



**Policy Unit C**

**CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS**

**BRIEFING PAPER**

**POLICE CO-OPERATION:  
WHAT ARE THE MAIN OBSTACLES TO  
POLICE CO-OPERATION IN THE EU?**

**Abstract:**

Since the entry into force of the Maastricht Treaty of the European Union, police co-operation in the European Union has been slowly evolving. Two recent developments have led to calls for further action in the field: the enlargement of the European Union, and the increased emphasis on counter-terrorism after recent attacks. These calls for change have been reflected in the Hague Programme, which calls for new measures in the field. These developments have led to many levels of police co-operation in the EU, including:

- Co-operation between national law enforcement authorities, in particular the use of the principle of availability
- Co-operation between police and intelligence agencies
- Co-operation of national law enforcement agencies with Europol
- The development of EU databases (such as SIS II, VIS and Europol) and enhancing access and 'interoperability'
- Enhanced co-operation within and outside the EU, including initiative such as the Prum Treaty
- Enhanced co-operation with third countries, in particular the US

This multi-layered framework of police co-operation raises a number of issues that need to be addressed by the Committee. These include:

- the issue of trust between national police authorities, and how this can be enhanced
- the challenges that mutual recognition (as expressed by the principle of availability) poses to national legal and constitutional principles if no safeguards are adopted at EU level
- data protection, which is challenged by the proliferation of databases and enhanced information exchange – the adoption of the third pillar data protection Framework Decision must be prioritised
- democratic scrutiny and accountability of police agencies (in particular Europol) and information flows- the role of the European Parliament must be reassessed as a matter of urgency
- the external dimension – in the light of the challenges posed to EU fundamental legal principles and values (as witnessed by the PNR debate), there is a need for greater safeguards in this context and greater public and democratic debate, in particular in relation to the role of the European Parliament in the conclusion of international agreements between the EC, the EU, and Europol, with third countries.

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## **POLICE CO-OPERATION: WHAT ARE THE MAIN OBSTACLES TO POLICE CO-OPERATION IN THE EU?**

### **Legal basis for EU police co-operation**

Article 29 and 30 TEU

Europol Convention

### **Background**

1. Efforts to enhance police co-operation in the European Union have been taking place for a number of years now. Successive legislative and constitutional developments have granted the European Union competence to act in the field. Major steps in this context have been: the creation of the third pillar in the Maastricht Treaty and its amendment in Amsterdam; the incorporation of the Schengen *acquis* in Community/Union law by the Amsterdam Treaty; and the signature and ratification of the Europol Convention and the start of work of Europol in 1999.

2. On the basis of these developments, secondary legislation adopted and a certain enhancement of operational co-operation, police co-operation in the European Union has been slowly evolving. However, the extent and content of such co-operation has been repeatedly criticised both by commentators and officials, arguing that the current mechanisms do not ensure neither a clear legal framework protective of the rights of individuals, nor a framework that achieves optimal co-operation between law enforcement agencies and optimal results. This resulted in a number of calls for change, which were enhanced by two recent developments: the enlargement of the European Union, and the increased emphasis on counter-terrorism after recent attacks.

3. These calls for change have been reflected in the Hague Programme, which focuses predominantly on security considerations. The main novelty of the Hague Programme, in particular in relation to Tampere has been the emphasis on ‘operational’ measures. These measures aim in particular at boosting operational co-operation between national law enforcement (and to some extent intelligence) agencies, enhancing the exchange of personal data and strategic information between these agencies and their EU counterparts, and developing European Union databases. This emphasis on operational co-operation reflects the feeling that there are deficiencies in Member States’ and the EU capability to confront security – and in particular terrorist – threats stemming in particular from obstacles to co-operation and communication and the lack of trust. The Hague Programme and the subsequent Action Plan to implement it<sup>1</sup> attempt to remedy these shortcomings by both building on existing EU initiatives and calling for the tabling of new measures at EU level.

