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**EUROPEAN POLICING STRATEGIES AND  
TRANSNATIONAL CRIME:  
FROM GOVERNANCE TO INSTITUTIONAL DEVELOPMENT  
AND OPERATIONAL STRATEGIES**

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**ABSTRACT**

Counter terrorism is now a 'major policy objective' of the Union. September 11<sup>th</sup> galvanised the European Union and its Member States into a significant programme of police and judicial policy development, operational action and institution building. But has this resulted in a genuinely enhanced capacity to act dynamically against the transnational crime affecting the European Union? The chapter examines the development of the criminal police cooperation from 1993 to the current post-9/11 context. During this period the demonstrable scale of the task has been immense with increased expectations and demands of accession of ten new members states to the Union whilst attaining the treaty objective of establishing an EU Area of Freedom Security and Justice. Arguably, the European Union's response to September 11 transformed the legislative and institutional order within the Union, but also secured the first stage of its external vision to significantly advance a justice and home affairs external relations strategy not only with the USA, but with other states and international organisations. This fillip to third pillar integration has been attained despite the intergovernmental governance regime within the third pillar and consequent grinding pace of policy formation, institution building and legislative development, that has been characteristically punctuated by infrequent advances. A discontinuous pattern of development has underscored the weaknesses of the third pillar governance regime providing succour to those advancing the radical changes set out in the EU's draft treaty developed by the European Convention on the Future of Europe. In considering these issues, attention will be paid to four areas: the development of strategic guidance over the third pillar; the Council's efforts to improve 'third pillar working methods'; institutional development in the criminal police and judicial spheres; and finally the development of operational capacities within the European Union in tackling transnational crime.

## I. Introduction

‘Few events have galvanised the international system into action so completely in so short a time as the horrific attacks of 11 September in the United States. In the immediate aftermath, the Union expressed its full solidarity with the United States and its support for the action, including military action, which it was taking. The fight against terrorism is more than ever a major policy objective of the European Union’. (Presidency of the Council of the EU, 2001b: para.1)

The elevation of counter terrorism as a ‘major policy objective’ of the Union was a key event in the European policing context. September 11<sup>th</sup> launched the EU and its Member States into a significant programme of criminal police and judicial policy development, operational action and institution building. The speed and cross-pillar breadth of the EU’s response following the attacks was remarkable given the discontinuous pattern of crises and institutional inertia that has characterised EU Justice and Home Affairs (JHA) cooperation since its inception. Despite the rhetorical reference to September 11<sup>th</sup>, many of the measures recently achieved were set out at a European Council summit in Tampere in 1999. Given this, a key consideration for any analysis of the effectiveness of European policing strategies is whether the EU’s response to September 11<sup>th</sup> is an indicator of the same pattern of discontinuous development, or a genuinely enhanced capacity to act dynamically against the transnational crime affecting the EU – one that will be sustained through the challenge of the 2004 expansion of the EU to twenty-five Member States.

The ratification of the *Treaty on European Union* (TEU) in 1993 created what were to be Byzantine and fluid arrangements for the EU’s third pillar of JHA cooperation. Initially, most Member States saw JHA as tangential to the mainstream integration project of economic and monetary union with the third pillar’s intergovernmental features resting on rules of unanimity and power laying firmly in the hands of Member States, not the Union institutions

of the Commission or the European Parliament. Throughout the 1990s the pace of effective JHA integration<sup>i</sup> was unsurprisingly at that of the 'slowest' Member State despite a range of 'pushes' (examined below) and in particular the significant advances achieved in the *Treaty of Amsterdam*. The demonstrable scale of the task, the increased expectations and the demands of Accession of ten new Members States to the Union, is huge in attaining Amsterdam's treaty objective of establishing an Area of Freedom Security and Justice (AFSJ). By 2001 major elements of the vision of Tempere of putting into place the AFSJ lay dormant. Arguably, the foundering vision was rescued by the Member States determination to respond to the attacks by Al Qaeda in America - the EU's response to September 11 transformed the prospective legislative and institutional order (den Boer, 2000: 218-222) and extended the practical breadth of European policing strategies in integrating JHA with action in the spheres of foreign policy and within the financial system in tackling terrorist financing (Council of the EU, 2002a; European Council, 2002: Annex V). As den Boer and Monar state, 'September 11 must be regarded as the first truly 'cross-pillar' test of the Union's role as a security actor' (2002: 11).

