if this is only on the smallest common denominator. Most of the EU conventions refer to the **Council of Europe** as "mother convention". The EU - or a smaller judicial area – has, of course, the possibility of co-operating more closely, even going as far as becoming an actual European law enforcement area.

Concurrent/Divergent Conventions

10. **Concurrent conventions**: One of the most frequently asked questions in countries which are parties to different conventions of different origins is: which of a multitude of conventions, covering the same matter, but leading to different results has to be applied? To remain within the framework of the EU only: CoE Mother conventions/Schengen Implementation Agreement (SIA)/ EPC/EU convention/ OECD convention /UN convention or even regional conventions (Benelux/Nordic Countries) or bi-lateral treaties? In general, preambles or final clauses of conventions require that priority be given to the convention in question, or otherwise emphasise that the convention shall serve the purpose of facilitating the

application of another, explicitly mentioned, convention. But what about conflicting preambles and/or final clauses of this kind?

11. What about **divergent conventions**, existing in parallel, yet providing different answers to the same question? (Example: The transfer/enforcement of sentences between Germany and the Netherlands v. the CoE Convention on the Transfer of Sentenced Persons v. Articles 67-69 of the Schengen Implementation Agreement v. the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991). Public international law does not provide clear answers to questions of priority in this field, nor does it provide criteria designed to deliver solutions. In such cases, what about the rule of law? What about the rights of the individuals concerned?

The treaty-chaos - syndrome

12. In practice, there is no ready **access to the Law on Mutual Assistance in Criminal Matters**: Practitioners expect "Europe" to provide them with clear, easy-to-locate rules from which they can obtain answers to cross-border legal questions, as, for example:

- whether they can directly summon or subpoena witnesses by post

- **which law they should apply** (that of the requesting or the requested State) **when processing incoming requests for legal assistance**;

- **which law they should expect to be applied** (that of the requesting or the requested State) **in the case of outgoing requests for legal assistance**;

- **whether a criminal suit is exhausted by a rule that also applies internationally** and (to cite a concrete example of far-reaching importance) whether they have immediately to release a person arrested in a particular criminal case because of the possible application of the "ne bis in idem" [3] principle in the light of a foreign judgement cited by the defence.

The expectations of practitioners in Europe will not be met. They will be faced with **a jungle of conventions:**

13. Even when leaving aside special problems caused by "patchwork Conventions" (dedicated to specific offences only) and questions such as "ne bis in idem", examination of the law applicable in an ordinary extradition case (e.g. extradition from/to Germany) will place the judge/prosecutor in the Netherlands, for example, in a situation where **fifteen (15) levels of law may possibly be applicable to one single case:**

- four CoE conventions, each with a set of Declarations and Reservations
- four EU/EPC/Schengen conventions, probably again with a set of specific R/Ds
- one bilateral treaty
- at least two national laws on international mutual assistance
- two systems of substantive criminal law
- two systems of procedural law.

[3] See: Art. 54 - 58 of the Schengen Implementation Agreement as well as the Convention between the Member States of the European Communities on Double Jeopardy of 25 May 1987

14. In addition, **uncertainties arise** about the current territorial scope of certain treaties. That is due to the novel practice of using legal constructs, supplementary to the customary requirement concerning the entry into force of treaties, such as ”bringing into force” (Art. 139 of the Schengen Implementation Agreement - SIA) or ”advance implementation” in relation to two or more States (in EU agreements). In the absence of central documentation which can be consulted at any time, of the kind provided in exemplary fashion by the Council of Europe, such uncertainties cannot be overcome. Furthermore, uncertainties in a given case also arise because of the difficulty of accessing provisos and clarifications regarding the texts and the declarations, protocols and appendices thereto, for example concerning the territorial application of an agreement, many such stipulations being modified or even withdrawn, not in the ”mother convention” (i.e. the Council of Europe Convention), but in connection with other agreements (Schengen or EU).

15. The growing number of CoE conventions and legal instruments is counter-productive to intentions. They do not facilitate the day-to-day work of the practitioner. By contrast, it should be observed that more general conventions (e.g.: 1959 Mutual Assistance and 1957 Extradition) are still of the utmost importance and easy to handle because of their open clauses, avoiding over-regulation of details which can be left to interpretation and technical[4] / legal progress/development.

16. In addition, existing Council of Europe conventions neglect the fact that effective judicial co-operation in criminal matters increasingly calls for the **simultaneous application of CoE conventions.**

Examples:
- Request for extradition combined with the request for a formal first hearing of the suspect in the context of his/her arrest or the collection of additional evidence (Conventions: 1959 Mutual Assistance and 1957 Extradition)
- Request for extradition combined with one regarding (re-transfer of a sentenced person (Conventions: 1967 Extradition and 1983 Transfer)

17. Another problem area is the **lack of a uniform interpretation** of the conventions themselves in the various Contracting States, both at the stage of granting assistance (Executive) and at the stage of deciding on admissibility (Judiciary). There is the additional complication that the initial remedial measures to be taken shortly will produce new problems: under Article 35 (former Article K.7) of the TEU, the Court of Justice of the European Communities already is empowered to deliver preliminary rulings on the interpretation of the conventions under Title VI of the TEU (police and judicial co-operation).

However: this instrument is only available to those States, and between those States, which have recognised this jurisdiction in accordance with Article 35(2) of the TEU. Worse still is the fact that, since nearly all the conventions in the area under consideration refer to earlier Council of Europe conventions as "mother conventions", the Court of Justice will no doubt incidentally also have to rule on Council of Europe conventions. Such rulings will - de facto - have a certain binding effect on third States. In spite of that, neither the Council of Europe nor its Member States can have any influence on the rulings of the European Court of Justice.

[4] Worst example: Agreement between the Member States of the European Communities on the Simplification and Modernisation of Methods of Transmitting Extradition Requests of 26 May1989.

18. At the centre, **knowledge of foreign national law becomes more and more necessary**, and this, moreover, in all States concerned in a case, involving not only mutual legal assistance law, but also the law of criminal procedure (procedures in the initiating and/or requesting State) and substantive criminal law (e.g. in the matter of double criminality). The particular difficulty here lies in researching the current foreign law in each case. The formal information channels provided for this up to now are too slow for the purposes of criminal cases (Art. 6 ECHR), particularly in a case involving custody. A request, say, for temporary custody through an alert in the Schengen Information System under Articles 95 and 64 of the Schengen Implementation Agreement in conjunction with Article 16 of the European Convention on Extradition (Council of Europe) burdens the issuing judicial authority with an incredible responsibility when in practice the checking of double criminality and the non-application of a statute of limitation in currently 9 - soon 14 and more - partner States is often requested totally at random.

19. Even if there were a binding interpretation, there is no guarantee at all that contracting States would feel obliged to abide by any ruling on the interpretation. The **absence of any enforcement mechanism** on States not ready to meet (or not ready to do so in due time) an obligation entered into in ratifying a convention can be identified as one of the most crucial points in the traditional application of conventions/agreements by practitioners.

20. **Concurrent jurisdiction ("forum-shopping").** In view of the fact that, in cross-border crime, the place where a crime is committed is situated in many States, there are increasingly conflicting claims of jurisdiction or a conflicting disclaimer of jurisdiction between several States which, under their national criminal law, have the power or even an obligation to prosecute. Contractual or supra-national attempts at solutions – which, moreover, cannot be put off pending an (executive!) consultation mechanism – are not yet envisaged. This is so even when it is a matter of protecting the financial interests of the EU, although up to 15 States now already have the power to prosecute simultaneously (and hence, inter alia, to bring a criminal action). The safeguard afforded by the statutory judge is neglected and, at the same time, the possibility of "forum shopping" is opened up for both police and perpetrator.

21. There will simply be no getting away from inconsistencies as a result of **language barriers**. However, the primary aim must be to overcome these, both with regard to the conventions themselves already at the end of the drafting stage [5], and with regard to the interpreters and translators working on a specific case.

