

# Parliamentary control: European Co-operation in the Field of Policing and Criminal Justice

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## 1. The EU

After a slow start, the European co-operation has gained momentum. First, there was the European Convention on mutual assistance in criminal matters (1959), then the Benelux Treaty on extradition and assistance in criminal matters (1962), and later, the breakthrough came on the basis of the Schengen Convention (1990)<sup>1</sup>, next to a lot of other agreements which are – still – being concluded bilaterally.

Safety became one of the core tasks and issues on the agenda. This was a natural result, placed in the context of transnational organized crime. With the opening of the borders and free movement of (illicit) goods and (criminal) persons within the EU, an expansion of the market for criminal activity became a reality. It will be terrorists and transnational crime groups that will proliferate, because these crime groups are the major beneficiaries of this globalization.<sup>2</sup> With this knowledge, the EU realised the need for more cooperation in the police and judicial area to counterbalance this “threat”. European governments also saw real benefits in striving towards enhanced practical police cooperation, both as a response to perceived threats to order and security but also as a means of compensating for the removal of border controls.<sup>3</sup> The growing threats proved to be real with the terrorist attacks in the US, Madrid and London..

Before these threats and attacks, the EU was serious about combating crime.<sup>4</sup> The future of the EU is marked by growth, not just of territory, but most importantly of competences. This is reflected in the Constitution, which could be the reality from next year onwards. With this constitution the EU abandons the former pillar-structure, separating the supra national (Community) policies from the intergovernmental second and third pillars on foreign affairs and Police and Judicial Cooperation in Criminal Matters.

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<sup>1</sup> And its later incorporation into community law of the Convention implementing the Schengen agreement.

<sup>2</sup> Lisa Cartel (Ed.), *Organized Crime News*, Publications from; Nathason Centre for the Study of Organized Crime and Corruption, York University

<sup>3</sup> Lecture Mr. W. Bruggeman; Lecture in Cicero Foundation Great Debate seminar "Justice and Home Affairs - How to Implement the Amsterdam Treaty?", PARIS, 13 - 14 April 2000

<sup>4</sup> The European Drugs Unit, in relation to crime related to drugs, and Uclaf to coordinate the combat against fraud in relation to the EC financial interests by MS's

During the last years, the European Union has continued to enlarge its role in realising co-operation in the field of police, customs and justice, and in developing a coordinated policy with reference to asylum, immigration and controls at the external borders. This tendency was hampered by the rejection by some Member States of a common space of freedom, security and justice by the Conventional Treaty establishing a European Constitution, signed in Rome on October 29<sup>th</sup> 2004.

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

- The Action Plan to combat organised crime (1997): aimed at intensifying the mutual assistance in criminal matters, the creation of a judicial network of national contact points and an extension of the role of Europol to provide support to the preparation and the conduct of investigations;
- The Action Plan on how best to implement the provisions of The Amsterdam Treaty (1998): this action plan insisted on an adequate judicial instrument for police co-operation and for the definition of conditions and limitations of cross-border actions;
- The Action Plan of Tampere (1999) aiming at the creation of Eurojust and the Police Chiefs Task Force. It was also proposed to introduce at a large extent the mutual recognition of judicial decisions, among which the decisions which refer to the collection of evidence in pre-investigations in criminal matters and the creation of joint investigative teams;
- Council commitments to cooperation between Member States' police forces and custom authorities<sup>5</sup>;
- The Action Plan to prevent and combat organised crime (2000): this action plan is a strategic plan which served as a re-consideration of decisions taken earlier;
- The Action Plan to combat terrorism (2001): this action plan was adopted by the Council ten days after the attacks of September 11<sup>th</sup> and contained the recommendation for the Member States to ratify the treaties aimed at the fight against terrorism. It also contains the introduction of the European Arrest Warrant, in line with the agreements of Tampere aimed at the mutual recognition of judicial decisions. Europol was given the task to create a team of anti-terrorism specialists from the member states. This team is currently rebuilt into a structural part of Europol<sup>6</sup>.
- The Hague program (2004).

In 2000, the member states of the European Union signed a Convention on the mutual assistance in criminal matters, more particularly aimed at controlled deliveries, infiltration and joint investigative teams<sup>7</sup>. Joint investigative teams can be created for a certain aim and for a limited period of time, while the execution of the investigation is being done by virtue of the national law of the member state where the team is active. More recently the European arrest and later evidence warrant were introduced although some national decisions are still needed to bring these into practice.

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<sup>5</sup> The Vienna action plan and conclusions 40 to 50 of the Tampere European Council.

<sup>6</sup> European Council, Europol 86, November 8<sup>th</sup> 2002

<sup>7</sup> Also: Framework Decision of the Council of June 13<sup>th</sup> 2002 on joint investigative teams

In the meantime, on top of the Conventional Treaty efforts are being made to explore specific co-operation agreements (i.e. the new Schengen Convention and the renewed Benelux Convention<sup>8</sup>), the PRUM agreement<sup>9</sup> which demonstrates that there are still specific needs which cannot or do not have to be solved in a European context (for example cross-border police operations and the collaboration in common offices,; more systematic and structured exchange of information).

As a result, we have today several hundred decisions, framework decisions and conventions that prove the livelihood of third-pillar cooperation. In the course of time, the EC has created a number of agencies<sup>10</sup> which now carry out more or less independently some duties, more particularly with reference to information management and inspections. Most of these organs, bodies or organisations have different legal status and different working procedures and regulations.

