

## Chapter 1

# Introduction: The Search for EU Criminal Law— Where is it Headed?

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One of the most dynamic fields of EU law since the great changes brought to the EU constitutional order by the Amsterdam Treaty in 1999 has been cooperation in the fields of policing and criminal justice. Irrespective of whether the Reform Treaty is ratified by the member states, these two areas will continue to be high on the political and legislative agenda. Both fields have already been the subject of substantial legislative effort in the EU and an increasing amount of judicial activity in the European Court of Justice (ECJ). The original three treaties—creating the economic community, atomic energy community and steel and coal community—did not expressly anticipate the inclusion of policing and criminal law. Similarly, the objective of economic integration while requiring a mechanism of enforcement did not foresee the use of criminal law and the concomitant police involvement as a central part of the structure. In 2007, the Reform Treaty planned wide ranging changes to both EU police cooperation and judicial cooperation in criminal matters. In the meantime, the ECJ has found the use of criminal law sanctions in pursuit of Community law objectives to be lawful.<sup>1</sup> In order to understand these changes we must first review how we got to the Reform Treaty, what have been the key struggles in competence and how the Reform Treaty changes fit into the transformation of police and judicial cooperation in criminal matters in the EU.

To seek for answers to these questions is one of the main objectives not only of this introductory chapter, but also of this entire volume. This book is in large parts the outcome of a doctoral training school that was held in April 2007 at the Centre for European Policy Studies in Brussels, organized within the framework of CHALLENGE—an integrated project funded by the Sixth Framework Programme for Research of the European Commission. Its task was to explore the question: “Police and judicial cooperation in criminal matters in the EU: Which future for the EU’s third pillar?” And in fact at the time of the Training School this future was rather bleak. Hardly anyone would have dared to take a bet that a couple of months later European heads of state and government would actually

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1 C-440/05 *Commission v. Council* 23 October 2007.

be able to agree on a text that addresses some of the more notorious flaws in the institutional setting of the third pillar.

The circumstances accompanying the production of this volume allow us to take a look at major third-pillar issues from a unique perspective: assessing and analysing their present form (as influenced by their past) while being able to take the changes into account expected to be brought about by the Reform Treaty. As stated above, it is this perspective that makes us understand the envisaged new setting.

Furthermore the origin of this volume enabled us to bring together a unique combination of contributors from many different disciplines all across the EU: young researchers at doctoral level together with renowned experts, academics and practitioners alike.

Hence the first part of the volume is dedicated to some of the major actors of police and judicial cooperation in criminal matters, notably the agencies and bodies set up at EU level to facilitate cooperation and coordination of national authorities, as well as the European Court of Justice (ECJ) and member states themselves. Accountability, transparency, democratic and judicial control, emerge to be the underlying themes of this first part, themes, however, that constantly reverberate throughout the subsequent chapters. The first part sets off with *Sonja Puntsher Riekmann* providing (in Chapter 2) a comparative analysis of provisions relating to accountability and transparency in the legal acts setting up Europol (third pillar) and Frontex (first pillar). *Jiří Vlastník* then adds to this by assessing the current and future setting of Eurojust, the European Judicial Cooperation Unit, posing the question whether this unit can be perceived as precursor of a federal style of European criminal justice (Chapter 3). Control exercised by the European Court of Justice in the third pillar is the topic of *Eulalia Sanfrutos Cano's* contribution in Chapter 4. A contentious issue as the ECJ was originally intended to play only a minor role in this field. However, "by way of its cautious yet at the same time audacious jurisprudence, the Court has questioned the intrinsic characteristics of intergovernmental cooperation in criminal matters" as she observes. In contrast, the absence of control and the lack of transparency are the major issues of *Judit Tóth's* contribution (Chapter 5) concluding this first part on the actors. Drawing from recent reports of the Council of Europe and the European Parliament she addresses EU member states' complicity in CIA activities on European territory and assesses member states' reactions to these reports.