22. The **rôle of the individual in international co-operation in criminal matters** must be defined clearly. One will find different approaches to this issue in different countries. As a general rule, the individual in most of the existing conventions (except, for example, ETS 112) is regarded more or less as a mere object of international co-operation. A person to be transferred/ surrendered/ extradited may claim limited obstacles or the lack of prerequisites only. Only Article 5, para I, letter f of the ECHR (not Article 6) refers to extradition explicitly.
Nowhere is there a clause - general or specific - stipulating that co-operation is only one **part of a single criminal procedure against a human being**. It is necessary, above all, to reduce sources of friction: no suspect, victim or third party may be better or worse off than he or she would be, had the case been dealt with entirely under national proceedings. On the other hand,

[5] See for example the problems with diverging texts of the Schengen Implementing Agreement, Articles 54 and 41, due to translation problems

however, prosecuting authorities must neither be hindered nor released from fully carrying out their national judicial and legal obligations because of transnational aspects.

No suspect, no victim or third party may only be worse of to the mere fact, that is not a national procedure only. On the other hand must be guaranteed that investigation is not hindered or leaving aside duties to prosecute, only because transnational aspects are involved.

23. If one takes stock of the situation, it is also to be regretted that there **is no clear-cut inclusion of police co-operation** in Europe in cross-border criminal proceedings conducted in strict observance of the separation of powers. However, disregard of judicial principles of mutual assistance between police forces has already led (in Germany, for example) to several rulings of the Federal Supreme Court, which resulted in the annulment of rulings previously delivered by trial judges (Verwertungsverbot): The (not-) requested State (NL) had objected to the use of information obtained through police channels in a way contrary to public international law.[6] This does not imply any criticism of enhanced police co-operation. Nor should it be anyone's aim to transpose counter-productive national disputes regarding power over investigation procedures to a European level. But both the legal basis and the system of mutual checks and balances which are the mainstay of each and every democracy - in practice, as well as in technical and personal terms - must ultimately be correct.

24. **Europe has to be prepared for globalisation.** The above observations on co-operation in criminal matters have to be seen as those of today. They will still be valid for Europe in future too. But today already the challenges in the fight against major international crime have to be seen in a global context, demanding global solutions. The right way would be to open all existing conventions to all the countries of the world having a commitment to human rights in ECHR terms. This could lead even to the European idea of justice having a better chance of competing with the United States, for example, which seeks to bring its different understanding of criminal law to Europe's emerging democracies.

[6] See for example: Federal Supreme Court (Germany): Official Publications *(BGHSt)* Vol. 34 p.334-345

Interim summary

25. **The present situation is counter-productive for both practitioners and an effective fight against transnational crime.**

The improvements achieved by new conventions are cancelled out by their large number, their different scope (both territorial and in terms of their substance) and their **contradictions and inconsistencies** (in part at least).

There is no harmonisation between the "mother conventions" (Council of Europe) and their "children" (EU, Schengen, etc.).

There is no common documentation on applicable conventions, identification of States that are a Party to one or another convention, with their reservations and declarations (again with different territorial applicability when R/Ds of Council of Europe conventions are deleted partly or in common, e.g. in or pursuant to an EU convention)

There is no institution to solve conflicts concerning the application of conventions effectively, in reasonable time and bindingly.

Human Rights are neglected to a great extent.

There is a need for a clear European decision that the **Council of Europe** (being responsible for the broadest territorial application) **be (and remain) the nucleus of all conventions** on co-operation in criminal matters in Europe**.** The EU should support the Council of Europe to that effect: Where the drawing up of conventions is concerned, the EU must confine itself to presenting models for enhanced co-operation, both for an EU destined for enlargement, as well as for an inner circle of European states defined by criminal law criteria and which do not necessarily have to belong to the EU: a Europe of three speeds!

There should be a general link between these competing organisations in order to ensure harmonised but not duplicated drafting - a documentation of the conventions themselves in one hand in Strasbourg.

A documentation of the law of requested/requesting States, varying from day to day and needing interpretation with regard to national jurisdiction is one purpose of a Documentation and Clearing House which can only be achieved within the framework of the EU, being the nucleus of European institutions.

Proposals for solutions

A) Simplified Conventions

26. One solution would be to adopt **a systematic and harmonised approach**, all conventions being initiated by the group of States covering the largest number of countries and geographic areas in Europe: In the past and today still, this is without doubt the case with the Council of

Europe, whose conventions in a great many instances (but not all[7]) are regarded as or explicitly called "Mother Conventions"[8]. This approach - that of first finding a more general solution (the lowest common denominator amongst the 41) , has at any rate to be maintained. In any given case, practitioners in all participating countries know that CoE conventions form their common basis of co-operation. This does not - of course - preclude finding that the CoE Mother Convention provides - necessarily even - for more detailed and intrusive solutions (concerning sovereignty) in the framework of the EU, for example, or the regions (Benelux/Nordic Council) or on a bilateral level. Only one prerequisite applies: Each provision facilitating the application of a CoE convention should quote explicitly the Article of the CoE convention concerned.

It is a mistake to proceed the other way around, as is the case with the attempts to facilitate mutual assistance by giving work at EU level priority over parallel, if not in many aspects pioneering, work at the CoE (draft 2nd Additional Protocol to ETS 30). One can never find a real common basis by starting from the top. Moreover, the possibility of a convention's entry into force with only a small number of ratifications by States who so wish (provided by the Council of Europe) facilitates the drafting and signature proceedings and speeds up the entry into force of conventions[9].
It is politically incorrect and counter-productive for future co-operation when a group of 15 States de facto dictate the content of a convention designed to operate with respect to 41 countries. If any group of States so wish, it is open to them to decide, for example, that they will only draft, sign or ratify conventions unanimously.

27. There are (at least) **two avenues open in order to achieve a single Convention on Co-operation in Criminal Matters** in future (both having as an inalienable prerequisite that the status-quo of standing conventions be left untouched):

27a. CoE Codification: **"General Code On Co-operation In Criminal Matters"**, providing
- a **general part** (obstacles in general; prerequisites in general, application of human rights, rôle of the individual, data protection and a
- **special part** dedicated to the instruments of co-operation, referring to rules of the general part.

This solution would involve an interim situation where States would variously be bound by the existing conventions as well as by the Code, but it would lead in the end to a single convention for the vast majority of European States continent-wide.

27b. "Convention on the application of Conventions in the penal field" **(Framework Convention).**
This less complicated but possibly less helpful solution could address points of common value for all conventions (present and future ones):
- human rights
- rôle of the individual
- guidelines for interpretation

[7] See Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 13 November 1991
[8] See Art. 48, 59, 67 Schengen Implementation Agreement of 19 June 1990
[9] See the poor number of ratifications / anticipated entry into force of EU conventions

- rules/institutions for the solution of conflicts in the interpretation and application of conventions
- common data-base
- common rules on data protection
- relationship to other conventions in general
- definitions to be applied in all conventions
- definition of common objectives for European co-operation

B) Simplified Application of Conventions

Documentation and Clearing House (EUROJUST)

28. Without any doubt, there is a need for an easily accessible **central documentation** - covering all the networks of States - **of all currently pertinent rules** (transnational, supra-national and national of all contracting parties to conventions in the penal field), including access to national jurisdiction concerning both penal and procedural law. That is the minimum that legal practitioners can expect.

29. There is, in addition, a need for a **clearing house** to solve conflicts in the common interpretation and application of conventions in general and in due time in particular. The most frequent plaintive cry of practitioners is: Why does assistance take such a long time? : months if not years - as at present - are impractical if transnational crime in Europe is to be fought effectively.

30. Within the framework of the European Union, the Presidency Conclusions of the recent "Tampere Summit" already took a first major step in this direction **(EUROJUST)** ***46*** :

"To reinforce the fight against serious organised crime, the European Council has agreed that a unit (EUROJUST) should be set up"...." The European Council requests the Council to adopt the necessary legal instrument by the end of 2001".

31. The main purpose of such a unit is first of all that each judge in Europe who is burdened with day-to-day problems in the application of his own national law will be able to make his peace with "Europe" if he can telephone **his counterpart** at "EUROJUST" without formality, and raise his problems with him in his own language, using the terms of his own legal system. An effective contribution would be made to peace under the law in Europe if the corresponding judges of the States concerned - in adjacent rooms, with the colleague of their own nationality, with language assistance and a central documentation of all the relevant sources of law concerning co-operation at their disposal - were then to find solutions to problems and communicate them to the office of the enquiring judicial officer.