But the complex arena of international security management demonstrates that there is a lack of a unified legal framework. As a consequence of the proliferation of initiatives, culminating in a crowded policy space internationally operating police officers may be Alices-in-wonderland when it comes to applying the right instrument and the right code in unique and challenging situations. And finally **the democratic control is insufficient.**

## **2. The EU and democratic control**

### 2.1 The general situation

So the last decade marked a big change in cooperation mechanisms, but less in democratic and judicial accountability. However, the competences and powers of the authorities were still very limited. MS's still cherished their sovereignty, with the police force and its monopoly of force as the very core.<sup>11</sup>

Nowadays MS's became more willing to hand in a small piece of their sovereignty in order to combat organized crime, terrorism and enhance the level of safety for its citizens.

### 2.2 A theoretical approach.

In the literature, a general distinction is drawn between **internal accountability and external accountability**<sup>12</sup>.

Input legitimacy was for a long time considered to be sufficiently guaranteed at the level of the high contracting parties through national and/or regional Parliaments ratification or even approval by referendum. This view is based on the premise that input legitimacy is effectively guaranteed by national Parliaments, a posteriori by making the ministers representing the Member State in the Council account for the stances they have taken. It was widely acknowledged, however, that European integration has eroded the position of parliaments within the national institutional framework, tilting the balance in favour of the governments.

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

<sup>9</sup> Agreed upon on 27 mei 2005

<sup>10</sup> European agencies working across Europe for you, European Commission, Office for official publications of the European Communities, 2004

<sup>11</sup> C. Fijnaut, Police Co-operation and the Area of Freedom, Security and Justice. In: N. Walker (Ed.), *Europe's Area of Freedom, Security and justice*, Oxford University Press, 2004, p. 243-244. Further: Fijnaut, 2004

<sup>12</sup> Walker, Neil, *Deficient Weaponry, Reluctant marksmen and obscure targets: flaws in the accountability of undercover policing in the EU*, in Den Boer, M., (ed.), *Undercover policing and accountability from an international perspective*, Kluwer, 1998

Nowadays, the European Parliament embodies the principle that the peoples of the Member States, via their representatives, should take part in, or should supervise, decision-making. The European Parliament has no real powers in the deciding legislation affecting the remit or powers of Europol, it can not reject legislation propose measures on its own initiative, whereas parliaments in the Member States must approve rules governing the functioning of national agencies.

Output legitimacy must guarantee securing the Member State's loyalty as to effective compliance with the rules agreed upon and measures the extent to which citizens see their interests and desires mirrored in the outcomes of political processes and therefore accept and support the political order as right. Therefore the national Parliaments of the EU Member States and the European Parliament have a mission and a mandate to monitor and evaluate the activities that take place in the framework of Title VI TEU (Police and judicial cooperation in criminal matters), notably those of Europol and the Member States supposed to actively participate into Europol's activities. But suggested scenarios for judicial control have been refuted.

In reality the emerging EU state is different to the national state, not just because it exercises cross-border powers, but rather because even traditional, and often ineffective, liberal democratic means of control, scrutiny and accountability of state agencies and practices are not in place; nor is there any political will to introduce them<sup>13</sup>.

In addition legitimacy (output and input<sup>14</sup> legitimacy) can never be acquired once and for all by a political system, but has to be earned in various ways.

In Shuman's time, the Union was in fact conceived as an extension of national policies -also in terms of legitimisation of political power. Except by the European Parliament, the question of the finality and the methodology of the Union have hardly been put by its institutions and political leaders during the past fifty years<sup>15</sup>. In the meantime it is becoming more and more apparent that the Union is a highly political undertaking, taking far-reaching decisions in sensitive policy areas. This requires other forms of debate, in wider for a, alongside adapted, transparent and efficient procedures.

So it is not surprising that within the European Union there is increased reflection about the issue of accountability<sup>16</sup>. Accountability is part and parcel of a regime or system of governance.

### 2. 3 The Treaty situation

Legislative assembly of the EU originally consisted of representatives selected by the national parliaments of member countries. Beginning in 1979, members of the Parliament were elected by direct universal suffrage to terms of five years. In 2004 with the admission of ten new nations to the EU, the parliament reached to its current membership of 788.

The EU council of Ministers, which represents the member states, consults the Parliament, which is empowered to discuss whatever matters it wishes. The Parliament's powers were expanded with passage to the Maastricht Treaty (1993). Although it has veto power in most areas relating to economic integration and budgetary policy, it remains subordinate to the

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<sup>13</sup> Bunyan, T., Director Statewatch, March 2005

<sup>14</sup> Input legitimacy addresses the question of direct legitimisation of political power through democratic participation of citizens or their elected representatives in transparent decision-making and Constitution-making procedures.

<sup>15</sup> Lenaerts, K. and Desomer, M., New models of constitution-making in Europe, Common market law review, 2002

<sup>16</sup> Commission of the European Communities, European Governance, A white paper, Brussels 25 July 2001, (COM(2001)428 final

Council of ministers and does not function with the authority of a national legislature. The aspect of EU government over which the parliament has the most direct influence is the EU budget, which it may amend or reject and on which it generally has the final vote. It also must approve the state of nominees for the European Commission.

The European Parliament cannot initiate legislation, but it can amend or veto in many policy areas. In certain other policy areas, it has the right only to be consulted.

In some respects, the European Parliament and the Council of Ministers resemble the upper and lower houses of a bicameral legislature. Neither the European Parliament nor the Council of Ministers may initiate EU legislation, this power being reserved by the Commission, and the fact that the European Parliament cannot itself propose laws makes it different from most national legislative assemblies. However, once a proposal for an EU law or directive has been introduced by the Commission, it must usually receive the approval of both Parliament and the Council in order to come into force. Parliament may amend and block legislation in those policy areas that fall under the co-decision procedure, which currently make up about three-quarters of EU legislative acts. Remaining policy areas fall under either the assent procedure or (in a very few cases) the consultation procedure.

Under the proposed new Constitution for Europe Parliament's powers, would be enhanced, with almost all policy areas coming under co-decision, greater powers of democratic scrutiny of the Parliament and control over the whole EU budget. But up to now the EU Council didn't succeed in changing the decision making rules and procedures Commission, even not making use of the so-called passerelle possibilities<sup>17</sup>, president Barossa confirmed in December 2006 the necessity to involve more the national parliaments into the decision making processes.

