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THE EU ROLE IN FIGHTING TRANSNATIONAL ORGANISED CRIME

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Abstract:

Transnational Organised Crime (TOC) has risen up in the international institutions' agenda. The international community's mobilisation against organised crime has led to an impressive elaboration of institutional responses to what has been presented as a global challenge. The EU JHA agenda has not been an exception, while constantly addressing the issue of the fight against TOC as one of its priorities since the middle of the 1990's.

In order to understand the current state of the EU strategy against organised crime, this study examines the existing EU legislative framework and the various initiatives taken at the international level against TOC in order to put the EU strategy into a broader perspective. This includes taking a closer look at the European justice and police co-operation mechanisms (specifically the role and mandate of Europol and Eurojust), as well as reviewing the most recent developments in the EU strategy against organised crime.

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Table of Contents

Summary

Transnational Organised Crime (TOC) has risen up international institutions' agenda. The EU JHA agenda has not been an exception, and has constantly addressed this issue since the middle of the 1990's. As evidenced by the latest developments of the EU strategy in this field, and the EU JHA Council held in October 2008, European mobilisation is still evolving around the definition of concepts such as organised crime and participation to a structured organisation, and around the scope of action and mandate of European agencies in the field of justice and police cooperation, namely Europol and Eurojust.

The aim of this study is to provide elements of analysis in the following areas: the existing EU legislative framework; the various initiatives taken at the international level against TOC; the European justice and police co-operation mechanisms; and the most recent developments in the EU strategy against organised crime. Throughout this analytical review, several objects of concerns are particularly stressed:

- One of the main difficulties in the EU strategy remains the criminalisation of participation in a criminal organisation

Thorny issues in this respect involve the legal definition of organised criminal groups as well as the fact that organised crime is treated differently by the criminal law system of each Member State. The latest attempt to provide a definition of organised crime, to be found in the 2008 Council Framework Decision on the fight against organised crime does not show any progress on that matter. Instead, terms of definition remain very broad and highly flexible, and do not provide any legal certainty. Furthermore, the inexistence of a clear definition creates a potentially very extensive scope of criminalisation of organised crime across the EU. What is more worrying is that this may lead to considerable diversity in implementation at a time where organised crime is an offence for which dual criminality has been abolished under the mutual recognition instruments.

- Judicial and police cooperation still faces persistent problems and challenges

These persistent problems include g: the ambiguous relationship between OLAF and Eurojust; the ongoing reluctance, or hesitation, by domestic mechanisms to make use of European tools; and the lack of cooperation between Europol and Eurojust. In this context, and given the lack of certainty with regard to the scope of action and mandate of these agencies, on question becomes central, that of the principle of availability and interoperability of databases. These two aspects of the judicial and police cooperation are sensitive at several levels and for various reasons. Of significant importance are the current debates on the very legitimacy of the principle of availability and on its effects on civil liberties. The recent

consideration for the establishment of a *European Criminal Records Information System* (ECRIS) reinforces concerns about data protection, specifically private data. As such, the debate over the future of Europol and Eurojust, as well as the one on the control of information, remains highly sensitive. The current developments of the EU strategy in this field don't make the perspectives clearer.

- The EU tends to follow global trends against TOC, which can be questionable

The EU strategy in the fight against organised crime is closely linked to international standards. This is particularly true in the case of money laundering. The EU strategy in this field has, in particular, heavily relied on developments supported by the Financial Action Task Force (FATF). A number of challenges arise with regard to the regime influenced by the FATF. These involve in particular: the insertion of terrorist financing within the anti-money laundering regulatory logic; the consolidation of the extension of anti-money laundering duties to the legal profession; and the maximisation of powers of access to national databases for law enforcement purposes. More generally, it clearly appears that the EU follows the global trend that tends to maximize the fight against money laundering or terrorist finance, while being quite shy in areas such corruption. While the EU has been extremely active in the adoption of anti-corruption standards with regard to the candidate countries wishing to become EU members, *internal* EU legislative action against corruption has not been as intense. It may be time, on that matter, to rethink the Union's legislative approach to corruption in both the public and private sectors, but also to corporate crime, a field that has been considerably neglected by the international community.

Introduction

Transnational Organised Crime (TOC) has risen up international institutions' agenda since the very end of the 1980's. The mobilisation of the international community has led to an impressive elaboration of institutional responses to what has been depicted as a global challenge (Beare, 2003; Edwards and Gill, 2003). The EU JHA agenda has not been an exception, and has constantly addressed this issue since the middle of the 1990's.

However, and despite this increasing mobilisation, attempts and initiatives to harmonise the fight against organised crime at the international level have remained challenged by the difficulties to define the concept of TOC at the global level. As it will be developed in this study, defining and criminalising organised crime is a difficult task, because of the variety of activities carried out by organised criminals and because of the heterogeneous degrees of organisation of such criminal groups (Beare and Naylor, 1999; Mitsilegas, 2003a; Sheptycki, 2003). These difficulties are central to understanding the current state of European mobilisation against TOC, as loosely defined concepts are employed not only in provisions of criminal law and justice, but also in operational tools and mechanisms. The most recent attempts to define the concept of organised crime, especially within the third pillar Framework Decision of 2008, [1] illustrates once again this highly problematic and sensitive issue.

Moreover, after a careful analysis of the internationalization of the fight against organised crime, in which the EU has played a significant role, one can notice several shifts, as well as important gaps. For instance, various studies have shown that, depending on political environments and professional interests, the global fight against organised crime has constantly evolved, focusing alternatively or simultaneously on drug trafficking, money laundering, or terrorist financing (Beare, 2005; Mitsilegas, 2003b; Naylor, 2002, 2006). Similarly, other issues encompassed in the rather vague concept of TOC, such as corruption, corporate crime or white-collar crime, have remained of little concern in the international and the European agenda, especially when compared to money laundering or terrorist financing (Lascoumes and Godefroy, 2007) .

In order to understand the current state of the EU strategy against organised crime, part I of this study starts by examining the EU legislative framework. This part focuses on three main areas of internal Union action in the field: measures criminalising the participation in a criminal organisation; money laundering counter-measures, addressing both issues of criminalisation and prevention; and EU measures to combat corruption. As the EU is not isolated in the global fight against TOC, the second part of the study is dedicated to an

1. Council Framework Decision 2008/841/JHA, OJ L 300, 11 November 2008, p.42.

overview of the various initiatives taken at the international level against TOC (Part II). This part mainly focuses on the major international bodies that are recognised as leaders in setting international standards in the field: the UN, the Council of Europe, the OECD, and the G8. The EU specificity, specifically in terms of operational mechanisms, is addressed in part III, which is devoted to justice and police co-operation and the role of agencies such as Europol and Eurojust (Part III). Finally, this study ends by providing an insight into the most recent developments in the EU strategy in the fight against organised crime and some comments on these initiatives (Part IV).

Part I: The EU legislative framework

This part examines the various legislative instruments adopted by the European Union in order to combat organised crime. The analysis focuses on three main areas of internal Union action in the field: measures criminalising the participation in a criminal organisation; money laundering counter-measures, addressing both issues of criminalisation and prevention; and EU measures to combat corruption.

