

How EU policy in the fight against serious crime
affects national regulatory structures
in Germany and England

An empirical analysis on the dimensions
of liberty and security

by

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A thesis submitted in partial fulfilment of
the requirements for the degree of

PhD in
Integrated Social Sciences

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I certify that this thesis, and the research to which it refers, are the product of my own work, and that any ideas or quotations from the work of other people, published or otherwise, are fully acknowledged in accordance with the standard referencing practices of the discipline.

A handwritten signature in black ink, appearing to read 'Simon Dalferth', written in a cursive style. The signature is positioned above the printed name.

Simon Dalferth

Summary

The study addresses the question, how EU policy in the fight against serious crime affects regulatory structures in Germany and England. Building on a structured overview of the developments in this policy field, it shows how EU third pillar policy has moved from being weakly institutionalised to a policy area with central elements of hard law. In particular, the degree of delegation and the bindingness of legal regulations stand out. In addition, the analysis of policy developments shows that problem definitions and their solutions are stable over time.

On this basis a model of EU influence on national regulatory structures is constructed. The model differentiates between direct and indirect effects. Direct effects are the immediate result of the transposition of EU measures into national law, whereas indirect effects look at formal structures, but do not presuppose transposition. In order to further structure the analysis, the study develops empirical conceptualisations of liberty and security. It defines liberty as the degree of control inherent in the policy field. This control can either be executed by actors, such as lawyers, judges or citizens, or ensured through processes, such as sunset clauses or parliamentary scrutiny. The scope and depth of policing competences define security, where scope denotes the range of methods and depth their intrusiveness.

The study then conducts an in-depth analysis of this model of direct/indirect effects and security/liberty developments on the transposition of framework decisions and third pillar conventions in Germany and England. They are analysed as to their effect on the domestic frameworks, in particular on liberty and security.

The results show that while the domestic frameworks have undergone significant changes in the period studied, these cannot be attributed to EU developments. EU measures tie in with and further prevalent domestic developments. This concerns both the substance of policies as well as the effects on the two dimensions. In recent years, concerns have become increasingly louder that liberty is being relegated behind security. While this might still be the case, EU policy does not directly cause this development. EU effects are most visible in areas where independent regulatory regimes meet each other and their intersection is not clearly regulated. This study therefore advances the debate about the normative effects of EU serious crime policy and redirects the focus to domestic developments and thus politics.

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1. Introduction

Fighting crime and terrorism in Europe is no longer a national undertaking. Police cooperate across borders in the prosecution of criminals in order to provide security to the European citizens. This development of the legitimate monopoly of force, which is elemental to nation state sovereignty (e.g. Jachtenfuchs, 2005: 27; Schuppert, 2003: 62) in international cooperation structures poses new questions about the behaviour of policy-makers in response to the new conditions and the outcomes of internationalisation. The embedding of policing in a supranational context is particularly extensive in the European Union (EU). Since the 1970s police forces and other law enforcement actors have managed to establish a far reaching and increasingly formal framework for far-reaching cooperation in numerous fields, from terrorism to public order offences. In recent years, operational cooperation has been furthered by the Council of the European Union, which annually adopts numerous measures to make future law enforcement cooperation even more efficient and effective (cf. Müller, 2003: 266).¹ Drawing on the growing body of research on the third pillar, Wolfgang Wagner noted in 2003 that ‘a thorough analysis of how the institutional set-up of internal security cooperation impacts on internal security *policy*’ (Wagner, 2003: 1038). His assessment stands as correct today as it did four years ago. The present analysis provides a theoretically guided analysis of criminal justice policy in Germany and England in the context of European integration.

1.1. *Puzzle and Research question*

The growing political relevance of the development of an ‘Area of Freedom, Security and Justice’ (AFSJ), which the Amsterdam Treaty on European Union (TEU) stipulates, has also spurred the interest of academia. Since the late 1990s the number of studies in Justice and Home Affairs (JHA) cooperation has grown significantly (e.g. Bieber and Monar, 1995; Occhipinti, 2003; Knelangen, 2001; Müller, 2003). Even more recently, analyses have emerged, which are less concerned with explaining the development of the EU’s third pillar, but have looked at the policy at the EU level. These analyses diagnose an imbalance between the constituent concepts of the ‘Area of Freedom, Security and Justice’. According to their results on the institutional structure and the content of EU measures, the security element is much stronger than either justice or freedom (Smith and Wallace, 2000; Chalk, 2000: 196). In particular the virtually exclusive quest for

¹ For an annual overview of the developments in the third pillar of the EU, see the articles by Jörg Monar in the Annual Review of the Journal of Common Market Studies (e.g. Monar, 2007; Monar, 2005; Monar, 2003).

improvements of efficiency in a policy field dominated by securitisation discourses is seen to be the reason for this development (Mitsilegas et al., 2003: 162; Bigo et al., 2007). An alternative view on the developments emphasises the liberty conserving function of increasing law enforcement cooperation (Storbeck, 1999; Müller, 2003; Apap, 2004; Bruggemann, 2001).

Taking up these results of EU level analyses, studies of EU third pillar policy content have expressed concerns about the development of a European security state (Wagner, 2005; Busch, 1999). Others are concerned about the civil rights impact of the application of recently adopted measures in the fight against terrorism and organised crime (e.g. Guild, 2004; Alegre and Leaf, 2004). A third group of analyses is interested in the interaction of the different levels of policy-making (Glaeßner and Lorenz, 2005; Aden, 1998; Klip, 2007). Despite their normative and theoretical differences, all these contributions have in common that they assume an influence of EU policy on the national framework.

What none of these contributions provides, however, is a detailed analysis of where the impact of EU policy on the national regulatory framework can be found. Neither do they provide an indication of the extend of the impact beyond cursory evidence. They either rely on individual countries (e.g. Bukow, 2005; Glaeßner, 2005), individual measures (e.g. Alegre and Leaf, 2004; Obokata, 2003), organisational policing structures only (Den Boer, 2002a). The major evidence for a strong impact has been the discussion on the European Arrest Warrant (EAW) (e.g. Mölders, 2006), which addresses judicial co-operation, however, not police cooperation. The literature on the third pillar also lacks an identification of the way in which the assumed EU influence manifests itself domestically.

It is this gap in the literature the analysis engages with. The complexities of the field are enormous where very different legal traditions directly interact in a central area of what constitutes the modern state (Weber, 1972: 822). Therefore the analysis pursues the goal to provide a detailed stocktaking of the effects that EU policy in the fight against serious crime have at the national level. The intention is to assess the national developments in the policy against organised and serious crime and see how the EU policy framework influenced them. In other words, the project aims to qualify the developments of the third pillar not with regard to their democratic or normative quality, but with regard to its actual impact. To do so, the book develops an empirical approach to analysing liberty and security based on Europeanisation and implementation theory.

In doing so, two literatures that rarely actively engage each other are combined. Legal analyses of internal security abound, but rarely take into account the societal developments. This rich and immensely insightful literature is indispensable for a proper

analysis of the policy field. Political and sociological analyses address mostly general developments. Both would mutually benefit if they were to talk to each other more often. Similarly, international relations scholars surprisingly neglect the police in their analyses.² Police studies, at the same time, rarely look beyond their national framework to the international level.³ The following analysis builds equally on legal and political science analyses and hopes thus to provide an analysis of interest not only to political scientist, but also to lawyers and students of the police, who would like to see the policy field from a related though unusual point of view.

The results caution us to attribute too much influence for policy developments to the EU level. It is necessary to understand the long lines of developments on the multiple levels and their substantive interplay to identify the effects developing in this intersection of governance spheres. Without looking into the content of policies the analysis of the central dimensions of liberty and security is not possible either, as they are rarely directly changed, but more often affected through interaction effects with pre-existing structures. The next paragraphs are dedicated to this dimension of the analysis.

1.2. Liberty and Security

In virtually all the literature on internal security matters from serious crime to terrorism, the question is addressed whether the new measures increase the security of society and if the civil liberties guaranteed by liberal democratic societies are being affected (Haubrich, 2003; Fitzpatrick, 2003; Waldron, 2003; Meisels, 2005). In the context of national criminal law, the dominant two parameters of the debate are (1) the need for effective enforcement of the criminal law, and (2) the just limits to state power over the individual (Löf, 2006: 422).

Describing the effects of EU policy on the domestic regulatory framework only is not sufficient. In order to engage with the literature on internal security policy and policing, the study further provides an empirical approach to the study of liberty and security, which aims to avoid the normative dimension of the discussion. The interest of the book lies with the effect adopted EU measures have at the national level. While it will be impossible to always refrain from making normative statements about the appropriateness of a particular approach to an issue, the analysis uses a theoretically grounded, empirical conception of liberty and security to investigate properties of national policies under EU influence. Whether a particular policy is best suited to solve the problems faced in a particular policy field is less relevant. Beyond the mere question

² Exceptions are Andreas and Nadelman (2006), Aden (1998) and Busch (1999).

³ Notable are Sheptycki (2002a) or Loader (2002).

about the overall effect of EU policy-making at the national level, the research question is more specified to be able to assess the changes that take place. Does the expanding and increasingly binding European framework against serious and organised crime have a discernible impact on the relationship between security and civil liberty in national police policy? In doing so, the analysis puts the discussion about normative properties of the policy field on an empirical basis. This can be used in normative discussions about the positive and negative effects on liberty and security. The intention of this book is to lay the groundwork for a more informed discussion.

1.3. Case selection

In order to provide more meaningful results, a comparative approach has been adopted. The study compares the effects in Germany and England.⁴ Comparing Germany and England can be accused of restricting itself to the usual suspects of large, western EU member states. And while there are good arguments to include new member states in the analysis, these two states represent the broadest possible scope of legal structures, of policing and political systems in the EU. Mill's method of difference is useful to differentiate the two, as they differ in virtually all aspects save in their active involvement in EU policy-making. This applies not only to the legal and political system, but also to their law enforcement structures. Where Germany has a civil law system, England follows common law; Germany's legal system is highly formalised, whereas the English relies more on administrative measures. German police are hierarchically subordinate to the ministries of interior, in England they are locally organised and independent. In Germany there has existed for a much longer time a federal level coordination structures and in all but name a federal police, whereas in England such an establishment only began in the 1990s. Germany has relatively strong data protection laws, whereas England represents the 'permissive extreme concerning proactive surveillance' (Levi, 2004: 842). In Germany the tradition of civil liberties is relatively recent and, shaped by the experiences of the Third Reich, the Basic Law encases civil liberties as defensive liberties against the state (e.g. Glaeßner, 2003: 192-3). The UK tradition locates civil liberty in the constitution of parliamentary sovereignty since the magna charta and parliament 'could encroach on freedom without legal constraint' (Feldman, 2002: 70).

The two countries are similar when it comes to their involvement in third pillar cooperation in the EU. It is certainly true that the UK does not participate fully in the

⁴ The focus on England instead of the United Kingdom (UK) lies in its peculiar constitutional structure. While England, Wales and Northern Ireland follow a common law system, Scotland's legal structure more closely resembles the continental civil law model. Laws in the UK therefore mostly apply to either the one or the other legal order. To avoid pitfalls of the analysis, the analysis is restricted to measures that apply to England and Wales. Northern Ireland is excluded due to its particular historical situation, which makes its internal security policy virtually impossible to compare with the rest of the UK.

Schengen structures and has not abolished its internal borders with the other member states. It is, however, eager to participate in the law enforcement elements of the Schengen agreement, but not the border-related aspects. Germany is a strong supporter of police cooperation at the EU level. Ex-chancellor Kohl famously floated the idea of turning Europol into an operational European FBI (Occhipinti, 2003: 35). Both countries have long standing law enforcement cooperation with other countries (e.g. Sheptycki, 2002a; Baldus and Soine, 1999; Aden, 1998).

By choosing such an approach, the expectation underlying the analysis is that pre-existing domestic structures determine and shape the effect of EU policy on the domestic framework. This is in line with most Europeanisation research, which either looks at the misfit of EU and national policies (Börzel and Risse, 2003) or highlights the importance of domestic politics (Mastenbroek, 2005). While both approaches differ in many respects, their communality is that they focus on the domestic level to explain the reaction to EU pressures. This study thus remains within the research tradition, without explicitly developing hypotheses about the effect of different domestic characteristics, but builds on their insights mainly to choose case studies and by meticulously analysing the domestic development in response to the EU make a contribution to the debate about domestic influences.

1.4. *Some necessary clarifications*

In the following, police are not understood as a distinct organisation, but rather from a functional point of view. The police traditionally have two functions: (1) the averting of danger and (2) the maintenance of public order. The fight against organised crime concerns mainly the averting of danger, as it includes the prosecution and the prevention of criminal behaviour. While prevention falls primarily under the public order function, the first function will dominate the analysis. This also stems from the competences of the EU, which are mainly in the fight against serious crime and terrorism. Furthermore, when understanding the police as the capacity of the state to combat serious crime, the analysis cannot be restricted to the police organisations proper. The prosecution agencies, as well as the intelligence community must always be included. Only by including them in the analysis police governance can be understood and changes in governance arrangements assessed. 'Policing will be taken to cover the whole group of activities that leads to the detection of offences and the discovery of those who committed them, and 'police' will cover those actors whose task consists essentially of carrying out investigations.' (Mathias, 2002 459). So henceforth, talking about the police will include the police forces proper, intelligence services, public prosecutors and secret/intelligence services in the definition of police. In this vein, the alternative

expression 'law enforcement actors' will be used interchangeably to express this functional understanding of police (cf. Kugelmann, 2006: 66; Hecker, 2005: 421).

On the policy side, this problem is reflected in the relevant literature. When analysing the Europeanisation of criminal justice policy, multiple policy areas deal with law enforcement policy. The German legal literature on European criminal law and police cooperation (Ligeti, 2005: 17-8; Hecker, 2005) analyses *criminal justice policy*, which addresses normative questions on the desirability and direction of developments in the third pillar. Empirical analyses concern the dogmatic developments in *substantive criminal law*, i.e. the approximation of penalties and offences. This is the heart of what is commonly referred to as legal approximation or harmonisation. Finally, *procedural law* is affected, as police cooperation relies on an approximation of methods of investigation and prosecution. Combining all three areas leads to the object of this research, European police policy. Alternatively the expression 'policy against serious crime' will mean the same policy area from a substantive rather an actor-focussed perspective.

Beyond horizontal cooperation among member state law enforcement agencies, European police policy develops a new, binding institutional system of supranational criminal law, which harmonises national criminal law under the influence of a supranational legal system (Ligeti, 2005: 19-20) and which is increasingly reflected in the institutional structures at the European level.

Police policy primarily concerns the regulation and steering of the activity of the police. The differentiation between policing and the police has been a conundrum of much discussion among police scholars (e.g. Johnston, 2000; Ericson and Haggerty, 1997; Loader and Mulcahy, 2003). In the most basic sense, policing refers to the exercise to the exercise of social control. As the police often exercise this, the notion is that policing is synonymous with the activity of the police. This is incorrect, however, as policing functions can be fulfilled by many actors, including parents, guardians and teachers. For the purpose of this book, the analysis is restricted to the activities of the police as an institution in the sense defined above. So in the following pages the difference between policing and police is not taken up, but form and function are kept in mind when talking about 'police'. Not always are both aspects similarly important, but unless explicitly mentioned the analysis is concerned with policing by the police and other law enforcement agents. The focus lies on the way social control is exercised, but ignores the multiple networked nature of the 'elephant of social control' (Bayley and Shearing, 1996) below, beyond and above government (Loader, 2000: 324). Especially in the light of changing methods of police work (towards intelligence-led policing), the focus on the police alone cannot suffice (Sheptycki, 2004 311; Bailey et al., 2002: 813).

Doing qualitative research across various policy fields and the need to keep the analysis short, necessarily means that full justice cannot be done to the complexities of all the elements of serious crime policy. To capture the development in criminal justice and police policy, financial crimes with its connections to the internal market, illegal migration related to external border control and its humanitarian connotations and organised crime with its structural and societal components need to be included in a comprehensive analysis of the policy field, even though they all constitute analytical objects in their own right. The broad approach then necessarily leads to a certain shallowness of the analyses of individual policy field, even though the analysis tries to do the debate in the policy field as much justice as possible and to take them up when necessary.

1.5. *Plan of the book*

Analysing domestic policy developments in reaction to EU requirements necessitates the knowledge of general developments in the different political arenas. Therefore, the first part of the book provides an overview of the developments in police policy in the EU, Germany and England. In order to be able to analyse the effects of EU policy on the domestic regulatory framework, an understanding of the broad developments is indispensable. Using concepts from institutional analysis, problems and solutions in EU policy-making are highlighted and the continuity of their application is emphasised. The German case highlights the developments in response to domestic constitutional requirements as well as to development of EU policy. English police policy, as chapter three shows, is formally more similar to continental systems than ever before, but still differs considerably when taking into account doctrinal foundations of the criminal justice system and the emphasis of political developments.

The second part starts out with a chapter on the theoretical foundations for the study. It theoretically relates these developments to insights of Europeanisation and implementation studies and develops a theory-based, empirical approach to the study of liberty and security in police policy. The discussion about mechanisms and interlevel linkages provides a model of EU influence and helps to direct the further analysis. Chapter seven addresses the question how liberty and security can be analysed empirically without falling in the trap of normative analysis. Liberty is the Berlinian ‘negative liberty’ (Berlin, 2002) captured through an analysis of the positive control mechanisms available to defend substantive liberties against infringements by the state.⁵

⁵ While the conception of liberty as such does not contain a list of substantive liberties, the focus on mechanisms of control implicitly refers to the most commonly affected substantive liberties (informational self-determination, freedom of the person, freedom of expression, freedom of association), without being restricted to them (cf. Haubrich, 2003; Waldron, 2003).

This classical liberal conception of freedom is joined for the analysis by a concept of security, which builds on the political intention behind policies rather than an analysis of their outcomes (see chapter seven). By understanding security through the analysis of law enforcement tasks and methods, competing conceptualisations of what security actually means are avoided.

The third part provides in chapters eight and nine a detailed analysis of the way in which binding EU measures influence domestic police policy in Germany and England respectively. The results reveal an effect of the EU regulatory framework, which is much lower and more indirect than the theoretical model and the impression from the analysis of policy developments in general would lead to expect. In the conclusion, the theoretical conceptions are critically revisited and their usefulness for the understanding of the policy field re-evaluated.

2. Police policy in the EU

Guiding questions

- a. How developed is the regulatory framework for police policy in the European Union?
- b. Which problems were on the agenda in the EU, how were they defined and which solutions were proposed and implemented?
- c. When can we observe major changes in the design of the policy and what kind of changes were they?

2.1. *A Short History of international police cooperation*

Police policy has been an issue of international cooperation for a long time (e.g. Andreas and Nadelmann, 2006; Knöbl, 1998). Institutionally the International Criminal Police Organisation (ICPO/Interpol) is the best-known institution of cross-border police cooperation, which was founded in 1923. Despite its global scope, its restriction to non-political offences, which excluded terrorism, and cooperation mechanisms based on voluntary cooperation inducing no obligation to answer requests led to general unhappiness about its usefulness in the law enforcement community (Busch, 1995: 296-303). Especially in the context of the growing integration of Western Europe, practitioners considered the structure and scope of Interpol insufficient. Even though cooperation focuses on practical issues, up to eighty percent of the requests passing through Interpol originate in Europe, the headquarters are in Lyon, France, and there is a European secretariat to overcome the problems connected to issues of trust and reciprocity (Occhipinti, 2003: 29), these shortcomings dominated and are repeatedly quoted as reasons for the development of European Union (EU), and partially also European Communities (EC), law enforcement cooperation (Busch, 1995: 303 ff; Mitsilegas et al., 2003: 25).

This chapter deals with policy developments at the EU level in relation to the fight against serious crime, (similar, cf. Mitsilegas et al., 2003). It thus presents a framework to better understand developments of EU law enforcement policy employed to attain this objective. The presentation excludes migration policy (e.g. Lahav, 2004; Lavenex, 2001), except where police functions are addressed (cf. Huysmans, 2000).

The object of the analysis is the regulatory framework for the police. The effects on the operational activity of the police have been addressed elsewhere (cf. Sheptycki, 2002a). Therefore, it is not practical to draw a sharp line between judicial cooperation in criminal matters and police cooperation. The objective of the EU is to prevent and combat “crime, organised or otherwise, in particular terrorism, trafficking in persons and

offences against children, illicit drug trafficking and illicit arms trafficking, corruption and fraud” (art. 29 TEU). So police policy in itself is not a goal of the Union and there is no coherent body of EU law which could be directly attributed to the regulation of police as an institution. But measures that aim at improving the fight against crime or the management of external borders to stop illegal immigration deal with police matters, as do regulations on the treatment of personal and private data. In order to analyse the way police work and policing is regulated at the EU level, all aspects in title VI TEU (with the exception of migration) are addressed and be analysed with regard to their impact on the regulatory framework for the police, on the EU and at the domestic level.

The chronology focuses on the substantive development of binding policies. Three phases of EU policy making in internal security matters can be distinguished: Trevi and early Schengen begin in 1975 and take place outside the treaty framework of European integration. The period between 1993 and 1999 covers cooperation under the treaty of Maastricht, where police cooperation was introduced in the treaty framework, but remained institutionally and scope-wise limited, while Schengen remained outside the EU treaty.⁶ The third, and current phase begins with the treaty of Amsterdam in 1999, where the third pillar was fundamentally reformed and Schengen included in the EU treaty. Since then we observe unsurpassed policy production at the EU level and increasingly their national transposition. These phases are predominantly analysed with a view to the production of binding policies.

A systematic analysis precedes the chronological account. Previous studies have shown that a linear development of the policy field cannot be assumed. Guiraudon (2003) has shown the importance of non-linear developments in her application of the garbage can model (Cohen et al., 1972) in the establishment of EU migration policy, which shows that answers and problems are not directly linked. The development of police policy does not depart from a blueprint like the Single Market Programme (SMP), which identified the necessary measures for the attainments of the single market. Rather, different authors have attributed the development of JHA to the framing of public discourse by law enforcement actors and their institutional preferences (Busch, 1995: 319; Guiraudon, 2003; Elvins, 2003: 69 ff) while others have focussed on preferences of national governments (Occhipinti, 2003) and the power to initiate and enable of the political agenda of the day and public opinion (Weyembergh, 2004: 262; Andreas and Nadelmann, 2006). The changing institutional configurations also indicate that the development contains an ad hoc element. The analysis shows that problems and

⁶ Monar annually publishes a succinct analysis of the developments separated by policy field (asylum/immigration, police, judicial cooperation) in the *Journal of Common Market Studies* (Monar, 1999; Monar, 2000; Monar, 2001a; Monar, 2002a; Monar, 2003; Monar, 2004a; Monar, 2005).

solutions do rarely change over time and only since the mid-1990s more direct relationships have been established. All these analyses focus on security problems and policy reactions to them. Such a focus on problems and solutions makes the analysis of EU influence more approachable, because influences can only take place within the frame defined by the treaty. This highlights the areas of internal security policy in which changes at the national level are most likely.

Both aspects of the chapter concentrate on policy developments that govern EU police cooperation today. In other words, the chapter focuses on the analysis on the output of the system and discusses its properties. In the following the treatment of problems and solutions in the treaties is followed by analysis of them in non-binding action plans. The latter are important as political documents declaring the intentions of the governments. Finally, an account of the temporal development of binding third pillar policy follows.

2.2. *Problems and solutions in anti-crime policy*

Cohen et al. introduced the analytical model of the garbage can (Cohen et al., 1972). It aims to explain policy developments in situations when problems and solutions are independent streams in a system. Its descriptive potential is drawn upon to make sense of policies where problems and solutions are not necessarily linked and where actors combine them under incomplete information (cf. Jones and Newburn, 2007: 21), sometimes due to reasons not related to criminal justice policy (Guiraudon, 2003). Descriptively, internal policy fulfils the three criteria characterising ‘decision situations’ identified by Richardson (2006: 15): problematic preferences (policy makers face serious information deficits when devising policy), unclear technology (the effects of decisions are not clear to policy makers (cf. Lords, 2006)) and fluid participation (as the EU level has gained power, domestic actors compete with each other (Guiraudon, 2003)). Concerning policy content, solutions are not necessarily linked to problems. Policy-making is not primarily problem oriented, but responds to the current agenda (Weyembergh, 2004: 276) leading to the lack of a grand strategy (Aden, 1998; Douglas-Scott, 2004). Problems are identified on the basis of the national agenda, whereas solutions seem to follow the logic of the EU policy sphere.

This metaphor helps to describe the context in which questions of liberty and security are debated. Applying the garbage can as a descriptive tool to EU internal security policy helps to provide a focussed overview of its developments. What we see in this analysis is that over time neither the problems nor the solutions identified by decision-makers significantly change. Over time, however, the binding and the non-binding documents develop closer linkages between problems and perceived solutions in serious crime policy. From being virtually unrelated to each other, the frames are subsequently established, without changing their content, however.

2.3. *Problems and solutions in the European treaties*

Nonetheless, the treaties of Maastricht and Amsterdam identify problems to be addressed through EU cooperation, as well as solutions to solve the set of problems. This is not to say that the problems and the solutions proposed are directly and explicitly linked to each other (Guiraudon, 2003: 268). While there certainly is a connection between the two, the temporal order of their appearance is not necessarily clear. Nor was it important where the problem came from or whether it would best be solved thus. Over time better links between problems and solutions emerged, even though the adequacy of certain pairings can be questioned. The political construction of frames through which certain policies are addressed can thus be clearly seen. At the same time, there are only very limited changes in the problems identified and the set of solutions offered.

In the treaty of Maastricht, the definition of solutions is quite vague (“cooperation in criminal matters, customs cooperation”). An exception are the provisions on asylum and immigration and on police cooperation. Here we find a list of problems to which police cooperation is seen to be the solution (see table 1) It encompasses terrorism, drugs trafficking and other forms of international crime (art. K.1 TEU(M)). This ragbag of, in addition ill-defined, crimes is very open and the treaty does not flesh out the concepts in greater detail. Furthermore, the problems and solutions are intertwined in article K.1.

Table 1 Problems and police-related solutions in JHA under the treaty of Maastricht

Problems	Solutions
<ul style="list-style-type: none">• international crime• terrorism• trafficking of illicit drugs• external border control• fraud on an international scale	<ul style="list-style-type: none">• customs cooperation• judicial cooperation in criminal matters• operational police cooperation• a Union-wide system for exchanging information (Europol)

The treaty of Amsterdam is more explicit in identifying the problems and solutions for the third pillar. Leaving out questions of asylum and immigration, it identifies as problems crime (organised, particular terrorism, and otherwise), trafficking of human beings, drugs and arms, the protection of children and corruption and fraud (art 29 TEU). In order to tackle these problems, the treaty identifies three general solutions for these problems: closer cooperation of police and customs authorities (directly and through Europol), cooperation of judicial authorities (directly and through Eurojust) and

the approximation of “rules on criminal matters”. For police cooperation, article 30 expands on the notion of closer cooperation and emphasises

- operational cooperation to prevent, detect and investigate criminal offences,
- data collection, analysis, storage and exchange among law enforcement services,
- cooperation in training and liaison exchange,
- best practice exchange on investigative techniques and
- improving the mandate and work of Europol, including the extension of its mandate.

In judicial matters, the detailed provisions for cooperation encompass

- easier and faster cooperation between competent authorities concerning proceedings and enforcement,
- facilitated extradition,
- ensuring compatibility of rules in the member states
- preventing conflicts of jurisdiction
- improving the functioning of Eurojust and its embedding in the institutional EU framework.

The approximation of criminal law in the member states is restricted to “constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking” (art. 31 e TEU).

While the treaty of Maastricht has been relatively vague on the definition of problems and solutions, the treaty of Amsterdam is much more detailed. In and beyond the details, we see a strong continuity on problems and solutions. Terrorism, drug trafficking and “other illicit trafficking” were already identified in as problems in the 1989 Palma document, where law enforcement and judicial cooperation, data exchange and common border control were given as solutions (Bunyan, 1997: 12). Changes in details are also evident in the move from ‘regarding [JHA] as matters of common interest’ (art. K.1 TEU(M)) to an ‘area of freedom, security and justice’ (art. 29 TEU). However, even though the treaty is more detailed, it still only sets out a general framework (Monar, 1999: 167) and continues to apply ill-defined concepts as guiding posts for the development of anti-crime policy.

The two dimensions are at least logically linked to each other. But both dimensions remain vague even in their more detailed form. The concrete fleshing out of both sides can only be seen in concrete policy measures. From the treaties the relevance of individual solutions for particular problems is not clear. While it is possible to construct links from one set to the other, a direct attribution of problems and solution is not possible.

Table 2 Problems and police-related solutions in the current treaty

Problems	General solutions	Detailed solutions
<ul style="list-style-type: none"> • organised crime • general crime • terrorism • human trafficking • drugs trafficking • arms trafficking • protection of children • corruption and fraud 	<ul style="list-style-type: none"> • cooperation of police and customs authorities • cooperation among judicial authorities • approximation of rules on criminal matters 	<ul style="list-style-type: none"> • operational cooperation • data collection and analysis • mutual training • best practice exchange • Europol • proceedings and enforcement • extradition • compatibility of rules • conflicts of jurisdiction • Eurojust • definition of criminal acts • penalties

2.4. *Problems and Solution in Action Plans*

In the action plans similar problems and solutions can be found. The 1990 action plan to fight organised crime focuses on terrorism, drug trafficking, organised crime and immigration, while proposing to improve cooperation on information exchange, intensify meetings, liaison exchange, best practice exchange and technical cooperation to overcome the problems (Bunyan, 1997: 37). At that time, however, formal bases for these measures would have been bi- or multilateral agreements, as the EC did not have the necessary competences in police and judicial cooperation.