### **3. Europol: a case study**

#### **3.1 The actual situation**

It is worth the effort to perform a prospective study about the future democratic control of Europol and its possible operational capabilities, definitely with The Hague Program and the European Constitution in perspective.

The question constantly arises if Europol's operational capabilities should be further developed and if parallel to this the democratic control of Europol must be upgraded?

Europol has been established on the basis of the Europol convention<sup>18</sup> and Europol was founded on the basis of article K1.9 of the Treaty of Maastricht. The Treaty of Amsterdam (art 30, par. 2) gave Europol a privileged position in the exchange of information between police forces. Within five years after the Treaty of Amsterdam had entered into force, Europol had to be enabled to facilitate and support the specific investigative actions of the competent authorities and to facilitate the co-ordination, also of operational actions of joint teams in which representatives of Europol play a supporting role.

The Treaty of Nice states in art. 40 par. 2(b) that the Council shall encourage cooperation through Eurojust by promoting support by "Eurojust" for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking account, in particular, of analysis carried out by Europol.

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<sup>17</sup> Last proposals having been blocked by Polen.

<sup>18</sup> Council Act July 26<sup>th</sup> 1995 on the Convention based on article K.3 of the Treaty on the establishment of a European police office, *PB. C.* November 27<sup>th</sup> 1995, afl. 316

The (consolidated version of the) Treaty of the European Union (hereafter, TEU)<sup>19</sup> addresses the role of Europol as part of police and judicial cooperation in criminal matters. The role of Europol is further elaborated in art. 30 of the TEU.

The recent decisions by the Council confirming the possibility for Europol to participate in joint investigative teams, and its right to ask the member states to start an investigation in specific cases, is a first but certain step on the road to a more executive Europol.

In 2005 the EU was again stepping up the position of Europol, deciding that Europol acts as the Central Office for combating euro counterfeiting, within the meaning of Geneva Convention<sup>20</sup>, art. 12.

The Europol convention has in the meantime been subject of relevant changes, giving rise to three additional protocols<sup>21</sup>:

- protocol of 30 November 2000, amending article 2 and the annex of the Europol convention;
- protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol of 28 November 2002;
- protocol of 28 November 2002 amending the Europol convention (providing the legal basis for the active participation of Europol's officials in joint investigation teams).

These protocols are close to be ratified by all EU Member States and will enter into force beginning 2007.

In conclusion, we can clearly point out three visible trends in relation to the development of Europol:

- the shift from focussing on specific crimes, towards (organised) crime in general ;
- the shift from handling information towards operative powers;
- the establishment of specified working groups and task forces within Europol as a reaction to actual issues or problems, e.g. a Counter terrorist unit and a Unit with Euro specialists<sup>22</sup>.

The drawback of the in comparison "old" age of Europol is that its legal basis, a Convention, does not reflect state of the art legislations at it is possible under the current TEU. As a result, changing provisions of even minor importance has proven to last five years and longer.

Particularly in comparison younger organisations like Eurojust or Cepol this becomes an obvious and unnecessary disadvantage. With a view to the required level of preparedness for future demands at the EU level, the time frame for changing the Europol legal framework is generally considered to be unacceptable. A delay of more then five years for putting a minor change to Europol's mandate into effect is clearly not tolerable, although this does not mean that the legal ratification procedures and its consequent delays are on itself not justified taking into account the actual legal framework and democratic processes in place.

In matters of law enforcement Europol stood in 1995 alone as an institutional player within the EU and Europol is the only organisation, also within the framework of the third pillar, having been created on the basis of a convention.

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<sup>19</sup> OJC 325, 24.12.2002, p.1

<sup>20</sup> Decision 2005/511/JHA

<sup>21</sup> Europol protocols: the protocol amending art. 2 and the annex to the Europol Convention of November 2000, OJC 358 13.12.2000, p.1, the Protocol on the privileges and immunities of Europol, the members of its organs, its Deputy Directors and its members of 28 November 2002, OJC 312 16.12.2002, p. 1 and the Protocol amending the Europol Convention of 27 November, 2003, OJC 2 6.1.2004, p.3. The Convention of 29 May 2000 on mutual assistance in criminal matters between the Member States, OJC 197, 12.7.2000, p.1 and its accompanying Protocol of 16 October 2001, OJC 326, 21.11.2001, p.2 and Framework Decision 2002/465/JHA of 13 June 2002 on Joint Investigation Teams, OJL 162, 20.6.2002, p.1.

<sup>22</sup> Fijnaut, C. , Police co-operation and het area of freedom, security and justice, in: Walker, N. (Ed.), Europe's area of freedom, security and justice, Oxford University Press, 2004, 243-244

Integration the Europol convention into the European treaties is a realistic but difficult option; its potential transpillarisation is a problematic, maybe unrealistic objective.

Since 2002 it was agreed that the procedure for amendment of the Europol convention should be simplified. Several options have been elaborated. Since the 4-5th of December 2006 Council meeting there is a political consensus on a final decision in how replacing the Europol convention by a Council decision. In doing so it seems there is no need for the Council to establish a protocol to repeal the Europol convention.

### 3.2 The Constitutional Treaty

The Constitutional Treaty states in article III-276 that “ Europol’s mission is to support and strengthen action by the Member States’ police authorities and other law enforcement services and their mutual co-operation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

The application of coercive measures shall be the exclusive responsibility of the competent national authorities”.

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

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

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

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

### 3.3 Europol's future

Europol's future is mainly dependant upon political developments as described before, and cynically speaking each crisis situation will continue to offer opportunities for new decisions, strategies and developments.