### **The many levels of police co-operation in the EU**

#### **1. Co-operation between national law enforcement authorities**

4. A central element of police co-operation in the EU consists of co-operation and exchange of data between the law enforcement authorities of Member States. Article 39 of the Schengen Convention contains a provision in this respect, but does not render such co-operation mandatory. Co-operation can also involve joint operations, for instance by setting up joint investigation teams. Member States have now adopted a specific third pillar measure setting out conditions for the operation of such teams.

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<sup>1</sup> *Council and Commission Action Plan implementing the Hague Programme on strengthening freedom, security and justice in the European Union*, Council document 9778/2/05 REV2. See also the earlier Commission Communication *The Hague Programme: Ten priorities for the next five years*, COM (2005) 184 final.

5. However, the results have not been optimal. Joint investigation teams have not been used extensively by Member States. This may be explained by the resources needed to plan and operate these teams, their prioritisation (or absence of such prioritisation) by national/local police authorities and the reluctance to work with colleagues 'abroad'. On the other hand, many practitioners argue that the level of the exchange of information between law enforcement authorities has been rather disappointing. This has been attributed to the lack of trust between authorities in the various Member States, and the sense of ownership of information by police authorities, many times unwilling to share them with colleagues, especially abroad.

6. With regard to the exchange of information, the Hague Programme attempts to remedy the situation by introducing the 'principle of availability'. According to the Hague Programme, this means that 'throughout the Union, a law enforcement officer in one Member State who needs information in order to perform his duties can obtain this from another Member State and that the law enforcement agency in the other Member State which holds this information will make it available for the stated purpose, taking into account the requirement for ongoing investigations in that State'.<sup>1</sup> The Hague Programme calls for the principle of availability to be applied from 1 January 2008. In order to meet the Hague deadlines, the Commission has recently tabled a proposal for a third pillar legal instrument in the field.<sup>2</sup> The general principle of availability is established in Article 6 of the draft, according to which Member States must ensure that 'information shall be provided to *equivalent* competent authorities of other Member States and Europol...*in so far as these authorities need* this information to fulfil their lawful tasks for the prevention, detection or investigation of criminal offences'.<sup>3</sup>

7. A critical analysis of the principle of availability has been provided in our earlier note. Here it suffices to say that one wonders how this principle will work in the light of the current alleged lack of trust between police authorities in Member States. At present police authorities are reluctant to share information. With the principle of availability in its current form, they will be obliged to exchange data, almost automatically. However, this principle does nothing to actually enhance trust on the ground, and it remains to be seen how it will work in practice in the light of such lack of trust.

## **2. Co-operation between police and intelligence agencies**

8. Co-operation between police and intelligence agencies and the exchange of data (or, if not exchange, the provision of data from the police to intelligence agencies) has entered the debate prominently in the context of the 'war on terror'. It is the view of many that such co-operation is essential in order to prevent and combat terrorism, and other forms of serious crime. Therefore, efforts have been made to establish principles for such co-operation, which could be included in the Hague Programme. Indeed, the importance of the principle of availability is also mentioned in the Programme in the specific context of counter-terrorism co-operation. However, following criticisms by intelligence services in Member States which were alarmed by the fact that their work might be exposed to greater scrutiny by these mechanisms, the Hague Programme calls for particular consideration to be given to the special circumstances that apply to the working methods of security services (including sources of information, methods of information collection and confidentiality).<sup>4</sup>

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<sup>1</sup> Point 2.1, p. 27.

<sup>2</sup> *Proposal for a Council Framework Decision non the exchange of information under the principle of availability*, COM (2005) 490 final, 12 October 2005.

<sup>3</sup> My emphasis.

<sup>4</sup> Point 2.2, p. 29. The Commission has recently tabled a proposal for a third pillar Decision on the transmission of information resulting from the activities of intelligence services with respect to terrorism, COM (2005) 695 final, 22.12.2005

### 3. Co-operation with Europol

9. The establishment of Europol reflected the ambition to create an integrated system of police co-operation and analysis across the EU. Critics of the potential powers that this agency could accumulate have voiced concerns against the development of Europol, into a European FBI. However, and notwithstanding a detailed legal framework set out by the Europol Convention and subsequent legislative developments, reality has not done justice to these claims.<sup>1</sup> On the contrary, Europol has been criticised widely for inefficiency, cumbersome procedures and has been plagued by intra-institutional and political expediencies – the recent considerable delay to appoint a new Director being a prime example.