This chapter will show that the development and practical realisation of EU policing strategies against transnational crime has been slow and cumbersome until affected by specific 'pushes', key events or crises. A discontinuous pattern of legislative, institutional and operational development has underscored the weaknesses of third pillar governance, providing the case for substantial change, reflected in the draft *Constitution* being considered by the Heads of State and Government of the EU (European Convention on the Future of Europe, 2003). Even after the reforms of the *Treaty on European Union* brought in by the *Treaty of Amsterdam*, the domain of criminal police cooperation retained strong intergovernmental features, with rules of unanimity in decision-making undermining

ambitions to what could be agreed and realistically achieved by all – the lowest common denominator. Approaching a period of major expansion in membership of the Union and the development of a third pillar JHA External Relations dimension, the need for a major overhaul of the third pillar was a key theme of the European Convention on the Future of Europe and its resultant draft *Constitution*. Secondly, the post-September 11<sup>th</sup> impetus for EU-USA cooperation and international cooperation against terrorism has further enhanced the importance of the External Relations aspect of the EU's approach to transnational crime, the agreements between the EU and the USA on extradition and mutual legal assistance being the most prominent.<sup>ii</sup> The scope and impact of these agreements are a key dimension in the examination of European policing strategies as these set out prospective parameters of the EU's global response in effectively countering transnational offending and organised crime.

The paper will examine the EU's ambitions to develop effective policing strategies to combat serious cross-border and organised crime affecting the EU. Achievement relies upon operationalising the ambitions in the new EU institutions of Europol and EuroJust to deepen police and judicial cooperation in criminal matters against organized crime and cross border crime in the global context. In considering this, attention will be paid to three areas: the development of strategic guidance over the third pillar of justice and home affairs cooperation and its 'working methods'; third pillar institutional development, in particular in the criminal police and judicial spheres; and finally the development of operational enforcement capacities within the EU in tackling transnational offending and organised crime.

## **II. Third Pillar Governance and External Relations: developing strategies to counter organised crime**

The development of third pillar governance since 1993 can be seen as a limited number of integration phases or ‘pushes’ where treaty changes or Presidency initiatives have overcome legislative blockages. During this period many of the Council Presidency initiatives have been the most ‘politicised’ attempts to move the Union forward in the field of JHA, the stimuli often being unforeseen ‘events’, with the EU’s response to September 11<sup>th</sup> (examined below) being the latest. There have been three main ‘pushes’ (prior to the EU’s response to September 11) that have affected third pillar governance. The first was the decision, anticipating ratification of the Maastricht *Treaty on European Union* (TEU), of creating the original formal EU intergovernmental<sup>iii</sup> cooperation machinery for police, customs and immigration services in 1992. The pressure for such change came from the abolition of internal border controls under the terms of the *Single European Act* and realisation that security and law enforcement coordination across a range of criminal investigation and border control agencies was critical to secure the ‘external frontiers’ of the Union and to maintain the perceived levels of internal security (Home Affairs Committee, 1990). The ratification of the TEU in November 1993 formalized a relatively incoherent span of policy fora into a hierarchical and more transparent system of governance (Hayes-Renshaw & Wallace, 1997: 94) but fractured by the three ‘pillars’ – the community method within the EC treaties (first pillar) and intergovernmental cooperation within the ‘Common, Foreign and Security Policy’ (second pillar) and Justice and Home Affairs (third pillar). This established a formal framework for EU cooperation and a justiciable legal basis for international agreements between the Member States of the EU (Art.K.6). For the inaugural third pillar, the model was strictly intergovernmental, reliant upon unanimous agreement, with an attenuated role for the

Commission and no meaningful practical role for the European Parliament, let alone national parliaments, in the scrutiny of legislative initiatives (Art.K.11).

This new policy domain of JHA cooperation was capped by the collective political authority of the justice and interior ministers from the Member States in a new JHA Council. Whilst this seemingly moved away from an inchoate patchwork of informal cooperation for a pre-dating the TEU the arrangements for EU cooperation proved to be disappointing. The early decision-making processes of the third pillar were characterised by tortuous negotiations and extended delays in drafting two keys instruments, the *Europol Convention* and the *Convention on Mutual Legal Assistance*. Decision-making based on unanimity principles resulted in a lack of agreement on the appropriate role of the European Court of Justice, the inability to agree uniform standards of data protection, the demand for meaningful external accountability mechanisms, and ultimately no common view at which way Europol should develop in the future.<sup>iv</sup> Two years on, the Council's own assessment accepted that the system of JHA governance 'has proved very cumbersome and has slowed down the decision-making process' (Council of the EU, 1995: 17). The growing crisis in third pillar governance was keenly illustrated by the slow development of legislative measures that consistently foundered upon the unanimity requirement of the system of intergovernmental cooperation (TEU, Art. K.4.3), but was exacerbated by the disruption to JHA cooperation caused by the UK's obstructionism during the BSE crisis (Statewatch, 1996), and its ideological predilections against the European Court of Justice (Duff, 1997:186-187). It was widely seen that a flawed system of JHA governance had encumbered Member States where a single 'Euro-skeptic' administration could exploit the weaknesses of intergovernmental cooperation, prevent agreement and ultimately the attainment of the objectives of the Union (Art.K.1).