The second part of the book is dedicated to "Concepts and Instruments." It commences with a critical assessment by *Didier Bigo* of the EU development in the area of freedom, security and justice and how this affects national sovereignty. Putting a question mark behind the axiom that we live in a world of unprecedented threats, he raises the question whether state sovereignty is merely an old-fashioned argument masking egoistic self interest or whether it is the ultimate argument against global security hegemony (Chapter 6). In the chapter that follows *Bigo's* more conceptual assessment, *Julia Sievers* concentrates on the flagship instrument of EU-wide judicial cooperation: the framework decision on the European arrest warrant. Applying an empirical approach, she analyses first experiences with the

application of this instrument, comparing Germany and the UK with regard to legislative implementation and everyday application by national courts. “Too different to trust?” is the provocative starting point of her contribution (Chapter 7). Returning to a more conceptual and theoretical approach *Gloria González Fuster* and *Pieter Paepe* scrutinize the contrasting cases of EU data protection and criminal law based on the reflexive governance theory. Their objective is to propose a reflexive assessment of these case studies that may benefit EU third pillar governance (Chapter 8).

Under the headline “Law and Policy” *Valsamis Mitsilegas*, *Mar Jimeno Bulnes* and *Rocco Bellanova* in three separate chapters address some of the most contentious third pillar issues in recent years: the Community’s (first pillar!) competence to define legally binding criminal sanctions and penalties (*Mitsilegas*—Chapter 9); the adoption of common procedural safeguards for suspects in criminal proceedings throughout the EU (*Jimeno Bulnes*—Chapter 10); and the “Prüm experience” hailed by some as the way forward, criticized by others as a sign of contempt towards EU structures and procedures, lacking parliamentary oversight and involvement (*Bellanova*—Chapter 11). None of these three issues had been entirely settled at the time of preparation of this volume. And as it appears, not even the Reform Treaty will be able to solve all the questions and struggles that are inherent in them.

The last part mainly concentrates on practical questions: “Practice—Achievements and Obstacles” starts off with a contribution by *Toine Spapens* providing a criminological assessment of trans-frontier criminality in the Meuse-Rhine Euroregion and how EU and bilateral police and judicial cooperation impacts on this “laboratory” (Chapter 12). In the subsequent chapter entitled “Uniforms without uniformity,” *Peter Hobbing* sticks to the practicalities of police work. He reports on his frustrating quest to find “common EU standards in policing,” a concept often referred to in EU political statements and legal texts but still far from being reality (Chapter 13). Turning away from policing and the professionals of security, *Richard Lang* hence shares insights and experience he has acquired as a solicitor in practical cases affected by EU law. In three concise case studies he illustrates different ways in which practitioners can encounter the third pillar (Chapter 14). In the final chapter of this part, *Susie Alegre* takes a wider perspective, leaving to a certain extent the third pillar behind and investigating the intended global impact of the language and position of human rights in the EU Counter-Terrorism Strategy 2005. She criticizes the absence of any clarity as to how the EU ensures respect for human rights while combating terrorism and states that this makes it difficult for the EU to act as a promoter of human rights in this context outside its borders (Chapter 15).

Finally, in the concluding chapter of this volume *Sergio Carrera* and *Florian Geyer* assess the impact of the Reform Treaty on the common area of freedom, security and justice (Chapter 16).

Having outlined the genesis and structure of this volume, let us return to our introductory chapter and the questions initially posed: how did we get to the Reform Treaty? What have been the key struggles in competence? How will the

Reform Treaty fit into the transformation of police and judicial cooperation in criminal matters in the EU?

### **The EU's Engagement with Police and Judicial Cooperation in Criminal Matters**

An EU engagement with policing and criminal law began quite gradually—mainly as a response to the proposal to abolish intra member state border controls (Brouwer 2007). The Schengen Agreement of 1985, although outside the framework of the European Economic Community (EEC) as it then was, first brought to the legislative table the issue of policing. The inclusion in that treaty (which began with five of the then 12 member states) of provisions on police cooperation was the first visible manifestation of member states' concerns regarding the abolition of intra member state border controls and the effects on policing. In the Single European Act, signed in 1986 to amend the EEC Treaty, the abolition of these border controls was agreed with a deadline of 31 December 1991 without any express reference to policing and criminal justice (Guild 2006). 1990 brought two key changes to the European legal landscape on policing and criminal justice—on the one hand the signing of the Schengen Implementing Agreement which specifically provided for police cooperation across borders complete with the principle of *ne bis in idem* (the legal principle that an individual cannot be the objective of a criminal trial twice for the same cause of action or double jeopardy); and secondly the signing of the first EUROPOL convention establishing an institution loosely connected with the EU which would provide the engine for EU wide police cooperation.