Therefore it is interesting to prospect Europol's future, by analysing Europol's possible future in line also with recent decisions made by the Council (4-5th of December 2006).

The Council agreed that the Europol convention should be replaced by a Council decision, subject to a full assessment of the implementations of the following elements:

- financing of Europol from the general budget of the EU and,
- application of the EU staff regulations as well as the protocol on privileges and immunities to Europol staff guided by the principle of budget neutrality and taking into account the specific requirements resulting from Europol's mandate and tasks.

The Council aims to reach a political agreement on the essential elements of the draft council decision before the end of the German Presidency, the adoption of the text should take place in due time after.

In addition it remains worthwhile to explore future Europol developments.

Europol's information position.

With regard to the exchange of information, the Hague Programme attempts to remedy the situation by introducing the "principle of availability". It is clear that this will affect especially the horizontal cooperation between the Member States. But the actual enrolment of the Europol Information System (EIS) can give a direct answer to some aspects of this strategy.

In fact the more information is stored and made available via the EIS, the lesser intergovernmental systems or processes are needed. But the scope of the EIS is limited to serious crime affecting two or more countries, the trust Member States put into the system and how serious is their participation into the system.

In addition the fact that Europol could have increased access to national systems (based on the same availability system) will considerably improve its information position.

The question also arises whether the data, limited by the Europol convention will have not to be extended, in line with the designed new international data exchange mechanisms (e.g. Prum, Swedish proposal, ..) including telecommunications traffic data, biometrics and passenger name records. If this is not the case Europol risks to be atomically outranged out of the official intelligence business networks active within the EU.

Also the designed interoperability between EU databases (EIS, Schengen, VIS, Eurodac) and if possible regional applications (e.g. PRUM agreement) will ensure a better quality information position and avoid the fact that the same person is registered under different identities without joint knowledge in the respective databases. But the political will is certainly not present the go that far in the coming years. Privacy, data protection and equality concerns become more acute in the light of the recent emphasis on the need to ensure "interoperability" between EU databases.

Anyway different choices will have to be made and several options are possible:

- to apply a minimum or maximum "availability" approach;
- to introduce a real intelligence model at EU level for law enforcement agencies;
- to continue or not to develop separate/interlinked/integrated EU databases with or without a common or separate technical platform;
- to maintain a mixed (first, third pillar) approach or to gradually opt for an integrated (first pillar) approach;
- to opt for one overall data protection system.

Co-operation with other EU agencies (Eurojust, OLAF, ...) and third countries. Europol is in the position<sup>23</sup> to conclude (strategic<sup>24</sup> or operational<sup>25</sup>) agreements with third states and third organisations. The Rhodes Europol vision document stipulates that Europol should basically act within the geographical area of Europe while remaining flexible to the development of international criminality. Europol should also make more frequent use of the Member States Liaison Offices worldwide. Existing agreements should be implemented by giving first priority to organisations and countries focussing on items belonging to Europol's core business.

High priority shall be given to the EU agencies with a special focus on **Eurojust**.

The relationship and cooperation between Europol and **OLAF** needs urgently further clarification and should be subject of a more constructive debate in order to avoid unnecessary duplication of effort, and this under the guidance of the management board. This cooperation is essential in protecting the EU from the effects of counterfeiting the Euro and the best possible use is made of the resources of both organisations<sup>26</sup>.

The same is valid for the cooperation between Europol and **Frontex** (operational since June 2005), gaining more and more an important position as a cooperation tool for the EU internally, but also as the focal point for cooperation with the outside world in the field of border controls. Especially when the Agency may in the future become responsible for the coordination of operational activities in the field of custom controls, thereby creating a truly integrated border management system at European level, its relationship and interaction with Schengen and Europol has to be clarified.

The relationship between Europol and the **Police Chief Task Force** should be much more based on the need to better implement decision made at political level and the vision and strategies as developed by Europol's management board.

Finally, as far as the cooperation between Europol and other EU organisations and institutions are concerned, different models arise:

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

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

Provide Europol with (new) adequate operational capabilities

One can descry a trend that co-ordinating and supporting Europol tasks can and will sometimes evolve into executive tasks. The Constitutional Treaty and the Hague Program are identifying the limits of what would be acceptable for the Member States at this moment. In addition to Europol's participation in joint teams and other quasi-operational powers, the EU's joint team of counter terrorist specialists (Task Force) is based at Europol and it has just been proposed that Europol should have immediate access to data held in the SIS for investigative purposes. In this way not only is the position of Europol being reinforced, but Europol is also

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<sup>23</sup> Art.42 of the Europol convention.

<sup>24</sup> EMCDDA, ECB, WCO, Commission, UNODC

<sup>25</sup> Norway, Iceland, USA, Switzerland, Romania, Canada, Malta, Slovak Republic

<sup>26</sup> House of Lords, Europol's role in fighting crime (5th report, 28 January 2003, HL, paper 43)

more and more being imbedded in the co-operation structures which are being introduced in the European Union.

But in the meantime it is clear that the Member States themselves are rather conservative in giving Europol any capability to become more operational. Most of the national laws introducing the joint team capabilities (art. 13, 2000 Convention on mutual assistance in criminal affairs) in their respective national laws are minimising the role and support to be provided by Europol officers as member of the team. It became again and again clear, as stated Zanders<sup>27</sup>, that only a supporting and not an independently executive competency was foreseen for Europol. Also with reference to the co-ordinating role, it can be said that this is very important out of the European thought, but that the real impact right now is limited, since a lot of police officers on the field still work bilaterally (the so-called "old boys network"). Confusion also remains to exist on the ambitions of the Constitutional Treaty concerning the role of Europol, Eurojust and the standing Committee of article III-162. Minister Donner remarked that the articles on Europol and Eurojust depart from the principle of co-ordination and co-operation between the different national jurisdictions. He is convinced that these can be expanded and improved in a lot of ways<sup>28</sup>. Essential for the effectiveness of the co-ordination is whether, and to what extent the co-operation is compulsory. Are member states being forced to start investigations at the instigation of Europol or Eurojust, or can they disregard the request? The compulsory character however, does not match the principle that cases cannot be imposed unilaterally upon the states. Moreover, the compulsory character can lead to tension when prioritising cases of national interest.

