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JUDICIAL COOPERATION AND ORGANIZED CRIME IN THE EUROPEAN UNION

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1. INTRODUCTION

The subject to be addressed by this panel is complex, but one that is of great interest. In recent years the European Council, the European Commission and the European Parliament have continued to stress the importance of intensive police and judicial cooperation between the Member States to ensure that organized crime in the European Union is combatted effectively. The Commission and the Parliament have repeatedly taken the position that intergovernmental cooperation is, in fact, no longer sufficient to control organized crime and that the time has come to set up a European Prosecutor's Office and transform the UCLAF (the Unit on Coordination of Fraud Prevention at the European Commission) into a communitarian bureau of investigation. The activities of such a bureau would no longer be restricted to combatting European Community (EC) fraud, but would encompass organized crime in general.

In this debate on intergovernmental cooperation in the fight against organized crime versus a more communitarized approach, it is not easy for an academic researcher to choose a position. There are several reasons for this. Firstly, because there is a serious lack of empirical research on the topics being discussed here, i.e. organized crime, and police and judicial cooperation. Secondly, we should realize that the very ideological issues that are involved here are closely bound up with the constitutional future of the European Union. Thirdly, we should not lose sight of the fact that the debate about the effectiveness or otherwise of police and judicial cooperation is also prompted by institutional conflicts within the European Union between – roughly speaking – the European Commission and the European Parliament on the one hand, and the European Council and the Member States on the other.

Nevertheless, to get the discussion off the ground, I would like to make a few general comments about the development of judicial cooperation in the European Union against the background of the problem of organized crime in this part of the world.

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2. THE PROBLEM OF ORGANIZED CRIME

In recent years it has generally been argued in official documents that organized crime poses a major threat to the European Union and its Member States. Personally I have a problem with this idea. Not only because it completely overlooks the fact that the nature and scale of organized crime differ widely in the various Member States, but also because it takes no account of the fact that in virtually all the Member States organized crime has not gained control of any legitimate sectors of the economy or of any crucial sectors within government. For this reason it is better, in my view, to argue that organized crime currently poses not so much a threat as a challenge to the European Union and its Member States.

At this point I should point out straight away that what goes for organized crime in general, also applies to the part played by organized crime in EC fraud. One of the latest annual reports on fraud prevention published by the European Commission states that a total of 50 criminal networks have been found to be engaged in this type of fraud in the European Union. Not a large number by any stretch of the imagination, certainly not compared with the 841 investigations into organized crime that were started in Germany in 1997, and the 162 investigations conducted in Belgium in 1996. Purely on the basis of these figures, one is justified in asking whether in fact there are empirical arguments for organizing a supranational criminal justice system in the European Union with a view to combatting this type of crime.

There is another good reason for asking this question. In the official debate about combatting organized crime it is invariably assumed that, where organized crime is an international phenomenon, a large degree of international or supranational criminal cooperation is needed to stamp out the problem. This view should not be taken at face value, however. After all, organized crime is only an international problem insofar as it involves the transport of illegal goods and services. When it comes to production and distribution, this is mainly a local problem, in the same way as corruption and 'protection' are always confined to one particular place. This means that international or supranational cooperation must be regarded as complementing the repressive and preventive measures that are implemented by local and national authorities in each individual country. Besides, if the battle against organized crime is not well organized at national level, inter-state cooperation in this field will not yield much in the way of results.

3. THE DEVELOPMENT OF JUDICIAL COOPERATION

There is a long history of judicial cooperation in Europe. Within the context of this discussion, however, it is appropriate to make a distinction between its

development up to the signing of the Treaty of Amsterdam (in conjunction with the Action Plan to combat organized crime, which was adopted by the European Council in April 1997) and the development that is inherent in this Treaty. In my view, the Treaty of Amsterdam can therefore be regarded as an important milestone in the history of judicial cooperation in Europe.

3.1. A difficult patch in recent years

After the Second World War it was the Council of Europe that – with treaties like the Convention on extradition (1957) and the Convention on mutual assistance in criminal matters (1959) – brought structure to the organization of international mutual assistance between the signatory countries. These treaties are fairly complex owing to the stringent conditions they impose, the many grounds for refusing mutual assistance and the generous scope for reservations. Do they, therefore, no longer satisfy the requirements of our modern-day society? The lack of empirical research in this area makes it difficult to come to any conclusion. My impression is that the forms in which mutual assistance can be provided under the terms of these treaties are still very much relevant to this day and age, but that the limited human and other resources invested by the parties concerned to provide national support for this mutual assistance are the root of a great many problems when it comes to implementation: misunderstandings between authorities, lengthy procedures, and so on. Nevertheless, back in the 1980s the Council of Europe was convinced that the treaties in question should be integrated and modernized with a view to intercepting international communication and conducting cross-border surveillance, amongst other reasons. The efforts it made in this respect came to nothing, however. This failure was a serious setback for the Council of Europe because it seriously undermined its key role in this area.

Around the same time, however, the European Community had to put up with the fact that the Member States were not really willing to adapt the existing organization of European mutual assistance. Towards the end of the 1970s the then French President Giscard d'Estaing called for the creation of an 'espace judiciaire Européen' [European judicial area]. The only thing to emerge from this was a draft Convention on mutual assistance in 1980. And to date only a few countries have ratified the five supplementary conventions that were signed between 1987 and 1991, such as the Convention on the transfer of sentenced persons and the Convention on the simplification and modernization of methods of transmitting extradition requests. Compared with this failure, the Schengen Agreement (1985) and the Convention applying the Schengen Agreement (1990) represent a major success. Not only because the latter is gradually being ratified by more and more Member States, but also because it currently plays an important part in the day-to-day business of police cooperation between the signatory countries.