32. This approach involving **a central (but not a communitarised) body** seems to be more appropriate than the albeit positive use of bilateral liaison legal experts which already takes places successfully and extensively at EU level. It is, however, less labour-intensive and takes greater account of the fact that precisely the most dangerous types of crimes require more than just bilateral judicial reactions as rapidly as possible, for example surveillance of drug shipments ("controlled delivery") and the transport of exploited women or children, for which the trade routes and consequently the places where approval by a court or the public

prosecutor's office is required for intensive **intervention** can change **in a flash**. It seems to me rather doubtful that the recently developed EU networks whose staff change constantly, can be effective for the above purposes. They constitute a good preparatory stage towards the envisaged Documentation and Clearing House EUROJUST – being at the same time headquarters to the EJN - and will serve in future as the necessary national basis and medium for a permanent Round Table of European Crime Fighting.

33. Concerning the **Council of Europe**, it has to be decided as soon as possible what kind of relationship to EUROJUST has to be set up. There is no doubt that, in the interests of all European States, a way needs to be found which does not de facto establish a new, if only virtual, Iron Curtain (this time around the EU). It would appear unthinkable to exclude those very States, in particular in Central and Eastern Europe, from which, not least due to the collapse of the economy and of government power structures, the bulk of the most serious crime is imported.

34. The most appropriate way seems to be **to include all member States of the CoE that are a party to conventions in the field of penal law in that unit from the outset**. They should delegate permanent representatives (of lower rank so as not to water down this body) to this unit, as well as interpreters of their mother tongue. This solution would also avoid duplication on this level.
It is also worth considering where EUROJUST should take its seat

- in **Strasbourg** which is the heart of European justice, the home of ECHR and the seat of C-SIS,

- in **the Hague**, close to Europol

- in **Luxembourg** close to the Court of Justice of the European Communities

- in **Potsdam,** for example, as being closest to the origin of the vast majority of transnational crimes in Eastern Europe, as well as a symbolic European bridge too.

European Court

35. **As mentioned above, many problems will not or cannot be solved by EUROJUST on a consensual basis.** On the other hand, the need for binding decisions in the application, common interpretation and effective enforcement of conventions in the penal field has been identified.

36. At least **three solutions** are possible:

36a. The minimum standard (available now already) is the right of the individual to lodge an appeal with the **ECHR.** In addition, the ECHR could be empowered to solve certain problems arising out of the application of CoE conventions : only under the ECHR or in general

36b. A second solution would be - avoiding inconsistencies in interpretation - to entrust the **Court of Justice of the European Communities** with collateral powers (als beliehenes Gericht)**.**

36c. A third way would be to provide a "**European pre-trial chamber",** as envisaged by the authors of the "Corpus Juris" exercise.[10]

37. All the solutions (36c?) mentioned above have one major defect: **the court would never and, indeed, could never serve both the interests of the individual and national / European interests** in the sense described above. This conclusion leads to the following: a point that was earlier described as wishful thinking has, after all, to be taken seriously into account in the long run: the setting up of a European Criminal Court (ECC), not only to hear specific severe cases against individual suspects (terrorism, governmental criminality, protection of common European interests - be they financial or environmental, for example), but also to enforce European Conventions on Co-operation in Criminal Matters effectively.

Conclusions for The EU

38. Existing tools are not able to meet the threat to public peace in Europe caused by transnational crime.

39. The **hybrid position of mutual legal assistance** (Title VI of the EU Treaty) between an international treaty and Community law **must be reconsidered** with a view to communitarising the law on co-operation in criminal matters for those States which so wish (principal of opting into a uniform European system of criminal prosecution, not a common code of criminal procedure). From a criminal law point of view, the only logical course of action would be to have the dismantling of border controls followed by the dismantling of borders for prosecution purposes. More precisely, in an inner circle of Europe yet to be defined and built on mutual confidence (as in the case of the currency union but in accordance with criminal law convergence criteria)- and which does not have to be identical either with the Schengen area or with the EU – we no longer need a convention on mutual assistance, but the principle of co-operation in a common law-enforcement area in which each State is obliged to support uniform criminal proceedings based on division of labour, using the national procedural law remedies provided or not precluded under its law as if it were its own criminal proceedings.

The supreme judicial body for the settlement of disputes – and be it only a judicial (!) definition of the place of jurisdiction – in this Europe would be the **Court of Justice of the European Communities** which in any case should already be held up as a **specialised criminal adjudication body** on the basis of its powers described above, following the entry into force of the Treaty of Amsterdam. In the case of pending committal matters, for example, it has to function with the desired haste (Art. 6 ECHR!) and in a specialised fashion (what is necessary already now taking into account the already existing task of preliminary rulings under Art. 35, para. 7, sentence 2).

Concrete Measures to be Taken

40. **Three new approaches** in particular are **necessary** :

40a. to request the Council of Europe to draft a **European Single Convention on Co-operation in Criminal Matters** continent-wide.

[10] See: *v. d. Wyngaert,* AGON, August 1999

40b. **to set up EUROJUST** as soon as possible as a **permanent unit** of representatives of at least all Member States of the EU, preferably of all CoE Member States, possibly a solution in-between (e.g. Switzerland, Liechtenstein, Norway, Iceland, Greenland, the Farøer Islands, the candidates for accession to the EU - at least those on the first list).

40c. to enforce conventions and to solve conflicts by a **European Court** as ultima ratio where a consensual solution cannot be found.

41. We need more intensive and formalised **co-operation between the Council of Europe and the European Union** with the aim of gradually achieving co-ordinated, harmonised co-operation in criminal law matters throughout Europe. Parallel drafts of conventions covering the same area of law are not needed; this work is counter-productive and has nothing to do with the needs of the practitioner[11].

42. What we need is some kind of **NEW START concerning conventions** on mutual assistance in criminal matters in Europe, beginning all efforts of enhanced co-operation on the smallest common but continent-wide level. Rather, there must be the possibility of co-operating ever more closely provided that the rights transferred to such co-operation can be retrieved: the greater the degree of confidence established, the closer the co-operation. This new system must have a common nucleus which, given a joint commitment to human rights as a minimum requirement for co-operation in criminal matters, might well be the Council of Europe which is to be supported to a larger extent by the EU in work on treaties. A formal co-operation agreement between the EU and the Council of Europe might form the legal basis for this.

43. In view of the multitude of treaties and protocols which are also to be applied in the future, together with their differing degrees of declarations and reservations, national problems of competence, the requirement to produce the necessary judicial/public prosecutor's decisions rapidly, increasingly frequent conflicts of jurisdiction in the very area of serious transnational crime and, not least, in view of the documentation and language difficulties, there is a need for a Documentation and Clearing House ("EUROJUST") corresponding to Europol and tailored to judicial requirements, an institution which **can be set up by the European Union** only. This agency will exist separately but alongside Europol, and has both to control and to co-operate with Europol. It is precisely the often bemoaned failure to react or belated response to requests for mutual assistance which could be looked into in a straightforward manner by colleagues in such a liaison office. In the case of certain urgent matters, even the power to exercise jurisdiction by way of delegation could be conferred on these liaison lawyers.

44. This kind of specific judicial liaison office will at the same time constitute a starting-point for the **separation of powers** on a European level, without obliging States to cede sovereignty at a point where they are (still) unable and/or unwilling to do so with regard to pan-European co-operation.

[11] Worst example: The elaboration of parallel drafts of a EU Convention on mutual assistance in Criminal Matters (OJ EC 251/2 of 02. September 1999) on the one hand and the preliminary draft of a Second Additional Protocol to the European Convention on Mutual assistance in Criminal Matters – PC-OC (99) 11 – which without any doubt would at least have been signed today already (April 2000), if the proceedings had not been blocked by EU Countries.

45. The adequate mechanism for setting up **EUROJUST will be a convention based on Article 34, para. 2, letter d of the TEU**, if only to be on the same level with Europol. Due to the fact that the time-scale laid down in Tampere (by the end of 2001) is to be observed in the meantime one may refer to a framework decision/decision as foreseen in Art. 34 para2, letters b) or c). At any rate the aim must not be set aside to envisage a convention taking such an interim measure.