The general question however whether there is a need for an executive police at EU level is not new. Only a few supporters of a real European space have pleaded for an initiative in order to create a more executive police force at EU level. Most were against it or kept open their options. Some have suggested that all this would mean that Europol would be able to take part in police raids alongside national police, giving it the same sort of role as America's FBI. Many national governments have attacked these plans, complaining that they would spell the end of the national justice systems<sup>29</sup>. It can be noticed that police services usually use the same arguments as they do when they defend or obstruct the establishment of a national criminal investigation department.

Articles which try to answer this question have regularly been published and in a lot of cases, the authors have motivated the answer in connection with the question whether there is a need for a European Prosecutor, a so-called "corpus juris" and a European criminal justice. So when discussing future models for granting executive powers to Europol, three theoretical models can be distinguished:

- the joint investigation teams model;
- the "corpus juris" model (taken from the Commission Green paper on a European public prosecutor);
- the European criminal law model, consisting of creating a real European criminal law system, working together with a European public prosecutor to present cases too European criminal courts.

These models are only theoretical and only the two first models are more or less<sup>30</sup> realistic, the second being directly related to the Constitutional Treaty.

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<sup>27</sup> P. Zanders, "De Europese politie-eenheid: Europol", *Handboek politiediensten*, Kluwer Editorial, 1999, afl. 49, 104 (103)

<sup>28</sup> Speech at the official opening of Eurojust on April 29<sup>th</sup> 2003 in The Hague

<sup>29</sup> Daily Telegraph, 31st May 2003

<sup>30</sup> The House of Lords is of the opinion, just as an example, that the European Public Prosecutor is NOT a realistic and practical way forward ( House of Lords, sixteenth report).

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

But despite Sheptycki's<sup>31</sup> scepticism about the potential of supranational policing agencies such as Europol to homogenize police communications and police knowledge, transnational policing will experience the continuous motion of a changing European and world society, which is increasingly global and networked in character. And policy makers should, together with police chiefs decide upon the long term vision to be followed, also for Europol.

Yet, I believe that there is room for a limited European police; limited in competencies as well as in criminal areas. Following the model of the Dutch and the UK national criminal investigation units, which are supposed to co-operate with the regional and supra-regional criminal investigation departments, this European police should co-operate with the national police services.

The euro counterfeiting based strategy will remain a test case to find out to what degree the European member states are willing to establish and give Europol more operational capabilities. Here as well, the co-operation (competition?) between Europol and OLAF will remain an issue. In the meantime the Parliamentary Under-Secretary of State at the Home Office (Caroline Flint) immediately reacted by stating that "The Government notes that the Commission proposes, but does not specify certain investigative powers for Europol, and we need to know more precisely what is envisaged before commenting". In addition for example the United Kingdom Parliament reacted by its Select committee on European scrutiny by confirming that Europol was not conceived as an investigative body and a Minister's letter confirmed that there was no intention of departing from that position<sup>32</sup>. Peter Hain wrote "the word operational should be deleted. Investigative is sufficient and avoids suggestion of Europol having operational powers on the territory of Member States' territory. However it is remarkable to notice that the House of Lords stated that developments towards a major operational role of Europol must be preceded by a major debate across the EU, and should be based on fundamental change rather than a gradual accumulation of power, but did accept that at some point there may be calls from parts of the EU for Europol to be granted at least limited investigative functions on its own, for example in relation to Euro counterfeiting<sup>33</sup>. So we are far away from Ben Hayes Statewatch comments saying that "the vast extension of Europol's mandate, the framework for joint investigations teams and the EU convention on mutual legal assistance in criminal matters provides a logical and practical basis for the development of an informal and unaccountable "EU-FBI".

Finally the question whether Europol will also become the centre of "evidence" on top of its "intelligence based role" will depend on the practical interpretation which is given to these decisions, and on the content which is given to the co-operation with Eurojust.

### 3.4 Democratic control

Europol must remain accountable to the Member States of the European Union, through the Council members and the Europol Management Board, and also to the European Parliament. But the content and the degree of Europol's accountability becomes more and more subject of discussion.

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<sup>31</sup> Sheptycki, J., Police cooperation in the English Channel region 1968-1996, *European journal of crime, criminal law and criminal justice*, 1198, nr. 6, 216-235

<sup>32</sup> House of Commons, *European scrutiny*, twenty-ninth report.

<sup>33</sup> House of Lords, 2003, twentieth report.

Actually the Europol Convention provides for:

- the Presidency to present an annual report on Europol's activities to the European Parliament, but this report is not exactly the same as the annual report that Europol presents to the Council. In this way the European Parliament is getting only a passive right to information<sup>34</sup>;

- the European Parliament being regularly informed (Art. 39 of the EU Treaty) by the Commission of activities carried out in the area of police and judicial cooperation in criminal matters and being in the possibility to asking questions of the Council. Provision is also made for an annual debate on the progress that has been made.

The degree of involvement of the European Parliament seems to depending variable on the transparency-mindedness of the EU Presidency in charge. Consultation is usually ex post, in the sense that there is no prior and separate consultation on policy initiatives. The democratic bodies must direct themselves to Europol's director or coordinator if they seek explanation.

Art. 195 of the EC Treaty give the Ombudsman the power to handle complaints of maladministration relating to Community institutions and bodies, including Europol.

The European Parliament's Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (LIBE) recently launched a debate on the possibility of exercising democratic (and more particularly parliamentary) control over Europol.