The Maastricht Treaty has undoubtedly given new impetus to efforts to modernize international mutual assistance in criminal matters. Within the context of the (intergovernmental) Third Pillar, judicial cooperation – along with police cooperation and customs cooperation – has been defined as a subject of mutual importance for the Member States. In the area of judicial cooperation, the 1993 and 1996 working programmes stipulated that attention would be focused on new supplementary conventions on extradition and mutual assistance on the one hand, and on the development of a network of liaison and contact magistrates on the other. In the mid-1990s – in the run-up to the Intergovernmental Conference to review the Maastricht Treaty – some rather disparaging comments were written, especially by officials at the European Commission and the European Council, about what had been achieved within the Third Pillar. In my view, however, this censure was rather misplaced. Not only did the results achieved correspond to a large extent with the – perhaps rather unambitious – intentions in the working programmes, in themselves they were really quite remarkable. The Europol Convention, which is also of great importance for judicial cooperation, can be characterized as a 'bloodless revolution' in the history of international police cooperation in Europe, while the Convention on extradition is described by experts in the field as a 'quantum leap' in the way international mutual assistance is organized. Yet the development of a Convention on mutual assistance has suffered unnecessary delays; the draft version is shortly due to be completed, however. The Maastricht Treaty has therefore borne fruit in this area.

The European Commission has always had trouble accepting the fact that the Member States were not and still are not prepared to hand over part of their sovereignty to 'Brussels' in the field of criminal law enforcement of the communitarian legal order, not even where it involves combatting fraud concerning the financial resources of the Community. In 1994 the Commission therefore proposed entering into an agreement that would substantially increase the scope for the Member States to work together and with the Commission to combat this kind of fraud. In the convention that was eventually signed in July 1995, this scope is extensively curtailed to ensure that the Member States retain the freedom to decide for themselves on a case-by-case basis what form mutual cooperation in this area should take. The Commission was not willing to take this defeat lying down, however. This can be inferred from the Regulation of 11 November 1996 concerning the powers of the UCLAF to carry out on-the-spot checks and inspections on the Member States' territory. This Regulation sets out a number of options whereby the results of specific actions can be used in criminal investigations conducted in the Member States. It is also evident from the second protocol of 19 July 1997 to the aforementioned convention, which addresses a number of issues that were left out of the negotiations on this convention, such as the exchange of information between the Member States and the European Commission.

Following on from this, it should be pointed out that the European Commission, with the backing of the European Parliament, has not given up its efforts to communitarize the fight against organized crime to some extent. This is demonstrated by the Corpus Iuris project, which develops proposals for European criminal law and criminal procedure in the area of communitarian fraud and fraud prevention, and advocates that a European Prosecutor's Office should be set up. It might also be concluded from the reform of the UCLAF into a communitarian bureau of investigation, which would be in a position to lend support to the Member States with criminal investigations into organized crime. One could therefore say that the European Commission advocates both direct and indirect communitarization of the fight against organized crime.

3.2. **The possible impact of the Treaty of Amsterdam**

The Treaty of Amsterdam is a document that should be read in conjunction with the Action Plan to combat organized crime, which was mentioned earlier. This is because in some respects the Plan is the elaboration of a number of provisions that are included in the new Chapter VI of the Treaty.

Although the Treaty gives the European Commission slightly more scope to take initiatives with a view to combatting economic and financial organized crime, on the whole it does not embody its efforts to organize the fight within a communitarian framework. Clearly, the basic principle is that intergovernmental cooperation in this area must be stepped up. This is demonstrated by the fact that the Member States have agreed to do their utmost to ratify the aforementioned conventions on judicial cooperation before the end of 1998. The intention to actively organize the network of contact and liaison magistrates – with a view to improving this cooperation in practice – is another, cogent demonstration of this basic principle.

One of the main aspects that needs to be addressed in this respect is the question of the relationship between this magistrates' network and Europol. And certainly now that the Treaty of Amsterdam stipulates that Europol should be more involved in criminal investigations in the Member States, albeit in a supporting role, it is important that this issue be resolved satisfactorily.

4. CONCLUSION

In view of the relative seriousness of the problem of organized crime in the European Union, the intergovernmental framework of institutions and forms of cooperation that is now being built up within the Union must be sufficient over the next few years to support the efforts that each of the individual Member States is presently making in order to bring this type of crime more under control.

The Member States will only have to invest the necessary resources in order to take advantage – in the right way and on a large scale – of the opportunities that present themselves. Otherwise the idea that a communitarian approach to organized crime is more appropriate will once again take hold.

At the moment the intergovernmental approach is not only appropriate on the basis of the above empirical argument. As long as the European Union does not continue any further down the road to federalism, this is also, from a normative point of view, the only possible approach. This is demonstrated all too clearly by the difficult history of intergovernmental cooperation in the past few decades: as long as the Member States retain their independence in a number of crucial areas, they are not prepared to relinquish the hard core of their monopoly on violence, which is exactly what police and judicial cooperation is all about.

One of the consequences of this conclusion is that the European Commission would do better to defer its quest for its own communitarian criminal procedure for the time being. Moreover, since the UCLAF is directing more and more of its resources at combatting organized crime in general, it would be better to incorporate certainly the operational aspects of this unit within regular police cooperation ventures between the Member States of the European Union, in other words within Europol, which will itself become a more operational police organ in the near future.

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