10. Europol's defendants and officials argue that these accusations are not always fair, as Europol can only work on the basis of the data that its national contact points provide. And it has been argued that the input from some Member States to Europol has been minimal. If this is the case, this lack of trust constitutes a major obstacle to the development of the Agency, which, on the other side, is surrounded by concerns regarding its accountability and democratic control. The draft Framework Decision on the principle of availability aims to remedy this lack of trust, by including Europol in the authorities that may have access to national data. As mentioned earlier, whether this will actually resolve the issue of the lack of trust by national authorities remains to be seen.

### 4. Developing EU databases and enhancing access and 'interoperability'

11. There are currently in the European Union a number of databases containing 'police' data (the Europol database and the Schengen Information System being prime examples). Increasingly, the focus has been to make such databases 'interoperable', ie to make it easier to 'read' the data contained in each of them if access is provided. At the same time, in the context of the 'war on terror', it has been argued that access and interoperability should not be limited to 'pure' police databases, but should also extend to immigration databases (such as the Visa Information System), for identification and preventive purposes. These initiatives cause a number of concerns, as they reflect a 'security continuum' linking immigration and terrorism,<sup>2</sup> disregard the principle of purpose limitation in access and use of personal data, and disregard the fact that these databases have different characteristics and different purposes.

12. One of the main examples in this context is the development of the 'second generation' Schengen Information System (SIS II). The Commission has been presenting a series of documents with this aim, the latest being three documents (two first pillar Regulations and one third pillar Decision) tabled in May 2005.<sup>3</sup> Major aims of developing the 'second generation' SIS, apart from technical improvements, are to broaden the categories of data included in the database and the categories of national authorities having access to Schengen data. Counter-terrorism considerations have played a significant part in attempts at this extension.<sup>4</sup>

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<sup>1</sup> For details on Europol's role see our next note.

<sup>2</sup> For the (in)security continuum concept, see D. Bigo, *Polices en Réseaux*, Presses Sciences Po, 1996.

<sup>3</sup> *Proposal for a Council Decision on the establishment, operation and use of the second generation Schengen Information System*, COM (2005) 230; *Proposal for a Regulation on the establishment, operation and use of the second generation Schengen Information System*, COM (2005) 236; and *Proposal for a Regulation regarding the access to SIS II by the services of Member States responsible for issuing vehicle registration certificates*, COM (2005) 237.

<sup>4</sup> In 2004, the Council adopted a first pillar Regulation and a third pillar Decision concerning the introduction 'of some new functions for the Schengen Information System, including in the fight against terrorism'. (OJ L162, 30.4.2004, p.29 and OJ L68, 15.3.2005 p.44 respectively). The Regulation extends access to SIS data to national judicial authorities and access to immigration data to authorities responsible for issuing visas and

13. The widening of access to the Schengen databases have led to concerns that the nature of the Schengen Information System is being changed, with the system being transformed from an alerts mechanism accessed for specific immigration control or law enforcement purposes on a hit/no hit basis, to a general law enforcement database, to be accessed for a wide range of purposes. A related concern

involves proposals to enable the interlinking of alerts in SIS II. Interlinking of alerts may thus lead to a detailed profiling of individuals and the change in the nature of the SIS. This development, along with broadening the purpose of SIS and extending access to the database to a number of authorities, may lead to the collapse of the current distinction between SIS ‘immigration’ and ‘police’ data. The European Data Protection Supervisor has also noted that the introduction of links between alerts is ‘a very typical feature of a police investigative tool’.<sup>1</sup>