Each year the Europol Management Board reports to the Council meeting at the level of the Ministers responsible for police cooperation. The Ministers are accountable to their national parliaments. In the national context, it is usually the responsible Minister (Interior or Justice) who is held to account. In some countries like for example the Netherlands the Minister is bound by the opinion of the parliament before coming into the position to agree officially as member of the JHA Council. Nevertheless National Parliaments face problems controlling Europol activities and at the same time the European Parliament lacks the competences to balance the control deficit of the National Parliaments. Thus European police cooperation (including when involving Europol) can largely go on without parliamentary control<sup>35</sup>.

And of course giving Europol any operational task within a Member State (for example as member of a joint team) increases the need for including this activity within the system of classic parliamentary control at national level.

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

The Treaties contain however provisions allowing the European Parliament to intervene in the decision-making process relating to Europol, namely art. 39 of the EU Treaty introducing the procedure whereby Parliament must be consulted before the adoption of the measures referred to in Title VI of the EU Treaty (decisions, framework decisions) with the exception of common positions. If this provision would be applied retroactively tot the Maastricht regime, the European Parliament would have been formally entitled to be consulted about the extension of Europol's mandate, which was undertaken on the basis of a series of joint actions. But also the Treaty of Nice did not offer anything new in matters of Parliamentary control.

It is now widely accepted that the composite character of the Union's policy requires a dual source of input legitimacy: the national Parliaments and the European Parliament. More and

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<sup>34</sup> Art 34, Europol convention

<sup>35</sup> Wagner, W., Halt Europol, Frankfurt am Main, Hessische Stiftung Friedens- und Konfliktforschung, 2004

more frequently the European Parliament and also national Parliaments started to complain about their lacking or insufficient accountability capabilities. This is also resulting from rather unfortunate precedents in this area, for instance when the European Parliament was not consulted in the negotiation and drafting of the Europol convention<sup>36</sup>, the fact that agreements were concluded with third countries and more specifically with the USA<sup>37</sup> without referring to national parliaments nor to the European Parliament, and moreover when the Council act of November 2002 drawing up a Protocol amending the Europol Convention and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees<sup>38</sup> was adopted. Regarding discussions in 2002 on the Commission's proposal for a Council decision on the financing of certain activities carried out by Europol in connection with cooperation in the fight against terrorism<sup>39</sup>, this proposal was rejected by the Member States, although the Europol status as a third pillar body, does not preclude it from being financed by the Community budget<sup>40</sup>.

When the Scoreboard (Tampere planning) was updated in October 2001, the Commission raised the question of revising the Europol Convention in order to introduce some form of democratic control<sup>41</sup>. The importance of the issue was also highlighted in December 2001 in the Laeken Declaration on the future of the European Union, in which the Member States also expressed their commitment to greater transparency and efficiency. More specifically, it pleads for increasing the democratic legitimacy and transparency of the present institutions, for more closely involving the national Parliaments in European decision-making and for improving the efficiency of decision-making and the workings of the institutions in the Union. For police and judicial cooperation in criminal matters (third pillar), the possibility of the "veto" has been removed in line with what was envisaged for enhanced cooperation for the first pillar by the IGC when discussing the Nice Treaty.

In its recommendation of 30 May 2002<sup>42</sup> the European Parliament in relation to the initiative of Denmark with a view to adopting a Council act drawing up a Protocol amending the Europol convention, clearly stated its view that Europol must become an effective tool in the fight against organised crime in the European Union, and that it must be able to operate in a flexible manner so that it may make an effective contribution to the fight against the manifold forms of serious crime, and it requested that the Council replace the Convention with a decision, giving the existing major shortcomings:

- that Europol continues to operate within the ambit of simple intergovernmental cooperation, at a time Europol is given an increasing number of tasks to be carried out on behalf of the Union and is being authorised to transfer personal data to third countries and bodies;
- that, in the advent of enlargement, all decisions relating to Europol should no longer be taken by the Council acting unanimously;
- that the European Parliament must be provided with the legal means and institutional framework to enable it in the future to exercise genuine democratic control;
- and that the current procedure for amending the Convention or replacing it by a Council decision, which requires a Protocol that will have to be ratified by all Member States, is excessively lengthy and cumbersome, and consequently entirely inappropriate.

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<sup>36</sup> Report, Nassauer MEP

<sup>37</sup> Supplement agreement between Europol and the United States, December 2002

<sup>38</sup> Official Journal C312 of 16 December 2002)

<sup>39</sup> Document 117022 Europol 60

<sup>40</sup> Art. 41(3) of the Treaty on the European Union, but art. 35 of the Europol convention explicitly indicates that the funding remains the responsibility of the Member States.

<sup>41</sup> COM (2001) 628final

<sup>42</sup> European Parliament, A5-0116/2003

In recommendation 1 the European Parliament called on the Council to make Europol part of the first pillar, including the proposal to convert the Europol convention into a regulation to be adopted by qualified majority and by co-decision with the European Parliament. In recommendation 2 it called on the Council to amend the arrangements for the funding of Europol by replacing part of the contributions of Member States with funding from the EU budget.

Following the Constitutional Treaty European laws shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with the member states' national Parliaments.

In the main time suggested scenarios for judicial control have been refuted.

In 2001 The Dutch Senate has sent a questionnaire to the Parliaments of other Member States, but the result was rather poor. First of all it could be concluded from the answers that up to then parliament had not devoted any special attention to the subject of Europol. What is even more surprising is the fact that almost no attention is given to the degree of involvement by national law enforcement agencies into Europol's initiatives.

Secondly, reading the answers gives on the feeling that parliamentary supervision of Europol is generally considered to be inadequate, at both European Parliament and national parliament level. Some respondents however saw benefit in setting up an inter-parliamentary council- in which the European Parliament might also be represented- which could advise the national parliaments concerning Europol. Nevertheless these meetings haven't unfortunately lead to any official initiatives<sup>43</sup>.