1. Organised crime

The fight against organised crime has long been at the forefront of the EU JHA agenda, as evidenced by the two Action Plans to fight organised crime in 1997 and 2000, the 1999 Tampere Conclusions and the 2004 Hague Programme.

- ***A central element in this context is the criminalisation of participation in a criminal organisation***

Defining organised crime activities and treating them as criminal offences is an important signal of the focus of criminal justice policy on combating this phenomenon. It is also an essential task in order to define and clarify the mandate of EU criminal justice bodies such as Europol and Eurojust (combating organised crime is a central task for both). However, defining and criminalising organised crime is a legally complex task, as it is difficult to translate multifarious activities of organised criminals into a legal definition providing a sufficient degree of legal certainty and precision the. Thorny issues in this respect involve the legal definition of organised criminal groups, in particular with regard to the degree of organisation, the structure (or not) of such groups and the number of people involved. Further issues of difficulty include the *mens rea* requirements, *i.e.* the degree of knowledge or intention of somebody to participate in organised crime activities, but also the degree of actual participation required for criminalisation – with the main concern being - as with terrorist offences - that there is a danger of criminalising the mere support of the aims of a

group even if a criminal act is not actually committed. Adding to this complexity, EU Member States' criminal law system treat organised crime in significantly different ways, with a number of Member States not including organised crime-specific offences in their criminal law.

- ***The European Union responded to these challenges in 1998 by a third pillar Joint Action 'on making it a criminal offence to participate in a criminal organisation in the European Union'***

The Joint Action[2] offered an ambitious attempt at defining organised crime groups by taking into account law enforcement perceptions and criminalising active participation in such an organisation, *or*, alternatively, conspiracy to commit any of the offences stated in the instrument. The use of these two very different alternative approaches to criminalisation is striking in an instrument which seeks to harmonise criminal law, but can be explained as necessary to achieve compromise – and unanimous agreement in the Council - in the light of very different national legal approaches to organised crime (with the conspiracy alternative specifically aimed at satisfying the English legal tradition). The model adopted in the EU in 1998 has proven to be quite influential in the adoption of the 2000 United Nations Convention on TOC (the Palermo Convention). This model was repealed in 2008, when a Council Framework Decision on the fight against organised crime was adopted. This new instrument will be analysed in details in Part IV.

2. Money laundering

The fight against money laundering is inextricably linked to the fight against organised crime, as it depriving criminals from their proceeds of crime was deemed imperative.

- ***The Community has developed a detailed and very sophisticated anti-money laundering regime over the years, culminating in the recent adoption of the Third Money laundering Directive***

The Third Directive[3], which repeals earlier Directives, was justified as necessary to align the EU framework with the revised Financial Action Task Force (FATF) standards.[4] The

2. (98/733/JHA, [1998] OJ L351/1). For a detailed analysis of the Joint Action, and the issues discussed in para.3, see Mitsilegas V., 'Defining Organised Crime in the European Union: the Limits of European Criminal Law in an Area of Freedom, Security and Justice', *European Law Review*, vol.26, (2001), pp.565-581.
3. For an analysis of the EU anti-money laundering regime, see Mitsilegas V., *EU Money Laundering Counter-measures*, Kluwer Law International (2003).
4. Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005, *OJ L309*, 25 November 2005, p.15.

influence of the latter is evident in numerous instances throughout the text. The major changes begin with the title of the instrument, which now refers to money laundering 'and terrorist financing'. The aim of complying with international standards is again reflected in the Preamble, with specific references to the threat from terrorism,[5] the need to take into account the work of the FATF[6] and the need to change customer identification provisions in the light of international developments.[7]

Major changes involve:

- The amendment of the definition of money laundering to align the definition of 'serious crime' in the Directive with the one in the 2001 Framework Decision on confiscation (and thus extend the money laundering predicate offences)[8]

- The prohibition, along with money laundering, of 'terrorist financing'. The definition of the latter is similar, but not identical, to that found in the UN 1999 Convention, and the definition of terrorism is formulated in accordance with the relevant EU Framework Decision.[9]

- The introduction of a series of changes in the preventive field of customer identification and due diligence.[10] Of particular relevance in this context is the introduction in EC law - in the light of the FATF standards - of the 'risk-based approach': financial and other institutions covered by the Directive must use the principle of due diligence 'on a risk-sensitive basis'.[11]

- A greater emphasis on the reporting of suspicious transactions with the inclusion of express provisions on financial intelligence units[12] (Member States are asked to establish *Financial Intelligence Units* (FIUs) with specific tasks, and the units are given maximum powers of access to national databases.

- The enhanced use of 'Comitology': on a number of occasions, decisions on definitions and amendments to the Directive will not be taken under the ordinary

5. Recital 1.
6. Recital 5.
7. Recital 9.
8. Article 3(5)(f).
9. Article 1(4). Terrorist financing is defined as 'the provision or collection of funds, by any means, directly or indirectly, with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out any of the offences within the meaning of Articles 1 to 4 of Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism'.
10. Chapter II of the Directive is now entitled 'customer due diligence' and comprises no less than 15 Articles- Articles 6-19 of the Directive.
11. Articles 8(2), 11(2), 13(1).
12. Note the overlap with the 2000 third pillar Decision on FIUs (Decision 2000/642/JHA, OJ L271, 24 October 2000, p.4).

legislative procedure but by a committee chaired by the Commission and consisting of representatives of Member States.[13] Comitology matters include in particular clarifications of the technical aspects of definitions of concepts such as beneficial ownership, politically exposed persons, business relationship, and shell bank.[14]

The challenges encountered in the implementation of this Third Directive are analysed in Part IV. This plethora of legislative initiatives over time has not stopped the Commission from adopting a series of other measures aiming to align the Community legal framework with international guidelines and imperatives, in particular as regards the field of cash transfers.

Notable examples in this context are Regulation 1889/2005 on controls of cash entering or leaving the Community,[15] which takes into account FATF standards[16] and introduces an obligation to declare cash of a value equal to or more than €10,000 when entering or leaving the Community; and Regulation 1781/2006 on information on the payer accompanying transfers of funds,[17] also influenced by the FATF,[18] which introduces a series of due diligence obligations with regard to fund transfers. These instruments introduce and reinforce an extensive system of surveillance of the flows of funds into and from the Community financial system and territory.

3. Corruption

The EU has been extremely active in the adoption of anti-corruption standards with regard to candidate countries wishing to become EU members, and with regard to the development of international anti-corruption standards.

- ***However, internal EU legislative action against corruption has not been as intense (or at least as intense as similar action in the field of organised crime or money laundering).***

The bulk of EU legislative instruments in the field dates back to the days of the Maastricht third pillar - see in particular the Convention against corruption involving officials[19] and the

13. Articles 40 and 41.
14. Chapter VI, Article 40(1)(a).
15. *OJ L309*, 21 November 2005, p.9. On the concerns with regard to the legality of the adoption of this measure, see Mitsilegas V. and Gilmore B., 'The EU legislative framework against money laundering and terrorist finance: A critical analysis in the light of evolving global standards', in *International and Comparative Law Quarterly*, vol.56 (2007), pp. 119-141
16. Preamble, recital 4.
17. *OJ L345*, 5 December 2006, p.1.
18. Preamble, recital 3.
19. *OJ C195*, 25 June 1997.

first Protocol to the Convention on the protection of the Communities' financial interests[20], both of which seek to define and criminalise corruption of public officials (the latter instrument confirming the policy and political link between corruption and fraud against the Union budget). Corruption in the private sector is addressed by the 2003 Framework Decision,[21] which criminalises corruption in the field, but which Member States have found difficult to implement.[22] While this may be due to the inherent difficulties in defining, criminalising and prosecuting corruption, it may be time to rethink the Union's legislative approach against corruption in both the public and private sector.