The Rhodes Council of December 1988 tied progress on the abolition of border controls for the free movement of persons with progress on police cooperation and criminal law: “The European Council is aware that in the latter area, [free movement of persons], the achievement of the Community's objectives, especially the area without internal frontiers, is linked to progress in intergovernmental cooperation to combat terrorism, international crime, drug trafficking and trafficking of all kinds.” To make progress on these issues the Council set up a Coordinators' Group charged with presenting a report on the field. The result, the Palma Document, was presented to and approved by the Council in 1989, set out, both clearly the framework for police and judicial cooperation in the EU. It is worth going back to that document to examine the agenda which it set out and where we are now. The Coordinators suggest that “The achievement of an area without internal frontiers could involve as necessary, the approximation of national laws and their rules of application and scope, collaboration between national administration and a prior strengthening of checks at external frontiers.” They recommend two mechanisms—one entitled “ad intra” which are the measures needed within the EU to achieve the abolition of border controls. The other they called “ad extra” which relates to external border controls.

Looking then, at the ad intra facet, the Coordinators call for three sets of measures which are central to the current area of freedom, security and justice:

- Combating terrorism, drug trafficking and other illicit trafficking: the creation of an area without internal frontiers, in accordance with the Treaty, will require checks at the external frontiers to be tightened up which will involve increased inter-governmental cooperation.
- Improved cooperation on law enforcement: this improvement will in particular involve closer cooperation between the member states' law enforcement agencies, and an improved system for exchanging information.
- Judicial cooperation: judicial cooperation should be intensified, particularly in criminal matters, in order to combat terrorism, drug trafficking, crime and other illicit trafficking. In this context, the possibility of harmonizing certain provisions should be studied.

Just as the deadline for the abolition of intra member state border controls approached, the EU embarked on a new intergovernmental conference which finished in 1991 and resulted in the Maastricht Treaty which reframed very substantially the EU (indeed, the EU *per se* was only created as a result of the Maastricht Treaty). The famous pillar structure of the EU was created through a new treaty—the Treaty on European Union (TEU). The original three treaties were stuffed into the so called “first pillar,” the only one with legal personality; the common foreign and security policy inhabited the shadowy “second pillar” and the “third pillar” covered justice and home affairs, issues stretching from immigration and asylum to policing and drug trafficking.

It is worth noting at this point, that the Coordinators recommended to the Council that terrorism and drug trafficking remain inter-governmental. Cooperation on law enforcement they considered in effect as a practical matter which required law enforcement agencies to speak to one another. Judicial cooperation in criminal matters was tied to combating terrorism and here the Coordinators envisaged the possibility of harmonization. At least it was a subject to be studied. In the event, in the 1991 Treaty, everything went into the third pillar which was definitely intergovernmental in form—run by the member states (primarily the justice and interior ministries)—sheltered from the inquisitive eye of the European Parliament which was entitled only to an annual report; and protected from judicial control by the ECJ. The result may have been satisfactory for some of the actors in the Union but was a source of great friction between and among the EU institutions whose competences were chopped up and divided and the EU institutions and many non-governmental organizations which demanded greater transparency, democratic and judicial accountability.

### **The 1999 Compromises**

The shape which the EU took once the Maastricht Treaty came into force in 1993 (the delay a result of a rejection by referendum in Denmark) did not actually last that long. By 1996 a new intergovernmental conference was opened the purpose of which was to achieve a greater degree of institutional and structural order in the EU. A number of fundamental flaws were appearing in the fabric of the

EU—judicial challenges among the institutions regarding their competence for policy areas split between the first and third pillars (see for instance ECJ case C-170/96 *Commission v. Council* 12 May 1998 on the correct legal basis for airport transit visas) and between the Parliament and just about everyone else over the right to participate in the law making process in the split first and third pillars (see for instance C-392/95 *Parliament v. Council* 10 June 1997 on the legislative procedure regarding the visa list) were cropping up regularly. The result being that the ECJ was ultimately responsible for determining the political structure of the EU.