The review of the TEU (ultimately informing to the treaty changes agreed within the *Treaty of Amsterdam*) provided the opportunity for reappraisal (Council of the EU, 1995). The *Treaty of Amsterdam* introduced a revised legislative process with a number of attractive innovations that forged links between the JHA Council with other EU institutions, including a formal consultation role for the European Parliament (Art.39.1). The political will to improve what had become an embarrassing EU policy process spurred the Irish Presidency in the latter half of 1996 to initiate change in advance of the *Treaty of Amsterdam*. The second policy push was the Irish Presidency's response to the seemingly domestic issue of the assassination of an investigative journalist Veronica Guerin at the start of the Presidency period (International Press Institute, 2000). That event spurred the Irish Presidency to promote domestic legislation within the context of broad-based EU action against 'organised crime', the creation of the EU's first JHA High Level Group (on organised crime), the subsequent EU *Action Plan Against Organised Crime* (Norman, 1999; 2001: 186-8) with its enhanced focus on the achievement and implementation of agreed policy outcomes. This sustained Irish Presidency initiative established the institutional space for the General Secretariat of the Council, servicing national member States cooperating in the Council of the EU, to develop ongoing specific expertise in the field with the seconding of 'eight national experts and practitioners' (Council of the EU, 1997: 6) thereby providing the technical prerequisites for increased continuity between, and support for, the rotating Presidencies – a role performed by the Commission under the first pillar.

Crucial to the success of this second push by the Irish Presidency was the effective de-politicisation of policy formation, legislative development and institutional construction in the decisive move to selective horizontal policy integration, underpinned by the informal devolution of executive responsibility to a number of key 'expert' or 'High Level' groups.

This provided for the first time strategic orientation to the third pillar, but at the operational level also ensured concrete action on a wide front. The 1996 Irish Presidency focus on action against ‘organised crime’ was key to changing third pillar governance and gained high-level endorsement at the European Council (Dublin II) in December 1996. The initiative circumvented the problematic third pillar structures in creating the ‘High Level Group on Organised Crime’ - the temporary policy ‘cement’ for the coordination of JHA policy development and implementation across the three pillars.

The Council’s review of the effectiveness of the *Action Plan on Organised Crime* (updated at Vienna in December 1998) acknowledged that ‘the Plan of Action helped to create the political and professional climate required on both the EU level and the national level to take and implement the necessary decisions’ (Council of the EU, 2000:2). The expedient corralling of a wide range of stalled legislative initiatives in the ordinary criminal police and judicial cooperation sphere in terms of concerted EU action to combat organised crime was a deft Presidency ruse that assuaged the anticipated domestic political opposition to deepening JHA integration and brought much-needed strategic direction to the JHA Council in the *Action Plan’s* fifteen Political Guidelines. The JHA Council sanctioned a successor to the High Level Group, the Multidisciplinary Group (MDG) on Organised Crime, in July 1997 providing for a continued focus on strategy and its implementation. The MDG also rapidly developed a close working relationship with the ‘Group of Eight’ (or G8) Senior Experts Group on Transnational Organised Crime facilitated by the UK’s concurrent Presidency of both the EU and the G8 (Norman, 1999: 110-14; Wrench, 1997). Focusing on ‘transnational organised crime’ and later ‘cybercrime’ the resulting overlapping networks of state actors ‘possessing specialist skills and expertise’ empowered within the transnational context of EU-G8 (Norman, 1999). Remarkably, some of the EU ‘working methods’ during this interregnum

entailed presentation of G8 agreements at JHA Councils for adoption, bypassing the third pillar policy-making processes entirely (*Ibid.*: 113). This period can be seen as the start of the EU's nascent external relations ambitions in JHA, that were utilised to full effect in coordinating the negotiating position of the EU Member States in the drafting of both the UN Convention and Transnational Organised Crime and the Council of Europe's Cybercrime Convention (Norman, 2001).