46. Extension of the competences of the Court of Justice of the European Union will require **amendment of Article 35 of the Treaty** on European Union. Experts on Public International Law/the body of judges at the Court of Justice of the European Union will have to examine whether the latter has the organisational authority to set up the special criminal chamber necessary.

Final remarks

Let us at last tread new paths: may politics re-define the principle of **"sovereignty"** in the field of justice too so that it does not simply result – however unintentionally – in serving the ends of criminals engaged in transnational activities.

Let us first give "core Europe" what we demand for the developing new democracies of Europe: let us put justice in Europe on a stronger, more self-confident and, above all, more independent footing!

To quote Montesquieu:

"Everything would be lost if one and the same person or the same body exercised the following three absolute powers: to enact laws, to implement public decisions and to pass judgement on crimes and private disputes"[12].

[12] Charles-Louis de Secondat, Baron de la Brède et de Montesquieu, , De l`èsprit des lois, 11th book, Chap. VI, retranslated from the German translation of W*eigand, Stuttgart,1994, p.217*

LAUNDERING THE PROCEEDS OF CRIMINAL ACTIVITIES

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Over the past few decades, the criminal world has undergone a revolution similar to that of the economic world, through a two-fold phenomenon of concentration and internationalisation.

Organised crime has set up real business concerns aimed solely at making a profit, with violence and power as merely the means to achieving this end. These criminal business concerns are structured on exactly the same lines as those of the economic and commercial world with production departments, distribution departments, communications sectors and financial and personnel management.

The most elaborate forms of these criminal business concerns can be likened to cartels or holdings. The Colombian drug cartels thus control all the stages of a single product, from production to distribution through transformation – which enables them to make a profit from each of the economic operations involved.

The holding-type structures are mainly found in Italian and North American Mafias, Chinese Triads or Japanese Yakuzas, due chiefly to the numerous and varied criminal activities which they carry on (dealing in drugs, extortion, prostitution, clandestine gaming, smuggling etc) : the only link between all these activities being a financial one : investment and pocketing profits. This form of organisation, which is not concentrated on one single product, is very flexible, a fact which enables it to seize all criminal opportunities as and when they arise. The most significant example has been the way they have adapted to the workings of the European Union by rapidly applying for subsidies to which they are not entitled and by organising VAT fraud circuits through fictitious import and export schemes.

The first consequence of this situation has been the concentration in the hands of organised crime of increasingly substantial amounts of capital, often far greater than the budgets of certain States. Latest figures communicated by the United Nations stand at some 1,000 billion dollars, a large amount of which is recycled back into the legitimate economy.

This need to recycle has led to the money laundering phenomenon, the importance of which in the fight against organised crime has only become fully apparent with the increase in the amounts involved.

Money laundering is a vital necessity for criminal organisations. They must first of all transform the money in circulation into money in the bank, less likely to draw the attention of public authorities. They must also justify to third parties the sources of their income and, to this end, will use all financial and commercial transactions likely to give the money the have the apparence of having been legitimately acquired.

This accumulation of funds of criminal origin injected into normal economic circuits brings with it numerous risks for both States and private individuals. This capital is dangerous in that it distorts the rule of the economic game by leading to undesirable take-overs, by offering possibilities for dumping and by favorising the creation of artificial speculative bubbles intended to obtain fictitions capital gains to confer legitimacy on sources of income. This economic gangrene also engenders risks at a political level through individual corruption or the financing of political parties.

The same harmful effect is also found at the level of individuals. The easy and ready gains to be made from criminal activity may lead to a phenomenon of contagion, turning young people away from more demanding, lower paid work. The unrest which affects some of our suburbs is a striking example of this. This loss of ethical values and markers can adverse affect democracy as a whole, and there is a risk, in certain parts of the world, of seeing Mafia-type territories or even States come into being, and the setting up in democratic countries of no-go areas where the sole law is that of the struggle for power and profit.

I- TYPOLOGIES

In order to mark out the field of community jurisdiction involved, a brief definition should be given of the various aspects financial crime can present.

There are three main types : white collar crime or business crime. This includes offences against corporation law, tax law, securities law or fraudulent bankruptcies.
organised financial crime. Unlike the previous type, it is committed by professional criminals and covers fields such as embezzlement, obtaining property by deception, fraud and counterfeiting.

The financial aspect of organised crime which covers money laundering, mafia investments and underground economies.It is the latter type of offences which are the most dangerous and which should be carefully looked at by States and the European Union. This is why it is extremely important to secure the assistance of civil society in the fight against crime. It should be borne in mind that there is a difference in kind between tax offences, which concern funds coming from licit economic activities, and the laundering of the proceeds of criminal activities. The confusion which sometimes accompanies the analysis of laundering transactions may merely lead to deadlock if the fields concerned by the offences of which the proceeds are laundered are not more clearly defined.

A distinction must be made between “white”, “grey” and “black” money.

WHITE	**GREY**	**BLACK**
Proceeds of a licit and declared economic activity	Proceeds of a licit and declared economic activity	Proceeds of an illicit and undelclared economic activity

This fundamental distinction is not always obvious, since deciding whether money is white or black often depends on whether the party receiving this money does so in a legitimate or illegitimate context: here lies the heart of the problem in dealing with corruption.

Efficient mutual judicial and police assistance with no ulterior motives requires a clear-cut and precise definition of the constitutive elements of the offence of money laundering.

The introduction of the Euro as the single currency will not make matters easier. Until now, the nature of the currency involved (francs, florins, lira, deutsche marks) has made it possible to know, or at least to gain some idea of the origin of funds and so locate the relevant criminal activities. Obtaining such information will no longer be possible after January 1st 2002.

At the present time, in the event of there being a substantial deposit of funds in lira, pesetas or florins, the countries whose currencies these are can be approached for assistance and cooperation. This will no longer be the case when all the countries of the Union have the same currency, and this currency will de facto also be used in other regions or territories, such as for example, some countries in Central Europe or West Africa.

II- THE PROBLEMS INVOLVED IN FIGHTING MONEY LAUNDERING

Money laundering is a very particular offence. Its very shadowy nature makes it difficult to detect and arrive at a precise estimate of its importance (frequency and amounts involved). And it is an offence which, by its very nature, does not have direct victims and does not cause any visible injury.

No investigation into money laundering has ever been triggered off by the lodging of a complaint. The only means available to the authorities are either to request the assistance of third parties who may see funds in transit or participate in commercial or financial transactions likely to be connected with money laundering, or else use the investigation services to the infiltrate the laundering circuits set up by criminal organisations.

If organised crime has constantly the need to launder dirty money, it does its laundering very rapidly : the laundered funds will waste no time in rejoining licit economic circuits.

It is this specific nature of money laundering which has made it necessary to enlist the help of the financial world, by either requesting or requiring its members to report movements of funds or suspicions involving transactions where the funds would seem to be the proceeds of organised criminal activity.

The Financial Action task force, set up after the Arche Summit in 1989 by the G7 countries, and then rapidly extended to the members of the O.E.C.D, was the first to call upon the banking world to lend assistance. This group of experts put forward back in 1990 40 recommendations which constitute the bedrock in the fight against money laundering.

This system, which requires banks to report the occurrences mentioned above, has led to the setting up of numerous ad hoc services, responsible for collecting and dealing with reports of suspicious activity made by financial institutions.

Nevertheless, despite the European Directive of 1991 intended to harmonise and impose the new rules applicable to the financial world, the way these rules are implemented varies greatly from one Member State to another.

There is general agreement on the substance and scope of the obligations placed on banks which, with a few minor variations, are limited to money from drug trafficking and organised crime.

Where solutions diverge however, is in the setting up of a service designed to collect and deal with information.

- France

Two services have been set up a Central Department (TRACFIN) attached to the Ministry of Finance and a Central Office of Judicial Investigations attached to the Ministry of the Interior. These two services are independent and operate along parallel lines, with the case files dealt with by TRACFIN being transmitted to the Public Prosecutor of the relevant geographical area.

- Germany

Recent legislation allows financial establishments to transmit reports of suspicions to any Police or Customs officer. Information is only centralised at Lander level.

- United Kingdom

The unit which receives reports is attached to the National Crime Intelligence Service, which comprises Police and Customs Officers. It transmits information to the relevant services either on a geographical basis or ratione materiae.