Another source of trouble was the development of the Schengen area and *acquis*. As the objective of the Schengen Implementing Agreement 1990, the lifting of intra party border controls on the movement of persons, was finally realized in March 1995, and ever more member states became parties to the Schengen system, in the end leaving only Ireland and the UK outside, the EU objective of lifting intra member state border controls on the movement of persons was realized outside the EU but among most of the member states (Brouwer 2007). This perverse situation was made possible through an ever increasing amount of secondary legislation drawn up in the Schengen Secretariat to enable the system to work. However, this mass of measures was a dreadful jumble of policy decisions, operational instructions and determinations of specific cases, just to name a few. The insertion of the whole body into the EU was increasingly seen as a highly desirable outcome.

The result in the Amsterdam Treaty was quite dramatic. A new objective was inserted—the creation of an area of freedom, security and justice. First, immigration, asylum and border control was moved (almost entirely) out of the third Pillar into the first. Secondly, the third pillar (until then titled “Provisions on Cooperation in the Fields of Justice and Home Affairs”) was renamed “Provisions on Police and Judicial Cooperation in Criminal Matters.” The third pillar was made subject to the scrutiny of the European Parliament and judicial control by the ECJ—though by a rather peculiar *ad hoc* system whereby the member states had to opt in to judicial control by the ECJ. Thirdly, the Schengen *acquis* (that is everything that anyone was able to identify as belonging to the Schengen treaties and their implementing measures) was transferred into the EU either as part of the first pillar or if agreement was not reached that it had a legal basis in the first pillar then by default in the third pillar. One can well imagine just what an exact art it was to determine which bits belonged where. The Commission announced that as far as the first pillar measures were concerned it would be rapidly proposing proper EU legal measures—directives or regulations to replace the somewhat heterogeneous Schengen *acquis*. Finally, reference was made in the EU Treaty (third pillar) to EUROPOL and the relationship of the EU with the institution which was designed to facilitate police cooperation (article 30 (1) (c) TEU).

Sadly, this reorganization of the deck chairs did not resolve the problems of creating the area of freedom, security and justice. The intergovernmental legacy was still too strong. The addition of the Schengen *acquis* exacerbated the intergovernmental problems which beset the area. Elsewhere we have identified these key problems as follows (Guild 2006):

- Operational data and transparency: complaints to the EU Ombudsman and decisions of the ECJ have resulted in new and wide rules on transparency regarding documents in the possession of the Council. The principle in favor of transparency means that to reserve a document there must be a decision on the basis of the facts of each case. This is time consuming;
- Operational action and legislative weakness: the lack of a firm legislative procedure with a mechanism to control what is on the agenda has resulted in a rather heterogeneous list of measures adopted on the initiative of the member states in response to national or local concerns in the Council's Police Cooperation Working Party.
- Operational decisions first, legal bases later: where there is a need identified for a body to coordinate an activity, all too often one is created without regard to the available legal base;
- Operations, legislative and judicial supervision: when Schengen was inserted into the EU and police and judicial cooperation in criminal matters were divided between the first and third pillars, different rules of jurisdiction of the ECJ apply to the fields depending on where they are.

Until these problems would be addressed, there would be deep divisions among the member states about how to act in the field.

### **Mutual Recognition as the Organizing Principle**

The organizing principle which was adopted for police and judicial cooperation in criminal matters was mutual recognition rather than approximation or harmonization (Mitsilegas 2006). This principle was strongly supported by a number of member states though the Commission was less enthusiastic about it (Wasmeier and Thwaites 2004). The institutions have returned frequently to the issue of mutual trust—itself a manifestation in the field of police and judicial cooperation in criminal matters of inter-governmentality (Mitsilegas 2006a). The principle is that rather than harmonize an area of law, member states can retain their national rules. In order to make the national rules fit together after a fashion, they agree that they will accept as equivalent the decision, practice or measure of one member states for the purposes of its effects in another (Peers 2004).