This period can be viewed as a development from the formal intergovernmentalism of the third pillar to a reliance on mechanisms that sought to enhance effectiveness and efficiency of the JHA policy domain and thereby its 'output legitimacy' (Horeth, 1999: 251). Further, these were linked in a more transnational orientation towards the globalised crime concerns rhetorically keyed into the Trans-Atlantic Partnerships with the USA and Canada, to the G8 and to a lesser extent the Council of Europe (Norman, 1999:114-17). This period, mediated by the Irish then UK Presidencies, was the precursor to the development of a more systematic and graduated network of transnational relationships that have moved from informality to more a formal basis in the first JHA External Relations strategy document (Presidency of the Council of the EU, 2000). This developing external orientation to European policing strategies complemented the 'third push' that significantly broadened the scope of the EU JHA integration vision. Following ratification of the *Treaty of Amsterdam* a special Justice and Home Affairs European Council (Tempere) in October 1999 focused upon cross-border crime issues. Given the above Council mechanisms focused upon organised crime the overall coherence of third pillar policy development, implementation and institution building was now underpinned by two parallel tracks or foci of activity, that on organised crime on the one hand and an Area of Freedom, Security and Justice on the other (Monar, 2001:758-60). In reality, there was significant overlap in the criminal police and judicial cooperation

components of the *Action Plans*, ultimately resulting in a decision to merge the twin-track approach with a new *Strategy for the Beginning of the New Millennium* published in May 2000. In common with the original High Level Group's approach, this sought to provide overall strategic coherence to the Union's strategy with a series of Political Guidelines, dovetailed to specific recommendations with deadlines and institutional responsibilities clearly delineated. But the Commission's new found cross-pillar role under the provisions of the *Treaty of Amsterdam* introduced another pressure point to ensure Member State implementation and achievement of JHA policies. Most visible in terms of examining improvements to the effectiveness of governance is the transparency of the six-monthly Commission 'Scoreboard' of measures outlining progress made in attaining the 'Area of Freedom, Security and Justice' (where it is responsible), and that made by the Member States (Commission, 2002a).

The above analysis of the dynamics of third pillar governance since 1993 has indicated a number of general themes that have affected policy formation, institution building and finally the development and national implementation of legislative instruments. These issues have been considered by the Union in general, stimulated by the Commission's White Paper on *European Governance* (Commission, 2001a). Surprisingly, the White Paper only tangentially considered third pillar governance issues (Curtin, 2001) despite the Commission's shared right of initiative (with Member States) under Titles IV and VI. Nevertheless key issues were raised (predominantly to be resolved by the Council) including strategic guidance for the third pillar, consultation in legislative processes and the discipline of an 'impact assessment' for legislative proposals. Clear strategic guidance to the JHA Council on the Union's ultimate integration ambitions has recently come to the fore provided first by the High Level Group and latterly in the ambitions in the *Treaty of Amsterdam*. Contrary to the Second Pillar (TEU,

Art. 13) the European Council is not formally cited in the provisions of the TEU and thus does not have a routine obligation to provide strategic guidance to the third pillar/JHA Council (Curtin, 1993: 27; O’Keefe, 1995: 895-7). This has placed greater significance upon the role of the rotating Presidency, most particularly in the phase prior to the *Treaty of Amsterdam* when the Commission had limited powers of legislative initiative (excluding police and judicial cooperation in criminal matters and customs cooperation, TEU, Article K.2). The pitfalls of a reliance upon variable Presidencies, with again no treaty-based authority to represent or lead Member States in the third pillar (O’Keefe, *Ibid.*) was recognised implicitly in the second Presidency push. That Irish initiative to mandate a High Level Group on Organised Crime was an approach elevated after ratification of the *Treaty of Amsterdam* in the special Tempere European Council setting out how to attain an Area of Freedom, Security and Justice. Elsewhere it has been noted that this ‘de-politicised’ and thereby facilitated EU action (Norman, 1999: 106-10). As Curtin further highlights, this approach has continued, exacerbating the perception of diminished accountability and reduced transparency, not something the *European Governance* White Paper was overly concerned about. For Curtin,

... an increasing number of (sensitive) tasks of public administration are arguably carried out by a growing number of independent bodies such as Europol, pro-EuroJust, etc. ... there is a marked growth in position and tasks and influence of informal committees with no legal basis...[and where] the General Secretariat of the Council exercises power comparable to a public administration (Curtin, 2001).

The latter development of third pillar governance chimes with Anderson & Burns’ analysis of the EU as ‘an instance of post-Parliamentary governance’ (1998: 227) where ‘negotiations,

policy-making and implementation takes place in thousands of specialised policy settings’ (*Ibid*, 229) and in this case in an increasingly transnational context. This places greater weight upon political executives to provide strategic guidance (and *de facto* legitimacy), which is why the absence of a routine broad-based strategic orientation to the European Council was for the Commission, an identified area for further development in the governance of the Union (Commission, 2001a).

Legislative blockages were seen as an outcome of the problematic operation of the third pillar, an area where in the Commission ventures a position in its follow-up proposals on ‘better lawmaking’. These sought to

... form a whole centered on *the basic lawmaking framework of the European Union*, including the way EU law is transposed into national law. They are designed to apply to all the EU’s regulatory areas – not just the Community “pillar”, but also the third “pillar” that relates to justice and home affairs, bearing in mind the institutional framework and the decision-making arrangements proper to each “pillar”. (Commission, 2001b: 2).