- Luxembourg

Reports of suspicious activity are made directly to specialised judges belonging to the Public Prosecution Service.

These few examples illustrate the variety of solutions adopted. Such diversity in itself places limits not only on efficient cooperation but also on fully apprehending the money laundering phenomenon, on knowing how to quantify it and draw up strategies to fight it.
Reports vary depending on geographical perimeters and services involved : they range from a few dozen (Luxembourg) to tens of thousands (United Kingdom), a fact which makes it no easy task to analyse the phenomenon.

III- CURRENT DIFFICULTIES

1 The banking world comes up against two types of difficulties : getting round banking secrecy and lack of expertise.

The financial world has given its full unstinting support to the international fight against drug trafficking and organised crime. It has perfectly understood the need to waive some of the rules of banking secrecy by becoming a sort of “institutional informer”.

The ways things are currently going, with the project for a new Directive and the proposals put forward by certain Member States tending to markedly increase both the number of

persons or institutions under a duty to report and the reports filed, the financial world finds it more and more difficult to understand why all these efforts target solely the civil society, while State investigation services seems content to sit back and let things happen. The slogan “always more” but what for ? risks demobilising the financial world and bringing about a deadlock.

The second source of difficulties encountered by banking institutions comes from their lack of expertise : they are not professionals well versed in the world of crime. The banking world does not know how organised crime operates; it knows nothing of the progress achieved by laundering from both a technical and geographical point of view. It also comes up against the fact that since the installation of prevention and detection systems in European Union countries, the more dubious money movements have emigrated towards more clement skies (off shore centres, banking havens, tax havens) or towards countries where the economy is mainly fiduciary, and where no one is going to try and perform the virtually impossible task of sorting licit fiduciary money from illicit fiduciary money.

Russia is the typical example of a country where everything is carefully intertwined (money from crime, money licity acquired, money misappropriated from the economy), all of which makes detection and control a very uncertain business. It is quite impossible to trace the source of the money involved and decide whether it is the proceeds of a criminal offence. The enormous amount of money laundered by the BENEIX company and transiting through accounts at the Bank of New York clearly illustrates this difficulty.

The growing international nature of money movements does not make things any easier. One example among others : the sums dealt with in the United States by City Bank alone over a two-day period amount to around 1,000 billion dollars, as much as the annual turnover of organised crime.

2 The difficulties encountered by the services responsible for fighting money laundering.

They are of two types. Firstly, organisational. Each State has its own organisations and specificities which do not facilitate the processing of information or intra or inter-State cooperation. In a similar manner, disparity does not help information to get through to Europol, for instance, since the latter is quite disconnected from the systems of exchange of information supplied by reports of suspicious activities.

The main failing in the overall system is that it encourages those responsible for fighting the phenomenon to withdraw into their shells. This attitude, which consists in leaving it up to the sole banking sector to try to detect laundering, without it often knowing what exactly is supposed to be detected, leads to a lack of initiative and is counter-productive as regards the transmission of useful information.

The financial world which, by nature, is different from the criminal world, cannot itself alone supply all the essential elements for a successful fight against money laundering.

Only recourse to traditional (surveillance, phone taps, tailing) or new methods of investigations (infiltrating, wiring of premises, using turncoat criminals) can supply the information needed for an efficient system of detection and control.

As things stand at present, the authorities in each State are ready to invest human, material and financial means on condition that their territory be concerned by the final outcome of the operation. Each is therefore willing to pay for information if the place of arrival or unloading of the drugs involved is situated on their national territory. The same also holds good for money laundering. The shortcomings of this restrictive territorial approach are however quickly highlighted by the behaviour of organised crime which is quick to take advantage of the opportunities thus offered.

There is in fact no longer any direct link between the entry point of drugs in Member States of the Union and the places where these drugs are dealt in and consumed. Similarly "criminal business concerns" have got used to laundering the proceeds of criminal activities in countries other than those in which the original offences were committed. An investigation into the laundering circuits used by Colombian drug cartels thus revealed that money laundered in Paris come from cocaine trafficking in the suburbs of London, Barcelona and Milan.

IV POTENTIAL SOLUTIONS

First and foremost, care should be taken to avoid a headlong rush towards taking measures which quite simply lead to piling yet more national or community rules and reforms one on top of the other, and causing an exponential increase in the number of reports and reporters of suspicious activity, while leaving the foundations of the current system intact.

Coming to the conclusion that the current fight against laundering is not being carried on very efficiently should not lead us to lay the responsibility for this state of affairs solely at the door of the financial world or civil society as a whole. The latest report of the FATF is significant in this respect : the most substantial money laundering detected in OECD countries only involved the amount of 100 000 US dollars. If the result if disappointing, so are the conclusions to be drawn: the responsibility for failure lies with those countries and territories which do not have regulations.

The short-term solution of "always more" will not in any way make life easier for those services which receive reports, who will consequently have to deal with a substantial increase in information without any corresponding improvement in the quality of the reports involved, quite the contrary. Placing the emphasis on quantity to the detriment of quality cannot in any way be a solution to the problem of laundering the proceeds of criminal activities.

Unless all credibility and efficiency are to be lost, a clear line must be drawn between what is criminal and what is not (the fiscal field). To contemplate including in the forthcoming Directive offences which are harmful to the financial interests of the community, without specifying exactly what this means, is merely opening the door to all sorts of interpretations by Member States, ranging from a minimalist to a maximalist approach.

Such an attitude will not improve the quality and efficaciousness of mutual assistance, but will, on the contrary, act as a brake on the latter, or even bring it to a complete halt, with interminable questions of interpretation as to the scope of the measures involved, and with each country suspecting the requesting country of ulterior fiscal motives.

Greater efficiency will come neither from increasing the number of reports of suspicious activity, nor from widening the scope of the offences concerned. It will come only from an optimisation of the processing of information received and an improvement in cooperation between services, at the level best adapted to each case (national and/or European).

APPENDIX 1

INTRODUCING DOCUMENT TO THE CEO (2000/05/19-20)

Ensuring efficiency in the fight against international crime in Europe

Jean NESTOR
Secretary General of Notre Europe

1°) The completion of the single market, the introduction of the euro and the prospect of integrating the Schengen agreements into the body of Community law are all positive steps towards achieving a European area of freedom, stability and prosperity for private individuals. But these advances also provide new opportunities for the movement of criminal activities and their cause and product: illicit funds. The prospect of impending enlargement, although welcome, has added a new dimension to these developments. European citizens have a legitimate wish to be reassured as to how these dangerous side-effects will be controlled.

These new threats are not specific to Europe. The globalisation of financial markets and new modes of trade and information exchange are facilitating movements of criminal activities and funds throughout the world – just as the increasing gap between rich and poor regions is creating new incentives for them to spread.

Europe cannot, therefore, act alone against international crime but must ensure that its action is coordinated with advances in international cooperation in criminal matters. Yet on account of its own political integration process, it also has specific duties towards its citizens which require resolute internal initiatives. The legitimacy of its original mode of government hinges to a significant extent on how it will resolve this issue.

2°) Europe addressed these matters at a very early stage: building on the first experiments in police, customs and financial cooperation, the third pillar of the Maastricht treaty provided a framework for further developing cooperation in criminal matters as regards both investigation and criminal justice. It paved the way for the creation of Europol, a joint information and analysis instrument, and the European Judicial Network, which promotes information exchange among judges. Concerning the protection of its own financial interests, the European Union established a specific legal base and an integrated antifraud body, the European Anti-Fraud Office (OLAF).

However, these instruments are still patchy and incomplete and do not give investigation authorities and criminal judges the same freedom of movement as criminals. A new step must now be taken, as called for by the European Council at its meetings in Vienna and Tampere. These tentative steps must now lead to practical developments that are clearly perceptible to ordinary citizens.

3°) This does not require supranational judicial and police systems which would raise cumbersome, complex and unnecessary questions relating to the harmonisation of legal provisions and criminal proceedings, to the detriment of the efficiency sought. Such systems

could generate unhealthy competition with their national counterparts, without succeeding in demonstrating their added value.

Free movement of information on investigation and crime repression procedures relating to cross-border crime can be achieved by establishing a simple, permanent framework for immediate cooperation between national investigation authorities and jurisdictions, while respecting their internal procedures. Should it prove necessary, any harmonisation of criminal law and proceedings should draw on the experience of effective and conclusive cooperation among practitioners.