According to the Commission's Communication on the mutual recognition of judicial decisions in criminal matters and the strengthening of mutual trust between member states<sup>2</sup> "reinforcing mutual trust is the key to making mutual recognition operate smoothly." The Commission suggests that mutual trust can be reinforced by legislative and flanking measures.

Under legislative measures it suggests:

- a) improving guarantees in criminal proceedings—a reference to the stalled framework decision proposal;

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2 COM (2005) 195 final, 19 May 2005.

- b) presumption of innocence—a human right in article 6 ECHR—recognized as not being co-extensive across the Union;
- c) minimum standards on gathering evidence in criminal cases;
- d) decisions *in absentia* (where the defendant is not present at the trial);
- e) transparency in the choice of court—fundamentally linked to the *ne bis in idem* principle;
- f) further approximation of substantive criminal law.

Under flanking measures it recommends:

- a) reinforcing evaluation mechanisms—this includes evaluating the specific practical needs of the justice system;
- b) identifying barriers before new instruments are adopted;
- c) specific practical conditions for implementation, in particular best practices;
- d) a general evaluation of conditions in which judgments are produced to ensure high quality;
- e) promoting networking among practitioners of justice and developing judicial training;
- f) support for the development of quality justice—to provide funding for contacts and exchanges between practitioners, strengthening judicial training and improving access to justice.

Commissioner Frattini, in welcoming the Communication, stated: “the principle of mutual recognition of judicial decisions is the cornerstone of judicial cooperation, but mutual trust between member states is the necessary adjunct, the key to its success. Nobody can impose trust: it has to be built up bit by bit.”<sup>3</sup>

The list of things needing to be done is impressive. It is hard to imagine trying to get a system of mutual cooperation in criminal matters going without many of these issues being resolved, such as decisions *in absentia*. Condemning a person in a criminal trial where he or she is not present is high contentious in many member states. The rules around when this is permissible and when it is not differ substantially (Alegre 2003). Thus one might think it would be unwise to proceed with a system of mutual recognition of criminal decisions before this matter has been resolved. None the less it is exactly in this manner that the EU went forward in the field.

The key measure adopted by the EU in judicial cooperation in criminal matters is the framework decision on the European arrest warrant (EAW).<sup>4</sup> This measure, which sped through the legislative process aided by a political argument that it was needed for counter terrorism purposes, replaces the system of extradition among the member states (Wouters and Neart 2004). The EAW, on the basis of the principle of mutual trust, provides that where an individual is present in one member state but is sought in another member state to stand trial or to serve a

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3 Press Release, IP/05/581, 20 May 2005.

4 OJ L 190 18 July 2002.

criminal sentence, the second member state authorities may issue an EAW for the individual to be handed over whereupon the authorities of the other member states must arrest and surrender the individual with limited procedural guarantees (Guild 2006). There is no approximation of rules about trials *in absentia*.

There are three main ways in which the EAW system differs from classic extradition. First, for a list of 32 offences contained in the framework decision there is no need to check that the offence is also an offence in the second member state—the double criminality requirement. Secondly, member states are obliged to extradite their own nationals, something which was contrary to a number of member state constitutions; and thirdly, there is no political offence exception. All three key transformations of the extradition process are based on a presumption that the member states trust one another. They must trust that the definition of offences in one member state's national law reflects that of another. They must be confident that their own nationals will receive a fair trial in the other member state and thus partially abandon their constitutional duty to protect the citizen (as that duty has been interpreted in some but not all member states). They must be confident that the criminal justice systems of all other member states are not tainted by political considerations which might prejudice the fairness of the charges or trial. This is a tall order for trust among states let alone individuals, particularly when the EAW was not accompanied by what many considered to be the necessary complimentary measure—a framework decision on the rights of suspects and defendants (Morgan 2003), let alone the resolution of all the issues set out by Commissioner Frattini above.

In its first substantive judgment on judicial cooperation in criminal matters, the ECJ acknowledged the mutual trust principle as a foundation of the field.<sup>5</sup> The specific situation related to the *ne bis in idem* provision of the Convention Implementing the Schengen Agreement 1990 (CISA). It held:

In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied. For the same reasons, the application by one Member State of the *ne bis in idem* principle, as set out in Article 54 of the CISA, to procedures whereby further prosecution is barred, which have taken place in another Member State without a court being involved, cannot be made subject to a condition that the first State's legal system does not require such judicial involvement either.