As laid out in the next part, several international initiatives have been taken along the EU strategy in the field of corruption. However, as underlined in Part IV, international mobilisation against corruption has been quite shy compared with the fight against money laundering, or, more recently, with the fight against terrorist finance.

Several initiatives have recently been undertaken at the EU level, as evidenced by the outcomes of the JHA Council of October 2008, specifically in the area of legal harmonisation, data exchanges and corruption. The latest developments of the EU strategy against organised crime will be presented and analysed in Part IV.

The development of common measures against TOC within the EU is closely related to the development of relevant international instruments, with the Union increasingly emerging as an international actor in the globalisation of criminal law. However, at the same time international (hard and soft law) instruments have had a significant impact on the development of internal EU law in the field.

Part II: The EU: an actor among a variety of international frameworks and monitoring mechanisms

The EU is not isolated in the global fight against TOC. On the contrary, strategies developed by the EU are part of a rather complex set of institutional responses to this phenomenon. Therefore, this part aims at reviewing the various initiatives taken at the international level in order to put the EU strategies against TOC in a broader perspective. In the following sections special attention will be given to the UN, the Council of Europe, the OECD, and the G8.

20. *OJ C313*, 23 October 1996.
21. *OJ L192*, 31 July 2003
22. See COM (2007) 328 final. As indicated: "the Commission notes that most Member States found it difficult to incorporate into national law this 'key Article' defining criminal acts of active and passive corruption".

1. Transnational Organised Crime

The *UN Convention against Transnational Organised Crime* (opened for signature in Palermo in December 2000), known as the Palermo Convention, has been widely presented as being the first international instrument for combating TOC. The purpose of the convention was in fact an attempt to:

- standardise domestic legal instruments (especially with regard to mutual legal assistance and extradition procedures);
- facilitate criminal investigations;
- establish common offences in relation to participation in an organised criminal group, such as money laundering, corruption and obstruction of justice.

Furthermore, three protocols were added to this Convention: the Protocol on combating trafficking in persons, especially women and children; the Protocol on the smuggling of migrants by land, air and sea; the Protocol against illicit manufacturing of and trafficking in firearms. The Convention and the three Protocols were thus covering a wide range of issues integrated in the rather vague global expression of "TOC".

- ***A rather constant dialogue between various institutions with their own experiences in the field led to the elaboration of a common instrument, the Palermo Convention, which is now widely recognised as the standard of reference by the international community.***

The aspects of the UN Palermo Convention have been prepared, negotiated, and discussed since 1994, when the idea of building a multilateral instrument emerged. Indeed, the Naples Ministerial Conference of 1994 organised under the aegis of the UN has certainly been the first attempt to standardise the international mobilisation against TOC. However, as reported by some of the actors involved at that time, that conference did not explicitly start to draft a convention on TOC within the context of the UN because there was some scepticism, mainly on the part of Western countries, especially European ones, about the feasibility of establishing a global instrument. (Gastrow, 2003) It was only after repeated requests from developing countries and, above all, the United States that it was agreed to start drafting a convention within the UN context. In December 1996, a proposal was submitted to the UN General Assembly resulting in the establishment of an *ad hoc* UN committee to head the negotiations. This *ad hoc committee* is a good example of how the global fight against TOC has been crafted, and how various institutional responses to TOC have been put together and merged. The *ad hoc committee* first met in Vienna at the beginning of 1999. More than ten

meetings between January 1999 and October 2000 followed. In addition to the States representatives, these meetings frequently gathered what are referred to in official documentation as 'entities represented by observers', *i.e.*, observers from other relevant units of the UN system, such as the United Nations Office at Vienna and Office for Drug Control and Crime Prevention (ODCCP), but also other intergovernmental organisations, such as the Council of Europe, the European Commission, Europol, or the International Criminal Police Organisation (INTERPOL). This dialogue certainly explains why the standards against TOC at the international level seem to be so consensual.

In addition to this global instrument, specific aspects of what is referred to as TOC (such as corruption, money laundering, or cybercrime), have been tackled jointly or in parallel by several regional/international bodies.

2. Money Laundering

The fight against 'dirty money' has been an important feature of the global mobilisation against TOC since the end of the 1980's. The establishment of an international group devoted to the issue emerged during the G7 countries meetings. It was at the 1989 Paris Summit that the G7 set up the Financial Action Task Force (FATF), whose mission was to draft 40 recommendations to serve as a universal framework in the fight against money laundering.

- ***The FATF has become the major international body in the field of money laundering***

In 1992, the FATF became a permanent institution based at the offices of the OECD in Paris and went on to become widely recognised as the international authority on fighting money laundering. Even though the FATF gained independence at the beginning of the 1990s, it is worthwhile noticing that the Task Force is still constantly influenced by the G7 finance Ministers that have endorsed a couple of initiatives aiming at enhancing the global efforts against money laundering, including: the setting up of international networks, with the creation of *Financial Intelligence Units* (FIUs), which are assembled in the Egmont Group; the widespread adoption of suspicious reports mechanism (FINTRAC); the creation of the Financial Stability Forum (FSF) in 1999; the inclusion of International Financial Institutions such as the IMF and the World Bank into the fight against money laundering.

The FATF has gained the status of catalyst for the international fight against money laundering, and more recently against terrorist financing. The FATF membership is currently made up of 32 countries and territories and 2 regional organisations (including the EU

Commission). [23] The FATF also works in close co-operation with a number of international and regional bodies involved in combating money laundering and terrorist financing, among which the EU.

- ***Compliance with FATF standards relies mainly on two peer pressure systems: the self-assessment exercise and the mutual evaluation procedure.***

As seen in the previous part, FATF standards are widely recognized by the European Commission, who regularly stresses the need to comply with FATF Recommendations. This peer pressure that takes for reference FATF standards is supplemented by MONEYVAL (established in 1997 by the Council of Europe), a Committee of Experts on the Evaluation of Anti-Money Laundering measures. This Committee of experts is in charge of reviewing the anti-money laundering measures in Council of Europe Member States which are not members of the FATF.

3. Corruption

Even if the UN appears to be the body that centralises the international mobilisation in terms of legally binding multilateral instruments against corruption, the OECD and the Council of Europe have also played an important role in the development of international standards and initiatives.