The Vienna Action plan on the implementation of the treaty of Amsterdam (Justice and Home Affairs Council, 1999) is much more detailed than previous action plans in the third pillar. This is due to the fact that the Vienna action plan aims to specify the necessary measures to implement the relevant provisions of the Amsterdam treaty (Monar, 1999: 166-8).⁷ This means that the action plan not only identifies the well known problems, but proposes measures which go beyond the general solutions of improved cooperation, data exchange and liaison. It combines general strategic objectives with detailed instruments to be adopted, such as the 1995 and 1996 conventions on facilitated extradition among the EU member states and the proposed convention on mutual legal

⁷ The action plan was adopted after signing the treaty, but before the treaty entered into force in May 2000.

assistance as priorities for judicial cooperation. The section on police cooperation contains detailed notions on the scope of competences for Europol. The section on legal approximation, however, merely replicates the treaty provisions with a focus on money laundering, mentioning human trafficking, environmental crimes, computer fraud, which rank high on the priority list. Both areas focus on improving operational cooperation, especially concerning the activity of law enforcement agencies on the territory of another member state.

Table 3 Problems and solutions in the Vienna Action Plan

Problems	General Solutions	Detailed Solutions
<ul style="list-style-type: none"> • Illegal migration and asylum • Cross-border crime • Trafficking in humans, arms, drugs 	<ul style="list-style-type: none"> • Europol • Better operational cooperation and administrative mutual assistance • Common asylum system • Schengen integration in the treaty framework 	<ul style="list-style-type: none"> • Law enforcement priority to illegal migration networks • Cooperation with 3rd countries • Common minimal standards and definitions. • Legal approximation, including common sanctions • Operational cooperation and technical assistance
<ul style="list-style-type: none"> • Differences among legal systems by criminals 	<ul style="list-style-type: none"> • Compatibility and approximation of legal systems • Mutual recognition 	<ul style="list-style-type: none"> • Common minimal standards • Victim protection • Mutual recognition • EJN
<ul style="list-style-type: none"> • Organised crime, transborder crime • Terrorism • Fraud, money laundering and corruption 	<ul style="list-style-type: none"> • Joint mobilisation of police and judicial resources • Improved operational cooperation • Liaison among law enforcement actors 	<ul style="list-style-type: none"> • Best practice exchange and cooperation among authorities • Extension of Europol's competences • Alleviated extradition • Legal approximation • Mutual legal assistance • Data exchange • Common standards • Reporting
	<ul style="list-style-type: none"> • Data exchange • Interinstitutional cooperation • Expanding the role of Europol • Expedient judicial procedures 	

The 1999 conclusions of the European Council in Tampere set the next hallmark of political problem identification and solution for JHA (European Council, 1999). The language of the document is more positive, linking problems to possible solutions. In that respect the document clearly differs from earlier texts. Nonetheless, the problems identified remain the same, even though priorities changed. Terrorism has lost in importance and is only mentioned in connection with the call for the immediate establishment of joint investigation teams. Economic crime has taken the first place. The imminent introduction of the Euro as a common currency and the general focus on organised crime brings the problem of money laundering and fraud to the forefront. On the one hand this is due to the constitutive nature of this offence for any criminal activity (acquiring the necessary funds) and secondly due to the inherent interest of the EU itself to protect its resources.

The solutions in the Council conclusion show some interesting developments. One is the establishment of mutual recognition as a ‘cornerstone’ of JHA (no. 33). This is a deviation from previous proposed solutions which focussed on operational cooperation and legal harmonisation (cf. Monar, 2000: 140).⁸ Operational cooperation is still the preferred solution for many aspects of the problems, especially police cooperation. The establishment of common minimal standards remains prominent. Interestingly, however, concerning legal approximation terrorism is no longer on the agenda. Rather the European Council calls for a concentration on a ‘limited number of sectors’ (para. 48), which focus on the economic intent of the offences. This problem receives the whole plethora of solutions (approximation, implementation of adopted measures, institutional setup of financial intelligence units, operational cooperation, information and best practice exchange). Implementation as a solution takes a more prominent role than previously, which can be observed up to the present. Not only in the ‘naming and shaming’ communications by the Commission, but also in strategic Council documents, the issue of implementation is a necessary step to solving the identified problems.

Table 4 Problems and Solutions in the Tampere conclusions

Problems	General Solutions	Detailed Solutions
<ul style="list-style-type: none"> • Illegal migration • Cross-border crime 	<ul style="list-style-type: none"> • Common Asylum and Immigration system • Common border controls 	<ul style="list-style-type: none"> • coordination of external and internal security policy • cooperation with 3rd countries • common definitions of refugees etc. • legal approximation,

⁸ Even though it is worthwhile to keep in mind that mutual recognition without a certain degree of legal harmonisation is not possible in situations of widely diverging penal systems (Guild, 2004; Delmas-Marty and Spencer, 2002).

<ul style="list-style-type: none"> • Exploitation of differences among legal systems by criminals • Serious crime: Criminal persons • Serious crime: Proceeds of Crime 	<ul style="list-style-type: none"> • compatibility and convergence of legal systems • mutual recognition • joint mobilisation of police and judicial resources 	<ul style="list-style-type: none"> including common sanctions • operational cooperation and technical assistance • Schengen-regulated border control and compensatory measures • information campaign • common minimal standards • victim protection • mutual recognition • ratification of conventions • best practice exchange and cooperation among authorities • JITs with Europol support • Police Chiefs Task Force • Eurojust and CEPOL • Expand Europol's remit • Legal approximation • Mutual legal assistance • data exchange • Expand Europol's remit • Legal approximation • Common standards • Reporting
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In 2000 the Council adopted the so-called millennium strategy in the fight against organised crime (European Council, 2000). It is the successor of the 1997 action plan against organised crime and effectively deals with the same issues. The recommendations synthesise points from the 1997 action plan, the 1998 action plan and the 1999 Tampere conclusions, thus emphasising the continuity with regard to problems and solutions. The focus is on organised crime, of which drug, arms, human and commodity trafficking are subsets. Related to organised crime are also financial offences, such as counterfeiting, money laundering, corruption and (fiscal) fraud. Terrorism is only mentioned with regard to the approximation of legislation, but not explicitly as a problem. This is in line with previous developments. All in all the problems identified are still numerous, but more than previously united through the common frame of organised crime. They are not defined as stand-alone crimes, but as aspects or consequences of a coherent whole. This, however, leads to difficulties in implementation, as the definition of organised crime is notoriously weak.

The solutions in the millennium strategy show even less changes. Despite the title of the document, which indicates a strategic document, the recommendations are in many

aspects detailed and discuss individual tactical measures. A grand strategy against organised crime based on a coherent definition is missing. Solutions focus on a combination of national and European strategies. This is in line with the principles of proportionality and subsidiarity, but also takes account of the necessity to include the national level in a policy field still formally intergovernmental. The strong focus on data collection and usage, including exchange of data, calls for data improvement and studies to be conducted on the way advantages of data can be reaped. This goes hand in hand with demands for intelligence-led policing, a development taken up from the national level. The European Council calls for increased approximation of the definition of offences and penalties, as foreseen in the treaty. This time terrorism is back among the list of offences for which legislation should primarily be approximated. Furthermore the Council calls for the criminalisation and penalisation of new offences, especially regarding human trafficking and fiscal fraud. In the field of judicial cooperation, mutual recognition receives most attention. Since Tampere this ‘cornerstone’ has become an integral part of the action plans as well and surfaces in all aspects of JHA policy. The section on crime prevention is more extensive than in previous action plans, but this aspect remains quite vague despite an extensive analysis. An expansion can be noted concerning the protection of victims. Europol’s role and competences are to be strengthened and it is mentioned in support or leading activity in almost all solution approaches. With regard to the recommendations for Europol’s role in coordinating international investigations, the language of the action plan is hesitant and imprecise. Finally the now well established call for the implementation of adopted measures and the application of existing instruments is proposed as a solution.

Table 5 Problems and Solutions in the Millennium Strategy

Problems	General Solutions	Detailed Solutions
Organised Crime <ul style="list-style-type: none"> ○ Multi-faceted ○ Dynamic ○ Transborder in nature 	Dynamic and coordinated responses by member states <ul style="list-style-type: none"> • Collection and analysis of data • Prevention • Improving legislation • Investigation of organised crime 	<ul style="list-style-type: none"> • Legal rules to allow data exchange • Consultation of national authorities with COM • Regulations to minimise fraud and corruption • Best practice exchange • Common minimal standards • Approximation of legislation • Data protection • Liability of legal persons • Combating illegal migration networks

	<ul style="list-style-type: none"> • Strengthening Europol • Freezing, seizing and confiscation of criminal proceeds • Judicial and police cooperation • Implementation 	<ul style="list-style-type: none"> • Common standards for investigations • Closer operational cooperation • More Europol powers • Compatible criminal intelligence systems • Initiative powers for Europol • Agreements with on- and off-shore financial centres • Agreements with third countries • Criminalisation of money laundering • Legal approximation of crime definitions • Mutual legal assistance and mutual recognition • Expedite extradition arrangements • Mutual recognition • Eurojust and EJM • Procedural standards • Ratification and implementation of adopted measures • Legal approximation (substantive and procedural)
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The Hague Program was adopted in 2005. It takes stock of the Tampere program and identifies priorities for the period from 2005-2010. What is quite striking is the first point in the program, which calls for the development of an evaluation mechanism to be developed in 2006. This fits in with the complaints by analysts of JHA, also contained in the reports by the Commission, about the unsatisfactory implementation record by member states. The repeated call for evaluations in all areas of the action plan also seems to indicate the need for increased action at the national level in order to comply with the requirements arising from EU cooperation.

The exchange and use of data takes on a different quality through the principle of availability. Currently the exchange of data is dependent on the actual introduction of data by national law enforcement authorities. Under the new principle the interaction of data bases is automatic and whatever data is available in one data base can be accessed through the SIS or other networks. This increases the possibility to find useful data in the networks and thus facilitates work in the fight against crime and terrorism. Due to the differences among national legislations and the simultaneous availability of data, the new

principle requires the establishment of a new level of data protection (de Hert and Gutwirth, 2006; Weichert, 2005). The Hague programme acknowledges this by referring to the need to establish ‘adequate’ safeguards and legal remedies (European Council, 2004b: 10).

Once having established the instruments in the fight against crime and terrorism, the programme spells out progress in policy areas (i.e. solutions), without providing the problems, which are to be solved. This differentiation, however, must not be taken too far. A link between the proposals for action to the previously identified problems is, however, not spelled out explicitly.

Table 6 Problems and solutions in the Hague Programme

Problems	Solutions
Terrorism Organised crime <ul style="list-style-type: none"> • Corruption • Financial aspects of Organised • Crime Corruption	<ul style="list-style-type: none"> • Improve legislation • Improve monitoring and evaluation Police and Customs cooperation <ul style="list-style-type: none"> • Improving operational cooperation (legal bases and practices) • Exchange programmes • Europol and Frontex Judicial cooperation <ul style="list-style-type: none"> • Building of mutual trust • Mutual recognition • Data exchange • Legal approximation and identification of concrete issues (in absentia rulings, minimal standards for evidence, electronic evidence, procedural approximation) • Eurojust Cooperation with international organisations

Looking at the central action plans adopted in the third pillar over time, all in all we do not see a significant change in either problem identification nor in the proposed solutions over time. The presentation of the problems has improved in coherence. Regarding solutions the overall set has not changed significantly. Data collection remains the dominant solution instrument, together with calls for further criminalisation and more operational cooperation. Due to the better presentation of problems, the solutions

are more convincingly justified in the later documents. While the question remains, whether the solutions proposed are appropriate for the problems identified, later documents are much more detailed than earlier ones and that fundamental, legally binding texts do not place particular problems and solutions together, while declaratory texts, especially action plans, do so. This is not surprising, as the not binding texts do not compel the states to follow up on their promises.

2.5. *Formal policy making in the third pillar*

The problems and solutions presented in the first part of the chapter were developed in the context of different regimes. Since the 1970s the decision-making power of these regimes has gradually increased. The following paragraphs provide an overview of formal policy-making under the different regulatory frameworks in order to put the developments of problems and solutions in context.

2.5.1. Trevi

In the 1970s domestic terrorism in many European countries (Italy, Greece, UK, Germany, France, Spain) led to an expansion of the capacities and competences of law enforcement. At the same time, successes in the prosecution of terrorists revealed that groups considered to be terrorist were internationally connected. While this was certainly not restricted to Europe (for example the RAF-Palestinian connections), the European governments increasingly considered law enforcement cooperation against terrorism and serious crime indispensable (Occhipinti, 2003: 31). So the European Council at its 1975 meeting in Rome decided to establish a framework for police and criminal justice cooperation (Trevi) (Lobkowicz, 2002: 18). This intergovernmental mechanism mainly concerned the exchange of information on terrorist threats and on the structure of national police forces. Trevi was flanked by a Working Group on Judicial Cooperation, which was situated in the foreign policy arm of the European Communities, European Political Cooperation. The existence of such a judicial counterpart to operational police cooperation is important as from 1997 onward the two conflate.

Customs cooperation with a technocratic focus on law enforcement such as the Naples convention of 1967 and law enforcement based anti-drugs policy in the so called Pompidou group, which was then still located in the Council of Europe, had preceded police cooperation proper (Elvins, 2003: 82; Occhipinti, 2003: 30). However, little formal cooperation took place and the justice and interior ministers met less often than intended. Lobkowicz argues that the irregularity of the high level meetings were intended to give retroactive legitimacy to decisions taken on the working group level without involvement of democratically legitimate actors (Lobkowicz, 2002: 19; Aden, 1998). Practical cooperation among senior law enforcement officials was more successful

because the working groups in Trevi met regularly, negotiated substantively and got to know each other (Bigo, 1996). The latter is very important as questions of trust are highly important for the successful establishment of the area of freedom, security and justice, especially with respect to the principle of mutual recognition (cf. Bigo, 2000; Douglas-Scott, 2004: 227). Occhipinti explains the late development of police cooperation proper in the context of European integration with the change in the French government from de Gaulle to Pompidou in 1969 (Occhipinti, 2003), while Elvins emphasises the value spill over through epistemic communities⁹ in a classical functionalist account of EU integration (Elvins, 2003; cf. Haas, 1968). Irrespective of the reasons for institutional and formal changes, police cooperation among EU member states remained intergovernmental.

Information on Trevi is limited, as it was a secretive affair and rarely publicly scrutinised (Bunyan, 1993). The difficulty to obtain evidence on police and criminal policy matters was highlighted by the work of Statewatch, a British NGO, which in the beginning of the 1990s started to collect and publish classified and de-classified documents. Through their endeavour we now have a good idea what kind of cooperation was agreed in Trevi (Bunyan, 1993; Bunyan, 1997).

So output, in the time before the Single European Act 1986 and the Schengen convention 1985, remains limited. Concerning police policy few binding and formal agreements were agreed on. Most concrete and public measures were adopted in the Council of Europe, for example the 1957 European convention on extradition or the 1977 European convention on the suppression of terrorism (Peers, 2003). Contrary to the European Communities, the mandate of the Council of Europe included the maintenance and development of the rule of law in Europe since its establishment in 1949 (Brunn, 2002: 68). The Council of Europe

‘provided [the EU member states] with a framework in which they could work for the establishment of a number of basic principles and procedures on relevant JHA issues within a purely intergovernmental framework, which had the

⁹ Epistemic communities are ‘networks of knowledge-based experts’ (Haas, 1992: 2), who act on the basis of common belief systems and are thus able to frame issues in a certain non-political way. The role of experts in JHA has also been emphasised by, e.g., Guiraudon (2003), Aden, (1998) and Fijnaut (2002).

Functionalism is one of the two classical approaches to the study of EU integration, championed in Ernst Haas in the 1960s, according to which issue areas are integrated at the EU level, because functional pressures emanate from previously integrated areas. In this understanding, the move from a ‘pure’ market integration into political integration in security issues is a necessary step, because a free market produces new conditions, which require a coordinated, common response. Functionalist arguments play a big role in JHA integration, as Schengen has been justified with reference to market externalities and in the 1990s the opening of the Soviet borders was used to argue for a development of the EU regulatory framework and the extension of operational cooperation.

additional advantage of involving a wider circle of European countries' (Mitsilegas et al., 2003: 20).

The Council of Europe conventions were very important for the legal development of the area of freedom, security and justice, as the regular interaction supported the development of a 'European mentality' (Mitsilegas et al., 2003: 20). Especially in the field of drugs the UN was a forum of extended activity (Elvins, 2003).

The 'Trevi acquis' for police cooperation (Bunyan, 1997: 29) dealt in the beginning exclusively with improved information exchange on serious offences (including terrorism) and later added ministerial recommendations concerning common policy intentions. This is the reason why there seem to be no formal decisions in the policy area before the mid-1990s. But in fact decisions had been taken, only they were not binding (Müller, 2003: 252-4). Of the thirty-seven agreements reached in the context of Trevi (Council circular 3678/93) only thirteen were decisions, while sixteen were recommendations, two resolutions, four agreements and two statements (cf. Bunyan, 1997). In addition, the measures were not concerned with conceptual measures or the approximation of national system, but aimed to reduce obstacles to practical cooperation. They concerned the establishment of networks of information exchange on aliens, arms theft, explosives, drugs and other serious crime, on the exchange of liaison officers and the adoption of common policy intentions. The latter are probably closest to harmonisation efforts, but they were legally weak. There is no analysis detailing the degree to which those intentions were put in force in the member states. The persistence of a large majority of the issues from the Trevi area into the Maastricht era and until today indicates, that overall transposition was low. This is also the tenor of general third pillar analyses (Baldus and Soine, 1999). Despite these formal weakness, Trevi's consequences should not be underestimated (e.g. Busch, 1995: 306ff). Institutionally, the most notable development was the increasing differentiation of working groups in Trevi and the establishment of central offices in all participating member states. This triad of institutional, operational and political cooperation mechanisms already reflects future structures under the EU treaty.

Concerning the dynamics of policy-making within Trevi, an interesting development took place. Of the 37 agreements of the Trevi acquis concerning police cooperation only six were adopted prior to the Schengen agreement and the Single European Act. The increasing development of the internal market after the white book on the single market in 1985 seems to have affected developments in Trevi. That relationship is obvious in Schengen where police cooperation was explicitly regarded as a compensatory measure for the abolition of control on internal frontiers, that is, a defining feature of the common market.

A central document of the pre-Maastricht era is the “Palma Document” (1989) in which a group of experts identified necessary steps in the development of an area without internal frontiers. Developed in response to the single market program of the Commission until 1999 the Palma Document most closely resembled a policy program for third pillar areas. Internally (*ad intra*) it contained a detailed list of measures sorted in nine categories (external and internal border control, drugs, terrorism, admission to EC territory, asylum and immigration, removal, judicial cooperation and control of travellers). Towards the outside (*ad extra*) a common approach towards external borders was recommended, but the Schengen convention was not explicitly mentioned. Substantively many of the recommendations were later realised, even though almost none before the proposed deadlines of the end of 1992.

In 1990 the EC ministers adopted a “Programme of Action relating to the reinforcement of police co-operation and of the endeavours to combat terrorism and other forms of organised crime” (Bunyan, 1997: 37). Already the title shows the conflation of terrorism and organised crime (cf. art K.1 TEU (M), art. 29 TEU), which is the approach taken by this project as well. In the document the later scope of police cooperation in the context of the TEU is already discernible. Information exchange on methods and crime developments is a central aim. The nomination of liaison officers, who are to function as central contact points, is an important means to achieve this. The establishment of a system, which resembles the Schengen Information System, is also mentioned. The question of civil liberty and privacy is addressed as a matter of concern in the design of the system. The exchange of information is supplemented with operational cooperation only in the context of border control. The document spells out in detail the areas of cooperation and mentions the exchange of experts, the common control of external borders, police cooperation in frontier areas, rules for pursuit and communication as cooperation methods. The document remains fully intergovernmental as all cooperation is to be implemented bi- or multilaterally and without prejudice to national security considerations and national internal security policy. The idea of establishing a European policing structure is mentioned only with regard to the exchange of drugs intelligence.

The Palma document and the 1990 action plan set out a number of concrete policy proposals. They focussed on operational cooperation on drugs, terrorism and migration and only fleetingly touched the issues of approximation and harmonisation of national policing structures (concerning wanted posters, central coordination structures). While terrorism was the driving force behind the development of police cooperation in the 1970s (Busch, 1995: 270ff), migration took primacy in the early 1990s under the influence of massive influx of people from the CIS and developing countries. This led to national reforms in asylum and immigration systems, for example 1993 in Germany and the Netherlands, making it more difficult to obtain the right to stay. In police and

criminal justice cooperation, the Palma document had laid out the preferred course of action. While there was no section exclusively dedicated to police policy, the fight against terrorism and judicial cooperation almost exclusively dealt with policing issues and the area of migration is interspersed with proposals concerning law enforcement. Most far reaching are the proposals to harmonise laws on aliens and on narcotic drugs (cf. Elvins, 2003: 88) and to examine the possible harmonisation of the legal description of criminal charges. All these measures did not directly interfere with the member states' sovereignty to regulate their national police forces. At the same time, effects on the operational level clearly are connected with European developments, as new structures were introduced and law enforcement agencies were included in a European cooperative framework.

Before the treaty on European Union entered in force, the heads of state and government agreed on the 1990 Convention on the Transfer of Proceedings in Criminal Matters and the 1991 Convention on the Enforcement of Foreign Criminal Sentences. These conventions relied heavily on previous conventions and work done in the Council of Europe (Mitsilegas et al., 2003: 20).

2.5.2. Schengen

Another important development needs to be taken into account in order not to miss a central aspect of serious crime policy in the EU. In 1985 five EC member states (Germany, France, Benelux) signed in Schengen a convention on the gradual abolishment of internal borders. The Schengen framework was established and remained outside the EU treaty framework until the treaty of Amsterdam. The Schengen Implementation Agreement (SIA) was signed in 1990 in order to bring forward the implementation of the original charter. In 1995 the SIA took effect and the Schengen Information System (SIS) began to work (see Mitsilegas et al., 2003 34). Police aspects of Schengen (Title III SIA) were included in the agreement as compensatory measures (art. 17 Schengen agreement). The abolition of control at internal borders was regarded as a security risk, which needed to be complemented by stronger cooperation of the participant states (cf. Nadelmann, 1990). These regulations for cross-border cooperation are the most important and most extensive legal base for police cooperation (Commission, 2004d): Article 39 stipulates member states to 'ensure that police authorities assist each other', articles 39 and 46 form the basis for many bi-, tri- and multilateral cooperation agreements, article 44 aims to improve communication links, article 45 concerns the registration of non-nationals, and cooperation instruments are covered in articles 40-43, the SIS in articles 95-100. The 1985 agreement and the 1990 convention are binding under international law after ratification, which made them substantially different from the informal and non-binding coordination agreements under Trevi. During the Maastricht era, the Schengen acquis was the primary legal basis for

police cooperation and the approximation of criminal law (Commission, 2004d). Article 17 of the Schengen agreement foresees a common external border control and article 19 calls for the harmonisation of rules on narcotic drugs, arms, explosives and the registration of travellers. By existing alongside the EU treaty framework this international structure acted as a testing ground for those measures which could not be agreed on in the EU (Monar, 2001b: 750). The treaty of Amsterdam annexed the 'Schengen acquis' to the TEU thus bringing it into the treaty framework. The scope of the Schengen acquis and the impact it had on the development of policy in the third pillar due to the fact that it is legally binding, mean that its importance for the development of EU policy as well as the design of national policy must not be underestimated. Particularly important is the facilitating effect of Schengen on the establishment of bi- and multilateral agreements concerning police cooperation (Commission, 2004d).¹⁰

The main problem with Schengen is its restricted scope. The UK is not party to the Schengen agreement and has opted out of this cooperation as a whole. She reserved the right to take part in individual parts of the Schengen cooperation upon the agreement of all other participating states. Not before 2000 did the UK partake in those agreements pertaining to police and criminal justice cooperation. Ireland has followed the UK lead due to its travel union. Denmark also reserved a special rule, which allows it to opt out of any Schengen measure it does not approve of. Guiraudon has called this a 'legal nightmare' (Guiraudon, 2003: 271). This variation in application reduces the overall approximating effect of Schengen, but concerning the police still strong, as both Denmark and the UK participate in the police cooperation aspects of Schengen.

In 2005 the treaty of Prüm was signed. Contracting parties are Germany, Italy, the Benelux states, France and Austria. The goal is to improve cooperation, especially the exchange of information, in the fight against organised crime and terrorism (art. 1). The logic of the convention, which treats law enforcement cooperation as a necessary compensatory measure for the abolition of internal frontiers, has led to calling this convention 'Schengen III'. It also follows the idea of Schengen insofar as it intensifies cooperation among a smaller number of EU member states outside the EU treaty framework, but with the aim to ultimately see the provisions of the convention integrated in the EU treaty (preamble, art. 47). The convention explicitly shies from requesting the approximation of national laws. In that it markedly differs from the 1985

¹⁰ Of these a large number exists and they form the basis upon which EU police cooperation functions better (Personal interviews with police officers in Berlin and Trier, March/April 2007). They make different policing systems more compatible by approximating structures and procedures or by introducing limited recognition clauses. European efforts to improve police cooperation recognise this long standing pillar of international police cooperation (Commission, 2004d). As it builds on national or bilateral concerns with no European element, they are less important for this analysis.

agreement. By extending mechanisms of data exchange it indirectly affects national data protection rules, expands the rights of foreign officials on national territory and improves operational cooperation. The major change is the automated access of foreign law enforcement agencies to an increasing number of data sets, including fingerprints, DNA profiles, personal and non-personal data, without requiring prior approval of national data protection authorities. This poses problems for privacy and the principle that data may only be used for the originally intended purpose (Balzaq et al., 2006; de Hert and Gutwirth, 2006). The convention does not directly affect material law, but many of the concepts used are ill-defined and allow for a large leeway. As with many agreements in the area of police cooperation, the degree to which open worded provisions will be used only experience can show. The main problem from a democratic point of view is the insufficient democratic quality of the decision making process without the inclusion of the parliament (Kietz and Maurer, 2007). This is particularly relevant as the German presidency in 2007 took first steps to transform this convention into a Council decision to bring it into the EU framework.

2.5.3. The Maastricht period

The treaty of Maastricht introduced the third pillar, encompassing for the first time police, customs and judicial cooperation in a single framework (Den Boer, 1996 191). It formalised and institutionalised preexisting extra-treaty cooperation mechanisms and did not develop something entirely new (Monar, 2001b). Instead of fully integrating cooperation in Justice and Home Affairs into the EC framework, cooperation in police and criminal justice remained embedded in the intergovernmental realm. The Commission was only allowed to initiate proposals in asylum, migration, drugs and external frontier matters, and for the first time a policy area in a European treaty remained in the full competence of the member states (Occhipinti, 2003 36). But despite this limited inclusion, the fact that the Commission was included in JHA at all marked a shift away from the purely intergovernmental structures under Trevi (Müller, 2003: 136; Ucarer, 2001).

Police cooperation according to article 30 TEU (the old article K.1(9)) encompasses

- (a) operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;
- (b) the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data;

- (c) cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research;
- (d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.

Under Article K.3 the Council could unanimously adopt Joint Actions and Joint Positions. The former spelled out coordinated activity, where such activity would better achieve the goals of the Union than through the member states acting individually. The latter are unanimous recommendations taken by the Council to which the member states are required to give full effect both domestically and in foreign policy. Joint Actions were regarded by some to be legally binding (Müller, 2003: 136), but others pointed out that their legal nature was anything but clear (Fortescue, 1995: 23). By name they resembled common actions in foreign policy coordination (art. 14 TEU), but did not have the same intuitive clarity as there (Fortescue, 1995). Joint Positions allowed the member states to coherently pursue a strategy, such as agreeing on common definitions of refugees. They were not formally binding, but helped to bring forward negotiations e.g. in international negotiations at the UN and the Council of Europe. Finally, member states could adopt conventions, which the Member States should adopt in accordance with their respective constitutional requirements. They were used more often in the beginning of JHA cooperation and later replaced and reformed by less cumbersome procedures in the treaty of Amsterdam. The Maastricht treaty did not provide measures for the approximation of national laws, but Weyembergh (2004: 49) highlights that “[i]ls sont mixtes, dans la mesure où ils comportent des dispositions cherchant à harmoniser les législations que d’autres organisant divers mécanismes de coopération.” She mentions the conventions and a number of joint actions. In other words, approximation was not a primary goal of JHA, but a secondary (un)intended consequence of policy-making for operational cooperation.

Two legal developments can be heuristically differentiated at the EU level. First, a policing structure was established on the European level. This included the establishment of Europol, the European Judicial Network, which was later to become in Eurojust the judicial counterpart to Europol, UCLAF, the predecessor of the anti-fraud office OLAF and very recently FRONTEX, the European border agency. The institutional development had its base in a number of agreements and measures that had the primary goal of establishing such structures for police cooperation. In addition regulations on data protection and on the status of law enforcement personnel at the EU level fall in this category, thus extending it beyond organisational establishment. While Europol is based on a convention, institutions which were established subsequently, are based on either Council decisions or other measures.