The ECJ repeated its finding again in *van Esbroeck*<sup>6</sup> stating:

There is a necessary implication in the *ne bis in idem* principle, enshrined in that article, that the Contracting States have mutual trust in their criminal justice systems and that

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5 C-187/01 *Gözütok and Brügge* 11 February 2003.

6 C-436/04 *Van Esbroeck* 9 March 2006.

each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied.

The problem is that mutual trust is perhaps more evident in the declarations than the practices of the member states (Mitsilegas 2006a).

Mutual trust finds a central place in the opinion of Advocate General Sharpston in *Gasparini*<sup>7</sup> again a case regarding the application of *ne bis in idem*. She considered the ECJ's finding that the *ne bis in idem* principle implies the existence of mutual trust among the parties in respect of each other's criminal justice systems. The legal consequence of mutual trust then is the fact that different legal classifications in the criminal justice systems of the member states should not be an obstacle to the application of the principle. She noted that while in *Gözütok* and *van Esbroeck* the ECJ treated the lack of harmonization of national criminal codes and procedures as no obstacle in applying *ne bis in idem* in other cases it has taken a different approach requiring a decision on the merits. She also noted a tension between *ne bis in idem* as requiring only unity of the legal interest protected and its construction as a fundamental principle of EC law requiring a threefold unity of identity of facts, unity of offender and unity of the legal interest protected. In her opinion, Sharpston argued for a limitation of the mutual trust principle which she considered would permit, at least in the field of *ne bis in idem*, criminal jurisdiction shopping for instance to find a non-time barred jurisdiction or the opposite.<sup>8</sup>

Advocate General Colomer, in his opinion in *Advocaten voor de Wereld VZW*<sup>9</sup> regarding the European arrest warrant also struggled with the concept of mutual trust in the area of freedom, security and justice, though when the ECJ handed down its judgment it was less concerned with this aspect. He considered that inspired by mutual trust cooperation, this field is based not on the coming together of separate interests but on the common provision—the EAW itself. He places mutual trust also in the framework of subsidiarity and proportionality in effect if there is mutual confidence and the reciprocal recognition of judicial decisions then a joint approach is justified notwithstanding the subsidiarity principle.

One of the more telling statements in his opinion on the issue of mutual trust relates to mutual distrust—at para. 80 he stated, regarding the need for the ECJ to give interpretative authority to the EU Charter of Fundamental Rights: “in that way it might be possible to avoid repeating past misunderstandings with national courts which have been reticent about the capacity of the Community Institutions to protect fundamental rights.”

When the judgments came out in *Gasparini* and *van Straaten* (both on the same issue and both published on 28 September 2006), the trust of the accused is

7 C-467/04 *Gasparini* 15 June 2006 (date of opinion).

8 On this basis Sharpston continued, variations in age of criminal responsibility should not be the subject of an application of mutual trust which would bar prosecution where the age limit is offended in one member state but not in another.

9 C-303/05 *Advocaten voor de Wereld VZW* 12 September 2006 (date of opinion).

given a high level of respect by the ECJ. Most telling is the Court's statement "[Ne bis in idem] ensures that persons, who, when prosecuted, have their cases finally disposed of are left undisturbed" (para. 27). The justification for the tranquillity of the individual is found in para. 30 of the judgment:

There is a necessary implication in the *ne bis in idem* principle, enshrined in Article 54 of the CISA, that the Contracting States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Contracting States even when the outcome would be different if its own national law were applied.

The Court's judgment in *Advocaten voor de Wereld VZW* presents a somewhat different picture of the debate. So far it is the only decision from the ECJ on the subject, though a number of national constitutional courts have considered the legality of the national measures which transpose the EAW framework decision, not always favorable for the member state (Guild 2006). The ECJ, however, considered that:

The mutual recognition of the arrest warrants issued in the different Member States in accordance with the law of the issuing State concerned requires the approximation of the laws and regulations of the member states with regard to judicial cooperation in criminal matters and, more specifically, of the rules relating to the conditions, procedures and effects of surrender as between national authorities. (para 29)

Already one can see that the ECJ is concerned about the approximation of the effects of surrender. The use of the word approximation is politically charged as it is one of the alternative organizing principles to mutual recognition (Peers 2004). While approximation does not go as far as harmonization, it at least indicates that trust is based on legal elements which go beyond statements of officials of what may (or indeed may not be) equivalent for the purposes of mutual recognition. None the less, the ECJ did not consider inadequate the list of 32 offences in respect of which the requirement of double criminality no longer applies in the EAW.

