The future of Europol and its limits.
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1. **Introduction**

The future of Europol is linked to the expected developments in the EU concerning home affairs and justice.

Within five years after the Treaty of Amsterdam had entered into force, Europol had to be enabled to facilitate and support the specific investigative actions of the competent authorities and to facilitate the co-ordination, also of operational actions of joint teams in which representatives of Europol play a supporting role. It becomes again clear, as stated Zanders[1], that only a supporting and not an independently executive competency was foreseen for Europol. Also with reference to the co-ordinating role, it can be said that this is very important out of the European thought, but that the real impact right now is very limited, since a lot of police officers on the field still work bilaterally (the so-called "old boys network").

In the mean time, Europol had a slow and sometimes difficult start[2]. Above all, there had to be sought for quality within the organisation before the member states were willing to use Europol as a valuable instrument for international co-operation. It was especially a shame that the adoption of the Europol Information System was a long time coming, for all different kinds of reasons, and that it will only be operational now in 2005. It is remarkable that the creation of joint investigative teams is being watched with great reserves. Also, the legal preparation at a national level in some countries is still inadequate[3].

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

2. **The current legal framework**

Europol was established by an international convention signed by the first fifteen member states in 1995. The convention entered into force in 1998, and Europol began operations in 1999 after ratification of the protocol to the Europol convention concerning the privileges and immunities of Europol staff.

A further protocol to the convention, concerning the jurisdiction of the Court of Justice to receive references from national courts concerning the Europol convention, entered into force in 1998.

In addition three other protocols have been agreed. The first signed in 2000 gives Europol competence over money laundering, regardless of whether Europol is competent under the underlying crime. It is entering into force on 29 March 2007.

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[1] P. Zanders, "De Europese politie-eenheid: Europol", *Handboek politiediensten*, Kluwer Editorial, 1999, afl. 49, 104 (103)

[2] W. Bruggeman, "Europol: gewild of gedoogd?", *Panopticon* 2004, 57-71

[3] Statewatch, *UK is not complying with the EU framework on JITs*, March 24th 2005

A second protocol, signed in 2002, gives Europol the competence to participate in joint investigations teams in the member states, and to ask member states law enforcement authorities to begin investigations. It entered into force on 3 April 2007.
The third protocol, signed in 2003 makes a number of amendments to the Europol conventions, such as/
- wider access to the personal data held in the Europol information system and the Europol analytical work files;
- further cooperation with non-EU countries and bodies;
- simplified procedures to open data files and retrieve data from them;
- a modest enhancement of the consultations and supervision powers of eht European parliament, and
- possible competence for Europol to deal with additional crimes other than those listed in the current annex of the convention.
This protocol will enter into force on 18 April 2007.

3. **Current Europol tasks and competences.**
The Europol Convention[4] states in its article 2 that "the objective of Europol shall be (…) to improve (…) the effectiveness and co-operation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organised criminal structure is involved and two or more Member States are affected …".
From the beginning, Europol had an informative, supporting and analytical role. This becomes clear out of the declaration on the police which is annex to the convention, and which only talks about databases, support of the national investigations, analysis of information, the development of preventive strategies …[5].
The initial tasks of Europol essentially concerned the gathering, exchange and analysis of information and intelligence on criminal cases. The Europol systems are: the Europol information system, analytical work files and the index system.
The initial limited crime based competences were extended in 1999 to terrorism and currency counterfeiting, and then to all of the crimes possible listed in an annex to the convention form the end of 2001. Actually its mandate will be extended in respect of the three above mentioned protocols.

4. **The sky of the limits as designed by the Constitution.**
The Constitutional Treaty[6] creates a space of freedom, security and justice, which comprises police co-operation. This is not an exclusive competence of the European Union such as the currency policy and the customs union, but it is a shared competence of the Union and the member states. This still departs from the principles of subsidiarity; solidarity in respect of the common policy in the field of asylum, immigration and external borders; and mutual recognition of judicial decisions in criminal and civil matters.
The Treaty states in article III-276 that " Europol's mission is to support and strengthen action by the Member States' police authorities and other law enforcement

[4] Council Act July 26th 1995 on the Convention based on article K.3 of the Treaty on the establishment of a European police office, *PB. C.* November 27th 1995, afl. 316
[5] W. Bruggeman, "Policing in Europe: a new wave?", in M. Den Boer, *The implementation of Schengen,* Maastricht, European Institute of Public Administration, 1997, 111-128
[6] Approved on June 18th 2004 by the Intergovernmental Conference of the Heads of states and the Heads of Governments

services and their mutual co-operation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.
European laws shall determine Europol's structure, operation, field of action and tasks. These tasks may include:

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

European laws shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with the member states' national parliaments. Any operational action by Europol must be carried out in liaison and in agreement with the authorities of the member states whose territory is concerned. The application of coercive measures shall be the exclusive responsibility of the competent national authorities".
It is interesting to read this text together with article III-274: "In order to combat serious crime having a cross-border dimension, as well as crimes affecting the interests of the Union, a European law of the Council of Ministers may establish a European Public Prosecutor's Office from Eurojust.(…) The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of and accomplices in serious crimes affecting more than one member state and of offences against the Union's financial interests, as determined by the European law provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the member states in relation to such offences".
Thus, the operational competences of Eurojust are being expanded and described more precisely. Contrary to the agreements in the Treaty of Nice, where was stated that Eurojust could ask a member state to start an investigation without that member state being obliged to do so, Eurojust itself can now start a criminal investigation, suggest that the member states institute proceedings and coordinate the criminal investigation and the proceedings which have been carried out by the competent authorities. The actions of Eurojust must be in accordance with the fundamental rights and can be submitted to a judicial control by the European Court of Justice.
The Constitutional Treaty also states (art. III-271) that the Union can define criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions in ten areas: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime.
With reference to police co-operation, the rules for the co-operation between the competent authorities (art. III-275) reach as far as the competencies which are recorded in the current EU-Treaty. Nevertheless, the rules for the functioning of Europol are being changed. While article 32 of the current EU-Treaty states that every operational action of Europol has to be executed in consultation with the member states and that only the national authorities decide about the use of coercive measures, article III-276 reinforces the competencies of Europol. In case of serious crime affecting two or more member states, terrorism and forms of crime "which affect a common interest covered by a Union policy", Europol has to support and strengthen action by the member states' police authorities and other law enforcement services.