In order to reassure citizens as to their security, these forms of cooperation should meet certain simple requirements:

- straightforward cooperation procedures involving a limited number of clearly coordinated bodies

- democratic openness and respect for fundamental individual rights: the cooperation bodies should be accountable to the elected Parliament and to the judges, who are the guarantors of individual rights

- straightforward coordination with international cooperation processes, in particular those of the Council of Europe and Interpol's European Liaison Bureau

4°) Eurojust should be set up without delay to ensure that this cooperation system is properly balanced. From the outset, its main features should be as follows:

- It should be based on a "round table" of magistrates responsible for facilitating contacts with national judicial authorities, providing prompt documentation on the rules of law applicable to each case (agreements, national legislation), seeking solutions to divergences in the interpretation of these rules and complaints of inadequate cooperation, and establishing the headquarters of the European Judicial Network.

- Each of these magistrates (one per country) would be appointed by the highest authority responsible for criminal investigation in each State. Whatever the operational remit of Eurojust, this magistrate would have direct competence only in his or her State of origin. However, the collegial nature of the network would make it possible to transfer any query immediately from one Member State to another.

- Eurojust's operational framework would be responsible for translation and interpreting, for documentation and for liaison with national authorities, the Council of Europe, OLAF, Europol, and the Commission and Council. Duly authorised MEPs would participate in its governing bodies.

- It would be established from the outset that Eurojust's remit covers those of Europol and OLAF, whatever their development might be in the future. It would thus include international crime, serious cross-border crimes and activities adversely affecting the European Union's financial interests. Eurojust would also be empowered to submit proposals to the Council and Commission relating to any measure needed to improve the efficiency of judicial cooperation.

- It is important that the European Union's internal judicial cooperation should remain coordinated with the legal framework established by the Council of Europe. Eurojust should therefore involve the member countries of the Council of Europe – and in particular the candidates for accession to the Union – in its debates. It should also be given a leading role in the codification of "Mother Conventions", or even their conversion into a single convention relating to cooperation on combating crime.

- A specially created chamber of the Court of Justice of the European Communities would make it possible, further to complaints brought before Eurojust, to settle disputes relating to the interpretation of conventions or inadequate cooperation arising among EU Member States and any other countries which have accepted this jurisdiction. Naturally, this arbitration chamber would not have competence to rule on criminal cases.

5°) Beyond this basic framework, which should be established without delay, arises the matter of Eurojust's future development. The informal Justice and Home Affairs Council meeting held on 2 and 3 March 2000 identified two promising avenues for strengthening the system's operational efficiency:

- The possibility for each national representative to call on his or her national authorities to launch an investigation (or not) and prosecute (or not), and request certain precautionary measures to be taken during the investigation phase, if only on a provisional basis.

- A more ambitious scenario whereby these requests would be binding on the national authorities and the national representative would be empowered directly to take the precautionary measures deemed necessary.

These are the possible developments which should be envisaged for Eurojust in the future. It is up to the relevant ministers to determine the most efficient level of cooperation in the short term, according to the degree of trust established to date regarding judicial cooperation at European level. Whatever the circumstances, Eurojust must be empowered to submit proposals to the Council and Commission for the implementation of provisions of this type in the future.

6°) Europol's workings should be amended accordingly to step up cooperation between investigation authorities and make it more efficient:

- Europol's core should be comprised of a "round table" of high-level representatives empowered to commit resources and undertake direct operations in their respective countries.

- In addition to Europol's current duties (centralisation of data and analyses on international crime), this "round table" would be responsible for selecting the most relevant cooperation initiatives and identifying the concerted measures to be implemented, with a view to submitting them to national investigation authorities. Like Eurojust, Europol should be empowered to submit proposals to the Council and Commission for measures to make cooperation on criminal investigations more efficient.

- Europol should be given the additional task of intensifying contacts between the persons responsible for investigations at national level, in order to promote trust. With this same purpose in mind, it should also give widespread publicity to successful operations resulting from this cooperation.

- Europol's governing bodies should involve duly authorised MEPs and representatives of Eurojust. Likewise, there can only be advantages to making Eurojust the authority responsible for the protection of individual rights within the framework of Europol's activities.

However, any interpretation of point 44 of the conclusions of the European Council meeting in Tampere (which calls for the establishment of a European Police Chiefs' operational Task Force) aiming to establish an additional body would offer no further guarantees and would undermine the efficiency of European cooperation in this field.

7°) Lastly, this framework must be underpinned by clear, straightforward links between Eurojust, Europol and OLAF.

This could be achieved by setting up liaison units within each organisation and ensuring that Eurojust is represented within the governing bodies of Europol and OLAF. Two further points should be mentioned in this connection:

- The creation of multiple files on international crime and related cases should be avoided, as this would surely lead to dysfunctions and wastage and would undermine the protection of individual rights. On the contrary, a single file should be established. It would be shared by all the bodies involved, would involve an obligation to supply data and an access authorisation procedure, and would be placed under the supervision of Eurojust to ensure proper protection of fundamental freedoms.

- The Commission should be invited to organise regular meetings with a view to coordinating the proposals for increasing the efficiency of cooperation on combating international crime submitted by the various bodies to the Council. In this connection, it would be worth reviewing the relevance of the Article 36 Committee through which "high-level" officials propose such measures to the Council, and to contribute to its work in this area. Such a review would make a useful contribution to the ongoing reform of the organisation of the Council, aimed at simplifying its workings and making them more transparent.

APPENDIX 2

MEMORENDUM ON EUROPOL

I. THE ESTABLISHMENT OF EUROPOL

* **The objective of the European Police Office (Europol)**, as set out in Article K.1 (9) of the Maastricht treaty, is to establish a "system for exchanging information" within the European Union to combat "terrorism, unlawful drug trafficking and other serious forms of international crime".

The purpose of this computerised information exchange system is to collect in a single location all the intelligence hitherto scattered among the various authorities responsible for criminal policing and police cooperation within the European Union's Member States.

Europol therefore acts first as a "clearing house" by sorting the mass of data available to the various authorities, and then as a "dispatching house" by disseminating the analysed data among these authorities.

* Given the extent of the task, a step-by-step approach was adopted, beginning with the fight against unlawful drug trafficking. **The first working unit, the Europol Drugs Unit (EDU)**, was formally established on 2 June 1993 with the adoption of the Copenhagen agreement (a project team had been set up in Strasbourg to this end as of 1 September 1992, before Europol's move to The Hague in 1993).

The EDU has therefore been operational since 1993. Since 1997, its staff has included 23 liaison officers, four criminologists, five IT specialists and four persons responsible for administration and logistical support. The host country, the Netherlands, has seconded nine administrative officials and 15 security agents.

* **The liaison officers of the EDU** (the forerunner of the Europol Central Unit or ECU), appointed by the Member States, are the main distinguishing feature of Europol, whose star-shaped system also comprises the Europol National Units (ENUs) that have gradually been set up between 1993 and 1999.

The liaison officers are responsible for:

- exchanging information, in particular personal data, among the Member States of the EU; this information is exchanged within the framework of investigations of a criminal nature and is specifically related to combating drug-related offences
- establishing general situation reports analysing trends in crossborder crime on the basis of non-personal data supplied by the relevant authorities of the Member States.

* It is worth noting that **in parallel**, **a customs cooperation network** – the Customs Information System (CIS) – equipped with its own computerised information exchange system **has been under development** since 1993 under the Maastricht treaty.

II. EUROPOL TODAY

* **The Europol Convention – which definitively establishes the ECU and ENUs – is Europol's "birth certificate"**, since up to then the EDU had been operating on the basis of an interministerial agreement which gave it no proper framework. The convention was signed on 26 July 1995 and comprises 47 articles.

It deals with the organisation, running and mandate of Europol, as well as its status, confidentiality, responsibility and sources of finance.

* ***Europol is organised*** on a star-shaped model. The ECU, based at the Europol headquarters in The Hague, is made up of Europol liaison officers and officials. An ENU has been set up within each Member State, within which liaison officers forward the information supplied by the relevant national authorities. This information is then processed by the ECU and distributed to all Member States.