14. Similar issues arise regarding the establishment of another important EU database, the Visa Information System (VIS). The Council adopted in June 2004 a Decision forming the legal basis for the establishment of VIS<sup>2</sup> and negotiations began to define its purpose and functions and formulate rules on access and exchange of data. For that purpose, the Commission has recently tabled a draft Regulation aiming to take further VIS by defining its aims and rules on data access and exchange.<sup>3</sup> Article 1(2)(a) of the proposal states that one of the purposes of VIS is ‘to prevent threats to internal security of any of the Member States’. The conclusions of the JHA Council of 24 February 2005 raise concerns that the standards set out by the Commission will be dismantled by Member States in negotiations – the Council calls for access to the VIS to be given to national authorities responsible for ‘internal security’, when exercising their powers in investigating, preventing and detecting criminal offences, including terrorist acts or threats. The Council invited the Commission to present a separate, third pillar proposal to this end. This not only reinforces the ‘security continuum’ approach, but would effectively sideline the European Parliament, which will co-decide with the Council on the first pillar VIS Regulation but will only be consulted in the third pillar instrument.<sup>4</sup>

15. 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. Following the example of the EU Declaration on combating terrorism produced after Madrid, the Hague Programme calls for maximising interoperability of EU information systems ‘in tackling illegal immigration and improving border controls’ on the one hand, and ‘reciprocal access to or interoperability of national databases’ for security purposes, or ‘direct (on-line) access, including for Europol, to existing central EU databases such as the SIS.’<sup>5</sup> This could create a situation where databases including different categories of data and established for different purposes are ‘interoperable’ and thus easily accessed by a wide range of authorities. However, as the European Data Protection Supervisor has noted, ‘interoperability should never lead to a situation where an authority, not entitled to access or use certain data, can obtain this access via another information system’.<sup>6</sup>

## **5. Enhanced co-operation within and outside the EU – the Prum Treaty**

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residence permits and examining visa applications. The Decision extends access to ‘criminal law’ SIS data to Europol and Eurojust.

<sup>1</sup> See the EDPS Opinion on the initiative in [www.edps.eu.int](http://www.edps.eu.int)

<sup>2</sup> Council Decision of 8 June 2004 establishing the Visa Information System (VIS), OJ L 213, 15.6.2004, p.5.

<sup>3</sup> *Proposal for a Regulation of the European Parliament and of the Council concerning the VIS and the exchange of data between Member States on short-stay visas*, COM (2004) 835 final, Brussels 28.12.2004.

<sup>4</sup> V. Mitsilegas, ‘Controle des étrangers, des passagers, des citoyens: Surveillance et anti-terrorisme’, in *Cultures et Conflits*, no 58, summer 2005.

<sup>5</sup> Point 1.7.2, p.25 and 2.1, p.28 respectively.

<sup>6</sup> *Op. cit.*, p.23.

16. The development in question is the signing, in May 2005, by seven EU Member States<sup>1</sup>, of a Convention on the ‘stepping up of cross-border co-operation, particularly in combating terrorism, cross-border crime and illegal immigration’ – the Prum Convention.<sup>2</sup> Like Schengen, the Prum Convention was named after the town where it was signed. Like Schengen, it is a pioneering document, where a number of EU member states decide to push ahead on an intergovernmental basis and forge closer co-operation in home affairs matters – presumably in an effort to address obstacles in co-operation resulting from the lack of trust in a Europe of 25 and legislative paralysis in the light of the ‘frozen’ Constitution. The Convention contains far-reaching proposals which may have significant consequences for the protection of civil liberties and fundamental rights.<sup>3</sup>

17. The Prum Convention lies outside of the Community/Union legal order. Parties in the Convention however have taken care to avoid conflict and ensure compliance with their Community/Union obligations, by inserting a relevant clause.<sup>4</sup> However, and leaving issues of enforcement aside, the fact is that an initiative such as the Prum Convention leaves the possibility open for action that goes beyond the EU acquis (and may or may not be compatible with it). It also acts as a motor for further integration across the EU, by setting the agenda and imposing standards that have been adopted by a group of powerful members without necessarily democratic debate or consultation regarding their formulation. These standards can be used as political leverage against non-participating countries.<sup>5</sup> However, Prum is also a reminder of the ‘variable geometry’ of operational co-operation in the EU, with:

- the 25 EU Member States participating in police co-operation and Europol
- the ‘full’ Schengen Members (and those non-EU members participating in the Schengen acquis)
- the candidates for ‘full’ Schengen membership (the 10 ‘new’ Member States whose membership must be approved by the old members)
- countries which do not participate in the Schengen immigration provisions (UK and Ireland), and
- countries that may wish to go ahead outside the Union framework, for instance via the Prum Convention<sup>6</sup>

## **6. The external dimension of police co-operation**

18. One of the main elements of the response to terrorist attacks has been the quest for co-operation on a global scale- in response to a transnational phenomenon. The European Union has been at the forefront of such co-operation, by approaching the US regarding the establishment of EU-US

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<sup>1</sup> Belgium, Germany, Spain, France, Luxembourg, the Netherlands and Austria.

<sup>2</sup> Council document 10900/05.

<sup>3</sup> These include the establishment of national DNA analysis files and the automated search and comparison of DNA profiles (and fingerprinting data), the deployment of armed air marshals, and joint police operations, including in emergency cases action in the territory of other contracting states without their prior consent. When operating in the territory of another contracting party, officers ‘may wear their own national uniforms’ (Article 28(1)).

<sup>4</sup> Article 47(1) states that: ‘The provisions of this Convention shall apply only in so far as they are compatible with European Union law. Should the European Union in future introduce arrangements affecting the scope of this Convention, European Union law shall take precedence in applying the relevant provisions of this Convention. The Contracting Parties may amend or replace the provisions of this Convention in view of those new arrangements resulting from European Union law’.

<sup>5</sup> From the very outset, Prum members state that participation to their group is open to all EU members, and a proposal will be tabled in three years from the entry into force of the Convention leading to its incorporation into the legal framework of the EU (Article 1(2) and (4)).

<sup>6</sup> There is also the level of enhanced co-operation between EU and non-EU countries in the context of the G5.

counter-terrorism co-operation (including matters such as extradition, mutual legal assistance and police co-operation) shortly after 9/11. At the same time, the EU has inserted JHA clauses in agreements with its neighbours and other third countries. The emphasis on the external dimension has been reiterated in the Hague Programme, whose last section calls for the development of a 'coherent external dimension' of EU JHA.<sup>1</sup>

19. A major issue arising from attempts of the EU to co-operate with third countries: the extent to which the EU must be expected to sustain its own values and legal/human rights standards when co-operating with countries with different/lower standards. This issue has arisen prominently in the context of the agreements concluded between the EU and the US on counter-terrorism, which were criticised for compromising fundamental EU values and legal principles.<sup>2</sup>

20. These criticisms are exacerbated by the fact that these agreements were concluded without adequate debate and scrutiny by either national parliaments or the European Parliament. This reflects the very limited space for scrutiny currently offered by the third pillar, but also by the mechanism under which the assessment of whether a third country provides an adequate level of data protection for the purposes of the data protection Directive is taken behind closed doors by a comitology committee. The Commission was invited to present proposals in this context and the recent proposal for a Framework Decision on data protection in criminal matters contains a relevant section. However, this is not very encouraging, as the proposal provides that adequacy decisions will again be taken by comitology, with the European Parliament being only informed.<sup>3</sup>

#### **Central issues in the development of police co-operation in the EU and Recommendations for action**

21. The Hague Programme and resulting developments aim to give a new boost to police and operational co-operation in the EU. It is our view that, in any discussion regarding the development and improvement of police co-operation in the EU, the following issues must be taken into account:

**a. the issue of trust: is mutual recognition the best way forward?:** the issue of trust is central to any effort to enhance co-operation. At present, the lack of trust is deemed to be one of the main obstacles to co-operation both between national police authorities and between them and Europol. However, the tool chosen to surpass these difficulties is co-operation on the basis of the principle of availability, which is based on mutual recognition – which in turn pre-supposes almost blind trust to the legal and operational system of other Member States. The efficiency of this system, if no efforts to enhance trust on the ground are made, remains questionable. **There must be an open debate on whether police co-operation on the basis of mutual recognition, and with no or minimal harmonisation, is the best way forward.**