The *UN Convention against Corruption* (also known as the 'Merida Convention'), which opened to signatures in 2003, is the result of a two-year negotiation within an Ad Hoc Committee set up to examine in detail the question of illegally transferred funds and the return of such funds to countries of origin, a point that has been one of the main obstacles in previous attempts to adopt international standards in this area. The European Commission actively participated in the negotiations of this Committee, in order to ensure compatibility with EU instruments. The UN Convention has been signed by the Council of the European Union in 2005. [24]

- ***The Merida Convention has supplemented existing international initiatives in the field***

23.http://www.fatf-gafi.org/document/52/0,3343,en_32250379_32237295_34027188_1_1_1_1,00.html

24. Council Decision on the signing, on behalf of the European Community, of the United Nations Convention against Corruption (adopted by Council on 10 May 2005) (7984/05 and 5193/04)

Among the international institutions that have tackled the issue of corruption, the OECD has had an important role. In particular, the OECD prepared and elaborated the *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, adopted in 1998. This OECD Convention has been recognised as compatible and complementary to the *EU Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union* (1997).

In addition, the Council of Europe has developed a number of multifaceted legal instruments dealing with matters such as the criminalisation of corruption in the public and private sectors, liability and compensation for damage caused by corruption, conduct of public officials and the financing of political parties. Such instruments include several conventions, [25] guiding principles and recommendations, [26] but also targeted technical cooperation, such as the *Octopus Programme* against corruption and organised crime in Europe or the *Paco Impact Programme* that concerns the implementation of anti-corruption plans in South-Eastern Europe.

The various international initiatives in the field of corruption follow a rather coherent strategy that creates a common framework, specifically in the area of international cooperation in the control and sanctioning of corruption and the emergence of a peer pressure systems on government. The latter aspect is well illustrated by the recent Council of Europe's initiative: the *Group of States against Corruption* (GRECO) aimed at monitoring compliance with the standards set up by the international community. [27]

It follows from this overview of international mechanisms and conventions against TOC that the EU should be considered as one of the international actors influenced and influencing other institutions in developing standards, guidelines, good practices and norms. The question of the synergy between the EU and other international bodies will be addressed in part IV. Nevertheless, the EU has an important specificity: the EU is certainly the regional body that has developed and deployed the most significant tools in the field of operational co-operation.

Part III: Operational co-operation in the EU

25. The Criminal Law Convention on Corruption (ETS 173) ; The Civil Law Convention on Corruption (ETS 174); The Additional Protocol to the Criminal Law Convention on Corruption (ETS 191).
26. The Twenty Guiding Principles against Corruption (Resolution (97) 24); The Recommendation on Codes of Conduct for Public Officials (Recommendation No. R(2000)10) ;The Recommendation on Common Rules against Corruption in the Funding of Political Parties and Electoral Campaigns (Recommendation Rec(2003)4)
27. The GRECO recently published its first Evaluation Reports on Monaco, Poland, and the Russian Federation. In 2008, Compliance Reports have also been undertaken for the following countries: Montenegro, Moldova, USA and Estonia.

This Part aims at analysing the institutional framework of the competent European bodies in fighting transnational organised crime (TOC), such as the Liaison magistrates, the European Judicial Network (EJN), Europol and Eurojust.

1. The Liaison magistrates and the European Judicial Network

After the bombing attack against the famous anti-mafia judge Giovanni Falcone, on May 23rd, 1992, France and Italy put in place "Liaison magistrates". On the basis of bilateral arrangements between the home Member State and the host Member State, Liaison magistrates are appointed to facilitate cooperation and diplomatic exchange. The Liaison magistrates have since become "good practice" within the EU, and their main tasks are: [28]

- To create a direct link between the judicial authorities of the home and host Member States in order to facilitate and accelerate cooperation in the treatment of mutual assistance or extradition procedures.
- To promote diplomatic and practical exchanges to facilitate mutual understanding between Member States.

The European judicial Network (EJN) was officially evoked for the first time in the Action plan against "organised crime", as approved by the European Council on June 17th, 1997 in Amsterdam. On the basis of this Action Plan, the European Council adopted a Joint Action thereby creating the EJN on June 29th, 1998.[29] The tasks of this European network on criminal matters are similar to those of the Liaison magistrates' functions:

- accelerating the exchange of information and legal procedure between national authorities in fighting transnational organised crime.
- promoting cooperation by establishing links between the contacts points of the network.
- facilitating the understanding of the different EU legal systems, particularly at a procedural level.

If parallels with Liaison magistrates seem clear and evident, it is the composition and territorial architecture of the EJN that constitute its main innovation. The EJN is composed of 400 contact points across the European territory. [30] National contact points are designated by each National Central Authority in charge of judicial cooperation or by competent authorities

28. Joint Action 96/277/JHA of 22 April 1996 adopted by the Council concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between Member States of the European Union.
29. For an access of the EJN information, see: http://www.ejn-crimjust.europa.eu/about-ejn.aspx
30. Statistics available on : http://www.ejn-crimjust.europa.eu/about-ejn.aspx

in the fight against "serious crime". Recently, a Framework Decision has strengthened the capacities of the EJN.[31]

2. Europol

The 1995 Europol Convention allowed for an agreement between two political orientations (Bigo, 1996). For this reason, this body is defined as a central police office supporting Member States in the collection, analysis and dissemination of information and intelligence. In this perspective, Europol is composed of two main services with distinct objectives:

- a service in charge of analysing and producing databases for European bodies and national Law enforcement representatives;
- a liaison officers' service in charge of facilitating the bilateral and/or multilateral cooperation between Member States.

Since the creation of this unit, an exponential growth in the number of analysts can be observed. The services of liaison officers, composed of national members appointed by their national central authorities, present a more relative increase if the 2004 enlargement is taken into account.

In 1999, Europol was composed of 210 agents including 40 liaison officers. The attached budget for 1999 was then €19 million. In 2007, the same institution was composed of 421 Europol staff, including 114 liaison officers. The 2007 attached budget came up to € 58.94 million.[32]

Concerning its mandate and competences, Europol also faced important evolutions because of the adoption in 2000, 2002 and 2003 of protocols amending the 1995 Convention.

For most of Member States, it took more than five years to ratify these protocols. For example, the 2002 protocol extended Europol's competences with the capacity to request the opening of an investigation on the territory of a Member State, or to participate in joint investigation teams composed by members of national Law enforcement representatives.

- ***In January 2006, the Austrian presidency opened a debate on the evolution of the Europol institutional framework.***

The official objective was to improve its functioning *via* the implementation of *corporate governance*, and the development of its operational capacities. However, after diplomatic

31. Framework Decision on the European Judicial Network, 2008/976/JHA, *OJ 348/130*, 24 December 2008
32. Statistics available in the Europol annual Reports.

discussions, it is foreseen that, as of 1 January 2010, Europol will become an agency of the European Union.[33]

These institutional transformations and extensions of competences are at the heart of debates surrounding the issue of control of Europol's activity. Critics especially concern:

- the importance of the analysis function to the detriment of the operational cooperation, and
- the question of the "interoperability" between databases, such as the Information System Schengen (SIS II), the Europol databases and the European System of information about visas (Visa Information System - VIS). [34]

In this context, the control of these technical supports and their compliance with national constitutional Law or European Conventions constitute an important issue,[35] in particular with regard to the balance between security and liberty (Brouwer, 2008). These aspects will be given further comments in Part IV.