The application of coercive measures shall be the exclusive responsibility of the competent national authorities. The police co-operation is not - neither in the constitutional treaty – covered by community law, although the way to harmonisation is kept open by enumerating the offences for which a European framework law can lay down minimum requirements.
However, confusion remains to exist on the ambitions of the Constitutional Treaty concerning the role of Europol, Eurojust and the standing Committee of article III-162. Minister Donner remarked that the articles on Europol and Eurojust depart from the principle of co-ordination and co-operation between the different national jurisdictions. He is convinced that these can be expanded and improved in a lot of ways[7]. Essential for the effectiveness of the co-ordination is whether, and to what extent the co-operation is compulsory. Are member states being forced to start investigations at the instigation of Europol or Eurojust, or can they disregard the request? The compulsory character however, does not match the principle that cases cannot be imposed unilaterally upon the states. Moreover, the compulsory character can lead to tension when prioritising cases of national interest.
Thus, the JAI co-operation is not only subject to (geographical) expansion, but especially to deepening. Next to the new framework of the Constitutional Treaty, the tasks of the European Union have been redefined. Also, there is apparently a major concern for effectiveness and legitimacy. The description of the task of Europol has to be replaced by a new treaty, in which the role of Europol in the international co-operation must be more clearly defined. Also, Europol will be connected more closely to Eurojust and vice versa.
However, as long as no real European criminal law nor a European judicial system exist, one must not dream, but one has to build on a more effective co-operation within the margins that have now been designed.

5. **A council decision substituting the Europol convention**
A Commission proposal (discussions to be finished in 2007, following a council decision 2006) will first of all replace the Europol convention with a Council decision, which will have to be adopted unanimously by the Council. The Commission has taken the opportunity to suggest a number of important changes of substance to the rules governing Europol.
Europol will be competent to deal with further crimes (in total 32 crimes which are subject to "fast-tracking " under the European arrest warrant) and its competence will no longer be limited tot organised crime.
The intelligence tasks will be expanded and participating in a support capacity in joint investigation teams will require agreement of the member state concerned. The member states will remain responsible for coercive measures. Its Europol's participation will also extend to customs.
Europol will have a general power to establish new information systems.
The Commission's explanatory memorandum also refers to the need to prepare Europol for involvement in implementation of the principle of availability creating the possibility to access other databases, not yet including the Treaty of Prüm.
There is no reference to national parliaments and no enhanced supervision by the European parliament.

[7] Speech at the official opening of Eurojust on April 29th 2003 in The Hague

6. The future

First of all and based on the options listed in document 9184/1/06 Europol 10 rev1 and as adopted by the Council (November 2006) the functioning of Europol should be improved following recommendations which can be implemented without amending the Europol convention, such as:

- the initiative to hold half yearly meetings between all Justice and Home Affairs agencies and the presidencies of the art. 36 Committee and SCIFA with a view to enhancing cooperation and coordination among them in implementing the EU internal architecture. In this context I regret that a global interagency strategy is still missing;
- to play a stronger role in the fight against internet crime as foreseen in the OCTA;
- to support cross-border controlled deliveries;
- to take, together with member states an other EU actors the requirement of technical interoperability into consideration when designing ICT systems, in line with the Commission communication of November 2005 on improved effectiveness , enhanced interoperability and synergies among European databases.

Europol is also in a perfect position to play a coordinating and facilitating role for transnational investigations within the EU.

Europol could evolve to become a communication platform to support specific police units in the different member states who feel the need to communicate more easily in order to cooperate more easily (cfr Atlas project).

Europol could be granted more operational competences for the criminal phenomena that have an outspoken European nature, as for example the forgery of the Euro, taking into account the necessary conditions of an adequate European judicial framework. Although this will remain a dream for several years, three models can be further examined:

- the joint investigation team model;
- the "corpus juris" model and
- the European criminal law model.

In all cases and already now there is a need to rethink the democratic control of Europol and in recent publications. I made at several occasions suchconcrete proposals.

Europol could be made the privileged contact for the exchange of information with third countries for the as "European identified criminal phenomena".

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

7. Conclusion

It is clear that the European Union keeps on believing in the principle of sovereignty and in solid partnerships, supported by new organisations and initiatives. The political belief in the future of Europol remains strong, notwithstanding the fact that Europol apparently has difficulties in obtaining its politically and legally assigned position.

The European co-operation remains a learning process during which fundamental changes and adaptations of the treaty are regularly being made, while not always realising enough depth in the existing partnerships and possibilities for co-operation.

The tendency to harmonise the regulations, combined with the more far-reaching competencies of Europol and Eurojust and the changes in the decision-making procedure for the aspects of police and judicial co-operation in all respects shows a

Europe that is moving fast towards a "Europeanised" approach of crime. Fijnaut also remarks that the subject "police and judicial co-operation" no longer constitutes a separate title, but is covered by the title "internal security". This incites him to believe that the ambitions of the European Union reach further then 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[8] 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.

[8] C. Fijnaut, *De normering van het justitiële optreden van buitenlandse politieambtenaren op Nederlands grondgebied*, Clingendael, 2004, not published