The most important achievement under the treaty of Maastricht is the formulation of the Europol convention. Already the Trevi action plan of 1990 had called for the establishment of a European Drugs Intelligence Unit (EDU) and in 1991 the Ad Hoc Working Group on Europol (AHWGE) was established. In 1992 the Lisbon European Council agreed on the draft Europol convention, but it took until 1995 to agree on its final form. The Joint Action on the European Drugs Unit in March 1995 is the first legally binding EU measure in police policy. It formally replaces the 1993 ministerial agreement to establish EDU and provides a preliminary legal basis for developing Europol after political agreement had been reached the previous year. The joint action was meant to be an interim solution, because despite general agreement on a Europol convention, the member states had severe difficulties agreeing on its content. Eventually the Europol convention was adopted by written procedure in July 1995, but given the legal form of a convention. So it took until 1998 until all signatories had ratified it.

A noticeable development regarding Europol and its predecessor is the continuous expansion of its competences. Established as a clearing centre for drug intelligence, its competences were expanded even before its formal establishment in 1995/8 to the smuggling of nuclear material, illegal immigration and trafficking in vehicles and later to terrorism (1998), human trafficking (1997), forgery (of the Euro 1999), criminal law protection of the Euro (2000), general money laundering (2000), and finally to all annexed crimes (2001). In addition the possibility to give Europol more operational power was tabled by the then German chancellor Kohl in the Maastricht IGC 1992 and subsequently resurfaced at the second Dublin European council in 1996 (Monaco, 1995). Legally binding decision-making in JHA in the first half of the 1990s was almost exclusively focussed on the build-up of a European policing structure around Europol.

Even though it might look like an exclusively European development, the establishment of Europol has had consequences for the operation of national police forces. It induced organisational centralisation through the establishment of central contact points (cf. Aden, 1998). They provide the necessary information requested through Europol and function as an information desk for international cooperation (Art. 4 Europol Convention). The protocols on rights and immunities of Europol officials, on the form of analysis files, the joint supervisory body and rights and obligations of liaison officials, at the domestic level concerned the treatment of police personnel, data protection and the relation of control mechanisms. While these measures certainly had an impact on law enforcement structures, such changes are indirect effects of EU level structures. Most significantly, though, is that the actual activity of Europol does not directly rest on secondary law, but on measures that do not require the ratification by national parliaments, which is the only democratic control that exists in the third pillar (Aden, 1998: 314; Kietz and Maurer, 2007).

Further developments regarding the development of the European policing structure were the UK's opt-out on ECJ competences for Europol, which was adopted in 1996, and the 1997 immunities protocol for Europol personnel. The latter was especially debated in Germany (Aden, 1998: 314) as there is an inherent clash in Europol's structure between the need to control it as a law enforcement agency and its non-operational structure as an information brokering body under international law. By some such immunity was also regarded as being worryingly close to the principles of an authoritarian police state (Monar, 1999: 157).

Overall, few legally binding measures were adopted. This does not mean that no decision-making took place. But the activity was restricted to non-binding and declaratory measures (Müller, 2003: 260) and thus continued in the tradition of Trevi.

The second major development concerns the adoption of measures that relate more directly to judicial cooperation (Art. K.1(7)) and bear direct relevance for national law enforcement systems. It encompasses not only changes in criminal law, but also the direct establishment of cooperation structures at the national level emanating from the EU. Direct changes of national structures through European decision-making were rather limited under the Maastricht treaty, as measures adopted in the third pillar do not have the same legal quality as first pillar measures. They have no direct effect nor take precedence over national law (Müller, 2003: 135). In addition, the EU did not have extensive rights to approximate national legislation, as the treaty provisions were limited to 'inform and consult one another within the Council with a view to coordinating their action' (Art. K.3 TEU). In other words, contrary to the experts' demands in the Palma document and the 1990 action plan, there is no explicit treaty base for the approximation of national laws in order to attain the goals set out in article K.1. Under Maastricht, compulsory approximation could only take place through conventions or joint actions. Again the measure with the most significant repercussions was, though indirectly, the Europol convention. It established a cooperation framework, which could also be used partially by judicial actors.

More directly concerning police policy was the 1996 joint action on the exchange of liaison magistrates to facilitate judicial cooperation, which aimed to establish a framework for bi- and multilateral agreements. In 1995 the EU Data protection directive was adopted (95/46/EC). It clarified and extended the scope of data protection regarding the 1981 Council of Europe convention on the protection of personal data and became an increasingly important legislative instrument as the use and treatment of data for law enforcement purposes became a central feature in the third pillar. Despite the fact that the directive is a first pillar measure, its implications were important for the third pillar as well as much cooperation was based on information exchange. Its first

pillar basis, however, presented a major problem, as it could not be used directly for third pillar issues. Only in 2005 the Commission presented a proposal for a framework decision on data protection, which has not been adopted yet, though.

This further highlights a growing problem to differentiate between first and third pillar policies and to determine the correct treaty base of measures in law enforcement policy. Recent cases before the European Court of Justice show this. While preliminary rulings (art. 234 TEC) still constitute a large share, the number of interinstitutional cases has grown over time, especially in third pillar areas (*Pupino* and *Commission v Council C-176/03*). We can think of three major reasons for this development. First the *passerelle* clause (art 42 TEU), through which asylum and immigration policy has been moved to the first pillar in 2004 further blurred the already fuzzy functional boundary. Second, the scope of competences of the Commission to regulate the common market increasingly spreads into the criminal domain (Lords, 2006). Third, the establishment of the single market and criminal law enforcement are closely functionally connected.

A general observation that can be made is that despite the introduction of new binding instruments, the member states often used traditional instruments in JHA. Mostly they were non-binding, such as recommendations, declarations or resolutions and conclusions. The legal fuzziness of the new instruments further discouraged their use (see Fortescue, 1995; Müller, 2003: 263-4). Given the unanimity requirement for all binding decisions this method allowed the adoption of decisions without falling back on lowest common denominator solutions, as many of the legally binding measures are. As the policy area is central to national sovereignty, this does not come as a surprise given the lack of trust among the relevant actors involved (Commission, 2004d; Bigo, 2000; Douglas-Scott, 2004). The price for this was limited transposition and dependence on governments to willingly transpose policies. This was rarely the case, especially in the light of an increasingly sceptical public (Gabel, 1998). The use of conventions for agreeing on binding measures was still quite high under the Maastricht treaty.¹¹

Looking at the years of adoption, it is clear that conventions were used early on in the development of the third pillar. The cumbersome procedures necessary for their implementation make them badly suited for timely solutions to perceived problems. Despite their number and scope conventions under Maastricht only were able to exert a

¹¹ The following conventions were agreed upon within the EU framework: 1995 on simplified extradition, 1995 on Europol, 1995 on the protection of the financial interests of the EU, 1996 on the use of IT for customs purposes, 1996 on extradition among the MS, 1997 on the fight against corruption, 1997 on customs cooperation (Naples II), 1998 on driving disqualifications, and 2000 on mutual legal assistance in criminal matters.

limited effect, as only very few were ratified quickly. For most it took until after the year 2000 before they came into force.

2.5.4. Amsterdam and beyond

The treaty of Amsterdam introduced the area of freedom, security and justice (AFSJ). It contained three areas: asylum/immigration (arts 61-69 TEC), police customs and drugs (arts 29-42 TEU), civil and criminal matters (arts 29-42 TEU). But not only the set-up of the policy field changed, but also procedures and instruments. Asylum and immigration and civil matter cooperation were communitarised and the scope of the third pillar was extended (Monar and Wessels, 2000; Ucarer, 2001). Legislative activity in the third pillar greatly expanded (Müller, 2003: 251-69). Including Schengen, the annual growth of the *acquis communautaire* was on average 22 measures per year before the treaty of Amsterdam and almost 70 between 1999 and 2002 owing to the surprisingly substantive changes in decision-making brought about by the 1996 IGC (Monar and Wessels, 2000). In the light of the questions guiding the chapter, these changes recommend a more in depth treatment of the instruments, as they have direct effect on different levels of policy in each case. Article 34 II TEU specifies three types of legally binding measures that the Council can adopt unanimously in the third pillar: framework decisions, conventions and decisions.

Framework decisions require the member states to ensure the prescribed approximation of national laws. This can require member states to criminalise and penalise particular actions, to specify minimum maximum sentences for crimes or to employ procedures in particular cases. The goal is to approximate the criminal justice systems with regard to a more effective fight against organised and serious crime. Framework decision explicitly aim at changing existing national law or arguably compel the member states to introduce new laws to meet the requirements (Reichelt, 2004). Thus their potential for changes is quite high, even though they do not prescribe a particular way of doing things. Given the diversity of national criminal justice systems (Delmas-Marty and Spencer, 2002), the application of a similar requirement to different legal systems is prone to lead to national changes. Framework decisions are negotiated and adopted by the Council of Ministers. National parliaments are obliged to transpose them, but are free to determine the way in which this is done, as long as the content of the framework decisions is reflected in national law.¹²

¹² This is particularly obvious in the German case, where parliament was forcefully reminded of its scope of influence when the constitutional court nullified the EAW law in 2005 on the ground that parliament did not sufficiently exercise its control function (Bundesverfassungsgericht, 2005).

The second legally binding instrument in the third pillar that directly affects the national regulatory framework is the convention (art. 34(2)d TEU). Conventions are traditional instruments of international law. They are negotiated among governments in the Council and take effect at the national level as a whole after being ratified according to the constitutional requirements of the member state. The form of the measure requires the inclusion of national parliaments.¹³ But parliament cannot change the content of the convention. It only has the option to take it or leave it. Changes come about through regulatory statutes (*Ausführungsbestimmungen*). They specify the necessary adaptations in order to make the national system compatible with the demands arising from international obligations. Whether parliament needs to be included in their formulation depends on the constitutional rules. Whatever changes are adopted, however, only come to bear once the convention has entered into force, that is before 1999 when all contracting parties have ratified it according to their national laws, for conventions after 1999 once half of the member states have ratified it. But then it only comes into force for those member states. The ratification of a convention only implies a hypothetical obligation for the member state, which becomes reality only when the international instrument comes into force.

Reichelt (2004: 30) argues that Council decisions also affect the national legal order. Their effect, however, is indirect as they are explicitly established for 'any other purpose ... excluding any approximation of the laws and regulations of the member states' (art 34 TEU (2)c). This in his view does not preclude the adoption of measures which introduce detailed criminal law measures which are new to all member states. This would then not be an approximation, but fall within the scope of 'any other purpose consistent with the objective of this title' (art. 34 TEU (2)c). This situation has not occurred as yet. Decisions mainly have procedural effects,¹⁴ which affect the procedures at the national level as well. The establishment of organisational structures at the EU level can have profound effects nationally. Especially when reconfiguring the institutional constellation there, decisions

¹³ This, according to Reichelt (Reichelt, 2004) indicates the use of conventions for issues which affect significantly constitutional structures in the member states (cf. Douglas-Scott, 2004). Hecker, however, argues that the decreasing use of convention is related to the cumbersome nature of this legal instrument and the fact that even in the case of the reformed convention, according to which a convention can enter into force once half the signatories have ratified it (Hecker, 2005: 369; Weyembergh, 2005; Nilsson, 2002). So the argument of Reichelt (2004) is formally correct, but the empirical facts contradict his interpretation. In the areas of police and judicial cooperation in criminal matters, the member states of the EU have adopted twelve conventions between 1991 and 2000. But since the treaty of Amsterdam, this number has dwindled to one (MLA convention in 2000). The use of framework decisions has almost entirely replaced the use of conventions (Ligeti, 2005: 263) also with regard to central issues of the policy field. Arguably the framework decisions building on mutual recognition, such as the EAW, are the most constitutionally relevant measures adopted so far.

¹⁴ Organisational structures are expressions of procedures. Eurojust, for example, was established by a decision. It does not change substantive law, though but only institutionalises procedures for judicial cooperation.

are important for impacting on the national opportunity structures. This can have an impact in particular in emergent areas, such as Cybercrime, which are not yet as extensively regulated at the national level (see contributions in Koops and Brenner, 2006).

Concerning third pillar issues, the period since the Intergovernmental Conference (IGC) 1996 can be called the period of action plans. Action plans are not binding, but of great significance as they express the Council's political will to initiate legislation (Mitsilegas et al., 2003 88). In less than four years the Council adopted the 1997 action plan to combat organised crime, the 1998 action plan on the implementation of AFSJ, the 1999 conclusions of the Tampere European Council and 2000 the Millennium action plan against organised crime, which highlights their importance for the development of the policy field (Nilsson, 2002: 5). This is even more the case, as many of the measures thus proposed were actually transformed into legally binding measures.

Beyond the substantive treatment of problems and solutions in response to the EU treaties, the action plans are also interesting from a developmental perspective on the policy field. In 1996 the second Dublin European Council established a High Level Working Group on organised crime, which in 1997 presented the 'action plan to combat organized crime' to the European Council (Council of the European Union, 1997). Until this action plan police matters were the central aspect of cooperation in the third pillar concerning the fight against crime. The working group, though, demanded to extend judicial cooperation to match police cooperation in order to be able to 'enhance further police cooperation without distortions to the system'. Increasing judicial cooperation includes the possible approximation, or even harmonisation of laws in relation to the practical cooperation of police forces. This points to the relevance of the action plan regarding the national policing and law enforcement policies if all the recommendations were to be implemented. The repressive nature of the recommendations is highlighted in recommendation 5 of the action plan which demands that 'law enforcement and judicial authorities, *while avoiding undue restrictions* (emphasis SD), should have the means to prevent the use and misuse of new technologies'. Recommendation 17 calls for the harmonised criminalisation of participation in a criminal organisation. It was transposed through a joint action in 1998 (98/733/JHA), wherein article 2(9) defines offers two variants for being guilty of such participation:

- (a) conduct by any person who, with intent and with knowledge of either the aim and general criminal activity of the organisation or the intention of the organisation to commit the offences in question, actively takes part in:
 - the organisation's criminal activity falling within article 1, even where that person does not take part in the actual execution of the offences and, subject to the general principles of the criminal law of the Member States

- concerned, even where the offences concerned are not actually committed,
- the organisation's other activities in the further knowledge that his participation will contribute to the achievement of the organisations' criminal activities falling within article 1;
- (b) conduct by any person consisting in an agreement with one or more persons that an activity should be pursued which, if carried out, would amount to the commission of offences falling within article 1, even if that person does not take part in the actual execution of the activity.

This definition has been criticised as 'an amorphous concept which may jeopardise both certainty and efficiency, especially in view of the prospect of the Joint Action definition being used as a basis for other EU instruments' and for potentially 'challenging the very same fundamental legal and social values that it allegedly seeks to protect' (Mitsilegas et al., 2003 98). This vague concept of participation in a criminal organisation was later referred to in the development of EU anti-terrorism legislation after 2001.

In addition, the experts propose a mutual evaluation mechanism, a convention on mutual assistance in criminal matters, the establishment of central national contact points for operational cooperation, national multidisciplinary teams, a multidisciplinary working party on OC in the Council consisting of high level authorities, the full establishment of Europol and an extension of its competences and measures in the fight against money laundering. These goals were to be reached before 1999 and spell out the direction of European policy in the fight against organised crime. Already on first glance we see a focus on repressive means and the assumption of the experts that legal approximation of material and procedural criminal law is necessary. The action plan also mentions prevention, but contrary to repressive means does not spell out concrete measures.¹⁵ The experts identified the lacking degree of national ratification and implementation as setbacks and urged the MS to overcome this obstacle. This refers to both EU conventions and conventions emanating from other international bodies, such as the Council of Europe and the UN.

A multi-disciplinary Group on Organised Crime (MDG) was subsequently established to implement the action plan until 31 July 1999. Already in 1998 the MDG noted 'excellent progress' in the implementation of the action plan. This however needs to be considered in perspective, as the usual perception of third pillar cooperation was that of inertia and a

¹⁵ That might have to do with the lacking competence of the EU in social policy, wherein many prevention measures fall within that area, but also with the composition on the high-level group, which brought together senior police, justice and customs officials who have more experience in repressive policing methods (Occhipinti, 2003: 53).

strong reluctance to agree to sovereignty restricting measures. The decisions taken were mostly designed not to directly interfere with the sovereignty of the member states. By choosing this avenues, the member states had allowed for a speedy adoption of the action plan.

The Vienna European Council in 1998 agreed on the so-called Vienna action plan to establish the area of freedom, security and justice (Justice and Home Affairs Council, 1999). It talks more openly about the approximation of national criminal law than the 1997 action plan. In this it follows the critical report of the European Parliament which called for an approximation concerning the legal protection of fundamental rights, the definition of offences, the recognition of evidence and double criminality (Committee on Civil Liberties and Internal Affairs, 1997). Similar to the 1997 action plan the Vienna plan repeatedly emphasises the inextricable connection between police and judicial cooperation.

The Vienna action plan is less detailed than the 1997 plan, but effectively mentions the same measures concerning police. As Mitsilegas *et al.* note (2003: 85-86) the language of the action plan heavily emphasises security and follows a negative definition of freedom through combating and containing threats.

At the European Council in Tampere 1999, the presidency conclusions spelled out ten milestones for the development of JHA (European Council, 1999). As Occhipinti put it, 'although the specific objectives contained in each of the four main areas pertain, at least indirectly, to police cooperation in the EU, clearly those contained in part C (A Union-Wide Fight Against Crime) have had the most significant implications for this aspect of JHA policy' (Occhipinti, 2003: 83). Only four months later, in March 2000, the JHA Council adopted the action plan entitled 'The Prevention and Control of Organized Crime: A European Union Strategy for the Beginning of the New Millennium' (OJ C 124 of 03.05.2000). The following years were spent to implement the extensive political program contained in this impressive demonstration of political will to move forward in Justice and Home Affairs. Only in November 2005 the successor to the Tampere program was adopted, the so-called Hague program.

Last, but not least, institutional changes were plentiful after the treaty of Amsterdam. The establishment of Europol was counterbalanced through Eurojust by a Council decision in 2002. In 1998 the European Judicial Network (EJN) had been established, which would later be incorporated into Eurojust. It consisted of public prosecutors or judges who functioned as contact and information points in their respective countries. The goal was to make judicial cooperation more efficient and to exchange information on the different legal systems. Contrary to its policing counterpart Europol, the EJN did not have a central structure.

This was only established through Eurojust, which is a European Union body to ‘stimulate and improve the co-ordination of investigations and prosecutions between competent authorities in the Member States’ through legal assistance.¹⁶ The centralised structure in the area of police was seen to require augmented judicial institutions to avoid an imbalance between police and judicial cooperation in the light of their inextricable linkages (Justice and Home Affairs Council, 1999). Eurojust is a permanent institution in The Hague, staffed by liaison officers from the member states with the goal to improve judicial cooperation in criminal proceedings. Whether it is intended to be the nucleus of a European public prosecutor is unclear (cf. Douglas-Scott, 2004: 239).

OLAF, the anti-fraud agency of the EU, was institutionalised to protect the interests of the European Community and European Union. The need to have an institution to fight corruption was painfully highlighted by the forced resignation of the Santer commission in 1999 (Pujas, 2003). OLAF is also relevant in the fight against the financial aspects of crime, as it is competent to act where the financial interests of the Union are concerned.

In 2004, the Council established the European border agency Frontex (Council of the European Union, 2004). It is the youngest member among EU law enforcement actors. Its function is to support member states forces in their cooperative effort to secure the external border, support the expulsion (readmission) of illegal migrants and establish common education standards.

2.6. Conclusion

This *tour de force* of adopted measures and institutional development only paints part of the picture. All accounts of police and judicial cooperation in criminal matters point to the importance not only of non-binding measures, which were selectively discussed above, but also to the importance of informal discussions, non-papers and the simple continuity of meetings among practitioners and experts in the policy field (Bigo, 2000; Lobkowicz, 2002; Busch, 1995; Müller, 2003). The main effect of this has been quoted to be the improvement of trust through continuous interaction within the European structures (Anderson, 2002).

A gradual strengthening of supranational institutions in the third pillar can be seen, as well. On the one hand this concerns the operational cooperation supported through Europol, Eurojust, OLAF and Frontex, on the other hand, political EU institutions have increased in importance. The Commission was under Maastricht “an actor [in the third pillar], but not a very strong (and much less autonomous) agent” (Ucarer, 2001: 3), under the Amsterdam treaty its role improved considerably. After Tampere the Commission

¹⁶ See www.eurojust.eu (accessed 22.08.2007).

biannually published a scoreboard on the implementation of the measures foreseen in the Tampere conclusions (Commission, 2000b; Commission, 2000a; Commission, 2001a; Commission, 2001b; Commission, 2002a; Commission, 2002b; Commission, 2003a; Commission, 2003b). This ensured that the Commission gained in influence and was better able to determine the agenda in JHA.

Its supranational counterpart, the European Parliament (EP) gained importance through the work of the EP committee on civil liberties and internal affairs. Even though its role is formally very limited, and was especially so under the treaty of Maastricht, its reports were widely recognised and contributed to the discussion and public scrutiny of this pillar policy (Committee on Civil Liberties and Internal Affairs). Concerning third pillar output, however, its influence was and remains negligible.¹⁷

Finally, the European Court of Justice (ECJ) has strongly increased its role in recent years. While it did not have the right to issue judgements under the Maastricht framework, since Amsterdam it has limited competences (Smith and Wallace, 2000). Especially the competence to give preliminary rulings on the validity and interpretation of framework decision is important (art 46b with 35 TEU). Thus the ECJ has begun to develop case law, which has had a strong effect on JHA policy (Patett, 2006: 113). The most important decisions were the *Pupino* case (C-105/03 of 16.6.2005), in which the ECJ ruled that it had the right to give preliminary rulings on framework decision (at least for those member states who had signed such a declaration) and compelled national institutions to interpret national law with reference to the framework decision (Fetzer and Groß, 2005; Adam, 2005). In the case C-176/03 the ECJ annulled the framework decision on the criminal justice protection of the environment because it had the wrong legal basis. This led to a dispute between the Commission and the member states about the future policy-making (Lords, 2006: 19, 31, 40, 64). This further 'hardened' EU policy in the third pillar, because the member states now have to address the concerns of another player in the policy field. The binding decisions of the ECJ fulfil an important role in exerting pressure on the member states to comply with the requirements. The Commission uses them to supplant its 'naming and shaming' reports and the maintenance of the rule of law in the EU makes it virtually impossible for the member states to ignore the rulings of the ECJ.

The regulatory framework in the area of police policy at the EU level has grown significantly since the establishment of the Single European Act. The preceding presentation has traced the developments in Europe with regard to the dominant approaches to perceived problems and the concomitant solutions and regarding the

¹⁷ This might change once the reform treaty has entered into force, when third pillar issues, despite broadly still requiring unanimity, will be subject to the normal legislative procedure, which involves the EP.

temporal development more generally. In doing so it has presented the different forms the European policy framework takes. This is a first step towards answering the questions raised in this chapter on how developed the regulatory framework at the EU level is and where the major inventions lie. But we still need to qualify the developments.

The development of the scope and extend of third pillar cooperation in the EU can be assessed on the basis of the action plans. These political documents are often more ambitious than the eventual result. While not formally binding the member states, they form the political background upon which the formal framework is established. Their main advantage is to guide the spotlight to the issues, where the EU has become politically active.

Framework decisions were introduced by the Amsterdam treaty. Their goal is the approximation of national regulations. So in the light of the research question, which is interested in the effect the EU measures have on the design of national policy, they play a central role in the analysis. They form the core basis for the empirical analysis.

While the establishment of Europol was the biggest step forward concerning the institutional framework at the EU level and the extension of its competences was hotly debated, its direct relevance of individual changes for the design of national police policy was less imminent. Aden (1998: 307) has pointed to the importance of the judification of international police cooperation through Schengen and the third pillar, as it de-politicises controversies in a sensitive policy field. Another aspect of the policy development which comes to attention, especially with the disputed instruments available under the Maastricht treaty, is the long time it takes to reach agreement. The cumbersome decision-making procedures were often quoted to be the most severe obstacle to more productive policy-making in the third pillar (Müller, 2003). So if there is a domestic effect to be found in the Maastricht area or the institutional EU framework, its reasons is unlikely to be an individual measure. Instead of looking for a direct influence on national policy-making, the new structures at the EU level are likely to have indirect effects on the frames and norms dominant in the domestic arena. The same holds true for the period prior to the establishment of the EU. Trevi was an informal coordination structure and no legally binding measures could have been taken due to the lack of competences. So for this time period the effect of the EU is more likely to be indirect.

An exception to this rule remains the Schengen agreement and the conventions adopted in the 1990s. In particular the Schengen implementation agreement is important. It is the central legally binding measures for the cooperation among law enforcement institutions as well as the framework for the conclusion of bi- and multilateral practical cooperation agreements.

3. Police policy in Germany

Guiding questions:

- a. How has the policy framework governing the police developed in Germany?
- b. Where were major changes in the framework and what was their general effect on the policy field?
- c. How can we link the developments of the European and the German level to each other?

3.1. *The police in the German law enforcement framework*

In contrast to the analysis of the EU level, where we dealt with police and judicial matters, the focus in this and the following chapter is more directly on the police. Still the broader understanding of the police is used, which allows me to include, where adequate, other law enforcement agencies in the analysis. Policy-making and the definitional power of its content rest with the political and judicial domains. But their impact on the activity of the police is constitutive.

In Germany the police is regulated through a triad of legal areas and structurally differentiated over two levels. The three legal areas are the code of criminal procedure (*Strafprozessordnung – StPO*), the criminal code (*Strafgesetzbuch – StGB*), both of which are under federal competence, and police law (*Polizei- und Ordnungsrecht*), which is a matter for the German *Länder*. Central actors are the ministries of the interior of the *Länder* and the federal level, senior police officers and the relevant unions (Aden, 1998).

‘Organisational laws (mostly police law, but also partially laws changing the federal police) aim to change the structure of federal law enforcement agencies, procedural laws change the penal procedure with the aim to restrict the procedural rights of the accused and extend the rights of the law enforcement agencies. Penal laws criminalise previously lawful action or increase punishments’ (Aden, 1998 285-286, author’s translation).

The developments of the regulatory framework in the three legal areas are the subject of sections further below and are those not addressed here. A central question is the vertical separation of competences. The chapter intends to enable the reader to understand the organisational and substantive developments of German police policy. The argument is that despite the formal competence of the *Länder* for the police, an in depth analysis of the different levels is not part of the analysis of European influences, due to the focus of

EU policy on serious crime and due to the constitutional as well as the factual competence located at the federal level.

3.2. *Police governance in the Länder*

Fundamentally the competence for the police lies with the *Länder*, because after 1945 German police were decentralised to prevent the re-emergence of a *Gestapo* or *Reichssicherheitshauptamt* (Boldt and Stolleis, 2007: 27). The *Länder* thus have the organisational laws to regulate the composition and the competences of the police. Since the adoption of the model police code (*Musterentwurf eines einheitlichen Polizeigesetzes – MEPolG*) (Krüger, 1976), the laws have become increasingly modelled after it (Aden, 1998: 287; Tegtmeier and Vahle, 2004: 6; Roggan, 2000).¹⁸ This is even the case across the two dominant systems in the *Länder*, where police are either understood to be only those actors who are referred to in normal speech, when talking about the police (*Trennsystem* – system of separation), or where they are part of the state apparatus more broadly responsible for public order as in the old concept of *Policey* (Knöbl, 1998: 32 Pieroth, 2005 #47). In the political sphere the ministers' and senior officials' close cooperation in the conference of the ministers of the interior (IMK) means that developments within the *Länder* are well coordinated (Pütter, 2000).

Since the 19870s the *Länder* laws expanded the competence of police in prosecution and aversion of danger significantly in response to domestic terrorism (Wolf and Stephan, 1999: 16). New intrusive methods and the right to use force in the fight against serious crime, terrorism and drugs were introduced. The democratising tendencies of the draft police code, which aimed to provide more control measures against the abuse of police powers were mostly not taken up in new police laws. The focus of police regulation moved from terrorism in the 1970s to organised crime in the 1980s and early 1990s after the fall of the iron curtain and back to terrorism since the beginning of the 2000s. The result was an expansion of police competences on wiretapping, the bugging of private rooms, stop and search, the so called life saving shot (*finaler Rettungsschuss*), extended surveillance with new technologies (including automated license plate capturing and DNA collection) and improved cooperation among *Länder* police forces. This was not

¹⁸ Even though there seems to be some disagreement to which degree this coordination leads to an approximation of structures. While Pieroth (Pieroth et al., 2005: 8) sees a strong formative influence of the MEPolG, Hirsch (Union, 1998: 120) is more critical about the degree to which the MEPolG was used in the design of *Länder* police laws.(see also Wolf and Stephan, 1999; Tegtmeier and Vahle, 2004).

matched by restrictions on their use (Roggan, 2000). These expansive competences were primarily justified with reference to the fight against organised crime and terrorism.

In the *Länder* police laws were reformed around similar points in time. Reforms of the regulations took place around the early 1990s in response to the data protection requirements arising from the judgement of the federal constitutional court of 1983 on informational self-determination. Throughout the 1990s there was a constant stream of reforms, with BW republishing its police law in 1998 and NRW reforming it in 2003. A second wave of reforms took place in the 2000s when new technologies were introduced, so video surveillance of public spaces was legalised in 2000 (Würtenberger and Heckmann, 2005: 10; Tegtmeier and Vahle, 2004: 152) and continue until today.¹⁹ More recently, the reforms focussed on the introduction of New Public Management strategies to public administration, including the police (Lange and Schenck, 2004). In Baden-Württemberg, the law reforming the administrative structure (*Verwaltungsstrukturreformgesetz*) of 2004 reorganised the organisational setup of the police, leading to more centralisation and a stronger focus on efficiency and effectiveness of policing.