**b. legal and constitutional issues:** the regulation of police powers and the gathering of personal data at national level reflects national legal and constitutional traditions. Rules on which authority has access to personal data and how such data can be used, form part of a general legal framework of criminal law and procedure. The impact of EU co-operation on the basis of the principle of availability to the national systems may be considerable. Executing 'blindly' requests from another

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<sup>1</sup> Point 4, p.42.

<sup>2</sup> See the PNR Agreements (where the European Parliament has been very active), the third pillar Agreements on Extradition and Mutual Legal Assistance and the Agreement between Europol and the US. For a detailed analysis, see V. Mitsilegas, 'The New EU-USA Cooperation on Extradition, Mutual Legal Assistance and the Exchange of Police Data' in *European Foreign Affairs Review*, vol. 8, no 4, winter 2003, pp.515-536 and Mitsilegas, *Cultures et Conflits*, *op. cit.*

<sup>3</sup> COM (2005) 475 final, Articles 15 and 16.

Member State may contravene national norms and change the internal balance of the system. However, these implications are not discussed as the method of integration chosen is mutual recognition instead of harmonisation. **In examining proposals on the principle of availability, emphasis must be placed on the challenges that these may place on national legal and constitutional principles. Any proposals on mutual recognition must be accompanied by common safeguards protecting constitutional principles and fundamental rights.**

**c. data protection:** this is a central issue to any discussion on police co-operation. Data protection in the context of the proposed EU co-operation suffers from a series of limitations: no EU data protection framework for the third pillar exists; existing EU agencies and databases have their own, fragmented regimes of data protection (with their respective joint supervisory authorities); there is further fragmentation in the light of the persistence of the pillars (the European Data Protection Supervisor is for instance responsible for the 1<sup>st</sup> pillar aspects of Schengen but not for the 3<sup>rd</sup> pillar). It is questionable whether current arrangements can provide for a meaningful level of protection and control in the light of ‘interoperability’ and access to multiple databases with varied purposes. Moreover, the substance of data protection rules may have to be revisited in the light of the increased use of biometrics (which constitute a very invasive form of data collection), and the increased ‘interoperability’. **The European Parliament must prioritise the adoption of a high level of data protection standards in the Framework Decision of data protection and insist that no parallel measures (such as the one on the principle of availability) are adopted prior to the adoption of the data protection initiative. The adequacy of the current data protection systems to address issues of interoperability and profiling must be addressed as a matter of priority. The issue of remedies for misuse of data must also be examined.**

**d. the democratic deficit and accountability:** this issue is particularly prominent in the development of EU agencies such as Europol, but also in the development of databases (who checks them?) and the external dimension of EU police co-operation. At present the European Parliament (and national parliaments) do not have an adequate say in these matters, on many instances having to be satisfied with Reports. This attitude is based, especially in the case of Europol, on the view that the institution is primarily intergovernmental. The Constitution would bring some changes in this regard (most notably on international agreements), but would not necessarily touch upon scrutiny of Europol and databases. **The democratic control of police co-operation, and Europol in particular, is an issue that needs urgent examination and focus – at the same time, attempts to advance operational co-operation in secondary legislation by Comitology must be critically assessed.**

**e. the external dimension:** the need for a global approach to global issue has been highlighted as a major justification for police co-operation between the EU and third countries. As has been demonstrated, however, such co-operation may pose considerable challenges to the respect of EU legal standards, principles and values. **There is a need for greater safeguards in this context and greater public and democratic debate, in particular in relation to the role of the European Parliament in the conclusion of international agreements between the EC, the EU, and Europol, with third countries.** At present the role of the European Parliament is virtually non-existent in the third pillar and the ECJ ruling on the PNR case is awaited with interest in the context of first pillar agreements.

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