At the following conference involving as well national Parliaments as the European Parliament, a discussion took place about the creation of Parlopol, an inter-parliamentary body for the exchange of information about Europol and JHA matters more widely. This Parlopol initiative has led to the following conclusions and proposals:

- as long as the European Parliament has no competence in matters of supervision of policy in the field of police and justice, the national parliaments should take their responsibility in a more concerned way than has happened until then;
- finding that the national Parliaments are in fact not able to organise on their own sufficient parliamentary supervision of the decisions of the Council of Ministers in police affairs and the governing bodies of Europol and Eurojust;
- appeals to the national Parliaments and to the European Parliament, to recognise and to support the work of Parlopol.

Commissioner Vittorino argued for a continued development of control instruments<sup>44</sup>.

Although formally speaking, the JHA commissioner did not see an urgent need for further parliamentary control but he admitted that Europol is an evolving organisation with increasingly more powers. What seems to be missing, he argued is an "institutionalised information exchange between national parliaments and the European parliament, and he believes that a joint committee should be created to have a regular debate about matters regarding Europol. This joint committee would meet twice a year to exchange experience and to discuss matters regarding Europol. It should maintain close contacts with Europol through a special body nominated by this joint committee and reporting to it.

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<sup>43</sup> The Interparliamentary conference 2001, Dutch Senate., 2001

<sup>44</sup> Speech by A. Vittorino, Democratic control of Europol, Europol conference organised by the Senate and House of Representatives of the Dutch States General, The Hague, 8 June 2001. Speech 01/274. To be found at: [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action).

Maintaining that the arrangements for informing it about Europol's activities did not constitute an adequate level of control, the European Parliament also formulated proposals in a recommendation on reinforcing parliamentary controls and extending Europol's powers (April 1999) and two reports on initiatives by the Member States to extend Europol's powers (October 2000 and 2001).

Its 2003 recommendations called on the Council<sup>45</sup> to strengthen the European Parliament's democratic power of control over Europol and, to that end, to adopt:

- a provision amending art. 34 of the Europol convention laying down that one single annual activity report shall be forwarded to the Council and to the European Parliament;
- a provision amending art. 34 of the Europol Convention and conferring on the European Parliament the formal right to hold an exchange of views with the Council Presidency on the annual activity report;
- a provision amending art. 34 of the Europol Convention and conferring on the European Parliament the formal right to invite the Director of Europol to appear before the competent committee;
- a provision amending art. 24(6) of the Europol Convention and requiring the joint supervisory authority responsible for data protection to draw up an annual activity report, to forward it to the European Parliament and to give an account thereof before the competent committee;
- a provision amending art. 28 of the Europol Convention on altering the composition of the Europol Management Board to include two representatives of the Commission and two of the European Parliament, in addition to one representative of each Member State;
- a provision amending art. 29 of the Europol Convention and laying down that the European Parliament shall be equally involved in the procedure for the appointment and dismissal of the Director of Europol, jointly with the Council.

In recommendation 5 the European Parliament calls on the Council to adopt a provision which guarantees that the data protection provided and the supervision of compliance with these standards are equivalent to those guaranteed under the first pillar and repeats its message that the general reports on Europol's activities shall expressly refer to those priorities and shall reflect the state of their implementation and expected developments during the following year. The reports shall be forwarded to the European Parliament with a view to the annual debate referred to in art. 39 of the Treaty on the EU and shall afterwards be published together with the opinions of the European Parliament and any observations and appraisal of individual member states.

In recommendation 6 the European Parliament calls on the Council to take the measures required to ensure close cooperation between Europol, Eurojust and OLAF in order to strengthen the operational efficiency of those bodies in the fight against organised crime and terrorism.

The European Parliament also calls on Europol (recommendation 7) to adopt as soon as possible rules on access to documents in conformity with regulation 1049/2001 after consulting the European Parliament and to ensure that any rules on confidentiality of Europol information are compatible with the rules adopted by Europol in conformity with Regulation 1049/2001 on public access to documents.

The European Parliament also organised, in close cooperation with national parliaments, a meeting on 17 and 18 October 2005 in order to discuss the role that national parliaments could play to improve judicial and police cooperation among Member States.

Parliament made a number of suggestions in these documents. It called on the Council to:

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<sup>45</sup> See footnote 34

- provide for adequate parliamentary control in the event of Europol being given operational powers;
- provide for the creation of a European public prosecutor in the event of Europol being given cross-border operational powers;
- make the Director of Europol accountable to the competent Parliamentary committee.

Also Statewatch expresses the opinion that the a long-awaited European Commission communication on the democratic control of Europol has recommended little more than cosmetic changes to the current system and failed to address the key problem areas of decision making and judicial accountability. The Commission sets its stall out early stressing the need to find a balance between parliamentary control and police confidentiality and discretion<sup>46</sup>.

An important step however is the establishment in art. 22(2) of the Constitutional Treaty of a legal base for the adoption of measures which will enable the scrutiny of Europol's activities by the European Parliament and national parliaments.

As already mentioned before and following the Hague Programme, the European Commission is mandated to elaborate proposals concerning the role of the European Parliament and the national parliaments in the evaluation of the activities of Europol and Eurojust. These proposals have to be introduced as soon as the Constitutional Treaty has entered into force what will not happen very soon .....

The European Parliament also asked the Commission to present a proposal for a comprehensive reform of Europol which would include other topics such as judicial review of the instruments of police and judicial cooperation in criminal matters by the Court of Justice and the funding of the instruments in questions from the Community budget<sup>47</sup>. These proposals have to be introduced as soon as the Constitutional Treaty has entered into force. The Commission therefore suggests that, as soon as Europol's powers are extended, the arrangements for controlling it should be revised so as to provide for:

- a regular, formal exchange of information between Europol, the national parliaments and the European Parliament;
- the creation of a joint committee<sup>48</sup> consisting of representatives of the parliamentary committees (in national parliaments and the European parliament) that are responsible for police cooperation;
- the amendment of the Europol convention (presentation of a single annual report on Europol's activities to both the European Parliament and the Council, the right of the European Parliament to summon the Director of Europol to appear before the competent committee).