Institutionally, the police are subordinate to the ministers of the interior (Wolf and Stephan, 1999: 10) and each *Land* has an agency to protect the constitution (*Verfassungsschutz*). Through the reforms in the early 1990s they have become more centralised and in recent years have focussed on the introduction of new public management strategies (Lange and Schenck, 2004).

The federal level has almost no formal right to pass laws on police competences, methods or organisation. The police are organisationally independent actors, which are not subject to political direction. According to s. 154 *Gerichtsverfassungsgesetz* (law on the constitution of courts) the police can be designated as ‘auxiliary officer’ (*Hilfsbeamter*) of the office of the public prosecutor through *Länder* law (see also art. 163 StPO, cf. Heinz, 2004: fn 36).²⁰ But otherwise they are free to perform their function to avert danger and

¹⁹ A recent example is the ruling of the constitutional court against the police laws in Hesse and Schleswig Holstein which regulated the automatic surveillance of licence plates. BVerfG, 1 BvR 2074/05 of 11.3.2008 http://www.bverfg.de/entscheidungen/rs20080311_1bvr207405.html (accessed 20.04.2008).

²⁰ § 163 StPO

(1) “Die Behörden und Beamten des Polizeidienstes haben Straftaten zu erforschen und alle keinen Aufschub gestattenden Anordnungen zu treffen, um die Verdunkelung der Sache zu verhüten. Zu diesem Zweck sind sie befugt, alle Behörden um Auskunft zu ersuchen, bei Gefahr im Verzug auch, die Auskunft zu verlangen, sowie Ermittlungen jeder Art vorzunehmen, soweit nicht andere gesetzliche Vorschriften ihre Befugnisse besonders regeln.

prosecute breaches of public order on their own. This, however, only applies to the preventative function of the police (Gusy, 2006: 10). The repressive competences, on the other hand, are based on the criminal code. The methods available to the police in these cases are determined by the code of criminal procedure. The latter two exclusively belong to the competence of the federal level. Administratively, the oversight on both levels lies with the respective interior ministry.

This organisational separation across levels is functionally open. Concerning serious international and organised crime, the federal level has the competence to regulate. When a factual connection (*Sachzusammenhang*) exists between a necessary federal regulation and the competences of the police, the federal level may have an impact on the regulation of the *Länder* police (Lisken and Denninger, 2007: 126). Originally, this competence was very limited but has greatly expanded since the 1960s (Boldt, 1996). The underlying idea was that a successful fight against international and organised crime should not be hampered by the fragmented nature of police in the *Länder*. This emphasises the importance of the federal level for an analysis of the Europeanisation of the German police. So in the following the analysis is restricted to the federal level and the *Länder* level is rarely directly addressed. Given the importance of other laws than police law for the governance of the police, the presentation will be restricted to the *StGB*, the *StPO* and organisational laws on the federal and the *Länder* level. But we need to be aware that the police are affected whenever an action is criminalised in any law. As this could happen everywhere, a positive list of criminalised action and their effect on the competences of the police cannot form the basis for a meaningful analysis. Rather the focus on internal security guides the selection of measures to be analysed and only the changes contained in these measures will be included in the analysis. In addition, a focus will be put on procedural means as they are often regarded as a benchmark for the quality of democracy (Löf, 2006). But before turning to the substance of German police policy, the dominant actors and their constitution need to be introduced.

3.3. *Law enforcement actors*

Formally the public prosecutor is the main actor in criminal procedure. But as Wolfgang Heinz points out, in reality the police in many cases is in charge of preliminary proceedings (Heinz, 2004: 8-9). He even argues that the police determine the outcome of proceedings through their investigative activity. This means that while the *StPO* is primarily intended to regulate procedure with regard to the public prosecutor, the police

(2) Die Behörden und Beamten des Polizeidienstes übersenden ihre Verhandlungen ohne Verzug der Staatsanwaltschaft. Erscheint die schleunige Vornahme richterlicher Untersuchungshandlungen erforderlich, so kann die Übersendung unmittelbar an das Amtsgericht erfolgen.”

are often directly concerned. The police and the executive branch are closely connected to each other. The police require a legal basis to act upon and a judicial go ahead in order to execute the legitimate monopoly of force and infringe on the right of an individual (Lisken and Denninger, 1996: 123). In urgent cases this consent can be obtained after the act. Under certain circumstances, the police act as an auxiliary to the public prosecutor (s. 152b StGB). The enabling norms are either contained in general clauses (*Generalklauseln*) or authorisation for special cases (*Spezialermächtigungen*). There has been a development from the former to the latter in the democratisation of the police in Germany since 1945. Less intrusive measures are usually regulated through the former, whereas those measures that infringe on civil rights are regulated through special authorisations (Pieroth et al., 2005: 41). Recently, developments of police work to intelligence-led policing (Sheptycki, 2004) have increased the number of cases where this development is reversed with the aim to give the police more freedom to fight against organised crime and terrorism.

3.3.1. The federal office of criminal investigation and the federal police

The federal office of criminal investigation (*Bundeskriminalamt – BKA*) was originally intended only as an agency to facilitate and enable information exchange. The underlying idea was to provide a structure to the effective cooperation of police across *Länder* borders. Together with the federal police (previously federal border police – *BGS*), it is the only law enforcement organisation on the federal level with a direct police relevance. These two organisations are the most important directly police-related organisations on the federal level and at the same time increasingly powerful actors in the policy field. The BKA has exclusive competence for international law enforcement cooperation, which was one of the reasons for its establishment.

From a rather small institution, the BKA saw a massive increase in its organisational size and competence scope in the 1970s in response to domestic terrorism and serious crime (Aden, 1998: 54). Today it has more than 5000 employees (Mokros, 2007b: 47). This tendency to expand the resources of central bodies was identified by Funk et al. as a dominant feature of police development (Funk et al., 1980). In the 1970s the ideology of policy planning was a major driving force side by side with functional needs originating from domestic terrorism.²¹ The development of a European internal security policy was seen to further this development (Aden, 1998: 418).

²¹ For a practitioner view with a focus on the use of technology for crime fighting see (Herold, 1979)

The BKA is a federal institution under the oversight of the federal interior ministry. Its organisational structure is set by ministerial order. Sections on organised crime, central tasks of criminal investigations, police related protection of the state and criminological-technological institute were joined in 2005 by a new section on international coordination. The new section is responsible for the coordination of international police cooperation in which the BKA is involved. In 2004 a 'joint anti- terrorism centre' (*Gemeinsames Terrorabwehrzentrum*) was established in Berlin. It brings together representatives of the federal police, the *Länder* police forces and secret services (Mokros, 2007b: 47). This is an instance where the constitutionally prescribed separation between intelligence services and police seems absent. The separation between the police and the intelligence services is absolute concerning their competences and organisational establishment. This does not imply, however, that it is prohibited to exchange data which is relevant for law enforcement among intelligence services and the police (Zöller, 2006: 484). So the problematique of dissolving these borders is political, not legal. The argument is that the close cooperation among institutions, which are formally separate, but which may cooperate in order to fulfil their respective roles, threatens especially data protection principles, such as the restriction exchange to data which was 'accidentally' found by intelligence services (Zöller, 2006: 499), or the use of data for other purposes than originally intended. Most problematic is, however, the danger that the regularised cooperation between the services leads to a practical dissolution of boundaries between the working methods and competences.

The basis for the BKA is the BKA law, which was adopted in 1973 (BGBl I 704) and fundamentally reformed in 1997 (BGBl I 1650), when the competences of the BKA were extended. Through this reform the government aimed to transpose the requirements for the use of personal data after the ruling of the constitutional court in 1983, which emboldened the right to informational self-determination, and at the same time bring the BKA law in line with the draft uniform police code (MEPolG, Bundesregierung, 1995: 50). It was subsequently changed when the Europol convention was ratified in 1997, where the BKA was designated as the central contact point (see also the law on the International Criminal Court) and in the context of the fight against terrorism (*Terrorbekämpfungsgesetz* and 34. *Strafrechtsänderungsgesetz* 2002 extended the competences of the BKA) and money laundering (*Geldwäschebekämpfungsgesetz* and *Zollfahndungsneuregelungsgesetz* 2002), which changed the use of surveillance and the transfer and use of information and their treatment, where the BKA is the primary actor in federal law enforcement. The 1997 BKA law also allowed better cross-agency cooperation, which highlights the interdependency of law enforcement agents on the federal level. Furthermore, the activity of the BKA was affected through changes in a number of other laws over time. Its original function as a coordinating institutions has

long been overshadowed by its law enforcement powers (Lisken and Denninger, 2007: 131), even though the BKA law declares that the competence of the BKA to prosecute is without prejudice to the *Länder* polices, who originally had a monopoly in this regard (cf. Lisken and Denninger, 2007: 131).

The federal police (BGS) was established in 1951 as a militarised border police and despite the lack of competences of the federal level in police matters quickly expanded its competences beyond border control to more general law enforcement within clearly delineated boundaries. The increase in competences is a good example of the centralising tendencies mentioned above. Lisken (2001: 111) calls into question the competence of these extended activities which encompass the execution of police functions in airports, on trains and in train stations as well as in extended border areas. There are constitutional barriers against a development to an alternative police force to those of the *Länder*. In its relation to the BKA, the BGS is treated like a *Länder* police force and thus requires the establishment of formal relations to be able to cooperate with the BKA. Its legal base is the 1994 BGS law, which replaced the 1972 law, which had expanded the competences of the BGS beyond border control to the BGS playing a role in the fight against terrorism and international crime. The 1994 law reorganises the competences and the regulations for the use of data. Subsequently the law was changed again regarding the treatment of data (1998) and the scope of competences for the BGS (*Terrorismusbekämpfungsgesetz* 2002).

3.3.2. Other actors in the policy field/IMK

The politically and formally most important actors are the justice and interior ministries, and, due to the close connection between the police and the ministry through the hierarchical relationship, relevant interest groups such as police unions exert a strong influence on policy developments (Aden, 1998: 172-96). The conference of the federal minister of the interior and those of the *Länder* (*Innenministerkonferenz* – IMK) is a highly important though often overlooked institution for the development of police policy, as it does not have a formal legal basis (Busch, 1995: 162-64). Its existence is due to a gap in the Basic Law, as it does not regulate the necessary cooperation of the federal and the *Länder* level in internal security matters. Appraising the influence of the IMK is difficult, however, because its decisions and even its agenda are secret (Pütter, 2000: 275-76). Only since recently it publishes the agenda of its meetings and provides some information. These agendas do not justify the secrecy surrounding the IMK, as most topics covered are normal law enforcement issues, such as political debates on police training or strategy. The federal (penal and procedural law) and the *Länder* level (police law) are closely interconnected and in the IMK the relevant actors coordinate their policy. The representative of the federal ministry has a formally weak standing given the

constitutional constraints on federal law enforcement. All the same she plays an important role, often chairing the meetings and fully participating in meetings and discussions (Pütter, 2000: 277). This seeming contradiction has been explained by two factors. First, the federal level is an impartial outsider, who does not have direct interest in a particular *Länder* police force and is thus better suited as an moderator. Second, the federal level is responsible for international and serious crime and thus needs to ensure a cooperative and coordinated response by the *Länder*, their support and keep them informed about current developments.

3.4. *Substantive developments*

Criminal prosecution is regulated in the code of criminal procedure (*Strafprozessordnung* – StPO) and the criminal code (*Strafgesetzbuch* – StGB) on the federal level. Whenever the police take a measure, which affects a fundamental or civil right of individuals, it requires a basis in the criminal code, which is set on the federal level. There also needs to be a foundation in the code of criminal procedure. Recently notable is the increasing movement of police activity into preventive work, where the procedural rights are less qualified, because the StPO is conceptualised reactively. Here fundamental rights are of primary importance. Methodologically this relationship allows treating the developments in criminal law and criminal procedure as ‘hinges’ for the activity of the police.

On this level, the competence of the state to regulate the police is restricted (Lisken, 2001: 60 and art. 74 GG). There is no general ‘police law’. The state has only special competences, such as to defend the constitutional order, to ensure the effective cooperation of criminal police between the *Länder* and the federal level as codified in the law on the federal criminal police office, and to protect external borders of Germany through the border police.

In principle, the StPO and StGB – though changed often - still build on the original version of the codes from the 1870s. Their content and intention have changed considerably, though. Since 1945 the codes were modernised several times and their social re-integrative function was emphasised more strongly as opposed to their punitive function (Heinz, 2008: 11). At the same time policy-making follows the German tradition of having article laws, which change, replace or introduce individual articles or sections. Republications of whole section or the whole code only rarely take place. Interesting for our analysis is the fact that since 1984 an ‘avalanche of changes’ has occurred with regard to material and procedural criminal law (Hettinger, 1997: 2). The following paragraphs focus on the grand developments in procedural and material law. They do not provide a legal interpretation of the developments. The aim is to embed the development in the political discussion of the time and highlight linkages to the

developments in Europe as presented in chapter two. In addition, the institutional developments can be put in context.

The criminal code (*Strafgesetzbuch* – StGB) is the central body of legislation in criminal matters (Tröndle and Fischer, 2003: 1). While the procedural code is highly important as well and an independent piece of legislation, the penal code is the basis without which the procedural code cannot and need not exist. In 1987 the criminal code was re-published (*Neubekanntmachung*) and fundamentally reformed in 1998. The goal was to systematise previous changes (often) alongside a reorientation of the general setup. The reform in 1998 went deeper in that it renumbered the offences and aimed to internally harmonise and modernise the StGB. Instead of a cosmetic change, the dogmatic of the criminal code was changed. Subsequent reforms transposed European norms in Germany (EGFinSchG, EUBestG 10.9.1998).

The criminal code is not directly concerned with police, as it criminalises certain acts and behaviours and defines the applicable punishments. Looking at policy-making in the 1990s, we can observe two major developments in the area of serious crime:

(1) the introduction of new crimes and

(2) increasing punishments for existing crimes (Hettinger, 1997: 19 and 41-2; Hassemer, 2007).

This development is particularly pertinent in the context of serious crime. Serious crime is a term rarely used conceptually in German discourse and is meant to encompass terrorism, organised crime and trafficking of humans, drugs and arms. This is in line with the treatment of – in particular – terrorism. The frame in which it was criminalised was normal crime.

While the focus in procedural law remained the social reintegration of offenders (Hettinger, 1997: 15), the tendency in law making in the 1990s was no longer the protection of the individual's privacy, but the protection of the individual against organised crime (Interior minister Otto Schily in 1998, cited in Bukow, 2005). Such an approach favours the extension of competences for the state and has been criticised as treating individual rights as secondary to general security (Lepsius, 2004). Furthermore whether such a repressive focus was the best way to treat social problems (e.g. in the field of drugs (Elvins, 2003)) and address new risks, has been be doubted and is the object of a central critique of penalising developments (e.g. Johnston and Shearing, 2003; Busch, 1999; Hassemer, 2007). As this is often common agreement among experts, policy-makers are then accused of symbolic politics trying to appease the public for whom the provision of security is high on the agenda. A recent example is the debate

about the use of computer viruses to observe criminals and obtain relevant information about criminal preparations.

In the analysis of the developments in criminal law the intimate relation between substantive and procedural law is evident. Both underwent significant changes and despite their formal separation they strongly interlink. The developments in procedural law are often more relevant for civil liberty than changes in substantive law and the ramifications of seemingly small changes in procedural regulations have strong effects on the competences of the police. The analysis maintains the – therefore – heuristic separation between criminal procedure and material law for reasons of presentation, but focuses on both in the subsequent analysis.

In 1987 the procedural code was fundamentally revised to coherently include all previous changes. In the period since 1985 Heinz (2004: 32) identifies two reforms with the aim to streamline procedure, which are the 1994 law to fight crime (*Verbrechenbekämpfungsgesetz*) and the 1993 law to improve the criminal procedure (*Entlastungsgesetz*).²² The fight against terrorists was emboldened by procedural restrictions in the 1970s (*Antiterrorismusgesetz* 1978, *Kontaktsperregesetz* 1977) (Heinz, 2004: 33). In order to increase the competences of the law enforcement agencies in the fight against organised crime and terrorism, a leniency programme was introduced in 1989 and dragnet controls in 1986. In 1992 the OC law regulated (and legalised) the use of modern (technologically advanced) investigation methods and contained several procedural changes from the previous legislative period (Aden, 1998: 293). Aden (ibid) calls this law an instance of ‘deregulatory regulation’ as the ‘new’ methods merely regulated those methods already used previously. The law to change the criminal procedure (*Strafverfahrenänderungsgesetz*) of 1997 allowed analysis of DNA in the investigation of serious crime, and in 1998 the ‘*Große Lauschangriff*’ (‘The Great Bugging Operation’) was legalised (BGBl I 845). In order to be able to wiretap constitutionally private space for law enforcement purposes, the Basic Law had to be changed, which led to an intense controversy in Germany about the legitimate powers of the state and the resignation of the justice minister Sabine Leutheusser-Schnarrenberger, who has since become an ardent critic of such securitising developments in Germany and the EU. Since 1998 the statutory range of punishment for serious crimes, especially sex and violent offences have been extended (Düinkel, 2002: 4). This is a development whereby a differentiation between serious and not serious crime becomes obvious. The overall tendency in criminalisation and punishment is towards re-socialisation and a reduction of punishments (Heinz, 2007: 3), but in the field of serious crime, the criminal law competences to dry up the background for criminal activity has

²² In the period between 1983 and 1997 Hettinger mentions more than 30 changes of the procedural code (Hettinger, 1997: 2). Recent analyses indicate the continuation of these developments (cf. Heinz, 2004).

been continuously extended and punishment have been increased (Heinz, 2007: 3; Hassemer, 2007). The 2001 law to change the procedural code (*Gesetz zur Änderung der Strafprozessordnung*) introduced the extended retention of telecommunications data and their user for law enforcement.²³

This development can be seen in many laws adopted in the period between 1985 and 2005. The *Gesetz zur Bekämpfung des illegalen Rauschgifthandels und andere Erscheinungsformen der organisierten Kriminalität* 1992 (Law to fight illegal drug trafficking and other forms of organised crime – OC law) was the first law explicitly targeting organised crime. It is a good example for the aforementioned development as it expanded the methods of the police (dragnet search, extended surveillance powers, phone bugging), increased penalties of drug offences, introduced the offence of money laundering and criminalised the membership in foreign criminal organisations. It was one of the central legislative changes taking place in Germany in the 1990s (Union, 1998).²⁴ Other laws were the law to fight crime of 1994 (*Verbrechensbekämpfungsgesetz*), which introduced the competence for extended eavesdropping. Its final form was shaped by elections, which took place in 1994. In the campaign internal security was a dominant topic (Aden, 1998: 294).²⁵ In 1998 a new law against organised crime re-conceptualised the offence of money laundering and refers to the EU directive on money laundering (BGBl I 845, 1998). These laws have in common that they provide the police with a broad range of methods, especially concerning the use of new technologies, such as automated licence plate observation, online surveillance, dragnet search and DNA matching.

The second major area of serious crime policy concerns the fight against terrorism. Extensive policy-making in the 1970s against domestic terrorism expanded the instruments available to the police, as well as scope of activities, which then began to move to the *Vorfeld* (Funk et al., 1980: 17). Even then the police championed the use of new technologies to identify and prosecute terrorist (Herold, 1979). In the 1980s and 1990s the policy field received less attention until the late 1990s when the debate became more central again, because of the debates on the EU level and, of course, in 2001 after the attacks in the US. The anti-terrorism packages of 2002 can claim to be the most important single measures in the development of internal security policy (Lepsius, 2004). Through them article 129b was introduced into the penal code, criminalising the foundation and support of a foreign criminal or terrorist organisation. Thus the support

²³ On a side note, it is instructive to see that the 1998 law to protect witnesses (*Zeugenschutzgesetz*) has been modelled explicitly after the British example (see the documentation on <http://dip.bundestag.de>).

²⁴ The property fine, a punishment where the accused can be held liable with all her belongings (*Vermögen*) was ruled unconstitutional in 2002, as it was seen to breach art 103(2) Basic Law (BvR 794/95).

²⁵ Parts of the law were subsequently ruled void by the Constitutional court in 1995.

of a criminal or terrorist group, which was not active on German territory, was criminalised in Germany. Holzberger (2000) considers this an instance where German law has been uploaded (cf. Howell, 2004a). The participation in a criminal organisation had been criminalised in Germany before the adoption of the joint action in 1998. By expanding this concept to the whole EU territory, a German concept was introduced into European law, which was previously unknown in its structure. In addition it carried a possible problem for the protection of civil liberties, as a participation in an organisation which was neither active in nor directed its activities against Germany could lead to arrest there. This induced a change in the German criminal law, but instead of limiting the scope of the new article 129b to the EU, it criminalises participation in any criminal organisation worldwide. Substantially the anti-terrorism package continues the development that had been evident since the 1980s, whereby penalties for serious crimes are increased, while punishment for minor offences remained the same. This led Haubrich to call it 'the most wide-ranging package of laws directed at civil liberties in the history of the German Republic' (Haubrich, 2003: 10). Most laws have in common that they change not only the StPO, but also the StGB, which is also true for a significant number of other important measures.

A counterforce in the extension of the competences of the law enforcement agencies was the ruling of the German federal constitutional court on informational self-determination in 1983, in which the court stated that in principle everyone could decide individually on the divulgement and use of personal data. Infringements on this right require a legal basis. As a consequence, many of the laws concerning the police affected this right of informational self-determination. Similar to the EU level, the relevance of the ruling highlights the importance of courts and judges in the development of the constitutionally central policy field internal security. But despite the seemingly positive effect on data protection, Aden (Aden, 1998: 266) argues that this requirement offered the police the possibility to circumvent the restrictions on the use of personal data by providing lip service protection and provide a sound legal basis for the expansion of the competences of the police, i.e. to minimise the effects of the ruling.

On the federal level the developments of the regulatory framework for the police took place in two areas. First, the laws on the competences and structures of federal law enforcement actors (BKA and BGS) changed. The competences of the BKA and the BGS were expanded. This is reflected in the 2005 renaming of the former border police to federal police. Such a centralisation of police governance on the federal level to the expense of the *Länder* polices (Aden, 1998: 53-56) is a dominant trend and was, for example, influenced and supported by EU requirements to establish central contact points for Europol, SIS and Eurojust. Functionally, increasing competences relate to the growing focus of internal security policy on organised crime and terrorism, which

requires more intrusive competences. As their application often requires the use of large resources and due to their intrusiveness a limit on the number of actors who may authorise their use, organisational and competence centralisation is a logical step from an efficiency point of view. These developments are closely related to developments in penal and procedural law. Especially the fight against terrorism has reduced procedural guarantees which was justified with reference to the increasing sophistication of criminals. Points of change were 1994 when the BGS law was changed, 1997 with the reform of the BKA law, the 1998 reform of the BGS, the 2001 law on data protection and the 2002 anti-terror laws.

Second, material law has extended the criminalisation of acts and increased the punishments for new and existing acts. While for less serious crime this is not the case, in serious crime policy the tendency is obvious (Hassemer, 2007; Lepsius, 2004). Penalties have been increased, leniency rules have been tightened and proceeds from crimes can more easily and more comprehensively be seized (Heinz, 2007: 3). Interestingly, there is also a tendency to introduce minimal maximum sentences (Hettinger, 1997), which is also a feature of European criminal law (Weyembergh, 2005). Important changes were the 1992 OC law, which affected StGB and, for example, introduced electronic surveillance, new crimes and higher punishments) and the 2002 anti-terrorism packages.

3.5. Domestic developments on two levels

In Germany policies developed temporally more or less in parallel at the federal and the *Länder* level. The coordination of *Länder* and federal policy-making in the conference of the ministers of the interior (IMK) ensured overall coherent developments across levels even though formal competences remain with the *Länder*. After reforms in the 1980s significant reforms took place in the early 1990s, mostly linked to the requirement of the ruling of the federal constitutional court of 1983. Subsequent reforms in the 1990s focussed on improving the repertoire of law enforcement in the fight against serious crime. In the late 1990 and especially the 2000s the focus shifted to the fight against terrorism. Where is it then most likely to find an EU influence?

EU policy in principle affects all actors and levels equally. It does not specifically focus on the federal or the *Länder* level. The EU does not prescribe, how a member state ought to comply with the requirements emanating from EU policy. Neither does it regulate specific methods and approaches to criminality, but provides the meta-structures and frameworks within which national law enforcement actors cooperate.

Many reforms on the *Länder* level took place in response to changes on the federal level, e.g. when the criminal law was changed or procedural laws were affected. The observed incrimination of actions and the movement towards higher sentences affects the *Länder*

police laws in terms of procedural guarantees and of course the legitimate degree of action of the police. The original developments, which also Hassemer (2007) identifies as shaping German police policy, took place at the federal level, however.

The focus of EU policy is serious crime. In Germany this is an exclusive competence of the federal level to regulate. The same can be said for the governance of international police cooperation, for which the BKA is exclusively responsible (Gusy, 2006: 13). Beyond the obvious repressive function inherent in this rule, Baldus (2001: 360) argues that the expression '*internationale Verbrechensbekämpfung*' includes both preventive and repressive competences. This further reduces the competence scope for the *Länder* and leads to a centralisation of policy-making competences on the federal level.

Institutionally, the German law enforcement framework has become increasingly centralised in recent years (Aden, 1998). This process of moving competences from the *Länder* to the federal level for financial and functional reasons (Gusy, 2006: IV), was influenced by a new public management framework (Lange and Schenck, 2004). This seems to be partially a reaction to the requirements from EU measures to designate national contact points for police and judicial cooperation to reduce the transaction costs of cooperation among widely diverging systems (ENU, Sirene, EJN) (Den Boer, 2002a).

Substantively, police competences have been moved to the *Vorfeld*, i.e. to before a crime was committed for serious crimes. In line with that preparatory actions were also increasingly criminalised. Consequently, measures which were previously considered preventive are now legally based in the field of repression. So the *Länder* competence for the police in the fight against serious crime is eroded to a degree that they only have competence to regulate the maintenance of public order whereas their competence in crime fighting is severely limited. Simultaneously, the competence of the federal level in this area has increased.

These developments reiterate the argument made above, that while developments on the *Länder* level are important to understand German police governance, for an analysis of EU influence on this framework a focus on the federal level is more adequate.

3.6. *EU influence on German policy-making*

Descriptively the developments in the EU can be related to those at the national level. The transposition of EU agreements into national law constitutes a direct influence at the national level and thus offers contact points. In the discussion the likely influence of EU regulations for the development of criminal law has selectively been shining through. In order to contextualise this influence, the following presents a more detailed account of the influences of the EU on German policy-making in internal security matters. Töller has shown on the basis of legislative proceedings that in justice matters Europe has been

the impulse for 34% of legislative activity, up from 20% in 1990 (see table 1). In home affairs this increase is even stronger, growing from 2.3% in the period 1987-1990 to 19% in the period 1998-2002 (Töller, 2004: 33). The introduction of the treaty of Maastricht has had a significant influence on the amount of impulses originating at the EU level (Müller, 2003: 266).

Table 7 EU Impulses on German policy making in selected policy areas (in %, from Töller, 2004: 33)

Policy area	10 th legislative period	11 th legislative period	12 th legislative period	13 th legislative period	14 th legislative period
Justice	9,8	35	20	21,6	34,1
Home Affairs	4,4	2,3	14,5	11,9	19,2
Total	16,8	19,9	24,1	25,9	34,5

Den Boer, however, argues that the EU may have provided the incentive to reform national law enforcement organisations, but that changes were driven by domestic considerations and Germany implemented only few changes in direct response to European legal instruments (Den Boer, 2001: 268). So there seems a strong likeliness that the regulatory framework has been affected if there are European influences, but not organisational structures.

For the German police governance framework, there seems to be a direct influence through conventions in the 1990s and framework decisions in the 2000s. Examples are the ratification of the Europol convention in 1995 and the adoption of the protocol on immunities in 1998 (Baldus and Soine, 1999). UN and Council of Europe conventions, e.g. on the financing of terrorism, continue to play an important role.²⁶ Their role model

²⁶ The Council of Europe has been active in the establishment of a European legal space. It has adopted the 1957 European Convention on Extradition, the 1959 European Convention on Mutual Legal Assistance in Criminal Matters, the 1970 European Convention on the Validity of International Judgements and the 1983 European Convention on the Transfer of Sentenced Persons. In addition it adopted several convention on the protection of civil rights, for example the 1981 European Convention on the Automated Processing of Personal Data.

The United Nations play a role through their formulations of human and social rights and numerous conventions in the fight against terrorism.

function was highlighted in chapter two (cf. Monar, 2001b), but they do not constitute a core set of measures to be analysed.

While Schengen was an international agreement outside the EU treaty framework, its transposition had a strong influence on the adaptation of German law enforcement structures to international cooperation. It was transposed in 1990 and when looking at the data in the GESTA data base²⁷, which provides information on the origin and parliamentary procedure of laws, there are numerous changes that were made with reference to the Schengen convention and the obligations arising from it (ne bis in idem, the abolition of border control). In addition the Schengen convention provided the basis for bi- and trilateral agreements with neighbouring countries on cross-border operational cooperation. Especially in the debates on the fight against organised crime, there are several references to framework decisions. So these will receive particular attention.