3. Eurojust

- ***Eurojust, created in 2001, constitutes the first European judiciary unit in charge of coordinating and promoting cooperation between Member States in relation to criminal justice.***

Eurojust fulfils a unique role as a new permanent body in the European legal environment. Its mission is to enhance the development of cooperation on criminal justice cases throughout Europe. The College of Eurojust is now composed of 27 National EU Members, the majority of which are prosecutors. Its intergovernmental dimension has for consequence that each prosecutor sitting in the College of Eurojust is a "national member" representing his own Central authorities. Since its creation on 2002, the administrative department of Eurojust faces an inflationist evolution in connection with the growth of the general budget. The administrative personnel increased from 6 persons in 2002 to 113 employees in 2007. The budget for 2002 was € 6.2 million (executed budget), €12.1 million for 2005 and € 18.4 million for 2007.

33. Wednesday 23 April 2008, by European Commission, source Europa. Available on : http://www.libertysecurity.org/article2012.html?var_recherche=Europol
34. For more details on that matter, see Mitsilegas V., « Police co-operation: what are the main obstacles to police cooperation in the EU », Note for the European Parliament (2006).
35. For a detailed analysis on this issue, see the European Data Protection Supervisor website and the second report of the Europol Joint Supervisory Body. See also Bruggeman W., "What are the options for improving democratic control of Europol and for providing it with adequate operational capabilities?" (2006).

- ***A strong asymmetry appears in the financial and human resources between national teams***

The majority of national members are the only representatives of their State within Eurojust.[36] In 2005, 8 countries had appointed an assistant in addition to their national members (Germany, France, Italy, Netherlands, Portugal, Finland, Sweden and the United Kingdom).[37] Assistant prosecutors have the power of replacing the national representative during the meetings of the College. In 2007, only a few countries increased the number of their national members: France (5 members), Italy (4 members) and the Czech Republic (2). This asymmetry in the financial and human resources between national teams affects the competences delegated by each Central authority. No national member has direct competences concerning pursuits and investigations at the national or European levels. National authorities are therefore the only ones able to open a transnational judicial investigation constraining other judicial authorities.

In 2007, Eurojust registered 1,085 cases, representing a 41% increase compared to 2006 (771 cases). As for 2006, the casework of "drug trafficking" and "Crime against Property or public goods including fraud" represent the highest percentage. The number of cases regarding "traffic of human beings" and "money laundering and other related "criminal offences" continues to increase.

If Eurojust's main task is to facilitate the multilateral cooperation between national authorities to fight against TOC, it seems that the reality is different. In fact, bilateral cooperation continues to represent the most part of its activity (813 files in 2007) compared to multilateral cases (272).[38]

Following the adoption of rules of procedure concerning the treatment and the protection of personal data by the Council on 24 February 2005, Eurojust established an autonomous system of data management (*Case Management System* – CMS). The aim of CMS is the safe exchange of judicial information between Eurojust members and national judicial authorities. As of 2006, Eurojust started developing a system of data treatment, through, using the E-POC (*European Pool against Organised Crime*) project framework III, in order to improve information exchange between various national support E-POCs. The connection of Eurojust to the Schengen system went live in December 2007. This connection allows Eurojust national members to access the SIS system.

36. Eurojust, annual report, 2007, p.72-82
37. Eurojust, annual report, 2005, p. 113
38. Eurojust, annual report, 2007, p. 16

Europol and Eurojust are central to the reformulation of the EU strategy in the field of organised crime. More specifically, the need for autonomy and the strengthening of these two bodies have constantly been advocated, notably in the Newton Dunn Reports and the EU JHA Council of October 2008, as explained below.

Part IV: Towards a coherent EU strategy to tackle organised crime?

As several recent EU initiatives suggest, full attention is once again given to the issue of organised crime in the JHA agenda. This section provides an overview of these initiatives, most of which advocate strengthening existing instruments of cooperation and coordination and harmonising the legal framework (1); as well as a careful analysis of the latest developments of the EU strategy against organised crime and critical comments thereof (2).

1. Latest developments in the EU strategy to tackle organised crime

The fight against organised crime is at the forefront of the EU JHA agenda once again, as evidenced by the work of the European Parliament on this issue and the JHA Council of October 2008, which adopted the *Council Framework Decision on the fight against organised crime*.[39]

a. The "Newton Dunn Reports"

In May 2007, the European Parliament adopted a resolution based on the own-initiative report by Bill Newton Dunn making a recommendation to the Council on developing a strategic concept on tackling organised crime[40]. Such resolution followed a report adopted in April 2007 by the EP Committee on Civil Liberties, Justice and Home Affairs (LIBE).

In October 2005, the European Parliament adopted a resolution drafted by Bill Newton Dunn and made some amendments to the Commission's proposal for a Council Framework Decision on the fight against organised crime, adopted at the JHA Council in October 2008.

Even though most of the initiatives advocated by the European Parliament aim mainly at strengthening the existing instruments of cooperation and coordination (such as the ratification of the main international Conventions, the enhancement of mutual trust in criminal investigation and prosecution, the availability of data and the promotion of exchanges), these recommendations encompass specific aspects, which should be given further attention.

39. *Council Framework Decision on the fight against organised crime* (2008/841/JHA).
40. *Tackling organised crime: developing a strategic concept*, Reference INI/2006/2094
P*roposal for a Council Framework Decision on the fight against organised crime,* Reference CNS/2005/0003

- ***With regard to the EU legislative framework, the EP calls on the Council to ensure that Member States approximate their criminal-law provisions in close cooperation.***

In particular, the EP made special reference to the definitions of concepts and offences in the field of organised crime.

- ***With regard to operational instruments and European agencies, the EP clearly advocates the strengthening of Europol and Eurojust.***

The EP, in particular, recommends that Europol and Eurojust acquire real autonomy, and therefore be granted the means to act with greater freedom. If the EP firmly insists on the need to ensure appropriate parliamentary control in order to assess Eurojust and Europol's actions, special attention is also given to the need to grant Europol and Eurojust full powers of initiative.

- ***With regard to data exchange and data protection, the EP emphasises the need for improvement in information channels between actors***

The EP specifically highlights the following matters: the obtaining of evidence and its admissibility, the use of financial information for the purpose of identifying and then neutralising the proceeds of crime, and the principle of availability. Nevertheless, the EP also emphasises the need for safeguards in particular as regards the protection of personal data in the context of the third pillar. To this end, the EP urges the Council to adopt the Framework Decision on data protection in the third pillar as a matter of urgency. Furthermore, the EP reminds the Council that Member States and European institutions may call upon the expertise of the newly established Fundamental Rights Agency in order to protect the rights laid down in the Charter of Fundamental Rights and to investigate cases which have arisen in the field of cooperation in Justice and Home Affairs.

b. The Justice and Home Affairs Council of October 2008

The JHA Council held in Luxembourg on 24 October 2008 (devoted to EU internal security and judicial cooperation in criminal matters) more specifically addressed several aspects of the fight against transnational organised crime.