Further, the Commission states that ‘Member States should also carry out consultations and impact assessments when they exercise their right of initiative and make legislative proposals under Title VI of the Treaty on European Union and IV of the Treaty establishing the European Communities’ (Commission, 2002c: 17-18). This focus, more on Council working methods, may well reduce the number of proposals (that have little hope of agreement) if it is the case that impractical proposals have added to third pillar legislative blockages. In responding the Commission’s proposals the European Council lent its support to the

development of an inter-institutional agreement by the end of 2002 (European Council, 2002a: 3) that could *potentially* draw upon the Commission's 'better law making' proposals on consultation and the use of impact assessments within the third pillar.

By the time of the June 2002 Seville European Council it was clear that the Council's own efforts to reform its institutional arrangements in advance of enlargement (European Council, 2002: Annex II) had been accepted with immediate effect. For the European Council this entailed a 'substantial change to present practices in the direction of enhancing the efficiency of the institution' (European Council, 2002: 2). Specifically the reforms included the development of a 'multi-annual strategic programme' by December 2002 dovetailed to a 'annual operating programme of activities' for each of the Councils but, crucially, agreed by the next two Presidencies. Therefore strategic guidance to the third pillar was initially found wanting and a range of internal and external JHA issues have complicated the task. The increasingly cross-pillar nature of the EU policing and security, the shared right of initiative for both the Commission and the Council, prospective enlargement of the Union in 2004 and the developing External Relations dimension to JHA where long-term focused political and administrative action is required, have all had a dynamic and fluctuating impact upon the 'vision' of the EU's third pillar. But it is the anticipated numerical pressures of enlargement and continued unanimity requirements that were focusing the third pillar institutions on reform immediately prior to September 11<sup>th</sup>.

### **III. Institutional Development and Operational Capacities**

Since the ratification of the TEU in November 1993 the development of operational capacities to achieve EU strategies to counter cross-border and organised crime has been focused upon the European Police Office or Europol. Europol gained a formal place as a police intelligence

agency within the EU's institutional architecture in the *Treaty on European Union* (Art. K.1 (9)) and as such was to become the first EU enforcement body within the third pillar. These ambitions took some time to realize. First, it was more than three years before the Council could agree in July 1996 on a full legal basis for the organisation (Council of the EU, 1995). Second, the Member States' national ratification proved to be an extended process<sup>v</sup> - it was an additional three years before Europol was officially launched in July 1999 (Europol, 2003). Europol's possible competences were outlined within an Annex to the Convention listing crime categories, which have only gradually been activated. It was only in the immediate aftermath of September 11<sup>th</sup> that Europol's competence was activated in all remaining areas on 1<sup>st</sup> January 2002 (Council of the EU, 2001b). In 2003, Europol's five hundred staff helped to ensure it performed five main roles: acting as a central point for EU Member State's exchange of criminal information; operational intelligence analysis with a central analytical database; conducting strategic intelligence analysis; spreading best investigative practice; and finally, supporting transnational operations conducted by the Member States (Europol, 2003: 1)

In examining Europol's contributions to European policing strategies, particularly against organised crime, it is important to reflect back to the period of the *Single European Act*, when the policing and security impact of the abolition of internal border controls first focused attention on the EC's external borders, but also rapidly upon deepening cooperation and EU-wide criminal investigation capacities to overcome the perceived 'security deficit'. This meant that efforts to enhance police cooperation between the Member States were directed both at the effectiveness of border controls to create a 'hard outer shell' and the detection, surveillance and prosecution of transnational offenders. Therefore Europol was to 'add value' to the intelligence effort of each Member State, pooling intelligence and information for

Europol's intelligence analysts to work on. In addition to this central point for intelligence analysis, Europol was a convenient work site for the coordination of operations, working principally through National Units in each Member State via the seconded Europol Liaison Officers based at Europol's Headquarters in The Hague. All Member States are to have a single National Unit and be represented by 'delegations' of Liaison Officers (Council of the EU, 1995) comprising the full range of national enforcement agencies for the country concerned linked to their Europol National Units. The UK officers are drawn from UK police, Customs, Immigration Service and the Secret Intelligence Service who liaise directly with the designated national unit – the International Division of the UK's National Criminal Intelligence Service (NCIS, 2002: 35-36).