* ***The running of Europol***, since it is an information exchange system, is based on the compilation of files. The data is stored in three files. The first, the "information system", contains the names of persons suspected of having committed or being in the process of preparing crimes. It is accessible to all criminal police authorities. The second, the "analysis system", is devoted to certain specific cases and contains confidential data supplied by the Member States. It may be accessed only by the Europol liaison officers and officials working on these cases. A third file, the "index system", comprises keywords and indicates the fields covered by Europol.

* ***Europol's mandate*** is delimited by a restrictive list of 18 offences, including *inter alia* unlawful drug trafficking, trafficking in nuclear and radioactive substances, crimes relating to illegal immigration, trade in human beings, motor vehicle crime, terrorism and other serious forms of international crime.

* **The Europol Convention came into force on 1 October 1998**, after ratification by all EU Member States. However, it only began operating in earnest on 1 July 1999 to become a genuine instrument for European police cooperation in the fight against serious forms of international crime.

Europol was the subject of tough negotiations within the European Union and saw its sphere of competence increase over time.

The idea of establishing a highly computerised body to centralise information in various fields and produce original analyses, initially promoted by Germany and the Netherlands, was eventually endorsed by the other EU Member States.

* **Terrorism** was included in Europol's sphere of competence, despite the British refusal to allow any Europol intervention in the Northern Ireland question.

There may be new developments in this area: certain EU countries would like the concept of terrorism to be expanded to include acts of urban insurrection, while others want to restrict the scope of the concept to threats from outside the European Union or inspired by countries which do not belong to the European Union.

* Furthermore, under the convention, Europol no longer covers only unlawful drugs trafficking but also **all serious forms of international crime**. This terminology is sufficiently broad to encompass very diverse forms of crime (trafficking in nuclear and radioactive materials, motor vehicle trafficking, illegal immigration networks, trade in human beings, etc.).

As early as June 1994, at the European Council meeting in Essen, the remit of the EDU had been expanded to include, in addition to unlawful drugs trafficking, money laundering and criminal organisations associated with this activity. A recent Council decision, adopted on 29 April 1999, has further instructed Europol to deal with the forgery of money and means of payment.

* In addition, under the pressure of operational requirements, the tasks to be entrusted to the future European body have gradually been **broadened, based on the concept of organised crime and international crime.** Europol has thus been entrusted with an intelligence-gathering mission of an operational nature.

Statistics established for 1998 show that 60% of cases dealt with by the EDU involved drug-related problems, 15% illegal immigration, 13% stolen vehicle trafficking, 8% money laundering and 4% trade in human beings.

* **Europol is represented by a director, who is appointed by a management board** for a period of four years, renewable once. The management board comprises one representative per Member State. It oversees the proper performance of the director's duties and supervises the smooth running of the organisation. Its decisions are taken by a simple majority, by a two-thirds majority or unanimously depending on the issue. Europol currently has a staff of 190 – a threefold increase on 1997.

* **Europol's liaison officers are police officers** appointed by the ENUs (as opposed to the Europol director). Their main role is to act as interfaces between national authorities and Europol, notably by using the computer files managed by Europol.

* **As for Europol's administrative staff**, which essentially comprises analysts, animated discussions took place on whether it should be made up of police officers or possibly persons from the private sector.

* **The computer system is supervised by a joint supervisory body**, which ensures that personal data is properly protected and that the system does not infringe civil liberties. Upstream, each State submits its information flows to supervision by its own independent authority responsible for computerised data.

III. EUROPOL'S FUTURE DEVELOPMENT

* **The concept of a European police force**, upheld by former German Chancellor Helmut Kohl ever since the Luxembourg summit meeting of 29 June 1991, is not an option which can be envisaged in the short term, in the opinion of a number of Member States (in particular the United Kingdom).

They see the prospect as unrealistic, for a "Europolice" – or "European FBI" – of this nature would require profound changes in Europe in terms of a comprehensive harmonisation of internal laws and procedures and of the supervisory powers to be granted to the European institutions.

Nevertheless, Europol exists, is getting organised and, even in the present form defined by the convention of 26 July 1995, presents prospects for further development.

These prospects have been widely discussed at Justice and Home Affairs Council meetings since 1997 and, more recently, at the Tampere summit meeting in October 1999.

* **Even the terms used in Articles 2 (Objective) and 3 (Tasks) of the 1995 convention** appear to indicate that the information exchange system is to cover the specific area of criminal police activity – including its operational aspects – in the near future.

The convention makes repeated use of words such as "offences", "factual indications", "investigations", "operational activities", etc.

The necessary development therefore involves how this information can be exploited without delay:

a) at an early stage, through initiatives leading to the initiation of investigations by a relevant authority in a given Member State;

b) subsequently, by including Europol officials in criminal police teams responsible for using the information, and by prolonging Europol's initiatives within the framework of investigations of a crossborder nature.

* **Since 1997, ministers meeting within the Justice and Home Affairs Council** have thus envisaged:

- presenting Europol as a privileged partner of the Commission, third countries and international institutions in combating crossborder organised crime

- stepping up Europol's support to the authorities of the Member States responsible for investigations, including in operational terms

- developing Europol's specific sphere of competence in the interests of combating crime

- giving Europol a right of initiative allowing it to invite the relevant authorities of the Member States to undertake investigations

- building up Europol's momentum, by optimising its capacities, as a European instrument to combat crossborder organised crime

They also consider that, alongside this process, a debate should be held on the place and role of the judicial authorities in their relations with Europol.

*** These guidelines have been confirmed by a number of provisions of the Treaty of Amsterdam and are now well established.**

Article 30 of the Treaty on European Union provides that "the Council shall promote cooperation through Europol and shall in particular, within a period of five years after the date of entry into force of the Treaty of Amsterdam:

a) enable Europol 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

b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime

c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol

d) establish a research, documentation and statistical network on crossborder crime"

Article K.4 should also be mentioned in this context: "The Council shall lay down the conditions and limitations under which the competent authorities referred to [in Article 30] may operate in the territory of another Member State in liaison and in agreement with the authorities of that State."

*** A political clarification of these guidelines was given at the Tampere summit meeting.**

Points 43, 44, 45 and 46 of the conclusions state that:

"43. Maximum benefit should be derived from cooperation between Member States' authorities when investigating crossborder crime in any Member State. The European Council calls for joint investigative teams as foreseen in the Treaty to be set up without delay, as a first step, to combat trafficking in drugs and human beings as well as terrorism. The rules to be set up in this respect should allow representatives of Europol to participate, as appropriate, in such teams in a support capacity.

44. The European Council calls for the establishment of a European Police Chiefs operational Task Force to exchange**,** in cooperation with Europol**,** experience, best practices and information on current trends in crossborder crime and contribute to the planning of operative actions.

45. Europol has a key role in supporting unionwide crime prevention, analyses and investigation. The European Council calls on the Council to provide Europol with the necessary support and resources. In the near future its role should be strengthened by means of receiving operational data from Member States and authorising it to ask Member States to initiate, conduct or coordinate investigations or to create joint investigative teams in certain areas of crime, while respecting systems of judicial control in Member States.

46. To reinforce the fight against serious organised crime, the European Council has agreed that a unit (EUROJUST) should be set up composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. EUROJUST should have the task of facilitating the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol's analysis, as well as of cooperating closely with the European Judicial Network, in particular in order to simplify the execution of letters rogatory. The European Council requests the Council to adopt the necessary legal instrument by the end of 2001."

*** In conclusion, four priorities can be identified for further development:**

a) operational aspects
b) protecting individual freedoms (and personal data)
c) judicial supervision
d) parliamentary information

APPENDIX 3

THE EUROPEAN ANTIFRAUD OFFICE, “OLAF”

The **European Antifraud Office** was established on 1 June 1999 to replace the Unit on Coordination of Fraud Prevention (UCLAF). With this reform, the European institutions have established the framework for a substantial step forward in combating all forms of serious crime threatening the Community's interests and the credibility of the European integration process.
The purpose of the body is, broadly speaking, to protect Community funds against fraud and other forms of misuse. Some 20% of the Union's revenue is collected by the Member States in the form of customs and agricultural duties. And more than 80% of its expenditure is managed by the Member States within the framework of the various Community policies (common agricultural policy, structural measures, etc.).