- ***Of greatest significance is the adoption of the Council Framework Decision on the fight against organised crime.***

The main purpose of drawing up a new Framework Decision was to replace the 1998 Joint Action, taking into account the following needs:

- harmonising the definition of offences and penalties as regards individuals and legal persons; attaching a specific offence to "directing a criminal organisation";

- determining specific aggravating circumstances (commission of an offence in association with a criminal organisation) and mitigating circumstances (reduced penalties available for those who assist the police with their inquiries);

- including provisions to facilitate cooperation between judicial authorities and coordinate their activities.

This Council Framework Decision therefore aims directly at adopting common legal definitions in the following areas:

- what constitutes a 'criminal organisation' and a 'structured association';

- the scope of the offences relating to participation in a criminal organisation; the penalties encountered and special circumstances that could reduce them;

- the liability of legal persons and penalties for legal persons;
- the scope of jurisdiction and coordination of prosecution.

- ***The establishment of a contact-point network against corruption is another noticeable element addressed during the JHA Council* of October 2008**

In June 2008, the European Parliament adopted a legislative resolution, amending the initiative by the Federal Republic of Germany (the Pirker report) with a view to encourage the adoption by the Council of a Decision on a contact-point network against corruption. The purpose of the German initiative was the establishment of an anti-corruption network made up of national contacts in each EU Member State. According to the initial legislative document (CNS/2007/0809: 19/07/2007) one of the main objectives of this network was to improve co-operation between national authorities and agencies. The network would consist of Member States' authorities and agencies charged with preventing or combating corruption. The European Commission, Europol and Eurojust would be fully associated with the activities of the Network. Among the few amendments presented in the EP position of June 2008, OLAF was included in the EU agencies as part of this network. The main tasks of the network were then presented to be the following:

- to act as a European forum for the exchange of information on effective anti-corruption measures;

- to encourage contact between members.

The JHA Council of October 2008 adopted the Decision on a contact-point network against corruption.

- ***The Council also agreed on the proposal for the establishment of a European Criminal Records Information System (ECRIS).***

This proposal is a follow-up to the draft Framework Decision adopted by the Council in June 2007 on the exchange of information extracted from criminal records between Member States of the European Union. The purpose of this Framework Decision is to ensure that a Member State is able to provide the judicial authorities of another Member State of the EU with information on the criminal records of its nationals. The ECRIS Decision aims in particular to ensure that information can be transmitted by electronic means, and it lays down the conditions and format for data exchange. Member States will therefore be fully responsible for the management of their own criminal records, but transfers of information will be facilitated by means of a common data exchange format.

2. Comments on the EU strategy against organised crime

Several comments can be drawn from an analysis of the most recent developments of the EU strategy in the fight against organised crime:

- the difficulty in reaching legal definitions on phenomena such as organised crime;
- the challenges in the field of judicial and police cooperation;
- the synergy between the EU and other international bodies.

a. The difficulty in reaching legal definitions on phenomena such as organised crime

As underlined in Part I, defining and criminalising organised crime is a legally complex task, as it is difficult to translate the multifarious activities of organised criminals into a legal norm providing a sufficient degree of legal certainty and precision, as well as what legally constitute criminal groups.

The adoption of the UN Palermo Convention of 2000 at the EU level led to calls to amend the Joint Action of 1998 in order to align EU law with the Convention. This has resulted in the recent adoption of a third pillar Framework Decision 'on the fight against organised crime'.[41]

- ***The 2008 Framework Decision 'on the fight against organised crime' builds upon the Palermo Convention[42] and repeals the 1998 Joint Action.***

It states that: [43]

- 'criminal organisation' means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit'; and that
- 'structured association' means an association that is not randomly formed for the immediate commission of an offence, nor does it need to have formally defined roles for its members, continuity of its membership, or a developed structure[44]

This is yet another attempt to provide a definition of organised crime.

- However, its **inevitably broad and flexible terms** (in particular as regard the concept of a 'structured' association and the degree of 'structure' required) **do not necessarily bode well for legal certainty**.
- Moreover, it is noteworthy that the Council maintained the Joint Action and Palermo model of giving Member States the **choice of criminalising *either* participation in an organised criminal group *or* conspiracy**, and (in another attempt to avoid a clash with domestic legal traditions) refrained from criminalising the *direction* of an organised criminal group[45] – the Commission has opposed both these developments. [46] Why?

The Framework Decision now includes detailed provisions on penalties (minimum/maximum of 2-5 years, and the commission of an offence within the framework of a criminal

41. Council Framework Decision 2008/841/JHA, OJ L 300, 11 November 2008, p.42.
42. Preamble, recital 6.
43. Article 9.
44. Article 1.
45. Article 2.
46. The Commission, joined by France and Germany, issued a statement attached in the text arguing that the Framework Decision does not achieve minimum harmonisation of acts of directing or participating in a criminal organisation on the basis of a single concept of such organisation and enables Member States not to introduce the concept of a criminal organisation but to continue to apply existing criminal law- see Council doc. 9067/06.

organisation is to be treated as an aggravating circumstance),[47] as well as standard provisions on liability of legal persons[48] and jurisdiction.[49] As with the provision on aggravating circumstances, provisions which may have a substantial impact on domestic criminal justice systems - especially in the light of the ECJ ruling in *Pupino* - are the provisions establishing mitigating circumstances[50] and relating to the absence of requirement of a report or accusation by victims to conduct investigations or prosecutions into organised crime.[51]

The Commission may have a point in criticising the maintenance in a harmonisation measure of two alternative options of criminalisation of organised crime:

- **This does not help to achieve legal certainty and creates a potentially very extensive scope of criminalisation of organised crime across the EU**. This is linked to the fact that both alternative offences are worded in very broad terms - the concept of a criminal organisation is very broad and vague and conspiracy does not have to involve the actual execution of a criminal activity.

- What is more worrying is that this may lead to considerable **diversity in implementation**, at a time when 'organised crime' is an offence for which dual criminality has been abolished under the mutual recognition instruments (including the European Arrest Warrant, the European Evidence Warrant and measures on freezing and confiscation of assets).

- As far as the national level is concerned, **the focus must be placed on how the EU and UN instruments are implemented and how the concept of organised crime is used in the national criminal justice systems**.[52]

- Moreover, the vague offence of organised crime is among the offences included in the **mandate of Europol and Eurojust** - which may be called to action for behaviour which is referred to as organised crime in one Member State but not in others

47. Article 3.
48. Articles 5 and 6.
10. Article 7.
50. Article 4.
51. Article 8.
52. Indeed it might be argued that 'organised crime' is a useful investigative tool, to the extent that it may serve to justify investigative/prosecutorial intervention, but the actual prosecutions are eventually focused on the specific criminal offences that the group may have committed.

b. Challenges in the Field of Police and Judicial Co-Operation

The question of the mandate and scope of action devoted to Europol and Eurojust is central to current efforts to enforce police and judicial cooperation at the EU level. Nevertheless, and as an addition to the previously underlined need to reach clear legal definitions in order to clarify their mandate, careful attention should be given to the existing and persisting problems encountered by these two agencies.

- ***The relation between Eurojust and OLAF***

Firstly, it is crucial to underline the relation between Eurojust and OLAF, which share similar competences in the fight against transnational organised crime.