The focus of the empirical analysis of German police policy lies on the changes occurring since the late 1990s and early 2000s. They still build on the 1990 republication of the penal and procedural law on the federal level and the reformulated *Länder* police laws, but were spurred on by the renewed interest in anti-terrorism legislation (Bukow, 2005: 50; cf. Pieroth et al., 2005) and growing EU policy-making activity (Müller, 2003: 266). The previous chapter has shown that the general setup of the policy field has undergone significant changes, but that EU influence is unlikely to be found directly in regulations concerning the police. At the same time, the close relationship of criminal law and police competences indicates the possibility of indirect influences through the development of closer links, the exchange of liaison offices and the growing acknowledgement that police cooperation is necessary in an integrating Europe (cf. Busch, 1995).

The effects on the German level thus sketched out need to be analysed in more detail. After an overview of the developments in police governance in England in the next chapter, an in depth analysis of primarily binding EU measures in Germany will be provided with a focus on the developments in the fight against serious crime. In doing so, special attention will be paid to the effects of framework decisions. They are the most likely candidates to have caused changes of the German policy framework.

²⁷ Available at <http://dip.bundestag.de>.

4. Police policy in England

Guiding questions:

- a. How has the policy framework governing the police developed in the UK?
- b. Where were important changes in this framework and what was their general effect on the policy field?
- c. How can we link the developments in England and the EU to each other?

4.1. *The police in England*

The governance framework of the police in the UK comprises institutional and organisational structures of police and substantive policy issues, which deal with the definition of crimes and their punishment. These two issues are dealt with separately in UK legislation. The often restricted statutory basis, especially of institutions (such as the early National Crime Intelligence Squad (NCIS)) and of criminal justice law (Glaeßner, 2005: 98), recommends a similar structure for the chapter. In line with the functional definition of police advanced in this project, the combination of form and content is indispensable, because only in their interplay the changes affecting the protection of civil liberties or the provision of security can be evaluated.

4.2. *Remarks on the constitutional form*

In contrast to Germany, which has a civil law system as all the rest of continental Europe, England has a common law system. This is characterised by lower reliance on statute laws and a strong role for precedent rulings. These rulings constitute one major source of rules for legal governance. In addition, the UK does not have a written constitution. This has an effect on the provision of civil liberties and rights, as a codified set of rules upon which to assess the effect of police policy on their protection, does not exist.²⁸ These are, on the most fundamental level, the major constitutional differences between the UK and Germany.

In the UK police governance is thus not embedded in a superior legal framework with a high formal threshold against change. In Germany, in contrast, the constitution is strongly protected, as any change requires a two-third majority in both houses of parliament. In the UK domestic law is the highest law that exists and there is not

²⁸ Only the 1998 Human Rights Act, which incorporates the 1950 European Convention on Human Rights into domestic law, for the first time introduces a codified list of rights into national law, even though the UK in 1951 had been the first state to ratify the convention. Formally, however, it was not recognised as a directly binding measure in domestic law.

superior law to it (Walker, 2000: 8). In principle, parliament can revoke all liberties by simple law. For the analysis of civil liberties and security in the regulatory framework for law enforcement, it means that there is no formal source which sets out inviolable fundamental rights and liberties.

The concept of parliamentary sovereignty grants exclusive law making power and highest political authority to parliament. In France, in contrast, sovereignty is a property of the state, which can adopt and repeal all legislation (Sturm, 2003). As a consequence in England the separation of power between the legislative and the executive is reduced, as whoever controls the legislative gains executive powers (Walker, 2000: 9). The unitary constitution gives sovereignty only to the Queen-in-Parliament. This precludes the establishment of a decentralised, federal system of competences for police governance, as it exists in Germany. This is not to say that the law enforcement systems in the UK could not be decentralised. The devolution ascribes competences to the regional or local level, for example the Scottish parliament and the Welsh assembly. The decentralised form is even more pronounced on the level of the police, which is organised in local chapters. In contrast to Germany, where the *Länder* competence for the police is constitutionally protected, devolution and the formal organisation of the police find their basis in normal parliamentary laws and precedent, both of which can in principle be revoked by a parliamentary decision. Concerning the formal set-up of institutional structures, the growing degree of centralisation is an example. Especially in recent years the Home Office received more competences in setting targets and more direct control over law enforcement forces. This development had been going on for almost a century (cf. Walker, 2000). In recent years, however, they have accelerated and fundamentally affected the institutional balance in the UK policing system. So the English police system is organisationally decentralised, but accountability-wise centralised.

All these changes are based on parliamentary laws only and can theoretically be reversed. But we must not forget, that while this argument is correct in the strict constitutional sense, that we have the situation that policing is locally organised and only a relatively small degree of activity takes place on the state level. And while there remains the legal possibility of reversing the situation and to establish a centralised police system, the political costs of doing so extensively are very high, as they would challenge norms and doctrines deeply embedded in the political system of the UK.²⁹ These costs are not factored in when discussing the legal form of the British governance system. What

²⁹ There is also the argument that parliamentary sovereignty does not extend indefinitely. It requires that a subsequent parliament is able to revoke a simple law. So the abolishment of democracy by parliament is thus not feasible

remains, however, is the ability of the sovereign parliament to modify the system to a degree, which is broader than in Germany.

The development of a law enforcement framework on the European level challenges this formal structure. First, European integration develops a regulatory framework, which is in parts superior to national arrangements (constitutionalisation of Europe).³⁰ Second, community law is always and directly binding for the member states³¹ and despite its hybrid situation between intergovernmentalism and supranationalism, this is also true for an increasing number of third pillar measures. This effectively reduces the sovereignty of the Queen-in-Parliament, which by acceding to the treaty on European Union has accepted the obligation to transpose binding EU measures. Third, European law is strongly influenced by civil law, which fosters the development of a hybrid legal system, where civil and common law measures interact. All these development indicate an influence of EU law on the English regulatory framework for the police.

In this context the question remains, to what degree substantive developments in European integration actually conflict with national developments in the law enforcement policy area. More fundamentally, are there aspects beyond the more general effects on the constitutional setup mentioned above, conducive to changing entrenched national structures? The two questions concern both the influence of the EU level on national policy and the role of the EU in the substantive development of law enforcement policy. While these two questions are closely related, they are heuristically differentiated and addressed individually.

Empirically, the UK is surprisingly well integrated in the EU third pillar structures. This is surprising, because the UK is generally considered a Eurosceptic country, which strongly emphasises its sovereignty. On the other hand, the weak supranationalisation of the third pillar structures in the EU enable the UK to participate in structures which are politically desirable seemingly without having to give up sovereignty. In addition, the UK is practically and functionally interested in international cooperation. The UK government and police forces have been keen to integrate in particular into systems of communications and data exchange for police cooperation at the European level (Sheptycki, 2002b: 538). But also more general, the UK has historically been internationally oriented both in commercial endeavours as well as concerning law enforcement. The geographical situation as an island reduced the need to engage in operational cooperation to secure borders. In situations where cooperation was necessary

³⁰ For a discussion of the supremacy of European law, see Arnheim (2004: 61)

³¹ Cf. The *Solange I* (BVerfGE 37, 271 of 29 May 1974) and *Solange II* (2 BvR 197/83 of 22 October 1986) decisions of the German Constitutional Court, which clarified the relationship between domestic and supranational competences.

across borders, though, the need to establish working relations and learn from the others was strong. Domestic and international terrorism in the colonies and Ireland also helped to foster a positive climate for international exchange and cooperation.

4.3. *The policing framework in England*

In England police policy is not as uniformly organised as in Germany. Despite the rather convoluted structure of German policing in the federal constitutional setup, the overall structure is quite similar across *Länder* and there is an established two-level governance and enforcement structure. As one of the objectives of this investigation is to assess the reactions of different legal systems to European integration in law enforcement, the analysis focuses on England (Walker, 2000: 151).

The police in England are organised on the county level. There are forty-three police forces. They are ultimately subject to general control of the Home Secretary, but police authorities, of which forty-three exist as well, exercise more direct control. They are administrative bodies consisting of elected and appointed police and non-police individuals. Their nationwide representatives are the association of police chiefs (APCO) and the association of police authorities, which represent them vis-à-vis the central government. In addition, a number of national police forces exist, such as the transport police and the ministry of defence police, which have restricted constabulary powers. The Metropolitan police in London had been the first police to be organised according to the principle of Peel's 'new police', which significantly professionalised the police and put more emphasis on detective work, and has been under the direct control of the Home Secretary as there did not exist a local police authority until very recently (Walker, 2000: 17). Finally, the growing use of information in law enforcement and the institutionalised fight against organised crime and terrorism means that the intelligence services and their law enforcement competences need to be included in the analysis, especially the competences to exchange data and data protection.

4.4. *Doctrines in police governance*

The British system of law enforcement governance rests on legal and organisational doctrines. One fundamental legal doctrine, which is very different from the German system, is that of *constabulary independence*. In simple words, each constable is responsible for her own actions, and the superior authority, mostly counties or the police authority as a supervisory body, but ultimately the home secretary, cannot be held liable. In the words of Neil Walker '[t]here was, first, the "not ... delegated ... but ... original authority" exercised by the constable when acting as a peace officer. By original authority is meant an authority which vests directly in the constable both at statute and at common law' (2000: 50). Police forces are financially and strategically directly controlled by police

authorities composed of elected and appointed officials. The traditional myth about the British bobby is that he is a member of the community and not an instrument of the state. The militarised way the police were employed in Northern Ireland and the British colonies shows that this notion of police was just that – a myth (Bayley, 1985).

The Home Secretary, the police and the police authorities constitute the tripartite institutional configuration. It has shaped policy-making and governance since the establishment of the ‘new police’ at the end of the 19th century (Walker, 2000; Reiner, 2000; Loader and Mulcahy, 2003; Home Office, 2001: 143-7). Starting at the lowest level, the chief constable as the commanding officer of the normal constable is independent in her actions and only accountable to the law. She has the power to hire and fire and some independence on financial matters. The police authority is a corporate body independent and separate from the local council. Its goal is to provide and maintain an effective and efficient police force for the area. Finally, the Home Secretary is the central governmental actor involved in police governance.

The doctrine of constabulary independence in the UK has consequences for the control of police action. When the police officer does not act as an agent of the municipal authority, the degree to which a wrong can be remedied is severely limited from an institutional point of view.³² It also means that the autonomy of the agent (the constable) and the possibility of the principal (the government) to ensure that the agent conforms to its tasks is difficult to enforce. The doctrine is meant to ensure that the exercise of law enforcement is not marred by political influence, and that police can only be held accountable to law. In Germany, in contrast, a clear hierarchical order of responsibility exists where the higher ranks have direct responsibility for the action of their subordinates.³³ There is a direct link from the political to the police sphere, as the police are part of the federal and *Länder* interior ministries. While in enacting their function, police officers possess a degree of freedom to interpret the relevant regulations, the ministerial level decides on strategy, personnel and funding. Thus the underlying conception of police in Germany and England are based on normative differences. Recent developments in the structure of English police governance, especially the increasing control by the Home Secretary, have left the doctrine of constabulary independence “an empty shell” (Reiner, 2000: 197), an assessment which has become even more pronounced in developments since 2000. Traditionally his role was restricted, but has gained significantly in power during the second half of the 20th century and most so since 1980. Today, the Home Secretary develops a National Policing Plan, which sets

³² This does not preclude civil claims for damage.

³³ This dependence, however, is restricted as each police officer is ultimately bound only by law.

out strategic goals of the police and benchmarks for their performance, and he has more financial oversight and the power to deploy police forces. So the contested balance among the tripartite structure, which must guide all analyses of English police governance, has been tripped to the advantage of the Home Office (Reiner, 2000: 196; Loader and Mulcahy, 2003). The process of centralisation, which we find in EU and in German policy-making, can thus be found in the UK as well (Walker, 2000: 42; see Aden, 1998; Occhipinti, 2003). A discussion of changes in the relationship within the tripartite structure, highlights most problems and developments in English police governance.

4.5. *Policy developments in the last two decades*

Since the 1984 Police and Criminal Evidence Act (PACE), the UK regulatory framework for the police has been repeatedly and fundamentally reformed. The first steps towards the current institutional structures were taken in 1964, when the proposals of a Royal Commission were translated into a new regulatory framework, which reduced the variability of the statutory framework pertaining to police between the national, county and local level. Secondly, the commission in its recommendations acknowledged the trend towards centralisation, which had begun to increase the role of the Home Office. Finally, the doctrine of constabulary independence was maintained, despite difficulties with its formal and normative implications (Walker, 2000 53-60). A major shortcoming of the 1964 reform was the underspecification of role boundaries for each element in the tripartite structure. This negatively impacted on governance performance and led to limited accountability of all actors involved. In subsequent years an increasing number of problems appeared also through changes in the political landscape. At the same time, the actors in the policy field tried to expand their remit. This increased the political conflict between socialist local authorities and conservative central government.

The conservative government under Thatcher since 1979 not only used the police to break-up strikes, but increasingly applied market-based management methods to policing. The hardline approach to law and order meant that in the beginning the police were less affected by the general sceptical attitude of the government towards the public sector and guaranteed a sound financing of the police force. But since the mid-1980s the police were also subject of new public management techniques and the government used increasingly quantifiable benchmarks for police performance primarily based on crime statistics. Their addition to the already problem laden old governance framework in police have been identified as a driving force for the following police reforms (Loader and Mulcahy, 2003 28; Walker, 2000 91). Such an ‘altered climate of governance’, which has in principle been continued by the Labour government, was seen to be in conflict

with professional performance of the police as a 'civilian' control without internal knowledge of the job has taken over responsibilities (Loader and Mulcahy, 2003 296).

PACE fundamentally reformed the way the police operated. It was one of the biggest reforms to address powers of police and constitutes currently the central framework for police powers and activities against which reforms need to be evaluated. Experiences with domestic terrorism and excessive strikes in the UK in the end of the 1970s had influenced its form. The assessment that PACE was a response to the perceived lack of possibilities to react to extensive and violent strikes depended strongly on the normative position taken by the analyst (cf. Loader and Mulcahy, 2003 286-287).

The public and experts led an intense debate on the act (Reiner, 2000: 176-80). PACE codified and extended the coercive powers of the police, 'in particular by giving them the power known in France as *garde a vue*: the power to detain suspects at the police station for questioning.' (Spencer, 2002b: 15). Only after the powers of the police had thus been extended, the courts enforced the boundaries of these powers, which previously had been admitted often on a case by case basis (ibid.).

The early 1990s saw another overhaul of the police governance framework. In 1993 the Home Office published a White Paper on Police Reform (Home Office, 1993) and the Sheehy Report (Sheehy Committee, 1993). The White Paper addressed the general institutional setup, whereas the Sheehy Report focussed on internal institutional reforms of the police. The Sheehy report has been called 'a watershed, a powerful symbol' (Loader and Mulcahy, 2003: 292). The two reports led to the 1994 Police and Magistrate Court Act and its consolidation in the 1996 Police Act (Walker, 2000: 97). They had the goal to clarify the sphere of competences in the tripartite structure (Chief Constables, Police Authorities, Home Office) and to introduce a more business-like model of governance and increase the police force's responsiveness to their customers, the citizens (Loader and Mulcahy, 2003: 28). Performance targets were introduced and the Home Secretary must exercise his increased powers in a way which is conducive to *effective* and *efficient* policing. Reiner calls the 1996 act the "definite statutory statement of the structure of police governance" (2000: 194).

In the first half of the last century, we can observe a centralising tendency, whereby the Home Office tried to increase its powers to the disadvantage of the constabularies on the local level. The Royal Commission of 1962 did not fully endorse this development, but accepted it as a fact to a certain degree by giving the Home Office a stronger role in strategic policy-making (Walker, 2000: 99; Reiner, 2000: 193). The introduction of managerialism in the 1990s increased the 'steering power' of the Home Office over local police forces. As a consequence the local police forces are "free to 'row' in any way they decide, so long as it is in the direction 'steered' by the home secretary" (Reiner, 2000:

197). This is important for the analysis as the general development and strategies of the police are determined centrally, while the local level maintains day to day management competences to achieve these goals. The focus, however, does not lie with the actual activity of the police, but with the more general framework of law enforcement governance. The centralising developments towards the Home Secretary help to focus the analysis on the nationwide regulations and still capture the essence of changes in a decentralised system.

The way internal security problems in the UK were addressed through laws and regulations in the early 1990s was criticised of being merely 'instrumental', i.e. only concerned with solving the immediate problem identified in the reports (Reiner, 2000: 193). They ignored the underlying normative problems with the concept of constabulary independence and did not present alternative courses of action different from managerialism (Walker, 2000: 98).

The next significant change, this time through changes in the organisational structure of the British police governance framework, came in 1997, when the National Crime Intelligence Service (NCIS) was established. Its task is

- to gather, store and analyse information in order to provide criminal intelligence;
- to provide criminal intelligence to local forces; and
- to act in support of these forces and agencies as they carry out their criminal intelligence activities (Police Act 1997, s.2(2)).

It was built on predecessor units, such as the National Drugs Intelligence Unit and the National Central Bureau for Interpol. Beyond its domestic function of supporting local police forces in the fight against crime, it is the central hub for all international police cooperation activities. It is an institutional base for foreign liaison officers and hosts the Europol and Interpol contact point and the Sirene office. Growing EU integration in the third pillar strengthened the role of NCIS. The embedding of the monopoly of the legitimate use of force in international structures (Jachtenfuchs et al., 2005) led to centralisation in the UK, too, and increased the power of central offices. Functionally there is a striking similarity between the NCIS and the federal office of criminal investigation (BKA) in Germany. The original function of the latter was to support and improve cooperation among *Länder* police forces by disseminating information. The NCIS does exactly that and supports it by research and analysis. Europol's focus is also very similar to the function of the early NCIS in its focus of informational support to national police forces. When looking at the genealogy of the institutional development we see a striking similarity to the institutional development at the EU level. At the EU level the European Drugs (Intelligence) Unit was established in 1993, after political agreement had been reached in 1990. Its remit was continuously expanded until in 1995 it

was absorbed in the formal Europol structure. The predecessor to Europol was established through ministerial agreement, and while this structure is formally legitimate, it is also clearly a construction to overcome deadlock and proceed with the institutional integration. The British developments preceded the European developments in both the non-statutory and the statutory structures by approximately a year. NCIS was established on a non-statutory basis in 1992 and was formally established 1997. The latter was delayed, curiously, due to an inquiry relating to lost notebooks, which contained information obtained through wire-tapping by NCIS officials (Walker, 2000: 202).³⁴ So while the driving forces for integration in justice and home affairs in the negotiations on the Maastricht treaty were seen to be the Germans with their demand to establish an operative European FBI (Occhipinti, 2003: 31), the British had domestically anticipated the institutional structure for intelligence-led policing, which was to be established at the EU level in the following years. The power of the NCIS within the national governance structure was expanded, as it is the contact point for international law enforcement cooperation. The growing use of EU cooperation instruments further increases this powerful position.

Another important institutional change was the National Crime Squad (NCS), which is an operational police force at the national level to deal with serious crime. It was established through the Police Act 1997 (s. 48(2)) and is a significant deviation from the British traditions of localised police forces. Specialised national police forces have existed for a long time, but were restricted functionally or in scope. Examples are the British transport police, which is responsible for the security of transportation, and the Ministry of Defence police, which has full constabulary powers but only with regard to member of the British army and their relatives. The establishment of a general national police force under the authority of the Home Office, which is generally tasked to fight crime, deviates from traditional doctrine.

This is especially pertinent in the light of the increasing criminalisation of socially deviant behaviour, which had been a characteristic feature of the conservative government and has been continued under the *tough on crime* approach of the Labour government since the end-1990s (Glaeßner, 2005: 90-94). So the basis for the NCS continuously expands and the close link of organised crime and terrorism (Home Office, 2004c: 1) continues this expansion into areas, which are highly sensible concerning civil liberties. The dominant securitising discourse of exceptionalism legitimises the use of intrusive means (Wæver, 1995). The likeliness of the establishment of the NCS to incite public disputes was the reason for Walker to explain the immediate establishment of a statutory basis for the

³⁴ This event once again highlights the importance of data regulation in the development of the policy field.

NCS, which makes its development different from the NCIS (Walker, 2000: 215). NCS has only jurisdiction over England and Wales, because the legal basis in Scotland is too different.

The NCIS and the NCS exerted a significant centralising push on the British police system and thus furthered the tendencies seen regarding the role of the home office. The 2005 Serious Organised Crime and Police Act established the Serious Organised Crime Agency (SOCA). It merges the NCS with the NCIS and is directly under the authority of the Home Office. This is an even further departure from the previous and the expression of a continuing centralisation of police governance in the UK. According to the Serious Organised Crime Act (SOCA), the officers working at SOCA have powers *as if they were* constables. But as they are explicitly *not* constables before the law, the doctrine of constabulary independence cannot be applied to their actions. Rather than acting as an office-bearing individual, SOCA officials are treated as employees of the home office. In the words of the Home Office Minister Caroline Flint, the home office refutes 'the argument that only police officers can be entrusted with police powers, and [the home office has] moved away from that position' (Lords, 2004: 6). Such an allocation of police powers to non-police officers is certainly necessary for successful and unbureaucratic cooperation with other national police forces and simplifies the treatment of foreign officials acting under the authority of the SOCA. This is in line with the findings by Bayley and Shearing who talk about multilateralisation rather than privatisation of policing (2001: VII). But the House of Lords in its report on the SOC Bill expressed its concern about the degree to which the officers of the new organisation can be held accountable and to which degree their actions are limited in a way comparable to a person holding the office of a constable, customs official or immigration officer (Lords, 2004: 6). The execution of the legitimate monopoly of force is formally transferred from representatives of the state, or in the case of the independent constable, the community and the citizen, to a private employee, who is under the direct control of the government. The fact that the activity of the SOCA is highly relevant for individual liberties enhances the problematique of an implicit privatisation of the monopoly of force.

Institutionally, recent years have seen a plethora of changes in England. Organisationally and with regard to the accountability structures, strong centralisation can be seen. The Home Office has been successful in establishing a national police force to a degree unthinkable under the constitutional doctrine of devolved policing which had its high time in the mid-20th century. In terms of accountability, the centralisation of policing structures and the increasing direct influence of central government as well as open channels of accountability to the highest political level were previously unavailable, due to the 'grey zone in the allocation of responsibilities between government and other agencies' (Walker, 2000: 17), but also not feasible under the dominant doctrinal norm of

constabulary independence embedded in the English law enforcement system. By establishing a national police force and a centralised agency, the rejection of ‘operational’ responsibility in favour of ‘policy’ responsibility can no longer be upheld. This has the potential of holding the highest political level accountable, but the price is the increasing political influence in the execution of the legitimate monopoly of the use of force and a growing influence of actors who are not public officials.

In the following section developments in the UK concerning substantive policy will be discussed, which are crucial for the evaluation of the new governance framework which has been established in the last fifteen years and its interaction with the EU level.

4.6. *Substantive issues*

The 1991 Criminal Justice Act introduced a retributive rationale in criminal law, which had previously been absent and institutionalised the principle of proportionality, whereby a punishment must be proportionate to the offence (Allen, 2003: 7). The 1997 Crime (Sentences) Act went further and introduced mandatory minimum sentences for repeat offences (Allen, 2003: 8). This regulation, however, was rarely applied in practice (Jones and Newburn, 2007). The act was adopted in the election campaign to the 1997 elections, where both large parties wanted to appear tough on crime. Similar to what Aden (1998) finds for the OC legislation adopted in Germany in 1994, Allen notes (2003: 9), that this legislation would not have been adopted without the election context in the first place. The Court of Appeals mitigated the mandatory minimum sentence later by interpreting broadly what ‘exceptional circumstances’ meant.³⁵

This shoring up of governance framework can be found in all three substantive areas, i.e. terrorism, crime fighting and public order (Glaeßner, 2005: 93), which are addressed in the following. The analysis mostly emphasises crime fighting and terrorism, which are usually subsumed under the heading of serious crime. In the EU terrorism is conceptualised as a type of crime in article 29 TEU. In the UK the close connection for the political sphere is evident in the White Paper ‘One Step Ahead’, which claims that there is a ‘overlap between organised crime and terrorism’ (Home Office, 2004c: 9), thus proposing a uniform set of measures to fight both (Home Office, 2004c: 7). While this identification of crime and terrorism can be criticised (cf. Pütter, 2000), it is used both in Germany and the UK to legitimise the extension of law enforcement powers. Terrorism is a better discourse to securitise and legitimise extraordinary measures as it builds on the concept of *menace*, whereas the fight against crime ‘only’ builds on the concept of *risque*.

³⁵ R v Frost, Times LR 5.1.01; R v Offen, [2001] 1 WLR 253 CA.

4.6.1. Terrorism

In Germany the role of the fight against terrorism had given way to a strong focus on organised crime in the 1980s and 1990s. Only with the 2001 attacks in the US, terrorism surfaced as a primary motivation for internal policy-making. The UK conversely continued to experience domestic terrorism by the Irish Republican Army (IRA). So there was no move away from anti-terrorism in UK policy. Since the 1974 Prevention of Terrorism (Temporary Provisions) Act, which gave exceptional measures to law enforcement in the fight against domestic terrorism in Northern Ireland, the police always had a broad range of instruments available for the fight against terrorism. The 1974 – temporary – act was annually renewed until 2000, when parliament adopted permanent anti-terrorism legislation (Home Office, 2000). The 2000 Terrorism Act put the Northern Ireland conflict into a broader context and provides rules for a general anti-terrorism approach. Previously, anti-terrorism legislation designed for Northern Ireland was ad hoc and partially extended to more general forms of domestic and international terrorism (Glaeßner, 2005: 98). The 2000 act changed this and expanded to domestic and international terrorism. It also contains a definition of terrorism according to which terrorism means the use or threat of action where the use or threat is designed to influence the government or to intimidate the public, and has a political, religious or ideological cause. (s. 1(1) and 1(2) Terrorism Act).³⁶ Once again, the UK was ahead in its reaction to international terrorism both to the EU and Germany. While most other countries in the EU adopted new anti-terrorism legislation only after the events of September 11, 2001, the UK formalised its previously existing terrorism legislation a year prior. Political disagreement in the EU prohibited the adoption of a definition of terrorism on that level until 2002.³⁷ This does not mean that the UK did not respond to these events as well. Since 2000 there has been new legislation on terrorism almost every year (Terrorism Act 2000, Anti-Terrorism Crime and Security Act 2001, Prevention of Terrorism Act 2005, Serious Crime and Police Act 2005, Terrorism Act 2006). As discussed above, though, terrorism legislation does not only refer to terrorism, but includes methods and competences, which are also used in fighting crime in general (cf. Statewatch, 2004; Haubrich, 2005). The debate on this problematique is similar to the one in Germany in the 1970s when emergency legislation was criticised for treating terrorism as a normal crime, but giving suspect not the same procedural rights, even though the tendency to punish them more harshly normatively requires stronger

³⁶ In addition the power of the Home Secretary to issue exclusion orders was abolished, which reduced the discretion of the Home Secretary to prohibit someone from being in or entering Britain on the basis of non-discloseable intelligence (Walker, 2005: 399). This re-institutes a layer of control and de-politicises the procedure.

³⁷ OJ L 164, 22.06.2002.

constitutional guarantees (Lisken, 1996). In 2001 the UK parliament adopted the Anti-Terrorism, Crime and Security Act after only one month of deliberation, which introduced significant measures (Feldman, 2006). Not only does it restrict most of the categories of substantive civil liberties which Haubrich identified, but contrary to similar 'emergency legislation' in France and Germany, the law does not contain sunset clauses (Haubrich, 2003: 19). Furthermore, the government declared a constant public emergency in order to deviate from article 5 of the ECHR, as the act allowed the detention of terrorist suspects without trial. The 2005 Prevention of Terrorism Act replaced this part 4 of the 2001 act and introduced new control orders by the Home Secretary when not derogating from the ECHR, which then have to be subject to judicial review afterwards, or courts when derogating from the ECHR. These are 'preventative orders which are designed to restrict or prevent the further involvement by individuals' in terrorist activities (Home Office, 2005b). Orders can be issued against anybody, irrespective of nationality or the cause for their (suspected) terrorist activity. The suspect can be denied information in the cause for the order with reference to national security. This vague formulation meant that courts upheld the refusal of official sources to reveal the reasons for orders without obtaining these factual reasons themselves. Thus they reduced their control function voluntarily. The new provisions have been criticised by the Joint Committee on Human Rights inquiry as potentially harming constitutional due process guarantees and breaching the ECHR (Joint Committee on Human Rights, 2006b), while the government maintains that a sufficient degree of constitutional control is given and the deviation from the ECHR is within legally allowed boundaries (Joint Committee on Human Rights, 2006b).

In 2006, parliament adopted the Terrorism Act 2006, which had been introduced in parliament in October 2005. Already shortly after the events of July 7, 2005, the Home Secretary had announced in a letter to the opposition leaders the intention to reform anti-terrorism legislation and stressed that the bones of the measure had been in preparation before the attacks (Home Secretary, 2005). This measure was hotly debated, especially the plan to allow for a 90 day detention without being charged with a crime. This power had been introduced by the government on November 9 and followed a request made by the Metropolitan police. However, parliament reduced this demand to 28 days citing concerns about the necessity of such long detention and conformity with the ECHR, as arbitrariness could not be ruled out (Joint Committee on Human Rights, 2005: 4). The procedure highlights the close proximity of legislator and police (cf. Aden, 1998). The arguments of the Home Secretary, which strongly emphasise that the bill had been prepared pre-7/11, highlight how controversial the issue was and could be interpreted as an attempt to justify the proposals more forcefully.