Europol became a key site for further EU criminal police development after September 11<sup>th</sup>. Its budget increased by 50% in 2002 reflecting the increased demands from the creation of the EU Counter Terrorist Task Force, the Counter-Terrorist Analytical Unit, the enhancement of computing facilities and the deployment of Europol officers, for the first time, in other countries. Reflecting both the focus on EU-USA cooperation as well as the need to establish a network of information exchange and operational liaison mechanisms Europol opened liaison offices in Washington, USA and at Interpol's Headquarters in Lyon, France (Monar, 2003: 128; Europol, 2003: 2). This was made possible by the joint agreements between Europol and the respective third countries and organisations. By the end of 2003 there were three agreements in force with International Organisations<sup>vi</sup> and eight with third countries<sup>vii</sup> with another thirteen being negotiated (Statewatch 2003). Extending Europol's intelligence and information network is a key element to increasing its effectiveness, but the Council of the EU also agreed at the end of 2003 to allow Europol to participate in specific operations within the agreed EU framework of Joint Investigative Teams comprising two or more Member

States (Monar, 2003: 128). This is regarded as key to increasing the EU's operational capacities against organised and transnational offending particularly where it is perceived that some Member States are not performing at optimum levels of effectiveness, though the arrangement clearly falls short of the initial ambitions of some Member States in the early 1990s of a Euro-FBI with full operational powers, it provides a dynamic and operationally focused law enforcement structure at the EU level.

To tackle organised crime effectively attention also needs to be focused upon judicial cooperation in criminal matters between the Member States (and now third countries). In 1998 a decentralised European Judicial Network was established to improve judicial procedures between Member States, to provide expertise information to local judicial authorities on other Member States and to spread good judicial practice in mutual legal assistance (Council of the EU, 1998). The gathering and transfer of evidence, offenders and witnesses is key to successful prosecution of the serious crime within the EU and the deepening of such cooperation was recognised in the *Conclusions* of the 1999 Tampere European Council that ambitiously announced plans for a judicial cooperation unit, EuroJust, to work alongside Europol to tackle organised crime affecting the EU as well as the effective abolition of extradition between Members States, alongside a strategy embedded in mutual recognition of judicial decisions. Mutual recognition implies a programme of 'harmonisation' of sanctions and a detailed EU legislative programme in the criminal policy sphere. Progress on deepening integration in judicial cooperation criminal matters was slow despite early 2001 agreement on a *Programme of measures to implement the principle of mutual recognition of decisions in criminal matters* (Council of the EU, 2001a) – that is until the September 11<sup>th</sup> attacks in the USA (Monar, 2002: 129-32).

Overnight the domain of EU counter-terrorist cooperation became one of the most high profile areas of cooperation between EU Member States significantly deepening judicial cooperation in criminal matters and enhancing practical policing capacities. Within days of George Bush declaring ‘war on international terrorism’ the Commission prepared two key proposals on *Combating Terrorism* setting common EU definitions of terrorist offences, and the *European Arrest Warrant* effectively abolishing extradition between EU Member States (Commission, 2001b; 2001c). The JHA Council met on the 20<sup>th</sup> September to agree the ‘EU counter terrorism roadmap’, endorsed on 21<sup>st</sup> September by a special European Council meeting. The EU’s actions were a major step-change in national decision-taking. The JHA Council *Conclusions* of the 20<sup>th</sup> September 2001 set out a far-reaching ‘roadmap’ of EU action in four main areas: counter-terrorism within the EU, cooperation between EU police and intelligence agencies, the financing of terrorism and lastly EU-US cooperation (JHA Council, 2001). The roadmap is continuously updated<sup>viii</sup> with allied initiatives and actions, recording progress made by the EU institutions and the Member States (Presidency of the Council of the EU, 2002).

In the operational context the EU responded both to early indications of European links to the al-Qaeda terrorist suspects, as well as to ambitious plans to secure unanimous agreement on the replacement the current extradition arrangements between EU Member States with a ‘European Arrest Warrant’ (by 7 December 2001). Further, ratification of two EU extradition conventions<sup>ix</sup> (by 1<sup>st</sup> January 2002) and agreement on ‘common definition of terrorism and penalties’ (JHA Council, 2001) adopted on 13 June 2002 (Presidency of the Council of the EU, 2002: 13) ensure an EU-wide definition of terrorism provided for the facilitation extradition of suspects between EU Members States. The EU extradition conventions of 1995 and 1996 demonstrated how implementation of EU conventions has been problematic with

extended delays in securing national ratification. On September 11 only two thirds of Member States had ratified both, but by July 2002 progress had been made with thirteen Member States ratifying both, with France and Italy still outstanding on both conventions. These conventions have now come into force between those ratifying Member States who ‘made a declaration to that effect’ (*Ibid.*). Since the roadmap was first agreed this measure has been coupled with ‘mutual recognition of measures on the taking of evidence’ in the electronic sphere (Presidency of the Council of the EU 2002: 14).