At the same time that the principle of mutual recognition in criminal matters began to raise serious issues, a small group of member states decided to push ahead with their own version of mutual recognition in the field of police cooperation—the Prüm Treaty 2005. Here five member states—Austria, France, Germany, the Netherlands and Spain entered into an agreement which provides for exchange of police information and data in a wide field (Balzacq et al. 2006). This treaty, parts of which are also now the subject of a proposed Council decision which, if adopted, would move them into the EU, avoids both the idea of approximation and harmonization. It is only concerned with mutual recognition and primarily concerned with improvement of police cooperation. It is, however, popular, quite a number of member states have expressed an interest in joining the treaty and the proposal for a Council decision has substantial support.

The Reform Treaty does not change substantially the emphasis on mutual recognition in this field but approximation has an enhanced position in relation to it. It will certainly be possible, depending on the political will of the member states and the political and judicial pressures which may arise in the area to move towards greater legal certainty in judicial cooperation in criminal matters. While this would undoubtedly be political sensitive and slow, in the longer term it would enjoy greater legitimacy. However, as examined in the next section, there are still major obstacles to a common understanding of the role of criminal law in the member states. These differences may make the attempt to create an area of freedom, security and justice in these fields particularly complicated.

### **A Common Area of Police Cooperation and Judicial Cooperation in Criminal Matters?**

The EU's area of freedom, security and justice in the field of police and criminal matters depends on coherence in our understanding of what policing is and how criminal justice works. If the social understanding of the two are not sufficiently coherent then the area's organizing principle of mutual recognition will prove also its Achilles heel (Wasmeier and Thwaites 2004). In order to examine a little further the extent of convergence in member states' understanding of criminal justice it is useful to have regard to the way in which criminal justice is delivered in the member states. Here the Council of Europe's report *European Judicial Systems* (edition 2006) of the European Commission for the Efficiency of Justice (CEPEJ) is invaluable.

If one starts with the number of courts per 100,000 inhabitants competent for a robbery trial, it appears that in Austria the figure is 0.19 while in Bulgaria it is 1.87 and in Spain it is 3.45. Clearly there is a quite substantial difference in the perceived need for courts with this type of jurisdiction depending on which member state one considers. More striking is the comparison of numbers of criminal cases dealt with by public prosecutors in 2004. Taking the same criterion, the number per 100,000 inhabitants, a short table of only some member states reveals the picture shown in Table 1.1.

Clearly, Denmark uses its criminal court system to a much greater extent than Latvia does. It would seem that the role of criminal justice in the regulation of disputes in these states is substantially different—thus the needs of criminal courts must vary substantially. The numbers of persons who find themselves engaged in criminal court cases will also be very different. For instance, in Denmark there is a 16 per cent chance of an individual being involved as a defendant in a criminal case each year while in Latvia it is 0.6 per cent. The relationship of the society with the criminal justice system is informed by the frequency with which the members of the society find themselves engaged with that system. Such a substantial difference indicates quite a different engagement. The relationship of convictions and acquittals is also interesting to note in different member states. These figures are not presented by reference to number of inhabitants but are interesting by comparison to one another (see Table 1.2).