Eurojust and OLAF were founded upon radical different principles (intergovernmental for Eurojust, supranational / European for OLAF), following a logic of institutional competition. This situation has important consequences on the actual relationship between these units. Beyond the legal settings and political declarations (including numerous declarations on the part of the European Commission) calling for a closer cooperation, there seems in fact to be a difficulty to cooperate. Both units are very keen on preserving their autonomy.

Moreover, legal dispositions on cooperation make the issue of exchange of information hinge upon the goodwill of the institutions. As part of the inter-institutional struggles at the European level, Eurojust and OLAF both try to assert their legitimacy as central actors in judicial cooperation. The creation, within these units, of departments dedicated to the development of collaboration has not altered this competition logic. In 2007 Eurojust registered only 4 demands from OLAF and only one meeting was held between both agencies.[53]

- ***The problematic relationship between the domestic and the European level***

The relations between European agencies, such Eurojust and Europol, and national Law enforcement bodies or judicial authorities have a direct consequence on the volume of cases treated by the European bodies. This dimension is essential for the development of the "training of judicial staff" program adopted to promote trust between institutions.[54] In spite of a constant increase in the number of cases registered since their creation, it seems that the relation with the national level remains very uncertain.

According to interviews conducted with French, Belgian, Dutch and Italian magistrates and members of national Law enforcement bodies, most of them remain, for various reasons, "alien" to European issues. For the majority, European issues are still very distant from their

53. Eurojust, annual report, 2007, p.23
54. JHA Council, 24 October 2008, p 22.

priorities, in particular because their daily investigations are not of a transnational nature. An obvious reason lies in the legal and linguistic barriers faced by national members.

- This issue of knowledge overlaps the whole European security domain. The posture of national officials therefore varies between learning and resisting. **Europe often appears as a remote and complex issue**.

It is also often difficult for magistrates and policemen to share their investigations and information. This exchange and cooperation appears even harder between two foreign Law enforcement systems.

- Mutual confidentiality is at the heart of the exchange of information between national and European authorities. The work of members of Eurojust and Europol is precisely to make national authorities aware of their existence. This objective accounts for an important part of the activity of Eurojust and Europol liaison officers. **In this context, their personal resources represent a decisive value**. The accumulation of a long experience within European or national authorities allows these actors to rely on multiple personal networks.

In the case of Eurojust and Europol, if the barriers are essentially located at the national authority level, it is essential to note that:

- prosecutors and liaison officers still depend on national authorities. For example, between 2002 and 2005, articles 6 and 7 of the Eurojust Framework Decision were used only twice. According to these articles, national members of Eurojust can send a request to national authorities, which are not inclined to open an investigation, to do so. It seems that **national members hesitate to use such a procedure in order to avoid creating conflicts with national authorities of their own country**. The use of this procedure could be considered by national magistrates as an infringement of their independence.

Mutual trust and the importance of **informal or personal relations are still privileged to improve the cooperation logic**. In this perspective, since 2007 Eurojust has decided to finance the travels of national participants who take part in coordination meetings in The Hague or elsewhere in Europe.

- ***Finally, the relationship between Europol and Eurojust is characterised by a form of competition that has consequences on their collaboration***

To a certain degree, a competition exists between the two institutions, essentially because of:

- an overlapping of tasks

- the institutionalization process which is currently structuring the European security environment[55]

In spite of numerous legal dispositions and political declarations calling for an intensified cooperation,[56] relations remain very distant at the institutional level.

- ***In this institutional context, the control of information is certainly one of the main issues between these two bodies.***

Statistics since 2004 regarding the exchange of information between both units are illustrative in this regard. In 2004, no demand was registered by Eurojust from Europol. In 2005, Europol issued 1 demand and received 1 answer. On the side of the judicial unit, Eurojust issued 8 demands and received 4 answers in 2004. In 2005, Eurojust issued 64 demands and received 52 answers. Nevertheless, recent statistics concerning the exchange between Eurojust and Europol as well as the joint projects seem to highlight a development in the cooperation movement. In 2007, a Europol-Eurojust working group was created on data analysis (AWF). Its mission is to examine the legal and practical problems that Eurojust faces concerning assistance in its competence scope. The number of cases treated by Eurojust and implying Europol increased drastically in 2007 (from 7 cases in 2006 to 25 cases in 2007). Finally, 12 coordination meetings between both units were organised in 2007.[57]

- ***Data exchanges and data protection***

In this context of competition, and given the lack of certainty concerning the scope of action of EU police and judicial cooperation agencies, the questions of control, but also of data availability and databases interoperability, become central. [58]

- As underlined elsewhere,[59] **these two aspects of the judicial and police cooperation are highly problematic**, at different levels: in addition to difficulties on the operational aspect (the supplementary work that will be needed, the heaviness of the management of data coming into the system and the time spent to deal with the other agencies' demands), and to the question of the role of Europol in the databases, the debate focuses particularly on reasons linked to the very legitimacy of the principle of availability and on its effects on civil liberties.

55. Bigo D., Bonditti P., Mégie A. *and al., The Field of the EU Internal Security Agencies*, Paris, L'Harmattan, (2008).
56. See *Agreement between Eurojust and Europol*, 2004.
57. Eurojust, annual report, 2007, p.23
58. On that matter, see previous notes written for the European Parliament on the topic: Mitsilegas V., « Police co-operation: what are the main obstacles to police cooperation in the EU » (2006); Bigo D., 'The Principle of availability of information' (2006).
59. Bigo D., Bruggeman W., Burgess P., Mitsilegas V., 'The principle of information availability'(2007).

- Those debates insist specifically on the **qualitative difference between data shared** by intelligence services and repressive authorities (police, customs, judicial bodies), for which eligibility in front of a court is not the same, and for which credibility and veracity depend on the conditions in which the information was obtained. In order to function, the principle of availability supposes that there is an agreement on the categories of authorities that will have access to these data.

The consideration for the establishment of a *European Criminal Records Information System* (ECRIS) opens up a further debate on data protection and the principle of availability. The latest Framework Decision on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters adopted in November, 2008, doesn't appear to be sufficient in order to guarantee the protection of personal data. [60]

- ***The need for safeguards for personal data***

As emphasised by the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament in its report, even if data exchanges are important tools to fight TOC at the EU level, the need for safeguards is also very strong in particular with regard to the protection of personal data in the context of the third pillar.

Before the Council of October 2008, the *European Data Protection Supervisor* (EDPS) adopted an opinion on the establishment of ECRIS[61] that showed concerns and promoted enhanced mechanisms for data protection. The EDPS, in particular pointed out that:

- additional data protection guarantees should compensate **the current lack of a comprehensive legal framework on data protection** in the field of cooperation between police and judicial authorities.

It therefore emphasised the following:

- the need for **effective coordination in the data protection supervision of the system**, which should involve authorities of the Member States, and the Commission as provider of the common communication infrastructure.