The years between 2000 and 2006 have seen a much stronger legislative activity in the fight against terrorism than the decade before. On the one hand, there were external events, which opened windows of opportunity for legislation which would have had problems passing parliament in ‘non-extraordinary’ circumstances, such as the events in the US in 2001, Madrid 2004 and London 2005. Terrorism has taken primacy in internal security policy making since 2000, when it had been put on a permanent basis and consequently expanded concerning law enforcement methods and competences.

The British anti-terrorism policy was highly controversial and has been debated extensively among experts and in the public (Haubrich, 2003; Waddington, 2005; Mythen and Walklate, 2006). Mainly the perceived overreaction of the state to a significant threat was criticised, which was seen to lead to a dismantlement of fundamental freedoms. The derogation from the ECHR in 2001 was met with strong criticism (Walker, 2007). The detention of suspects without trial was eventually ruled untenable by the Lords.³⁸

4.6.2. Fighting crime

The fight against serious crime, the second broad policy field, has also had a strong impact on the development of the police governance framework. In many instances terrorism is treated as a type of serious crime. In the Criminal Justice (Terrorism and Conspiracy) Act 1998 this is obvious in the title. But not only anti-terrorism legislation is applicable to serious crime, but criminal justice legislation increasingly blurs the boundary between terrorism and serious crime, too. The 1994 Criminal Justice and Public Order Act and the 2001 Criminal Justice and Police Act are cases in point, where radical animal rights activists or groups with socially deviant behaviour (‘Raver’) are criminalised and subjected to similar instruments as used in the fight against terrorism (Glaeßner, 2005: 92). The concept of organised crime was employed by British law enforcement actors later than in Germany. After the conservative government under Thatcher took office, the police ‘were located at the forefront of the ‘fight against crime’ and received more financial and administrative support than other public services’ (Loader and Mulcahy, 2003: 273). The focus was on serious crime, a broad, ill-defined concept which gave the police and the legislator broad leeway in designing policy (Glaeßner, 2005: 86). While dealing with fundamentally the same phenomenon, the difference is important as the use of the vaguer concept – serious crime – only seemingly provides clarity, but allows for legislation which is broadly applicable. It can create problems for successful international cooperation, as mutual recognition faces difficulties when different concepts are applied, especially when their scope and content are unclear. In 1996 the Home Office

³⁸ A (FC) and others (FC) v. Secretary of State for the Home Department / X (FC) and another (FC) v. Secretary of State for the Home Department, [2004] UKHL 56, 16 December 2004.

mentioned for the first time organised crime in its annual report. As a consequence, the NCS and the NCIS developed a definition of organised crime, which is very similar to the continental European definition. Organised crime 'contains at least three people; criminal activity is prolonged or indefinite; criminals are motivated by profit or power; serious criminal offences are committed' (NCIS, 2000: 6).

The strategies of law enforcement against serious crime can be found in a number of measures which are not concerned with institutional reforms, but with the establishment of administrative and political priorities. These measures include the 1986 Public Order Act, which replaced common law offences with statutory instruments (Glaeßner, 2005: 93). Offences previously defined through precedent judgements were replaced by formally defined statutory offences. The 1994 Criminal Justice and Public Order Act continued such formalisation of criminal law. The 1998 Crime and Disorder Act focussed on multi-agency cooperation in dealing with young offenders. It aims to reduce crime in general through a partnership approach with local agencies and tries to improve policing relations with ethnic minorities (Walker, 2000: 108). In 2001 the Criminal Justice and Police Act further led to a stronger focus on *social disorder*. The introduction of anti-social behaviour orders is a case in point, which can be issued by constables on the spot and prohibit individuals to behave anti-socially and encompass, for example, loitering, public drinking and graffiti. These developments stem from Labours 'tough on crime' approach from its 1997 manifesto and have been criticised as being too far reaching in their infringement of civil liberties.

4.6.3. Public order

While not the primary subject of the analysis, the increasing criminalisation of anti-social behaviour has an effect on policy in the fight against serious crime and terrorism. The tendency of the state to come down hard on those breaching the existing social order can help to form a public opinion positively predisposed to a heavy handed approach in the fight against organised crime as well. Recently, however, the growing number of imprisoned people in the UK, which is the highest per capita in Europe, and the absence of falling crime rates, have led to increased criticism, especially from the scientific community (cf. Glaeßner, 2005: 94). So the effect of public order policy on the development of police governance must not be underestimated. But as the EU is only to a limited degree active in public order areas and given the restricted scope of competences in social policy, the European influences can be expected to be small.

Overall, English police policy underwent a process of formalisation in statutory laws, experienced a use of expansive concepts being used and conceptually approximated continental law (Heckenberger, 1997).

4.6.4. The transposition of EU legislation in England

Having discussed the particular constitutional order of the UK and the domestic developments in central issues areas of internal security, the question is how EU measures can interact with the domestic level. The following paragraphs provide a short overview of mechanisms through which EU law can be transposed nationally. The effects of this transposition are analysed later.

Fundamentally, the European Communities Act 1972 ensured the applicability of EC law in the UK and determined the rules of application. Contrary to the German situation, the law did not affirm the supremacy of European law. Rather parliamentary supremacy was maintained in effect by arguing that the 1972 act could be repealed by any subsequent parliament, but that until that point all principles of European law would also apply in the UK (Barnett, 2006: 247ff, 49-50). This position is also held by courts since the *Factortame* case, when Lord Bridge ruled that 'it has always been clear the it was the duty of a United Kingdom court, when delivering final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law'.³⁹

Where in the development of British police policy have EU regulations played a role? The UK is a difficult case in the context of the third pillar. She is very active in the area of practical cooperation (Sheptycki, 2002a; Lords, 2005: 12), but shows politically a strong reluctance to pool sovereignty in EU structures (Hix, 2007). So while the UK is keen on improving the effectiveness of international cooperation both within and beyond Europe (Home Office, 2004c: 16-20), the UK is not member to the Schengen agreement. In 1999, however, the UK signed an agreement with the other Schengen states that allows her partial, but for operational cooperation central, participation in those parts of the convention dealing with cooperation in criminal justice and police matters and anti-drugs policy. This includes access to the Schengen Information System (SIS) for those purposes, but no access to immigration data.⁴⁰ The UK government supports mainly the improvement of efficiency in the cooperation agreements. Given the general positive disposition towards operational law enforcement cooperation (Home Office, 2004c; Sheptycki, 2002a; Lords, 2005: 12), high transposition of measures is likely, because the improvement and simplification of cross-border law enforcement cooperation is the central aim of the EU arrangements. However, the strong reluctance

³⁹ *R v Secretary of State for Transport, Ex parte Factortame (No 2)* [1991] 1 CA 603 (ECJ and HL), 659A.

⁴⁰ Full access will only be realised in April 2010.

of the UK to give up parts of its sovereignty⁴¹ is a counteracting force to successful transposition. Thus any transposition will be contested and will try to be as unintrusive regarding existing domestic structures as possible. That expectation means that the UK will primarily transpose measures which build on mutual recognition and thus minimise required changes in the national system or intergovernmental cooperation agreements, which have limited direct domestic effects. That the UK government was strongly in favour of intergovernmental cooperation supplanted with the principle of mutual recognition (see Friedrichs, 2005; Jachtenfuchs et al., 2005) supports these expectations. This would also be in line with integration in this policy area, as the UK had been instrumental in introducing the 'cornerstone' of mutual recognition in the Council conclusions at Tampere.⁴²

Furthermore, the principle of parliamentary sovereignty and the absence of a written constitution make it difficult to give formal guarantees for civil liberties and human rights. In trying to strike a balance, the 1998 Human Rights Act is a good example. Its intention is to transpose the ECHR into national law. Under the act the rights of the ECHR form part of the municipal law. In principle parliament can adopt primary legislation, which is incompatible with these rights. The entrenched standing of the convention in the UK, which was the first Council of Europe member state to ratify it, effectively makes the adoption of such an act impossible (Feldman, 2002: 80). The Human Rights Act does not formally restrict parliamentary sovereignty by introducing a binding catalogue of rights, which could be construed to constitute a nucleus for a written constitution. It merely requests the courts to take up the ECHR 'so far as it is possible'. The UK government tried thus to reconcile the two different legal philosophies.

Looking at the transposition of EU measures we see that partially they are included in broader acts and partially transposed individually. The 2003 Extradition Act transposes the framework decision on the European Arrest Warrant. The 2003 Crime (International Cooperation) Act is a major step for the UK to formally comply with the requirements emanating from several EU provisions. Part 1 of the act implements the mutual legal assistance provisions of the Schengen Convention, the Convention on Mutual Assistance in Criminal Matters and its 2001 Protocol, which includes obligations for participating

⁴¹ The fact that policing is close to the 'heart' of national sovereignty certainly poses larger problems for any nation state to give up sovereignty over the legitimate monopoly of the use of force. Adding to this rather difficult disposition the general euroscepticism, which is prevalent in much of UK's political sphere, furthers the reluctance to give up rights in the area of public order and security than in other areas. Factoring in the normative and cultural difference with regard to the role of the police in public life, adds another aggravating aspect.

⁴² This, of course, does not say anything about the likeliness of compliance in general, but merely addresses the form of necessary adjustments.

countries to respond to requests for assistance with locating banking accounts and to provide banking information relating to criminal investigations. Part 2 implements the Framework Decision on combating terrorism, Part 3 implements the Convention on Driving Disqualifications, which introduces the mutual recognition of driving disqualifications. Part 4 implements additional measures of the Schengen Convention on police co-operation, extradition and data protection, transposes the evidence-freezing provisions of the 2003 Framework Decision on the execution of orders freezing property or evidence and contains provisions to enable the UK to implement the Framework Decision on combating fraud and counterfeiting of non-cash means of payment.

This act is not only interesting in that it transposes a plethora of EU measures which had been in force and open for ratification or transposition for a number of years, but also for the late point of its adoption. Given the keenness of the UK government to engage in operational cooperation and its support for the principle of mutual recognition on the one hand, and the characteristic of the UK political system where the government has a large majority in parliament and thus a large leeway in passing legislation (cf. Sturm, 2003) an earlier transposition would have been possible. The importance to maintain a sovereign internal security policy for the UK is evident in the explanatory notes to the act and the transposition as well. Rather than unilaterally accepting the mutual recognition and cooperation agreements, the UK qualifies its participation by requiring the other member states' participation in the relevant instruments (Home Office, 2003: 3). In addition, most measures build on the concept of mutual recognition, thus minimising the transformatory impact on the national system.⁴³ Finally, the 2002 Police Reform Act transposes the framework decision on joint investigation teams.

This overview is not exhaustive. The EU Commission was not always satisfied with the way the government intended the English legal system to comply with European requirements (Commission, 2004b). A detailed analysis follows later. This chapter has merely intended to provide an impression of the way, form and location of transformation measures in England. In particular the aim was to give the reader a more thorough understanding of the intricacies of the English police governance framework.

4.7. Conclusion

Police policy in the UK has changed fundamentally in the last 20 years. While many of the changes have long been looming, they nonetheless coincide with the establishment of the police governance framework at the EU level. We observe a very strong

⁴³ For a criticism of this conception and the requirement of approximation for successful and mutual recognition, which does not limit *habeas corpus* and due process rights, see Alegre and Leaf (2004) and Guild (2004),

centralisation function, both organisationally (Den Boer, 2002a) as well as hierarchically. The Home Secretary has growing control over the objectives of the police through the national policing plan and the means to attain the goals contained therein. Through the establishment of the operational National Crime Squad, which has been merged with the National Crime Intelligence Service into the Serious and Organised Crime Agency and which is directly accountable to the Home Secretary, a fundamental doctrine of British police governance, the separation of operational police and political control was abolished and constabulary independence curtailed. For the first time, the Home Office has direct power concerning operational policing.

The analysis above indicates that changes – and especially fundamental changes affecting fundamental, doctrinal beliefs – in the police governance framework cannot be easily causally linked to the EU only nor any other individual reason. The UK police is internationally oriented (cf. Jones and Newburn, 2007). This can be explained by the long standing experience with international police forces in an empire and the international implications of Northern Irish terrorism. And while the UK is among the most active member state in using the new arrangements at the EU level, its priorities lie equally on more general international cooperation. This is also exemplified by an bilateral extradition treaty with the US, which goes beyond agreements with other EU countries, and the list of priorities for international cooperation in the White Paper on the fight against organised crime (Home Office, 2004c: 16-20). While large parts of the international strategy section deal with EU arrangement, such as the European Arrest Warrant or mutual legal assistance in criminal matters, the use of other international fora, such as the commonwealth, the UN or the Council of Europe are mentioned on an equal footing.

Empirically interesting is that many institutional developments in the UK took place earlier than they took place at the EU level. The definition of terrorism and the establishment of the NCIS are examples. On the statutory level, the UK has for a long time been rather unaffected by the developments at the EU level. The fact that the UK is not party to the Schengen convention and a general reluctance to partake in the supranationalisation of the legitimate monopoly of the use of force has led to limited inducements to modify the legal governance structure. In recent years this has changed. Following the increasing bindingness of EU measures, the UK has started to directly transpose EU measures, which could also be linked to its partial participation in the Schengen structures. Rather than transposing the measures individually, the UK government combined many of those measures which are less controversial, because they are either intergovernmental or build on the principle of mutual recognition, in the 2003 Crime (International Cooperation) Act.

Bayley classified both Germany and England as having ‘moderately decentralised’ police systems (Bayley, 1985: 59). Whether he would come to the same assessment when looking at the two systems today is not sure. The identification of a secular centralisation trend of policing structures in both countries is a determinant in police policy development, which has become more pronounced in the 1990s. Despite the similar point of departure and relatively similar challenges emanating from the international and domestic environment in the area of serious crime, one fundamental difference can be said to shape the general development in the two countries. The federal structure of Germany makes developments such as the establishment of a strong national police force and the increasing concentration of competences with the minister of interior more difficult due to the higher number of formal veto players. The lack of a written constitution means for the UK that not the *constitutional form*, but *constitutional doctrine* or *constitutional principles* need to be changed. The latter two are not legally protected to the same degree as the constitutional form in Germany.

5. Issues, cases and next steps

Guiding questions:

1. When did changes occur at the EU level, in Germany and in the UK?
2. What impression do we get, when we regard the development in the three arenas comparatively?
3. What do these impressions mean for the following steps of the analysis?

The previous three chapters discussed developments in the structure of law enforcement policy at the EU level, in Germany and in England. This chapter summarises to identify salient issues and to provide guidance for the subsequent analysis.

Over the last twenty years a political movement often referred to as neoliberalism or managerialism has gained ground. Guiding principles for policy-making and for administering the implementation of policy are an effective and efficient public service (Lange and Schenck, 2004). Market-based concepts have been introduced in almost all areas of policy-making. This development has not stopped before law enforcement (Reiner, 2000), even though the degree of state withdrawal in this area is less extensive than in other areas. The position of conservative governments which combine a critical stance to public service provision with a strong stance on law and order is certainly an explanatory factor (Johnston and Shearing, 2003: 48). In Europe the introduction of new public management methods (NPM) was championed by the Thatcher government since the early 1980s (Walker, 2000; Loader and Mulcahy, 2003). The main principles are measurable performance targets and a stronger orientation towards the needs of 'customers', i.e. citizens. This led to a politicisation of policing as increasingly politicians set targets (Reiner, 2000: 74). With some delay, most other EU states have adopted similar strategies. In Germany, the *Länder* law enforcement agencies were geared to perform according to the principle of the 'activating state' since the early 1990s and on the federal level, central steering of law enforcement policy and policing goals can be observed as well (Lange and Schenck, 2004). Recent policy initiatives have been criticised not only on the basis of their effectiveness for law enforcement, but also for their financial effects.

On the European level, market mechanisms entered law enforcement policy through a different venue. In the Tampere conclusions (1999), the European Council introduced the principle of 'mutual recognition' as a corner stone in the development of the Area of Freedom, Security and Justice. Mutual recognition is a principle, which has been

successfully applied in the economic area in the establishment of the common market. The idea is to develop a common judicial space, but manage and maintain legal diversity. As Friedrichs (2005) has noted, market-based principles and explanations do not necessarily work well in the judicial sphere (cf. Sievers, 2007).

5.1. Periods of Change

In the continuous policy development pertaining to law enforcement two periods of change stand out, which are similar in Germany and the UK: the early 1990s and the early 2000s. These two periods correspond to two phases in the development of EU police policy, Trevi and Amsterdam.

In the early 1990s policy development at the EU level was dominated by non-binding measures, such as the Palma Document and the Trevi Acquis (Bunyan, 1997). The establishment of the third pillar was not only the result of government preferences to compensate the perceived security losses through the establishment of the single market and the four freedoms (Occhipinti, 2003). The changing geopolitical environment had law enforcement authorities acknowledge that a formalisation of operational cooperation was necessary to increase efficiency of their work and gain retrospective legitimacy (Aden, 1998; Bull, 1999; Lobkowicz, 2002 19). So developments at the EU level show elements of spill-over from European economic integration based on experiences outside the treaty framework or as a function of national developments. The relevance of the EU on domestic policy was general and indirect. The most important institutional development in the first period undoubtedly is the establishment of Europol 1998.

The second phase begins in 1999 with the Amsterdam treaty, which brought a plethora of changes in JHA, including more binding and easier to adopt legal instruments. Another watershed event in the same year was the Tampere European Council. It was the first high-level meeting exclusively devoted to JHA and laid out the way ahead for police and judicial cooperation. The consequence was a strong increase in binding decision-making in JHA (Müller, 2003 266). While there were instances when sovereignty sensitive measures were 'locked-in' before changing to majoritarian modes of decision-making, e.g. in asylum and immigration policy (Aus, 2003), the new rules constituted a significant simplification. Since 1999 the member states have thus been subject to greater demand from the EU level to transpose European regulations. Since 1999 the Council adopted 20 framework decisions, which aim to establish a common judicial and policing space. In addition a number of convention were adopted in the 1990s on extradition, corruption, customs cooperation and mutual legal assistance in criminal matters.

During the Maastricht phase, changes in Germany were based partially on domestic developments, while in England pre-Maastricht reports were a strong driving force. On

the EU level, the focus lay on the establishment of Europol and the continuation of functioning operational cooperation in the Trevi framework. Before discussing the influence of these measures on domestic policy, general trends in Germany and the UK need to be highlighted in order to allow the identification of units of analysis independent of the transposition of EU measures.

5.2. *Developments in the countries*

In Germany the 1983 ruling of the constitutional court on informational self-determination⁴⁴ triggered many changes during the first period. The focus lay on the necessary regulation and expansion of the use of data and intelligence by law enforcement, which were also used to expand the remit of law enforcement and to retrospectively legalise tasks and methods (Roggan, 2000). This is in line with general observations about changes in policing strategy from reactive to preventive, intelligence-led policing (Kühne, 2002). On the federal level, the 1990 '*Gesetz zur Fortentwicklung der Datenverarbeitung und des Datenschutzes*' provided a new basis for the intelligence services. The 1994 '*Verbrechensbekämpfungsgesetz*' and the '*Bundesgrenzschutzneuregelungsgesetz*' extended the competences of the intelligence service and the federal border police and in 1997 new rules for the use of personal data by the federal bureau of criminal investigation (BKA) were adopted. Changes of the institutional setup were dominated by new public management ideology and demands from politicians and some practitioners for federal law enforcement agencies (Lange and Schenck, 2004). On the *Länder* level police laws were changed in response to the 1983 ruling as well. Subsequent changes extended the competences of the police and included surveillance, the use of technology and wire tapping (Roggan, 2000).

In the UK two reports in 1993 were the trigger for the overhaul of police governance in the UK (Sheehy Committee, 1993; Home Office, 1993; Walker, 2000). The 1994 Police and Magistrates Court Act and the 1996 Police Act clarified the role of the elements in the tripartite structure and strengthened the influence of the new public management ideology in law enforcement. The increasing role of the Home Office in law enforcement policy is one of the major developments in the policy field.

In both countries the events of September 11, 2001 in the United States led to a fundamental and still ongoing reform of the law enforcement system. Since then the fight against terrorism has taken a prominent role in internal security policy in both countries. But not only the regulatory framework against terrorism changed. Many elements can be applied more generally to the fight against serious crime. Especially the

⁴⁴ Decision of the German Constitutional Court, BVerfGE 65, 1 – Volkszählungsurteil, BvR 209, 269, 362, 420, 440, 484/83.

attempt to stop terrorist financing transformed money laundering policies and – at the EU level – policies for the protection of the financial interests of the community into a broad tool for law enforcement, which has had repercussions beyond terrorist finance. In particular the repeated linkage between terrorism and organised crime in political debates contextualised money laundering as a new type of crime (Andreas and Nadelmann, 2006). In addition, anti-terrorism policy reconfigured the working practices of most law enforcement agencies, affected interagency relations by removing obstacles for cooperation and extended methods and the degree to which data could be collected and used. The new anti-terrorism laws were criticised for empowering the state with adversarial effects for the protection of civil liberties (Haubrich, 2003; Waldron, 2003; Davis and Silver, 2004).

In the UK new laws extended the competences of law enforcement almost yearly. The first codification of anti-terrorism policy came in 2000, when the regulations of the 1974 Prevention of Terrorism (Temporary Provisions) Act were made permanent in the 2000 Terrorism Act. Since then the competences for law enforcement have been continuously extended and certain rights have been subject to restrictions (Bamford, 2004; Haubrich, 2003; Moran, 2005). The fact that the UK has been the object of terrorist attacks on July 7, 2005 and failed attacks on August 8, 2006 have further spurred the development of a strong anti-terrorism strategy. More general measures in the fight against serious crime were not in short supply, too. First, many anti-terrorism measures have been accused of being unspecific and more geared towards fighting serious crime than specifically terrorism, such as the 2001 Anti-Terrorism, Crime and Security Act (Moran, 2005). Second, the 'tough on crime' approach championed by New Labour since the early 1990s has focussed on eliminating the preconditions for serious crime by strengthening the fight against social disorder and criminalising anti-social behaviour (Glaeßner, 2005: 94). Third, British law enforcement has focussed on organised crime as a background structure for terrorism, thereby linking the two phenomena. These changes affected the power of the police. Many organisational changes, such as the establishment of the NCIS, had been planned before the 9/11 events in the US.

Germany has seen several attempts to expand security competences of the federal level watered down. These proposals included the use of the army on German territory for policing, the establishment of extensive data bases on criminal suspects or the capability of the government to order the shooting down of an abducted civilian airplane. Germany has not been subject to terrorist attacks⁴⁵ and neither extensive video surveillance nor long detention without trial have been able to pass the legislative process to an extent

⁴⁵ The failed attacks of July 2006 and of September 2007 changed the perception and public debate about the susceptibility of Germany for homegrown Islamic terrorism.

comparable to the UK. Some argue that legal amendments are increasingly used to retrospectively legalise a creeping infringement of individual liberties according to the wishes of law enforcement actors (Becker, 2005). On the federal level, the most fundamental overhaul of law enforcement governance were the 2002 anti-terrorism packages. Many other changes in this period seem to have exogenous influences as groundbreaking changes had been implemented in the 1990s. The overview also supports the finding of other studies (e.g. Aden, 1998; Lange and Schenck, 2004) that policing structures in Germany underwent a strong centralisation of competences if not formal structures. Concentrating on serious crime policy-making, which EU policy focuses on as well, means that in the following the *Länder* level will not be focussed on.

Concerning the substance of police policy, as reflected in criminal and procedural law, growing criminalisation and increased penalties can be preliminarily observed. In addition there have been movements away from the assumption of innocence in the work of the police. What is generally termed intelligence-led or proactive policing, i.e. the exercise of the monopoly of force when a crime has not (yet) been committed (*Vorfelddermittlung*, proactive investigation), has changed the way police worked in the last decades (Kühne, 2002: 248). This enables the state to expand its power and regulate a broader area of social action through law enforcement. Similar to the concept of securitization (Wæver, 1995), criminalisation enables the state to draw the dealing with 'criminal' social activity within its immediate remit and use extraordinary powers to fight these developments (Bigo, 1996). Such a strategy is particularly effective if applied in conjunction with a general approach to define developments in the internal and external security situation as threats to society, nation or state (cf. Lepsius, 2004). The consequence is an increasing encroachment on the protection of individual liberties. In Germany and UK senior political actors conceded this and argue that an increase in the repressive and preventive capacities of the states are indispensable for a successful fight against serious crime (Schily, 2004 ; Blair, 2006).

Underlying these idiosyncratic developments, more general tendencies have emerged from the discussion as well.

5.3. *National compliance with EU policy*

The reforms of the third pillar through the treaty of Amsterdam introduced more dynamic policy-making instruments, such as the framework decisions, and coincided with the events of September 11, 2001. In the subsequent window of opportunity a fundamentally overhauled European decision-making regime and an external shock enabled governments to agree on far reaching measures on the European level in the fight against organised crime and terrorism, which had previously been blocked due to political disagreement. Contrary to most previous developments these latter measures

were legally binding. So in the following, the compliance of Germany and the UK with those legally binding measures will be assessed to provide a first approximation to the effect EU rules have on the member states in law enforcement policy.⁴⁶

In Germany the general impression one gets from looking at policy developments is that the EU plays merely virtually no role, or only a legitimacy one (Bukow, 2005). Other findings seem to contradict this impression by finding a significant determination of parliamentary decisions by the EU (Töller, 2004). Especially in the fight against terrorism, but also concerning the use of personal data for law enforcement purposes, the influence of the EU in Germany is more obvious. The German government and ministerial experts claim to have a good compliance record for measures emanating from the EU level. This is explained by the extensive codification of the German system and the strong involvement of Germany in the development of EU policy. The Commission's assessment is less complimentary and repeatedly criticises Germany for non-compliance.

In the UK, there has been for a long time only limited activity in transposing legally binding measures in the third pillar. This could be explained by the general reluctance of the UK to restrict national sovereignty and by the nature of the legal system, which requires less formal statutory instruments. The use of instruments such as circulars or other administrative decisions is more common than in civil law systems. The requirement of legal certainty of framework decisions, however, underscores the changing nature of third pillar decision-making in the EU and has led to the Commission criticising the lacking formal legal basis of circulars. Recently, therefore, several acts were adopted in parliament, which openly intended to transpose EU measures.

Both countries have shown significant changes in their law enforcement framework over time. But to what degree is the EU responsible for these changes? Or, on a less ambitious note, can influences of the EU on the national level be identified? These questions will be addressed in the third part. In order to do so, a conceptual framework to guide the analysis is necessary. Its development is the task of the following chapters.

⁴⁶ A methodological note is in order. By looking at the transposition record of the countries and by analysing, in a second step, the actual content of the transposition, certainly introduces a selection bias, as only the effect of transposed measures will be analysed. But the analysis is not intended to provide a full explanation of the impact, but identify the type of effect the transposition has. In this case the bias is not so problematic.

6. The theoretical framework

Guiding questions for the chapter:

1. How can we conceptualise the effect of EU policy on the domestic framework?
2. Why and how can we expect member states to comply with the requirements from the EU level?
3. What effects does the EU have at the national level?

6.1. *Introduction*

In its overall approach, the project engages with the growing literature on the domestic impact of EU policies (e.g. Featherstone and Radaelli, 2003; Cowles et al., 2001; Schmidt, 2002). It uses the insights of previous studies to identify how the EU matters for national policy in an area central to state sovereignty, in police policy. Theoretical insights also structure the book by emphasising the importance of domestic politics and pre-existing policies. Furthermore, they provide a tool to select the cases for analysis and to help develop an issue-specific hypothetical model of the influence of EU policy in the criminal justice area, which will be subsequently put to an empirical test. In order to do so, a careful look at the political and policy dynamics are necessary to understand the embedding of EU policy in ongoing developments.

Police policy is an under-analysed issue area in implementation and Europeanisation studies. In doing so the project contributes to the overall discussion of how and whether internal security policies in nation states are contingent upon the international level. It also serves to put the (often normative) discussion about the effects of EU cooperation in police matters on fundamental rights on firmer empirical ground.

Implementation studies predominantly address welfare issues in the context of EU studies (see Featherstone, 2003: 7). Security issues are underrepresented in them and when security is addressed, analyses focus on external security (Tonra, 2001). Authority (*Herrschaft*) (cf. Czempiel, 1981) and especially the effects on the monopoly of force is rarely mentioned,⁴⁷ even though the third pillar is a prominent policy field and has recently become a playing field for the EU. In principle there is nothing that contradicts the application of Europeanisation mechanisms to police policy. The analysis of the way and degree member states comply with EU prescriptions in police policy is therefore of interest to the specific policy field, but also holds the potential for a contribution to the

⁴⁷ An exception is the edited volume by Glæßner (2005).

wider study of the EU. It expands the application of Europeanisation to a transgovernmental policy field (Jachtenfuchs and Kohler-Koch, 2004: 11), which is characterised by direct cooperation among governmental actors while the overarching intergovernmental or supranational framework has traditionally been and remains to be relatively weak.

The presentation of developments in serious crime policy in Germany, England and the EU has shown that significant changes have taken place over the last decades. Changes in substantive policy have been accompanied by changes in institutional structures and the distribution of rule setting across vertical levels. But how are the countries and the different levels connected to each other? In particular, how does EU policy affect the domestic framework? This general question raises further questions. The first is whether member states comply with the requirements from the EU level. The second is about the type of effect of EU policy-making on domestic policies. Finally the content of policies needs to be addressed in order to answer the question, whether growing EU policy-making against organised crime has a discernible impact on the relationship between security and civil liberties in national policy?