The most significant boost to third pillar institution building within the ‘roadmap’ was the commitment to gain agreement of the full launch of EuroJust (JHA Council, 2001). In practice it was July 2002 before rules of procedure and agreement on Community funding had been settled (Presidency of the Council of the EU, 2002: 12). Comprising essentially of a single representative of each Member State, EuroJust is to provide immediate legal advice to investigators, prosecutors and judges, assist in requests for international judicial assistance and liaise with the EU’s anti-fraud Office on prosecutions (Council of the EU 2002e). The Commission is fully associated with the work of EuroJust that can act in a number of ‘formations’. These are as a whole (‘College’), between two or more Member States representatives or with just one Member State representative providing assistance (*Ibid*; Monar 2003: 127). Key to the enhancement of operational capacities is that the fact that EuroJust has been empowered not only to work within Joint Investigation Teams, but also to lead a Team and ask a Member State to launch an operation (but not require them). This allows EuroJust to provide immediate operational legal advice to law enforcement agencies whilst maintaining an index of investigations and exchange data with international organisations and third countries (Council of the EU 2002e).

In the key area of EU-US relations the roadmap sought to significantly enhance the policy cooperation within the 'Trans Atlantic Dialogue' initiated in 1995 (EU-USA, 1995). JHA cooperation has always been a feature of the (confidential) EU-USA Transatlantic Dialogue but now there is a clearer focus upon operational police and judicial activities. This has resulted in US participation in EU Counter-terrorist Task Forces and the counter-terrorist analytical unit established at Europol, enabling intelligence gathering, analysis and coordination of police operations, as well as extended contacts with EuroJust. The immediate exchange of intelligence with the US authorities 'informally' was requested anticipating formal agreements on information exchange (JHA Council, 2001) with the first on strategic intelligence exchange with Europol being signed in December 2001 and extending in the event beyond terrorism to serious crime and coupled with subsequent agreement on two key legal agreements. First, a joint agreement on the joint exchange of intelligence that included personal data (European Council, 2001: 1-2) being approved at the November 2002 JHA Council following discussions with the Joint Supervisory Body responsible for overseeing data protection issues at Europol (Council of the EU, 2002a: 25). Secondly, complementary agreements based on Article 38 of the TEU on EU-USA extradition and mutual legal assistance, the first of its kind, again extending beyond terrorism to serious crime in general (Statewatch, 2002). The latter was initially regarded as controversial given the death penalty in the USA but was again envisaged at Tampere (European Council, 1999: para.60). In the event agreement was attained on these significant EU-USA agreements in July 2003 (Council of the EU, 2003).

The development of practical operational capacities can now be seen in the sustained post-September 11 'push' to deepen EU police cooperation. Reflecting back, it can be seen that the

1995 *New Transatlantic Agenda* was a wide-ranging cooperation agreement accompanied by a detailed *Joint Action Plan*. The Plan details measures including ‘establishing interim cooperative measures between competent US authorities and the Europol Drugs Unit and [to] begin implementing the possibilities provided for in the convention on EUROPOL’ (EU-USA, 1995: 24). By 1996 the JHA Council was considering a formal Protocol entitled ‘Access of the United States to the data held by the Europol Drugs Unit’ (Statewatch, 1996: 2) but no agreement was ever attained. After September 11<sup>th</sup>, the operational orientation is manifest: the EU Task Force on Counter Terrorism established operating within Europol, and with American officers based there; and the recent agreement of EU Member States to form Joint Investigation Teams for specific operational projects, now with a fully fledged EuroJust, can also be extended to the USA following agreement on the EU-USA Mutual Legal Assistance treaty.

The extension of legal and investigative powers within the counter-terrorism roadmap is great and it’s seen above that many of the ambitious political agreements have resulted in successful legislative outcomes in 2002 and 2003 but in the broad sphere criminal police and judicial cooperation. These initiatives have significantly deepened integration on mutual recognition in the ‘security’ aspects of the EU’s creation of an Area of Freedom, Security and Justice (Monar 2000: 140-41; Grabbe, 2001: 73-75) and also transformed the EU’s JHA External Relations vision into an increasingly practical reality between the EU’s ‘privileged partners’, its near neighbours and its trading partners. To achieve the above outcomes the Union has required significant cross-pillar coordination – by the General Affairs Council - and the high political profile of the contemporary counter-terrorist context has provided the EU with the facilitative environment to attain what were, to a high degree, pre-existing visions, plans and objectives in the EU’s policing strategies set out in the 1997 *Treaty of*

*Amsterdam* and the Tempere European Council on JHA.