The modalities of the establishment of ECRIS should therefore be given full attention and follow-up. As suggested in the Newton Dunn Report, the *Fundamental Rights Agency* (FRA) should be mobilised to ensure that the protection of the rights laid down in the Charter of

60. Décision Cadre 2008/977/JAI du 27 Novembre 2008, *JO L 350/60*

61. 'EDPS Opinion on European Criminal Records Information System: need for solid infrastructure, quality of information and effective supervision', EDPS/08/9, 18/09/2008

Fundamental Rights are preserved and to ensure that guarantees regarding protection of personal data and privacy are provided.

c. The synergy between the EU and other international bodies

The EU strategy in the fight against organised crime is closely linked to international standards[62]. This is particularly true in the case of money laundering. As noticed in Part I, the EU strategy in this field has heavily relied on developments supported by the FATF.

- ***The Third Money Laundering Directive was justified as necessary to align the EU framework with the revised FATF standards.***

A number of challenges arise with regard to the regime introduced by the Third Money Laundering Directive. These involve in particular:

- The insertion of terrorist finance within the anti-money laundering regulatory logic.

Terrorist financing may involve **'clean' and not always 'dirty' money** (Mitsilegas, 2003b; Van Duyne, 2003), it may involve **small sums** (Levi, 2003), and it may involve **transactions outside the financial system** (Naylor, 2006). Furthermore, and as underlined by many scholars, the **current regulatory regimes and enforcement practices against terrorist finance are ineffective and counter-productive** (Birstecker and Eckert, 2007; Naylor, 2006; Passas, 2006; Wade, 2007). It appears that the approach used in the fight against terrorist financing produces the opposite of desired effects, including higher remittance costs, fewer options for remitters, unnecessary criminalisation of economic sectors and ethnic groups, lower transparency and traceability of transactions, alienation and mistrust between ethnic communities and authorities (Passas, 2006).

- The consolidation of the extension of anti-money laundering duties to the legal profession.

This may challenge fundamental fair trial rights and the administration of justice in Member States.[63] The delicate proactive role assigned to bankers is now extended to lawyers, accountants and real estate agents, known as 'gatekeepers'. Regarding lawyers, this not only has important privacy implications, but may also jeopardise the defendant's right to a fair trial (Mitsilegas, 2003).

62. It is worth noting that the relationship between the EU bodies is in constant flux, as demonstrated in the recently negotiated amendments to the Europol and Eurojust legislation.
63. Indeed the European Parliament raised such concerns very strongly in the negotiations of the 2nd money laundering Directive. See also the ECJ judgments in Case 305/05, 26 June 2007.

- Member States are asked to establish *Financial Intelligence Units* (FIUs) with specific tasks, and the units are given maximum powers of access to national databases.

In this maximisation, no data protection provisions accompany this maximum access. [64]

- From an institutional point of view, the increased use of Comitology to define and extend the scope of key concepts in the anti-money laundering enforcement field raises important questions

As indicated earlier (in Part I), Comitology matters include in particular clarifications of the technical aspects of definitions of concepts such as beneficial ownership, politically exposed persons, business relationship, and shell bank.[65] Yet, these concepts are central to the delimitation of the duties set out by the Directive in applying the FATF standards, and **their definition may have significant implications for the liability of the institutions and persons involved, but also for the fundamental rights of the individuals covered by these** (such as politically exposed persons).[66] Furthermore, the increased use of Comitology **limits scrutiny in the central processes of concepts elaboration**.

- Concerns are also raised by what can be called '**implementation fatigue**', with the Third Money Laundering Directive being adopted shortly after the expiry of the implementation deadline of the second.

Generally speaking, concerns should be raised on **the leadership role of the FATF**. The FATF is constantly criticised, not only for the orientations it promotes at the international level (as detailed above), but also for its lack of legitimacy. Indeed, the FATF suffers from a worldwide legitimacy deficit, as it is an *ad hoc* body consisting of 'rich' countries and not an international organisation.

- ***The EU's role in the field of corruption needs significant improvements***

It clearly appears that the EU follows the global trend that tends to maximise the fight against money laundering or terrorist financing, while being quite shy in the area of corruption for instance. The adoption of the network contact point against corruption, as well as efforts

64. Article 21. According to paragraph 3, Member States must ensure that FIUs have access, directly or indirectly, on a timely basis, to the financial, administrative and law enforcement information that they require to properly fulfil their tasks.
65. Article 40(1)(a).
66. In this context, a Commission Directive was adopted in 2006 laying down implementing measures as regard the definition of politically exposed persons and the technical criteria for simplified customer due diligence and for exemption on grounds of a financial activity conducted on an occasional or very limited basis (Directive 2006/70/EC, OJ L214, 4 August 2006, p.29).

made by the European Commission to understand the links between organised crime and corruption (as demonstrated in the Commission Staff Working Document of February 2008 on "An examination of the links between organised crime and corruption"), certainly constitute a step further in the EU strategy against corruption. However, as noted in Part I, while the EU has been extremely active in the adoption of anti-corruption standards with regard to the candidate countries wishing to become EU members, and with regard to the development of international anti-corruption standards, *internal* EU legislative action against corruption has not been as intense. **It may be time to rethink the Union's legislative approach against corruption in both the public and private sectors**. Closer attention should therefore be given to the Merida Convention that includes provisions against corruption in the private sector. Nevertheless, it is worthwhile noticing that the international community remains relatively discreet on that matter, especially when compared to the loud unanimity around terrorist financing and money laundering.

The silence over corporate crime is also striking at the international level. Recent examples (such as Enron, WorldCom) demonstrate that fraud and corruption can sweep through a number of industries, leaving thousands of victims with massive financial losses, as well as hundreds of indictments (Tillman, 2009) without having (almost) any consequences on white collars. As usefully reminded by some scholars, there are few legal constraints on the depiction of white-collar as 'organised' crimes: the EU and UN Transnational Organised Crime Convention 2000 definitions apply to a broad range of offenders and offences with quite modest thresholds (three or more participants), but the overwhelming social and police institutional construct of 'organised crime' remains of Mafia-type organisations, consisting stereotypically of social outsiders (Levi, 2008).

EU Official Documentation

Council Decisions

- Council Framework Decision on combating terrorism 2002/475/JHA , *OJ L 164,* 13 June 2002
- Council Framework Decision on corruption in the private sector, 2003/568/JHA, *OJ L192*, 31 July 2003
- Council Decision on the signing, on behalf of the European Community, of the United Nations Convention against Corruption 7984/05 and 5193/04, 10 May 2005
- Council Framework Decision on the fight against organised crime 2008/841/JHA, *OJ L 300*, 11 November 2008
- Council Framework Decision 2008/977/JHA on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters, *OJ L 350/*60, 27 November 2008
- Council Framework Decision on the European Judicial Network, 2008/976/JHA, *OJ 348/130*, 24 December 2008

Joint Actions

- Joint Action concerning a framework for the exchange of liaison magistrates to improve judicial cooperation between the Member States of the European Union, 96/277/JHA, *OJ L 105,* 27 April 1996
- Joint Action on making it a criminal offence to participate in a criminal organisation in the European Union', 98/733/JHA, 1998, *OJ L351/1*

Directives

- Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005, *OJ L309*, 25 November 2005

Decisions and regulations

- Decision on Financial Intelligence units, 2000/642/JHA, *OJ L271*, 24 October 2000
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- Convention against corruption involving officials, *OJ C195*, 25 June 1997

Reports

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