**Table 1.1 Numbers of criminal cases dealt with by public prosecutors in 2004**

<b>Country</b>	<b>Number of first instance criminal cases received by the public prosecutor per 100,000 inhabitants (2004)</b>
Austria	7,697
Czech Republic	1,093
Denmark	16,531
Estonia	2,522
Finland	1,680
Italy	5,454
Latvia	669
Luxembourg	10,630
Portugal	4,739
Spain	9,214
Sweden	2,055

**Table 1.2 Criminal cases in court 2004**

<b>Member state</b>	<b>Convictions</b>	<b>Acquittals</b>
Bulgaria	57,383	2,953
Denmark	131,298	–
Finland	54,018	3,486
France	1,115,823	47,800
Germany	442,356	37,243
Latvia	13,222	209
Netherlands	126,174	6,353
UK	1,548,500	50,948

While in France there are more than twice as many convictions of individuals as in Germany, the number of acquittals is only 10,000 apart. Bulgaria and Finland have fairly similar numbers of convictions but the acquittal rates diverge. While Latvia may not bring many people before its criminal courts, it has a low acquittal rate. The UK has substantially more convictions even than France but its acquittal rate is only marginally higher. The relationship of acquittals and convictions may provide some indication of the relative importance which various member states place on achieving an EU measure on the rights of the defence. It is clear that different countries achieve quite different outcomes in respect of their criminal justice systems.

The number of public prosecutors per 100,000 inhabitants also gives some indication of the variations which exist among the member states. For example, in Austria there are 2.6 while in Cyprus there are 15.5. In Denmark one finds 10.4 while in Latvia there are 26.0. In the Netherlands there are only 3.7 while in Scotland there are 28.1. Clearly different member states and jurisdictions consider there are very different needs for prosecutors as a percentage of the population. It is surprising, though, when one compares Denmark and Latvia that one finds so many prosecutors in Latvia but few criminal cases and few convictions while in Denmark there are fewer prosecutors but many more criminal cases.

Another interesting comparator examined in the Council of Europe study is the status of judges and prosecutors by reference to their levels of pay. In Ireland, for example, the gross annual salary of a first instance profession judge at the beginning of his or her career is €125,563 while that of a prosecutor is €57,630. In Sweden the comparable figure is €23,364 for a starting judge and €38,000 for a prosecutor. In Slovakia the figures are for a judge €17,632 and a prosecutor €12,750. In Poland and Germany however, both judges and prosecutors start at the same level, for Poland €11,633 and for Germany €38,829. In France there is only a small difference: judges start on €49,095 and prosecutors on €50,923. In Denmark, however, judges start on €83,000 and prosecutors on €40,191. Of course these figures are only meaningful in the context of the way in which the different services are organized. But it is important to note that the differences in salary levels between the two professions do not follow the traditional divisions regarding systems of law. Clearly, the duties and roles which prosecutors and judges perform in the member states vary substantially and are remunerated very differently. One must then ask the question whether a decision made by a prosecutor in Slovakia should be equivalent in legal force to that of one made in Sweden. On the basis of their comparative salaries, clearly the Swedish prosecutor is more highly valued in relation to the judge than in Slovakia where the judge is more highly valued in terms of pay.

Clearly, it is not for the EU to seek to establish a hierarchical scale of pay for judges and prosecutors in the member states. However, it is incumbent on the EU to recognize that there are very fundamental differences in the importance of different actors in the criminal justice systems of the member states. The holy grail of trust among the member states will be hard to achieve if this difference which, one must suspect, is reflected in the relative authority of the different actors in the national system is not taken into account.

## **Conclusions**

After having outlined origin, purpose and structure of this book, we have reviewed in this chapter where the EU's engagement with judicial cooperation in criminal matters has come from. We have plotted the gradual development of policy spheres then laws in the area over a period of 20 years. In doing so the importance of the abolition of border controls among the member states on the movement of persons has been central as a catalyst. Not least as a result of this starting place,

the organizing principle of mutual recognition based on trust appears increasingly inadequate for the job. At the heart of the challenges which confront the EU in this field is the diversity which is inherent in it. We have highlighted this diversity through the very divergent figures on criminal systems in the member states. On account of this quite impressive diversity, it is clear that mutual recognition as the operative tool is not satisfactory. When the role performed by the criminal justice systems of the member states differs so dramatically, all efforts to reduce or abolish the effects of jurisdictional limits, the equivalent of border controls for the movement of persons, must be based on a sound understanding of the effect that any measure will have in each member state. This can only be possible on the basis of approximation, where the elements of the criminal justice system are painstakingly assessed and evaluated and only then are they given an equivalence dependent on their effects on the individual and within the community.

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