The theoretical and conceptual issues related to these complexes are addressed in this chapter. A differentiation between policy processes and policy content is necessary. While policy content lies at the core of my endeavour with its focus on formal structures and the substantive question of liberty and security, processes are necessary to understand content, as Sabatier has highlighted in his ‘advocacy coalition framework’ (Sabatier and Jenkins-Smith, 1999). The next part presents insights from compliance research about possible processes, through which EU policies are translated at the domestic level. The following part addresses the substance of JHA policy and discusses why and how EU policy should affect the domestic level. Subsequently a model to analyse the domestic impact of EU third pillar policy at the domestic level is proposed.

6.2. *Do member states comply with European requirements?*

To what degree complies the member states’ domestic regulatory framework with the requirements from the EU level? This question has been addressed in various forms in implementation research (for recent overviews see Pülzl and Treib, 2006; Barrett, 2004; Saetren, 2005).⁴⁸ Compliance studies are a subtype of implementation studies and analyse the degree to which states adhere to international rules (e.g. Börzel, 2001). Neither do they addresses how legislation differs from its enactment, which is the object of

⁴⁸ Most of this strand of research focuses on the effectiveness of implemented policies. How well do outcomes of the process and outputs of the application of rules match with the intention of policy makers? This is not the focus here.

implementation studies, nor is concerned with the problem-solving capacity of rules, upon which criminologists have focussed (Jones and Newburn, 2007: 20). The book simply asks to what extent addressees comply with rules (Zürn, 2005: 8). In doing so it restricts itself to formal rules and legally binding obligations arising from EU integration. The compliance with non-institutionalised rules is not taken into account. More specifically applied to the EU, the Europeanisation approach has combined compliance studies with insights from comparative politics (e.g. Ladrech, 1994; Featherstone and Radaelli, 2003; Cowles et al., 2001).

Zürn defines compliance as the 'directly ascertainable actions of actors' instead of their 'attitudes or motives' (Zürn, 2005: 8). In the words of Young, compliance is the agreement of proscribed and prescribed rules:

“Compliance can be said to occur when the actual behavior of a given subject conforms to prescribed behavior, and non-compliance or violation occurs when actual behavior departs significantly from prescribed behavior (Young, 1979 3).

So, 'assessing compliance is restricted to the description of the discrepancy between the (legal) text of the regulation and the actions and behaviours of its addressees' (Neyer and Wolf, 2005: 42). In this context it is irrelevant whether compliance is voluntary or not or whether the actor showing a certain behaviour normatively consents to the content of the rules she complies with (Zürn, 2005: 8). Compliance is also different from implementation. Whereas the latter concerns itself with the problem-solving capacity of a given policy, compliance asks whether an actor's actions are in line with the requirements set by the rule setting authority. Compliance focuses on observable behaviour, action or policy of an actor, but does not presuppose a willingness on the side of the actor to do so. It is conceivable under certain conditions to imagine compliance with requirements which conflict with dominant norms and belief systems.

This is not to say that norms do not play a role in explaining compliance. Börzel and Risse have highlighted the role of norm entrepreneurs to facilitate domestic change (Börzel and Risse, 2003), Dimitrova and Rhinard the relevance of different forms of societal norms for successful compliance (Dimitrova and Rhinard, 2005) and Beach identifies a 'culture of compliance' in the EU, which is conducive to compliance (Beach, 2005). So in explaining compliance, the normative dimension is an important determinant for domestic change. When investigating compliance, however, norms are irrelevant if they are not manifest in the behaviour of actors or in the form and content of policy. This project focuses on the content of policy, but does not aim to identify the norms which are represented in the rules adopted. It takes a first step in this direction by looking at the observable effects of EU policy-making at the national level on the empirical constructs of two normative concepts, namely liberty and security.

In EU research, the concept of compliance is generally equalled with the transposition of EU measures in national law (Börzel, 2001; Mastenbroek, 2005: 1104) and is the focus of the project. The book is a compliance study in the field of criminal justice policy in the EU. By looking at the degree to which EU regulations are transposed nationally, a first step is taken to analyse the effect of EU policy on national frameworks. What the concept of compliance does not provide, however, is a mechanism through which compliant behaviour is determined.

6.3. Why should the EU matter for national police policy?

Beyond the descriptive approach of compliance, Europeanisation studies have recently begun to identify different effects of EU policy at the national level. Two competing views in the literature present mechanisms of Europeanisation, which are based on different conceptualisations of the relationship between the EU and the national level.

The first view is dominant in legal studies, where Europeanisation usually refers to the development of EU policies, which constrain the ability of the national level to set policies individually (Ligeti, 2005; Vervaele, 2005). Cowles et al. expand on this notion and conceptualise Europeanisation as the emergence and development of authoritative European rules, which in turn impact on domestic politics and policy (Cowles et al., 2001). Both definitions strongly emphasise the ‘uploading’ of policies to the EU level (Howell, 2004a: 20). This conceptualisation, however, is closely connected to European integration, which are primarily analytical approaches to explain the content and form of EU level developments (Jachtenfuchs and Kohler-Koch, 2003: 11). But Cowles et al. emphasise the importance of processes of uploading for the type and extent of impact EU policies have in domestic settings. In a similar vein, Peters and Pierre (Peters and Pierre, 2001) emphasise that in systems of multi-level governance not top-down hierarchies are dominant, but that relations among and across levels in both directions are crucial (cf. Howell, 2004b). This is also true for the law enforcement policy field. Particularly as the degree to which it is embedded in transnational fora is still an object of debate (Jachtenfuchs et al., 2005).

For the sake of conceptual clarity, however, a restriction to the downloading of policies is the more intuitively comprehensible concept (cf. Ladrech, 1994). This is second view on the concept of Europeanisation. Following Bache (2003: 5) Europeanisation is defined as ‘a redirection of policies and/or practices and/or preferences in the domestic arena towards those advanced by dominant EU level actors/institutions’ (cf. Knill, 2005: 158). It is conceptualized as a situation, when changes have occurred and Europe is incorporated in the logic of national policy-making (Lüddecke, 2004; Töller, 2004; Bugdahn, 2005: 180). Three mechanisms of Europeanisation are identified in the

literature (Featherstone, 2003: 14; Knill, 2005: 158; Bulmer and Radaelli, 2005: 353; Radaelli, 2003: 35):

1. the prescription of an institutional model,
2. EU legislation alters domestic rules of the game and
3. EU policy alters norms.

These sketches of processes provide insights about the development of policies on the national and the EU level. The investigation does not aim to test their explanatory power for the policy field, but uses them to select measures to be analysed.⁴⁹

The three mechanisms correspond to three ‘domains of Europeanisation’, where observable effect can be expected. These are institutional structures, policy content and norms (Radaelli, 2003: 35-6). For the effect of the EU regulatory framework in police policy in particular the public policy dimension is relevant. Previous studies in other policy fields have revealed a greater impact of Europe there, than on institutional structures (Radaelli, 2003: 36). Furthermore, an international research project coordinated by Den Boer showed that institutional structures in police policy have been reformed, but that EU influence has been inconclusive (Den Boer, 2002a). From a more pragmatic point of view, the expectation to find more EU influence on public policy makes the identification of its influence more likely, but if no or few changes were to be found, it would provide an even stronger argument for the limited impact of Europe than an analysis in the footsteps of Den Boer’s study would yield. Second, public policy is better suited to capture the essential question of the policy field, namely the ability of law enforcement actors to avert danger and prosecute violations of public order, on the one hand, and controls for individual liberty, on the other. The research question about the provision of security and the safeguarding of liberty addresses policy content and not policy processes.

The analysis of public policy is also central, as the understanding of broad processes of political change, often implicitly or explicitly brought forward by analysts of the policy field, can only be answered by digging up the dirt of details. Jones and Newburn convincingly argue in their study of policy transfer in British crime control policy that insights about policy processes depend upon a clear understanding of policy content, as contained in statutes, and administrative rules and regulations, and policy instruments, such as regulatory administrative and judicial tools to achieve goals (Jones and Newburn, 2007: 22). Only after having gained a clear understanding of the changes taking place in

⁴⁹ The problem of insufficient variation in the independent variable is recognised (cf. Haverland, 2005). By restricting the investigation to possible streams of causalities, which had been provided by previous research, this problem is avoided. Furthermore, the problem is insignificant, if the results are *negative* concerning the detection of an influence (Haverland, 2005: 2).

content can we go back to investigate processes of change, and thus attempt to identify causal pathways between EU policy and developments at the national level.⁵⁰

The detailed analysis of developments of policies at the national level where EU influence is likely, allows the construction of rich narratives, which can form the basis of further research which should then look into the processes of change and can thus also include a more thorough analysis of normative changes.

In police policy, then, Europeanisation takes place

- (1) when European measures are transposed directly into national law. This includes organisational models and effects, such as national Europol contact point or the Sirene offices (cf. Den Boer, 2002a) and legally binding measures which prescribe an institutional model, such as framework decisions and conventions (Weyembergh, 2004);
- (2) when the outcome of the political process at the national level is connected to decisions taken at the EU level, which includes legally binding measures and political obligations adopted at the EU level, as they establish an institutional framework with effects on the national power structure (Lavenex and Wagner, 2005);
- (3) when the outcome of policy-making is a traceable reaction to developments at the EU level, such as action plans and other political declarations (Weyembergh, 2004; Mitsilegas et al., 2003).

As a first step in the analysis of the Europeanisation of police policy the focus lies on formally binding top-down Europeanisation as analysed by Ladrech (1994). When a country implements EU measures the policy concerned is Europeanised. This is a less ambitious undertaking and does not take into account all elements of the rich concept proposed by Bache (2003: 5). At the same time, the aim is not to provide a full explanation of the Europeanisation of police policy, but to lay the empirical groundwork for a more nuanced analysis by investigating the compliance-related top-down dimension of the Europeanisation concept. To bolster the case of top-down cases of Europeanisation to a limited degree the second instance is taken up by including the

⁵⁰ Norm changes are not analysed. This has mainly pragmatic reasons as a detailed analysis of criminal policy requires a deep understanding of its minutiae, and an inclusion of an analysis of normative changes, including the changes of preferences of actors and effects on the way things are done, would have exceeded my resources and would require a more actor focused approach. This of course leaves out an important element of the picture. Understanding the effect of EU norms on cognitive and normative frames is a desirable avenue of research. The degree of compliance and the formal way obligations are met allows to draw some cautious remarks about possible norm effects as well (cf. Zürn, 2005).

official debates in parliament in the analysis. This can help to establish, whether there is at least an argumentative connection.⁵¹

Fundamentally, all these research traditions are concerned with explaining policy change at the domestic level (Jenkins, 1978: 203). This has been a major conceptual problem, as processes of uploading (Howell, 2004a) and a lack of misfit (Börzel and Risse, 2003) might not entail changes at the national level. Complying with EU measures, however, even conceptually does not require change. It is a description of concurrence of rule and addressee. Neither compliance with EU rules nor the Europeanisation of domestic structures necessarily lead to an convergence of member state policies nor need we observe a change in every national policy at every point in time. In the process of European integration structures, policies and norms of some member states are more directly replicated at the EU level, while other member states experience misfit more directly (Börzel and Risse, 2003). In the former cases, the transposition of EU measures does not lead to changes. The situation complies with the EU requirements, but it would be difficult to argue that it was 'Europeanised', as no changes have taken place and not even norms or beliefs had to be changed. Neither is it sure that convergence across member states will take place. This might be the idea of the Commission (at least to a certain degree), but intervening variables, such as domestic opportunity structures, can impact on the form of transposition (e.g. Mazamanian and Sabatier, 1983; Sabatier and Jenkins-Smith, 1999). In this case a situation is conceivable, where compliance is high, but the policy effects diverge rather than converge between countries.

At the same time, Europeanisation is not a one-off occurrence. Over time, several processes of up- and downloading of policies take place. Thus by not restricting the analysis to a particular point in time the likeliness of observable effects increases. The EU is a negotiation system, where decisions are built on negotiated compromises. This is even more the case in the third pillar where decisions have until not exclusively taken by unanimity. When decisions are contested in the Council, even where majority decisions are possible, voting remains a last resort (cf. Hayes-Renshaw and Wallace, 2006: 284). This not necessarily leads to lowest common denominator decisions, but the fact that police and criminal justice systems vary greatly in the EU in combination with a longer time frame of analysis increases the likeliness that changes occur through the transposition of EU requirements. A full uploading of national policy, which would not require any changes in the domestic framework, is less likely the more compromises are struck.

⁵¹ Whether the EU argument is used strategically or whether it really is the justification for a specific measure, however, remains unclear.

This study provides a first step to assess whether Europeanisation is a useful tool to analyse current changes of police policy by providing a theoretically guided study of the transposition of EU measures in Germany and England.

6.4. *Why should there be change at the domestic level?*

In the EU exists a strong political will to move forward in police cooperation. With reference to new threats and the need to provide citizens with sufficient security, the development of this policy field has been in the centre of attention since 1999.⁵² As Monar has shown over the years, the policy field has developed in terms of output and decision-making efficiency (Monar, 1999; Monar, 2001a; Monar, 2003; Monar, 2005; Monar, 2007). Accounts of the policy field have stated that national politicians use Europe to overcome judicial scrutiny (Guiraudon, 2003: 217) or domestic political opposition (Bukow, 2005: 59; Lavenex and Wagner, 2005). Following this logic, national policies would not be uploaded, as they still face political opposition at home, whereas norms which conflict with national structures would be. So while uploading is certainly important for the development of EU policies⁵³, it should primarily concern the normative dimensions. When these norms are moulded into policies, however, they should result in EU policies, which are in line with the uploaded norms and thus in conflict with national policies. In other words, national policy should come to mirror central aspects of EU policy. These are likely to be at least partially in conflict with national policies. So there should be effects observable at the national level either in policies, when substantive changes were transposed, or in political opportunity structures, when the establishment of European structures changes the relative power position of actors in the national policy field.⁵⁴

This ties in with the misfit hypothesis of much of the literature on Europeanisation (Cowles et al., 2001; Börzel and Risse, 2003). Misfit of policies or opportunity structures was required as a precondition (Cowles et al., 2001; Börzel and Risse, 2003) or a facilitator for change (Falkner et al., 2004). As a uniform and binding EU framework for police cooperation (cf. Müller, 2003: 266) is applied to a highly diverse set of criminal justice systems (cf. Bayley, 1985), which differ consistently on virtually all aspects of criminal procedure (Spencer, 2002b; Mathias, 2002; Bayley, 1985), misfit is likely to be

⁵² See, for example, Commission (2004d), European Council (1999; , 2004b) and Monar (2001b).

⁵³ I refrain from calling this process of uploading Europeanisation, because it blurs the difference to integration, even when the dependent variable is the impact on domestic structures (Cowles et al., 2001).

⁵⁴ Both aspects can be analysed on the basis of documents. This does not necessarily reflect the changes fort he practical day-to-day work of law enforcement, but the structures put in place have results as well, without seeing their transposition in reality

high among the member states. Therefore, an EU effect should be observable for binding third pillar measures.⁵⁵

6.4.1. The type of EU governance: hard v soft law

Underlying the question of domestic EU influence is the assumption that the mode of governance at the EU level is important for the analysis of its domestic impact. Internationalisation refers to a situation where an increasing amount of decision-making takes place at the international level and the legitimate monopoly of the use of violence is pooled on this level (cf. Jachtenfuchs et al., 2005). National policy develops in response to and under influence of policy developments from outside of the nation state.

Whether this assumption is correct depends on institutional characteristics of the EU governance system. The debate on hard and soft law in international governance can be helpful to further qualify whether a EU influence at the national level is likely (Abbott and Snidal, 2000). ‘Hard’ forms of international agreements, such as EC agricultural policy, lead to stronger adaptation pressure with high costs and possible restrictions of sovereignty than soft law, such as the Open Method of Coordination (Abbott and Snidal, 2000). As ‘hard’ arrangements also come with stronger sanction mechanisms, the debate links the likeliness of implementation with features of the steering arrangement. Recent studies use prescription, i.e. the amount of obligation and hierarchy, and negative or positive integration (Héritier et al., 2001; Scharpf, 1998) and the degree of delegation to the international level (Abbott et al., 2000) as dimensions to assess the ‘hardness’ or ‘softness’ of steering mechanisms. In a similar direction goes the analysis of policy transfer by Bulmer and Padgett (2004). While policy transfer is different from Europeanisation in that it does not require an EU, but includes vertical, horizontal and even diagonal processes of policy transfer (Evans and Davies, 1999: 368), their goal is also to explain changes at the national level through EU policy-making (Bulmer and Padgett, 2004: 104). They distinguish between the governance types hierarchical steering, negotiation and ‘facilitated unilateralism’ to capture different transfer types. The hierarchical mode requires a institutional model at the EU level which must be transposed domestically and includes a sanction mechanisms for non-compliance (command and control). Negotiated governance leads to commonly agreed rules at the EU level, where ‘policy models or norms from one or more member state(s) are incorporated in EU norms’, which then ‘reduce adaptational pressures’ (Bulmer and Padgett, 2004: 106, 09). This leads to more or less voluntary adaptation of national

⁵⁵ This certainly does not prevent a member state experiencing no change at all, when the EU policy conforms with its national policy for whatever reasons (uploading, further developed national system, inertia).

structures via the EU level. Facilitated unilateralism, finally, mainly relies on voluntary horizontal transfer, which is facilitated through coordination at the EU level, but does not restrict sovereignty and can be implemented unilaterally. This goes along with a high tendency to abort policy transfer. There is no EU model with which to conform (Bulmer and Padgett, 2004: 110). They further differentiate between emulation, synthesis, influence and abortion (in decreasing ‘strength’) to conceptualise transfer mechanisms (Bulmer and Padgett, 2004: 106; Radaelli, 2003: 37). The ‘harder’ the steering mechanism at the EU level, the more likely a ‘strong’ transfer mechanism is to be found.

In most accounts of Europeanisation, police and judicial cooperation in criminal matters have been conceptualised as a soft governance arrangements, where only coordination takes place, as in the Common Security and Defence Policy (e.g. Bulmer and Padgett, 2004; Bomberg and Peterson, 2000: 30). Bulmer and Radaelli even place the ‘third pillar’ together with the open method of coordination into one policy type (Bulmer and Radaelli, 2005: 354). In this conceptualisation of the third pillar, changes in the national framework are essentially voluntary. The location of JHA in the governance type ‘facilitated unilateralism’ also points to the assumed lack of pressure a member state faces from the EU level. This assumption is also supported by Baukloh et al., which explicitly deal with the Europeanisation of internal security policy (Baukloh et al., 2005: 245-46).⁵⁶ Justice and Home Affairs in the EU can be characterised as a negotiation system. This characterisation indicates that attention should be paid to the measures intended to improve implementation (Scharpf, 1997: 117). As Mayntz highlights, implementation not only requires enforcement, but also the management of unintentional non-compliance (Mayntz, 2004).⁵⁷

On first sight there are some good reasons for subscribing to the conceptualisation of JHA as a soft governance arrangement. The Commission has a relatively weak position within the policy field and no sanction mechanisms. The European Court of Justice’s competences to adjudicate third pillar matters are restricted, member states decide unanimously and the scope within which they can decide is clearly restricted by the Treaty. Measures adopted in police and criminal justice cooperation do not entail direct effect and their transposition cannot be enforced in a top-down manner.

There are counter arguments to this assessment, though, because the situation today is different from before treaty of Amsterdam, when the third pillar was a soft policy

⁵⁶ At the same time, it might explain why so few studies have applied the Europeanisation concept to justice and home affairs policy in the EU.

⁵⁷ This concept implies a state-centric understanding of governance, where implementation by the state is a rational behaviour, and includes a bottom-up understanding of implementation studies, in that it includes political and societal actors ‘on the ground’ as actors with the power to influence the success of implementation (hybrid theories, cf. Pölzl and Treib, 2006).

arrangement. While the formal regulations still indicate a soft governance structures, the reality of their application and the composition and amount of policy production paint a different picture of a virtually hard law system in the third pillar (cf. Weiß and Dalferth, 2007).

The Commission has no sanction mechanisms, but the member states are legally bound to inform it on the implementation of framework decisions. On the basis of this information the Commission compiles detailed reports, in which it 'names and shames' laggards (e.g. Commission, 2004h). The Commission makes extensive use of this opportunity by publishing regular reports or setting up scoreboards to identify actors and policy areas, where political declarations of intent are contrasted with political decisions (e.g. Commission, 2004i).

The growing activity of the European Court of Justice has in recent judgements bolstered the amount of competences of the Commission. Chapter two discussed the competences of the ECJ, which can give preliminary rulings on the validity of national implementations upon the request of a national court (Article 34 TEU).⁵⁸ This is particularly relevant, as third pillar measures require the transposition by national parliaments, before they can be enforced before national courts (Hix, 2005: 131). In a recent landmark decision, the ECJ required all national organs to ensure that their action within existing national law were in the spirit of the framework decision, even if not yet formally transposed.⁵⁹ The *Pupino* case has arguably introduced a proto-direct effect for framework decisions (Adam, 2005: 560-61). The ECJ cannot force member states to implement third pillar law, but it begins to develop case law, which gradually increases the (normative) obligation of member states to comply (Adam, 2005; Baukloh et al., 2005). Delegation as a dimension of legalisation is extensive. Both legally and organisationally member states have transferred monitoring mechanisms to third parties and have given them the power to exert pressures on non-compliers.

It has been shown that in action plans content remains stable over long periods of time (cf. Coordinators' Group on the Free Movement of Persons, 1989; Council of the European Union, 1997; European Council, 1999; European Council, 2004b). As these documents are drawn up and adopted by the governments of the member states, their reappearance is intentional. The reappearance of issues in numerous action plans could thus function as a socialising mechanism for the member states, reminding them to adapt their policies.

⁵⁸ With the exception of the UK, which has not signed the necessary declaration according to art. 35(2) TEU.

⁵⁹ Case No. C-105/03 *Pupino*, see <http://curia.europa.eu>.

While action plans and declarations are still important elements of the policy field, Thorsten Müller has shown that the amount of legally binding measures has increased significantly since the treaty of Amsterdam (Müller, 2003: 266). So member states are increasingly legally compelled to comply. This is an further indication of a hard governance system, as it is strong on the dimension of obligation (Abbott et al., 2000: 404). Necessarily accompanying this development towards legally binding measures is an increasing precision of measures. While the wording of measures is repeatedly criticised for being ill-defined, the measures themselves fulfil the requirement to 'clearly and unambiguously' specify 'what is expected of a state or other actor' (Abbott et al., 2000: 412).

These instruments are all meant to enforce the implementation of binding rules nationally. When considering merely the wording of the treaty, they seem relatively weak. Once the way European institutions use the instruments is taken into account, however, they appear surprisingly hard and adaptive (Hix, 2005: 131). The fact that third pillar law is legally binding provides the necessary leverage for activism by the ECJ and the Commission (cf. Conant, 2006).

Concerning the management of non-compliance, it appears from Commission reports that the large diversity in criminal law and police systems (Spencer, 2002b; Bayley, 1985) often leads to unintentional non-compliance. At the same time, the Commission reports on the transposition of framework decisions show that even politically contentious issues tend to be implemented. Reporting can be considered as mutual monitoring, using an external arbiter to compile and analyse the individual transpositions. Additionally, the EU facilitates the socialisation of law enforcement officers through the European police college (CEPOL) to increase knowledge of and trust among national law enforcement actors and European structures (Bigo, 2000; Müller, 2003: 217).

Implementation and compliance controls combine soft and hierarchical instruments to a virtually hard mode of governance (cf. Tallberg, 2002). While institutional and legal structures do not fulfil all the requirements of hard law (Abbott et al., 2000: 422), compared to clearly soft modes of governance, such as the Open Method of Coordination or ESDP, JHA structures are very close to the hard side. The ECJ plays an increasingly important role. National courts can adjudicate state action on the basis of European measures. Commission reports, while not binding, openly identify laggards, which defy their legal obligations. Such mutual monitoring is supported by education measures for law enforcement officials to strengthen mutual trust. The member states have committed themselves to adhere to the decision taken in JHA and in combination with the pressure from the relatively soft compliance instruments find themselves under a strong obligation to comply. The conceptualisation of JHA as an area of hard law

(Abbott et al., 2000) supplants the relevance of the EU level for domestic internal security policy.

6.4.2. Domestic politics

A further factor for the effect of EU policy at the national level are domestic structures. As discussed above, a strand of Europeanisation studies took the *misfit* between EU structures and domestic structures as a central element in explaining compliance. Based on the assumption of rational cost calculations of actors at the national level (i.e. police and law enforcement) or the degree of agreements on the norm level, *misfit* was considered a necessary factor for compliance (Börzel and Risse, 2000). The higher misfit, the more difficult to achieve compliance.

Against this rather static hypothesis, which has been found to lack in explanatory leverage (Mastenbroek, 2005: 1111), the focus in other strands of research is that domestic *politics* play a decisive role, even when applying the more general ‘goodness of fit’ model. (Mastenbroek, 2005; Zürn, 2005; Lenschow et al., 2005). Instead of taking a structural approach, which has been accused of overemphasising the status quo persistence, they focus on actors. Haverland, for example, focuses on the position of domestic veto players (2000) and Steunenberg on the coordination of institutional players in a policy field (2005). In a slightly different vein, Bugdahn argues that Europeanisation is mediated in different rounds by pre-existing national structures and actor preferences (2005). The importance of national processes is also emphasised by Bulmer and Padgett (2004), which see *misfit* not as a necessary condition for Europeanisation, but as a factor influencing the form of the domestic effect. In their model domestic power structures and actor constellations are more important. These approaches tie in with repeated calls in the literature on compliance and Europeanisation to ‘bring domestic politics back in’ (Mastenbroek, 2005: 1110; Smith, 2000). *Misfit* thus seems particularly useful to predict the amount of change that a transposition would yield, but not as a predictor for compliance, for which an actor focus is more useful. In applying this alternative approach to police and criminal justice cooperation, despite the expectation of high misfit across the member states, there are good reasons to expect a high degree of compliance based on domestic politics.

Numerous studies have shown that the actor constellation in internal security policy encompasses mainly actors from law enforcement (e.g. Guiraudon, 2003; Aden, 1998). Whether it is police unions or officials from the relevant ministries, there are few organised interests acting as counterweights to these professional and state interests (cf. Olson, 1965). This should lead to high compliance, as mainly professional actors shape policy according to their own wishes. It should also reduce the observable impact, as these actors will try to upload their national systems to the EU level. Furthermore, the

literature sees a new criminal policy in Germany (Ligeti, 2005) and a tendency to punish in UK (Reiner, 2000; Walker, 2000). The same has been said for the EU (Lavenex and Wagner, 2005; Wagner, 2003) and several commentators have lamented the overemphasis of security to the detriment of freedom and justice (Mitsilegas et al., 2003; Chalk, 2000). Problems could arise through the necessary transposition of EU measure by national parliaments. They could function as counterweights to security interests of dominant professional actors. Students of the policy field, however, often accused the parliament as merely acclaiming government proposals without the necessary scrutiny.⁶⁰ These considerations further support the expectation that effects of the EU framework should be observable at the national level.

6.4.3. Horizontal policy transfer and idiosyncrasies

An alternative mechanism, which is particularly important in transgovernmental areas where top-down forces are less powerful, is horizontal policy transfer (Bomberg and Peterson, 2000: 10; Howell, 2004a). This helps to differentiate Europeanisation from similar developments across countries which do not originate at the EU level, but are 'cross-loaded' (Howell, 2004a) from another member state or even a state from outside the EU. But cross-loading does not exclude the development of similarly structured EU policies, as there is no reason to assume that cross-loading is not at the same time accompanied by uploading of these emerging trends to the EU level (cf. Cowles et al., 2001). Jones and Newburn (2007) and Andreas and Nadelmann (2006) argue that the US is a dominant influence in shaping global and British crime control policies. In the EU Bigo has emphasised the role of policy transfer in police policy (Bigo, 2000). In the context of EU enlargement twinning projects were strong conduits for horizontal processes (Papadimitriou and Phinnemore, 2004). Without discarding the explanatory value and practical importance of horizontal transfer processes, they are not explicitly included in the analysis. The research interest lies with the influence of the EU. While thus the influence of other member states' influences cannot be controlled for, the investigation of EU influences alone is an important step to address central questions in the policy field, especially concerning the interrelation of horizontal levels.

Taking into account the literature on the implementation of EU policy and the member states compliance with it, the expectation is that the EU influences both the processes and the outcome of national law enforcement policy in Germany and the UK. Based on

⁶⁰ It must be said, though, that these students often pursue an implicit (sometimes even explicit) normative course, which is particularly state-critical for political science analyses of the field (Busch et al., 1985; Busch, 1995; Aden, 1998).

the type of EU policy in the third pillar, the EU influences details in certain policy areas on the method and competence level, but does not greatly to influence general developments in the framework of police governance.