Accordingly, the Council and the European Parliament decided to strengthen the means devoted to combating fraud. This entailed not only increasing the antifraud body's scope for investigation on the ground but also stepping up the fight against fraud and irregularities within the Community institutions.
At the request of the European Council, a "high-level interinstitutional group" bringing together representatives of the Commission, Parliament and Council was set up, leading to the establishment of Olaf and the adoption of its legal bases. The European Council, at its meeting in Cologne, stressed that the establishment of the European Antifraud Office was a strong political signal demonstrating the Union's ability to act against fraud, corruption and mismanagement.

The legal framework

A new legal framework was adopted, further to a Commission proposal, to protect the financial interests of the Communities and combat fraud and any other illegal activity detrimental to the Community's interests. It is as follows

I-The decision of 28 April 1999

The Commission decision of 28 April 1999 provides that Olaf will take over all the responsibilities of UCLAF, in particular those relating to the drafting of legislative and statutory provisions in the areas of activity covered by the body (including instruments relating to Title VI of the Treaty on European Union).

Olaf has furthermore been given genuine operational independence. It is headed by a director, who is responsible for conducting investigations and may neither seek nor take instructions either from the Commission or from any government or institution, body, office or agency.

The director is appointed by the Commission for a period of five years, after consultations with the European Parliament and the Council. The director's duties are performed under the supervision of a newly established "supervisory committee".

Olaf has full independence in administrative and budgetary matters. It defines its own staff policy, in accordance with the Staff Regulations of officials and the conditions of employment of other servants of the European Communities. It authorises the specific appropriations relating to antifraud policy and the running of the office.

II-Regulations 1073/99 and 1074/99

Olaf's operational and functional independence, as defined in the Commission decision of 28 April 1999, was further strengthened by regulations 1073/99 and 1074/99. These provide that the director of the office opens and conducts investigations (both external, in the Member States, and internal, within the Community institutions, bodies and agencies) on his own initiative.
The establishment of a supervisory committee and the status of the director are additional guarantees of independence, since neither may seek nor take instructions from governments or the Community institutions.

Olaf is located within the Commission and takes part in administrative and decision-making procedures (relating to legislation) at departmental level. But it fulfils its operational duties as an independent and interinstitutional body and is to take part in the investigation, information exchange and operational analysis process in an objective and impartial manner.
Olaf is therefore independent with respect to starting and implementing its own operational activities.

III-The interinstitutional agreement of 25 May 1999

The interinstitutional agreement between the European Parliament, the Council and the Commission concerning internal investigations by Olaf provides for *common rules*. These include the implementing measures required to ensure the smooth operation of the investigations carried out by Olaf to combat illegal activities that are detrimental to the financial interests of the Communities or to bring to light serious situations that are likely to jeopardise the credibility of all Community institutions, bodies and agencies, where they are related to the discharge of professional duties and are liable to result in disciplinary or criminal proceedings.
On the basis of this new legal framework, the Commission has adopted an internal decision published in the Official Journal of the European Communities setting out the practical arrangements for the intervention of Olaf officials in internal investigations within the Commission, with a view to protecting the rights of the persons involved. Most of the other institutions have done the same.

The outcome

- The new director is Mr Franz Herman Brüner (D).
- Olaf's independence in conducting investigations is clearly established and the director of the office opens and conducts investigations (both internal and external) *on his own initiative*. This applies not only to the investigation itself but also to related activities such as collecting information, monitoring cases and contacting national administrations and any other relevant department, whether within the Commission or another Community or international institution, body or agency.
- As far as investigations are concerned, the new system equips Olaf with the duties and operational means available to the Commission under the treaties and extends its internal investigation capacity to all Community institutions, bodies and agencies. Olaf may thus decide on its own initiative to start an internal investigation within a Community institution or body, leading where appropriate to the forwarding of cases to the relevant national judicial authorities.

On the other hand, the procedures for collecting information from the Member States are governed by the sectoral regulations in force relating to own resources, the common agricultural policy, structural policy and mutual assistance. In addition to this main formal source of information, there are other means of collecting useful information, not only from the other Commission departments but also directly from the specialised services of the Member States, the other institutions or the media.

- As regards administration, the director is responsible for recruiting and appointing staff and for preparing a preliminary draft budget which he forwards to the Commission.

The restructuring of OLAF is intended to equip it with experienced investigators who will be integrated into an operational unit working closely together with a policy and legislation unit and an intelligence and strategy unit. Investigation expertise has also been sought from the national authorities within the Member States.

Olaf's supervisory committee

The supervisory committee comprises five members appointed for a renewable three-year term. Its members are appointed by common accord of the European Parliament, the Council and the Commission. The current members are Ms M. Delmas-Marty (F), who was elected chairwoman by her colleagues, Mr E. Bruti-Liberati (I), Mr J. N. da Cunha Rodrigues (P), Mr R. Kendall (UK) and Mr H. Noack (D). The Committee meets at least ten times a year. These persons represent very diverse aspects of the judicial sphere at the most senior level (academic research and comparative criminal law, police and judicial authorities, rights of the defence).

The committee is responsible for regular monitoring of the discharge by Olaf of its investigative function and assists the office's director in the performance of his duties. It is located within the Commission but fulfils its operational duties as an independent and interinstitutional body. It must also be able to take part in the investigation, information exchange and operational analysis process in an objective and impartial manner. The committee does not intervene in the implementation of investigations, but may receive information which Olaf does not forward to other bodies. As regards the other activities of Olaf as an ordinary Commission department, the supervisory committee has a consultative role.

In practice

For the purposes of fulfilling its operational duties, Olaf collects and processes information, undertakes administrative investigations (both internal and external), provides coordination and assistance for the relevant authorities of the Member States, and monitors all information and all available findings of investigations.

I-Internal investigations

Olaf may decide on its own initiative to undertake an internal investigation within a Community institution or body and, where appropriate, to forward the case to the relevant national judicial authorities.

II-External and sectoral investigations

Based on the legal texts governing the various sectors of the Communities' budget, investigations relating to indirect expenditure (common agricultural policy, Structural Funds, etc.) and own resources are conducted in collaboration with and under the responsibility of the Member States. Olaf may also conduct investigations within national administrations on its own initiative, but in partnership with the Member States. On the other hand, where Olaf wishes to inspect an economic operator on the basis of these legal texts, it must request the opening of a national investigation in which its officials may take part. Olaf officials take part in investigations opened at Olaf's request. Investigations are conducted strictly in accordance with national procedures. During the investigations, although Olaf's agents act under the authority of the Member State, they are in practice closely involved in the conducting of operations. At the end of the investigation, the report drafted by Olaf is forwarded to the national supervisory authorities, which may decide to follow up the findings.
However, direct expenditure is managed by the Commission itself. In this area, the Member States have neither a management nor a supervisory role.

III-Other areas

Protection of the euro

In 1998, the Commission announced initiatives to protect the euro as part of an overall approach. The priorities identified included training, information exchange, cooperation and mutual assistance, and protecting the euro against counterfeiting through the approximation of national criminal law provisions.
This initial framework must now be completed. A proposal for a regulation relating to research and identification of forgeries and protection of the euro against counterfeiting is being drafted by the relevant Commission departments. For its part, Europol is preparing for the task it has been given to protect the euro against counterfeiting in the field.

IV-The fight against money laundering

The Commission has submitted a proposal amending the 1991 directive relating to money laundering, with a view to countering the new threats it presents and its spread to other forms of organised crime beyond drugs trafficking. In particular, the Commission wishes to extend the obligations of the initial directive to certain non-financial activities and professions. The new text also provides for an obligation on national authorities to cooperate in combating illicit activities that are detrimental to the financial interests of the Communities.

The changes proposed by the Commission stem to a large extent from the involvement of organised crime in illegal acts that are detrimental to the financial interests of the Communities. The profits generated by fraudulent use of Community funds are either laundered directly (through traditional financial networks) or reinvested in lawful trading activities (via goods and services networks) carried out by companies which may or may not be aware of the illegal nature of the funds they are handling. Information on suspect financial dealings is essential for protecting the financial interests of the Communities, since it makes it possible to establish a link between the perpetrators and the organisers of criminal acts, and thus prosecute them.