Summarising Parlopol, the Commission and the European Parliament called on the Council to strengthen the European Parliament's democratic power of control over Europol and, to that end, to adopt:

- a provision amending art. 34 of the Europol convention laying down that one single annual activity report (including data protection aspects) shall be forwarded to the Council and to the European Parliament with a view to the annual debate referred to in art. 39 of the Treaty on the EU and shall afterwards be published together with the opinions of the European

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<sup>46</sup> Statewatch, March 2002

<sup>47</sup> Democratic control over Europol, Commission, Last updated 24 August 2005

<sup>48</sup> The idea of a joint committee of members of the European Parliament and national Parliaments to oversee Europol was first suggested by the Communication on Democratic Control of Europol of March 2002. This idea was included in early versions of the Danish proposals to amend the Europol convention, but was not included in the version upon which a general approach was reached in December 2002. The reason was that only primary European legislation (European treaties themselves) has the power to establish formal parliamentary committees of any kind.

Parliament and any observations and appraisal of individual member states + a provision amending art. 34 of the Europol Convention and conferring on the European Parliament the formal right to hold an exchange of views with the Council Presidency on the annual activity report;

- a regular, formal exchange of information between Europol, the national parliaments and the European Parliament and the creation of a joint committee<sup>49</sup> consisting of representatives of the parliamentary committees (in national parliaments and the European parliament) that are responsible for police cooperation;

- a provision amending art. 34 of the Europol Convention and conferring on the European Parliament the formal right to invite the Director of Europol to appear before the competent committee and make the Director of Europol accountable to the competent Parliamentary committee + the establishment in art. 22(2) of the Constitutional Treaty of a legal base for the adoption of measures which will enable the scrutiny of Europol's activities by the European Parliament and national parliaments;

- a provision which guarantees that the data protection provided and the supervision of compliance with these standards are equivalent to those guaranteed under the first pillar + a provision amending art. 24(6) of the Europol Convention and requiring the joint supervisory authority responsible for data protection to draw up an annual activity report, to forward it to the European Parliament and to give an account thereof before the competent committee;

- a provision amending art. 28 of the Europol Convention on altering the composition of the Europol Management Board to include two representatives of the Commission and two of the European Parliament, in addition to one representative of each Member State;

- a provision amending art. 29 of the Europol Convention and laying down that the European Parliament shall be equally involved in the procedure for the appointment and dismissal of the Director of Europol, jointly with the Council;

- provide for adequate parliamentary control in the event of Europol being given operational powers + provide for the creation of a European public prosecutor in the event of Europol being given cross-border operational powers;

- the measures required to ensure close cooperation between Europol, Eurojust and OLAF in order to strengthen the operational efficiency of those bodies in the fight against organised crime and terrorism;

- rules on access to documents in conformity with regulation 1049/2001 after consulting the European Parliament and to ensure that any rules on confidentiality of Europol information are compatible with the rules adopted by Europol in conformity with Regulation 1049/2001 on public access to documents.

#### **4. Conclusion**

It is clear that the European Union keeps on believing in the principle of sovereignty and in solid partnerships, supported by new organisations and initiatives. The European co-operation remains a learning process during which fundamental changes and adaptations of the treaty are regularly being made, while not always realising enough depth in the existing partnerships and possibilities for co-operation. In general the Parliamentary accountability is insufficient.

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<sup>49</sup> The idea of a joint committee of members of the European Parliament and national Parliaments to oversee Europol was first suggested by the Communication on Democratic Control of Europol of March 2002. This idea was included in early versions of the Danish proposals to amend the Europol convention, but was not included in the version upon which a general approach was reached in December 2002. The reason was that only primary European legislation (European treaties themselves) has the power to establish formal parliamentary committees of any kind.

The example of Europol helps us to identify the situation and to explore possible initiatives in order to improve the accountability mechanisms.

It is in the interest of the EU in general and Europol itself to promote higher transparency and its Management Board should be asked to formulate a clear opinion and vision on this subject itself. But the risk is there that due to the members of this board are often members of the government administration itself, their response to this invitation would not be very innovative.

It would be advisable that the European Parliament further develops a common opinion on this subject in line with eventual new adequate operational capabilities to be provided.

The tendency to harmonise the regulations, combined with the more far-reaching competencies of Europol and Eurojust and the changes in the decision-making procedure for the aspects of police and judicial co-operation in all respects shows a Europe that is moving fast towards a “Europeanised” approach of crime. Fijnaut also remarks that the subject “police and judicial co-operation” no longer constitutes a separate title, but is covered by the title “internal security”. This incites him to believe that the ambitions of the European Union reach further than an expansion and intensification of the co-operation between the member states. The suspicion that we are gradually evolving towards a harmonisation of the national legal systems<sup>50</sup> arises. The Constitutional Treaty and the Hague Program are very ambitious as far as the future of Europol (and Eurojust) is concerned. As well the Parliamentary control as its operational capabilities are subject of further clarification.

Providing Europol with adequate operational capabilities AND improving democratic control are intrinsically interlinked. The limits of giving Europol additional capabilities are now reached if everything remains within the actual cooperation framework. Nevertheless it is in the interest of Europol itself and also of the Member States that the many proposals enhancing parliamentary control are subject of official political initiatives.

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<sup>50</sup> C. Fijnaut, *De normering van het justitiële optreden van buitenlandse politieambtenaren op Nederlands grondgebied*, Clingendael, 2004, not published