## V. Conclusion

Developing European policing strategies against transnational and organised crime continues to be a key challenge for the Union. The period after September 11<sup>th</sup> can be seen as a period substantial institutional and legislative development. However, it was seen above the majority of the recent achievements, particularly within the criminal judicial sphere, were set out at the Tempere Summit in 1999. A key factor in the analysis of the pattern of development since 1993, is why the governance of the third pillar was so problematic, and whether the EU is now in a position to make continued but sustained progress in the implementation of European strategies to counter transnational and organised crime.

Prior to September 11<sup>th</sup> the pace of JHA integration in general was slow, with a number of major breakthroughs evident. The initial formalisation of JHA police, customs and immigration cooperation was a key starting point, but the initial ambitions, for example in Europol, proved to unobtainable. 1996, with the Irish Presidency push on organised crime, proved to be a major accelerator, which was to some extent sustained in the *Treaty of Amsterdam*. However, implementation of the latter's Area of Freedom Security and Justice (AFSJ), proved slow, resulting in the most high profile EU event for JHA – the Tempere Summit. The *Conclusions* of Tempere demonstrated that the Heads of State had learnt the lesson of the Irish Presidency - in corralling necessarily detailed legislative initiatives within an overall strategic plan to tackle organised crime, and after Amsterdam in planning the attainment of the AFSJ. Further, it was also clear that the EU policing strategies could not be effective in tackling transnational offending *into* the Union, if Europol's reach could not be

developed to other third countries and major international criminal justice organisations. The developing External Relations strategy in justice and home affairs, pushed to the fore with the Irish and subsequent UK Presidencies in 1996-7, is a precursor to the major breakthroughs in the post-September 11<sup>th</sup> context. Major operational police and judicial engagement now exists between the EU and an important third country, in this case the USA, with agreement on mutual stationing of liaison officers, an extradition agreement, mutual legal assistance agreement and the USA's prospective involvement the new Joint Investigation Teams. The contemporary EU-USA criminal police and judicial relationship can be regarded as one indicative thread of the web of global relationships that will be required to attain effective EU policing strategies against transnational and organised crime.

The assessment of whether the EU can sustain this progress is predicated upon an assessment of third pillar governance. Is it sufficiently functional to allow continued development? Post-1996, it was seen that Actions Plans, deadlines and Commission and Council monitoring of individual Member States' obligations to implement policy and legislative agreements are all contributing to the effectiveness of the governance regime. Further, the commitment to multi-annual strategic planning of work, spanning a number of Presidencies, is in place – anticipating key reforms in the draft *Constitution* that is yet to be agreed and ratified. These can be regarded as positive indicators of change, away for the previous discontinuous pattern of JHA integration.

The development of EU operational capacities with Europol and EuroJust, extended to a third country in the EU-USA agreements, are keen indicators of the development of operational capacities. The political impetus has been clear after September 11<sup>th</sup>, but coupled with the above changes to the governance regime, the prospects of further substantial extension to a

wide range of other countries seem clear. It is at that point that an unambiguous assessment of the effectiveness of EU policing strategies against transnational and organised crime can be made.

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<sup>i</sup> i.e. in terms of ratified, and implemented, EU legislative instruments.

<sup>ii</sup> For the latest position and full text of the agreements see: Statewatch Legislative Observatory, <http://www.statewatch.org/semDOC/observatory/observatory4.htm> [accessed: 4.11.02]

<sup>iii</sup> As noted by O'Keefe, this is not strictly intergovernmental as Title VI cites connections between the third pillar and other European Union institutions such as the European Parliament, the Commission and the Court of Justice. In addition, expenditure under this pillar *may* be charged to the Community budget. O'Keefe, 1995: 903-4).

<sup>iv</sup> The Treaty of Amsterdam only partly addressed this bind by allowing conventions to come into force when half the Member States have completed their national ratification procedures (Article K.6.2.(d)).

<sup>v</sup> Under the term of the 1991 TEU, conventions had to be agreed unanimously by the JHA Council and then subject to national ratification by each Member State. The Convention could not come into force until all Member States had ratified the convention. Amendments to the TEU by the *Treaty of Amsterdam* mean that conventions drawn up under the third pillar now come into force when a majority of the Member States have ratified with effect only in those Member States.

<sup>vi</sup> Interpol, World Customs Organisation and the European Central Bank.

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<sup>vii</sup> Iceland, Norway, Poland, Hungary, Slovenia, Estonia, USA, Czech Republic

<sup>viii</sup> By COREPER. Versions include those of October 2001 (12800/01 REV 1), April 2002 (7686/02), May 2002 (8547/02), July 2002 (10773/02 REV 2).

<sup>ix</sup> 1995 Convention on Simplified Extradition between Member States of the EU (covering "voluntary" agreement to extradition) and the 1996 Convention relating to Extradition (covering "involuntary" extradition).