6.5. *A model of national effects of third pillar measures*

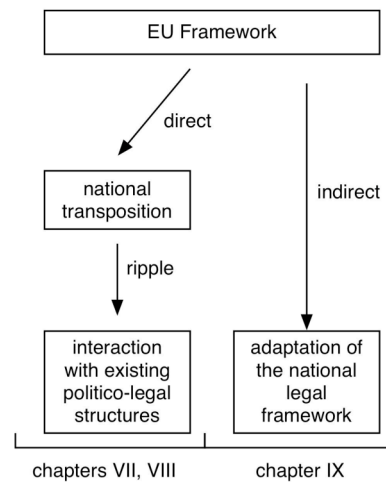
In the following a model of EU influence at the national level will be developed. The model is tailored to the third pillar, which makes it difficult to apply it to other areas of international governance. Building on insights from Europeanisation and implementation studies, its intention is to guide the analysis of the domestic regulatory framework for police governance. It builds on the insights from above and uses the methodological, criteria-based approach developed in the next chapter.

The model departs from the most likely case of change (cf. Gerring, 2001: 220), but can be applied to all types. The aim is to help produce the data necessary for the analysis of liberty and security as developed in the next chapter. The model (figure 1) helps to structure the analysis by pointing out the analytical relationships of the national and the EU level and the steps necessary for the analysis of the potential effects at the national level. The model does not intend to present fully-fledged causal relationships, but identify possible elements of a causal link between the EU and the national level.

Such a crucial case design (Gerring, 2001: 219-20) allows statements about the direct effect of the EU level at the domestic level. If there is no effect (or no distinct effect), further research must be refocused on the more indirect effect of the EU framework. To a certain degree the indirect effects are included in this analysis, too. A full analysis of the implicit changes through norm adaptation and the way of doing things would require another methodological approach than taken in this analysis, though.⁶¹

⁶¹ See the section ‚research agenda’ in the conclusion.

Figure 1 Model of EU influence at the national level



The implementation of EU measures at the national level has direct effects when EU measures are the direct reason for changes in domestic laws. These changes can encompass laws and administrative orders (Reichelt, 2004: 21ff). Direct effects primarily depend on the content of the EU measure, which can concern procedures or substance and thus determine the type of direct effect. In the case of framework decisions, they primarily include changes in material and procedural law. In part they also directly affect (co)operation of law enforcement actors. This is the most obvious EU influence. They are the result of the existence of a binding EU policy model and thus ensure the compliance of the national with the European policy. Their analysis focuses on (1) whether binding EU measures pertinent to the police's fight against crime were transposed nationally, (2) the form of the transposition in law or administrative regulations, and (3) their effect on the indicators for liberty and security.

The effects of the transposition, however, do not stop at the level of transposition proper. In cases where there is change through the transposition of EU measures, there might be effects beyond the new regulations. New regulations might not meet a void, but a (more or less) elaborate existing regulatory framework. The more elaborate the framework, the more interaction effects and indirect consequences can be expected. These effects, however, are directly dependent on the original measure. To differentiate the dependent indirect effects from general indirect effects, they are called ripple effects of national transposition.

The third type of effect is indirect. It not only does not concern issues of transposition, but the effectuating reason at the EU level might not even have a direct relevance for the

national level. Despite their informal nature indirect effects are important for the development of the regulatory framework in the fight against organised crime (Aden, 1998: 306 ff).⁶² Through various vertical interlinkages, e.g. Europol, databases, liaison officers, facilitating rules for operational cooperation, the policing framework at the national level is affected by EU development, even when they do not have a direct bearing on the form of national police policy. Here perceived necessary or voluntary adaptations of national policy to the EU framework are addressed. In addition, these indirect effects include the unforeseen consequences of EU integration in the third pillar on the national framework. Not only actual changes are taken up, but also changes in the competences of law enforcement when taking into account the new rules available at the EU level.

Beyond the conceptualisation of the relationship between the EU framework and the developments at the national level, the model also logically guides the further structure of the analysis. First the direct effects and their indirect ‘ripple effects’ are analysed with regard to their effect on the dimensions of liberty and security. The second large part then concerns itself with the macro effects through the empirical interconnections of different national law enforcement systems and the connections of national law enforcement systems with the EU level. By progressing thus all types of possible effects of the EU framework at the national level are covered.⁶³ The indirect effects on liberty and security are primarily analysed through an analysis of secondary literature.

6.5.1. The impact on substance and procedures

In general, EU policy in the third pillar in the fight against organised crime can have an impact on two aspects of the national regulatory framework. In the discussion of the effects of particular types of measures, this has already been alluded to. As criminal law is the object of analysis, effects can concern the substance of criminal law and procedures for law enforcement. This differentiation is adequate, because in the German legal system, substantive criminal law and procedural law are separate and even though the English system does not differentiate as formally, the dualism can still be applied. The content of criminal justice policy is primarily criminal law. And while decision-making processes *per se* are not affected through EU measures, the relative importance of the actors, especially in the implementation of substantive policies is affected, which is

⁶² In difference to the Europeanisation literature, indirect changes do not conceptualise norm changes. The focus is on formal changes in the domestic competence structure. They are the secondary effects of direct changes effectuated by the transposition of EU measures.

⁶³ These effects do not presuppose a change at the national level. Given that Europeanisation includes a significant element of uploading, the likeliness of no change must not be discounted. Ripple effects can occur even when there is no national transposition through the establishment of a common European structure, which has repercussions at the national level.

obvious in the discussion on centralisation and the growing role of intelligence services in the fight against crime. Rather than focussing on policy-making, the effect of implementation on the procedures of the policy field to attain prescribed goals is in the centre. This could also be referred to as 'opportunity structures', i.e. the distribution of power and resources among political actors (Knill, 2005: 158). Power includes political decision-making power as well as power within the specific policy processes. Resources enable actors to apply this power, which encompasses political clout as well as operational powers to fight organised and serious crime. EU policy empowers some actors more than others.

Substance concerns a rather limited set, namely substantive criminal law. In particular the effects can be found on the definition of crime and the level of punishment. This is central to my analysis of liberty and security, as the substance of criminal law defines the scope of law enforcement tasks. In addition the location of certain crimes in the dogmatic of criminal law has a bearing on the control mechanisms available to individual and public actors.

Criminal procedures vary greatly across the EU (Delmas-Marty and Spencer, 2002). The relationship between the police and the judiciary is highly variable, which is reflected in the different scope of competences for the police. They are affected by the transposition of EU measures. The proposed and politically agreed upon European Evidence Warrant would conclusively regulate the admissibility of evidence in proceedings, a practice that varies widely in the EU (Spencer, 2002a).

Particularly influential is the procedural effect of EU measures when it concerns the collection of data. This is the main element in the development of a EU criminal area. But also the explicit establishment of institutional structures at the EU level changes procedures at the national level (Spencer, 2002b: 57).

6.5.2. The analysis of indirect effects

As indirect effects can be virtually unlimited, based on the characteristics of the policy field and previous analyses of police governance in Germany, the UK and the EU (among others Aden, 1998; Busch, 1999; Sheptycki, 2002a; Smith and Wallace, 2000; Lavenex and Wagner, 2005; Monar, 2001b; Monar, 2002b; Chalk, 2000) and with a view to the two dimensions liberty and security, three broad areas have been identified, in which indirect changes are likely to be particularly salient.

The three elements show a clear relation to the two analytical dimensions. The boundaries on law enforcement (1) and the legitimisation of methods (2) talk directly to the elements of our security definition, methods and tasks. The emancipation of the police from the judiciary (3) is an element in the liberty dimension.

Indirect effects are particularly important when they affect *the boundaries of law enforcement activity*. The judicialisation (*Verrechtlichung*) of law enforcement cooperation in the EU has led to an increasingly dense network of regulations. The content of these regulations increasingly determine the scope and depth of law enforcement competences. The regulation of international law enforcement cooperation has the welcome effect of bringing previously obscure developments in the view of the public. TREVI was and remains a very inaccessible, practitioner-based and informal cooperation structure. The EU framework, which developed since the treaty of Maastricht, builds an extensive legitimate legal basis for police and judicial cooperation. This development, as welcome as it is, also has side effects. The regulatory framework often lacks precise definition of key terms. When this is the case, the seemingly elaborate regulations can be more extensive than they seem on first sight. There then is only a restricted possibility to effectively control whether the activity of law enforcement actors is within the boundaries of a democratic rule of law.

The second effect is the *legitimisation of methods*. Especially in cross-border cooperation, the establishment of a new regulatory framework serves to provide a legal basis and thus a legitimisation of methods, which had been used previously. This has been documented by Aden (1998) and Busch (1995). As we have seen in this discussion on the differentiation between direct and indirect effects, the latter more exclusively concern the police, whereas with the former it is less possible to draw a dividing line between the police and other law enforcement actors for the sake of the analysis.

A third effect, which more directly concerns the police, is the *emancipation of the police from the judiciary*. Police cooperation has been the first and remains the more elaborate form of international and EU cooperation in the fight against organised and serious crime. Only since the early 2000s has judicial cooperation gained a similar standing (Occhipinti, 2003; Commission, 2004d; Monar, 2003). Due to its higher flexibility and information advantage over the judiciary the police have become more independent from the judiciary in their activities than intended by policy-makers (Heinz, 2004: 8-9; Gleß et al., 2001: 7; Delmas-Marty and Spencer, 2002). The growing use of preventive policing methods has moved this dominance of the police from everyday crime to the realm of organised and serious crime, where the judiciary had been the dominant actor also in reality. Judicial cooperation in the EU has expanded through Eurojust and the EJNI. But the police cooperation structures remain more elaborate and more operational, because the informal cooperation works well especially in border areas, and even in the absence of formal cooperation structures.⁶⁴ The agreements reached in the field of judicial

⁶⁴ Personal communication from German, Czech and Dutch border control officers.

cooperation, particularly concerning the approximation of material law, thus not only help to improve judicial cooperation across borders, but also affects the scope and depth of the legitimate activity of the police. When legal rules are approximated and, for example, extraditable crimes are redefined, not only judicial cooperation has been improved, but the legal basis for the police to become active across borders is affected as well.⁶⁵

⁶⁵ Whenever possible attempts have been undertaken to delimit EU influence from other sources. In order to achieve this, previous developments at the national level were included to get an idea whether the developments are likely developments of previous decisions in national police policy and by cursorily looking at the debates around central reforms after the involvement of the EU in 1993 without finding references to the EU.

7. Concepts and methods

7.1. *Liberty and security as dimension for the analysis of police policy*

As illustrated in the introduction, liberty and security are central concepts for the policy field (e.g. Meisels, 2005; Glaeßner, 2003; Waddington, 2005; Reemtsma, 2005). The European Union has pledged to establish an ‘area of freedom, security and justice’ (AFSJ) in article 29 TEU. The three concepts are empirically in tension with each other in the policies adopted at the European level (Mitsilegas et al., 2003). But not only in existing policy an assumed conflict between security and liberty is the object of consideration. More generally in the debate about the role of the state and its relationship to its citizens, political philosophy has repeatedly returned to his debate (Mill, 1998; Berlin, 2002; Waldron, 2003).

In order to be able to make meaningful statements about developments on the two dimensions of liberty and security in the context of EU policy making and national internal security policy, a more detailed conceptual discussion is necessary. The following pages provide a conceptual approach to the question of security vs. liberty, or rather security *and* liberty. First, a liberal understanding of individual liberty is sketched out and an attempt is undertaken to reduce the multi-dimensionality of security. The goal is to explicate what each concept means for the subsequent analysis. This is necessary to make the concepts useful for an empirical analysis and to clarify the scope of the analysis of EU and national internal security. The goal is to arrive at a conceptual clarity, which premits to use the concepts as analytical dimensions against which to assess effects of the interaction of policy levels without falling back onto purely normative arguments.

In the second part, the chapter goes on to develop an empirical conceptualisation of the two dimensions. Based on the conceptual considerations of the first part, liberty and security will be captured by subcategories, in order to capture the richness of the concepts in a methodologically approachable manner.

Liberty can be positively defined with recourse to clearly delineated rights and concepts. Security, on the other hand, is normally defined negatively in legal terms as the absence of threats and danger (Zöller, 2004: 474; Lepsius, 2004). Glaeßner shows that a political approach to the concept of security is possible, but faces a similar problem of positive definition when trying to transform the notion of his eight dimensions of security into actionable concepts to be embedded by law (Glaeßner, 2003: 15-20). In the following a notion of individual liberty is set out as a negative concept understood as protection

against the state. The negative conception of security is approached positively through scope and depth measures for the competences of the state.

Approaching the concepts helps to avoid some of the pitfalls of the contentious debate raging around these concepts. The price to be paid for this is less normative depth. At the same time the concepts have certain implications and conceptual requirements which must be clarified before such a turned around conceptualisation carries conviction.

7.2. *Defining individual liberty: a liberal notion*

In the following an understanding of liberty is developed, which is normatively lodged with the individual and does not entail a substantive list of civil liberties. This allows in a subsequent step the operationalisation of liberty for the empirical analysis. The reasons for not building upon a positive list of rights lie in the difficulty of weighing detrimentally affected rights against each other when qualitatively assessing changes. Is a restriction of the freedom of the person graver than infringements of the freedom of expression? What is more important: privacy or freedom of association? These questions cannot be answered objectively. A focus on restrictions of the procedures through which these abstract rights can be made useful for the individual citizen, on the other hand, circumvents this problem. The development of a negative concept of liberty independent of positive rights allows the establishment of a link to control – at least when liberty is conceptualised in the context of the modern state – which in turn acknowledges the necessary and accepted preconditions for a functioning usage of negative liberty.

Liberty is a complex concept with different conceptualisations, depending on the underlying philosophy (cf. Wildfeuer, 2003). For an analysis of police policy, in particular liberty, i.e. ‘non-interference by others with one’s freedom of choice and action’ (Feldman, 2002: 4), and civil liberties, i.e. ‘those [liberties] which people enjoy by virtue of being citizens of a state’ (Feldman, 2002: 4) are central concepts. Liberty is a concept lodged with the individual. In the words of Brandeis and Warren from 1894, liberty in this sense is in most simple words the ‘right to be left alone’. I am free, if I can go about my affairs unperturbed by others. Following Sartori (Sartori, 1997: 298) political liberty is understood as negative or protective liberty (cf. Berlin, 2002). It functions as a set of defences and means to guarantee freedom *from* something. Traditionally the concept is considered in interpersonal relations. When applied to the situation of the citizen in a (liberal) democratic state, political liberty, and thus liberty as understood for the analysis, is directed against the state. It is the right of individuals to defend themselves against state intrusion into their unperturbed exertion of their right to act as they see fit.

This notion in itself is insufficient and incompatible with living together in a social order unless it is constrained by additional rules. The most fundamental of such rules is that my

individual liberty finds its boundaries in the liberty of others with whom I live. My liberty must be as broad as possible, but must not unduly restrict my neighbour's liberty. Going even further, this fundamental notion of negative liberty, builds on the assumption that (a) liberty as a good is a goal worthwhile to pursue (Feldman, 2002: 6) and (b) that everybody has the opportunity to make use of this negative liberty (Feldman, 2002: 12). This insight, which can be used to elaborate the relationship between negative and positive liberty (Berlin, 2002; Wildfeuer, 2003; Feldman, 2002), also allows us to link negative liberty to constitutional guarantees. But what are these constitutional guarantees?

7.2.1. Individual liberty and the state

The modern state is characterised by the monopoly of the legitimate use of force (Weber, 1972: 822). It finds its empirical expressions in taxation and the police (Schuppert, 2003: 62-67). Their legitimacy is based on the fact that the use of force lies *exclusively* with the state and that this monopoly is regulated by *laws*. The exclusive monopoly of the state⁶⁶ is, on the one hand, a guarantee to the citizens that lawfully only the state has the right to deprive them of their liberties. Laws provide a framework which restricts the use of violence and makes it predictable. They are a necessary precondition for the realisation of positive and a protective wall for negative liberty. On the other hand the exclusiveness of the monopoly of the use of violence establishes an obligation for the state to provide a sufficient degree of security, i.e. an absence of threats, in order for citizens to accept the monopoly of the state, which is a restriction of their liberty, positive and negative. At the same time, laws provide substantive guarantees for the individual liberties of each citizen.

Laws are universal and in modern states increasingly based on a constitution, which guarantees fundamental rights indiscriminately to all citizens (and, to a certain extent, to non-citizens). In other words, the 'solution' (Sartori, 1997: 301) to the problem of providing political liberty in a state to its citizens under the condition of a severe power imbalance between the state and citizens, is constitutionalism. In the constitutional documents of modern liberal states as well as in secondary law, the provision of negative liberty plays an important role. The overall framework through which these rights are guaranteed is the concept of the rule of law (*Rechtsstaat, état de droit*) (O'Donnell, 2004). Normatively we can say that 'security is a condition *sine qua non* for the full exercise of rights and liberty, but that it is never a right comparable, and not in the least opposable, to the [exercise of rights and liberty]' (Recasens, 2000: 252). The state certainly must provide security, as it is its fundamental legitimation. In cases where a trade-off seems

⁶⁶ Irrespective of the degree of how diluted it has become through the spread of private security forces (Johnston, 1999; Jones and Newburn, 2002).

inevitable, the protection of liberty must be given broad room in the deliberations and outcomes, though. And any infringement of liberty legitimately established by the state, must remain within the overall boundaries set by the concept of a liberal democratic society.

In the modern liberal democratic state constitutional guarantees and guarantees in secondary law exist for a number of defensive rights for the individual against the state. *The working definition of liberty thus is the scope of defensive mechanisms in place to protect the rights of the individual against intrusions by the state.* This is a very broad definition, which can be applied to virtually all political systems which can be found empirically.

The question for the analysis is not whether a particular configuration of rights is sufficient or good. The intention is to establish a number of criteria which clarify the content of the defensive dimension. The basis for such a definition of what liberty means, can only make sense with reference to the topic under consideration, i.e. police policy. The present analysis thus departs from the notion that we find particular configurations of individual positive and negative liberty in relation to the police in different countries at a certain point of time. But all these configurations contain independent of their substantive liberty content a common denominator in the control dimension of liberty, as will be shown in the following section.

7.2.2. Liberty, police and control

Such an embeddedness of liberty in the understanding of the modern state is the most useful approach to the concept in the context of an analysis of the framework for police governance. The police, as the executing body of the legitimate monopoly of the use of violence, exemplify the imbalance in power between the individual and the state.⁶⁷ In normal circumstances, the police may exercise force, whereas the citizens refrain from its exercise in exchange for legal certainty and security provision by the state. The power

⁶⁷ Questions of taxation are not addressed in the following. While the provision of security and the ability to raise taxes are intimately related (Schuppert, 2003: 194), this security provision concerns mainly the external dimension of security and the survival of the state itself. The focus lies with the provision of security to the inside. An inward focus of course does not mean that the aversion of danger would not contribute to the survival of the state. Quite the contrary. A state cannot survive without having a certain degree of internal stability and peace. But strategies and goals differ. To the outside, the opponent is 'the other', which allows the use of forceful strategies, and the goal is to survive dangers emanating (normally) from another state or at least an external entity. When executing the monopoly of force internally, however, the addressees of this force are the citizens themselves and the goal is the maintenance of the political system and the upholding of order than the aversion of an existential threat to the state.

This is not to say that the rhetoric employed in the public domain does not try to emphasise the certainly existing overlap between internal and external security. But there are good reasons to conceptually, but also empirically uphold the differentiation between internal and external security (Weiß and Dalferth, 2007). The focus to the inside justifies the restriction to the police when analysing the legitimate monopoly of force.

imbalance between police and citizens provides a normative reason for the containment of state power. Such an understanding finds its basis in the developments on the European continent since the absolutist era, when the state used its absolute power to interfere with the life of its citizens (Knöbl, 1998). The French revolution was motivated significantly by such infringements of individual expression (Glaeßner, 2003: 60). Accepting the imbalance, the demand arose to contain state power by conferring rights on the individual.⁶⁸

From a formal point of view, this imbalance requires a stable structure in order to provide citizens with a sufficient degree of predictability. Otherwise state and society are not viable. Laws provide this function. While the imbalance is non-negotiable for the existence of the state (cf. Hobbes' arguments of the state as the provider of security – an understanding which is also shared implicitly or explicitly by liberal theorists), this imbalance must be set in rules, which require the consent of the people to which they apply, i.e. legitimacy. In modern constitutional states laws are given legitimacy through democratic participatory procedures. This means, in principle, that the basis upon which infringements are based, could be changed by parliament any time. The scope of legitimately available infringements is, therefore, defined by constitutional guarantees. Whether these principles are codified in a unitary text or as established doctrines is less important. Thus constitutional form and doctrine are a point of departure for the analysis of liberty.

Alongside the formal structures in place to mitigate the imbalance, their enforcements is necessary as well. Deviations from accepted behaviour must be able to be remedied. Procedures for control fulfil this function. Bayley defines the control of the police as 'the achievement of conformity between police behaviour and community objectives' (1985: 160). Police behaviour can be defined as the empirical observation of the activity of individual police officers doing their job and the functioning of the police as a bureaucratic body. Community objectives are much more difficult to delineate. Not only do they encompass the desired relationship of liberty and security in a given social group at any given time, but they can also influence the accepted range of police behaviour. In democratic systems laws adopted by parliament regulate the activity of the police, which ideally represent community objectives. Especially in security issues, where the fundamental interests of the state are concerned, this is not necessarily the case. Taking a recent example, the war on Iraq would not have been joined by the UK had public

⁶⁸ Such an imbalance between the state and the individual can only be accepted by its citizens when the state is understood as a contractual concept. Only when the subjects are understood to have agreed to trade their sovereignty in exchange with the provision of certain public goods, the imbalance between the leviathan and themselves can be accepted.

opinion determined the policy of the government. In political discourse a flawed understanding of 'community objective' is regularly invoked (and produced) to legitimise policy. Following this understanding, a community objective is found in public opinion: 'What the public wants is a community objective'. If such an understanding is applied in internal security policy, social legitimacy runs the danger to be self-confirming. Already J.S. Mill recognised that the interest in security addresses feelings which go beyond utilitarian considerations. Daase argues similarly when he talks about psychological approaches to risk. Risk perceptions of small likelihood of occurrence, which have high costs attached are much more feared than the higher risk of events with smaller costs (Daase, 2002: 24). The discourse in internal security in the last two decades has focussed on ill-defined and evasive concepts, such as organised crime (cf. BMI and BMJ, 2006) or international terrorism. In these cases the likelihood of being affected by them is much lower than being affected by more mundane forms of crime (Glaeßner, 2003: 150). The defence of these high risk crimes are often used to legitimise intrusive policies. Such has been the case of computer searches by law enforcement agencies using Trojan horses recently in Germany. In this legitimisation attempt security and risk are used interchangeably and run the danger of dismantling state boundaries and ultimately the democratic order (Loader, 2002: 295).

Such excesses in their worst form can be constrained by a second expression of community objectives, namely constitution or constitutional doctrine. Constitutions provide a set of rights to the state and to the citizens. These rights must not be overridden by parliamentary law. To this effect, liberal democratic constitutions provide courts, parliaments and political party competition (Bayley, 1985: 170). Britain does not have a written constitution, which provides high barriers against changes of its fundamental structure. But Walker (2000) finds within the political class a constitutional doctrine, which prevents the provision of extensive rights to the police. Here 'enshrined political culture' provides the foundational guarantees for civil liberty. Beyond culture, there are also principal safeguards in the British system. It is logically not possible for a parliament to adopt a law, which would remove democracy, because it would withdraw supremacy from subsequent parliaments. In countries with a constitution, constitutional culture also influences the way changes in the legal framework are possible. In both cases, courts and the political class are guided in their behaviour by belief systems about the role and function of the state and its relationship to the citizens. This puts constraints on the set of possible outcomes.

The question thus far presents itself negatively: In which respects does police policy affect negatively the legal and constitutional protection of individual liberty? Such a negative relationship is not necessary. Police policy can be thought as providing restraining mechanisms for the police as well. The question then is not developed

explicitly from a set of liberties, which are infringed or extended. The point of departure is rather the assumption that there exists a common set of fundamental values at a given time in a given society. The focus is thus not on the degree to which particular rights are infringed or extended, but which methods are employed to ensure the conformity of police behaviour and community objectives. In general, such conformity can be achieved through control. This does not mean perpetual oversight, but the provision of effective means to prevent and sanction instances where community objectives are broken.

Political control in this context does not imply the establishment of a political police. Political control refers to the establishment of a regulatory framework for the police. In addition, political control encompasses the establishment of a priori and ex post control mechanisms, such as rules on the control by executive oversight (ministerial oversights and prosecutors), courts, parliamentary or civilian control instances (Goldsmith and Lewis, 2000). The police must remain bound only by law in their decision to investigate a suspicion and independent in their decision to halt an investigation.

The literature on the control of the police distinguishes between internal and external control (Den Boer, 2002b; Bayley, 1985: 159-72). Internal control is located within the police organisation and builds on the organisational form and emphasises professional and bureaucratic responsibility, supervision and loyalty. The guiding model is the machine bureaucracy (Mintzberg, 1983; Den Boer, 2002b: 280). Internal control mechanisms are not central to the analysis, however. While they are important to establish a situation of confidence among the population and improve thus effectiveness of police work, they are only partially governed by statutory instruments. External control is exercised by actors outside the police organisation, including administrative and executive control, even though the police is part of the administration.

Most authors of control further differentiate within the two dimensions. Bayley (1985) separates external control into mechanisms that *exclusively* refer to the police and *inclusive* mechanisms, which *also* refer to the police. Internal control encompasses *explicit* control, i.e. mechanisms designed only to enforce control, and *implicit* control, i.e. mechanisms which can be used to control, but whose primary function is something else (pay, promotion etc.). Den Boer (2002b) links the external-internal with a formal-informal dimension. Formal control refers to formal bases of accountability in legal documents, parliamentary reports, codes of conduct, organisational hierarchy and independent reviews. Informal accountability encompasses the non-formal settings, such as conferences and civil society control, as well as organisational culture, ethics and peer pressure. Recasens' (2000) dimensions of control also encompass internal and external, as well as formal and informal control. For the following analysis, liberty is thus

understood as control in the sense of providing an expression of boundary. With Bayley (1985) control and accountability can be used interchangeably.

7.2.3. Liberty and the EU

In the light of the research questions about the impact of EU policy on the national legal framework, it is worthwhile to look at EU policy-making in order to approach liberty conceptually. If there were an identifiable approach to the question of liberty discernible in EU policy, it could be useful as an analytical lens through which to look at national policy.

Liberty in a positive sense can be most generally understood as a combination of substantive civil liberties and procedural rights. These, however, can only be indirectly affected through EU measures, because the intergovernmental structure of the third pillar does not entail a transfer of sovereignty to the supranational realm (Reichelt, 2004: 63). The treaties do not contain a catalogue of rights, nor is it the task of the EU to protect individual liberties. But JHA is a highly dynamic policy field and the increasing importance of the policy field means that increasingly issues are discussed, which have a direct impact on the liberty of European citizens. For the moment the degree of this influence is irrelevant, because the main point is that there is an influence. Liberty as it was developed conceptually above is the possibility to protect the individual against too intrusive activities of the state. The most direct control is the formal appropriation of either control powers to certain actors or the establishment of control mechanisms in the constitutional order.

Internal security policy in the EU inevitably affects individual liberties and substantive freedoms of citizens. But as the states are required to transpose the EU measures in national law, the resulting effects on the control dimension are attributable to measures set in the member states. The questions to be asked then is whether the EU level restricts the choice available to member states to design their criminal justice systems and to adopt certain types of measures. Article 6 (1) TEU stipulates that '[t]he Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law' and 'shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950' (art 6(2) TEU). Both of these obligations refer back to the member states (art 6(1): 'principles which are common to the Member States'; art. 6(2): 'as they result from the constitutional traditions common to the Member States'). This implies that the Union must not adopt decisions, which violate fundamental freedoms, and is bound in its actions by the obligations arising from the conventions. The European Court of Justice is the competent authority to adjudicate conflicts over this obligation. But the treaty does not stipulate an active obligation to promote them. The

Charter of Fundamental Rights, which could fulfil the role of such a direct obligatory document, is only of recent origin and not legally binding until the reform treaty enters into force.⁶⁹ The most prominent legally binding document beyond national constitutions is the European Charter of Human Rights (ECHR), a Council of Europe document. While all member states of the EU are parties to this convention and have ratified it, it only guarantees a minimum level of protection and, most importantly, is not part of the EU legal framework. As the EU does not have legal personality, it cannot accede to the ECHR itself. The European Court of Human Rights in Strasbourg has strongly influenced the degree of individual liberty provided to the citizens and the trials of the court involving members of the EU indicate the continuing problem associated with the provision of individual freedoms (Spencer, 2002b: 42ff). While these elements are important for the protection of individual liberty in the member states, they are not part of the EU framework.

The obligation of article 6 TEU also applies to EU law in the third pillar. In its *Pupino* judgement, the European Court of Justice (ECJ) has called on the organs of the member states to apply framework decisions in line with fundamental rights. What is interesting is that the ECJ not only addressed the member states themselves, but explicitly addressed their organs, too. Internal dynamics of the member states were addressed in the ruling. The ECJ thus acknowledged that the differences in the member states play a role for the effect of EU measures. At the same time it reminded the individual organs of their obligation to protect the fundamental structures of democratic systems. In defining the protection of civil liberties in the third pillar, the court established three lines through which rights are to be protected. The national courts must ensure that 'the application of [the relevant national and European measures] is not likely to make criminal procedures ..., as a whole, unfair within the meaning of article 6 of the Convention [on Human Rights], as interpreted by the European Court of Human Rights' (Anonymous, 2005 no 60). For that the ECJ demands that

(1) 'the framework decision must be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected' (Anonymous, 2005: no 59).

(2) National courts are required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision (Anonymous, 2005: no 61). And

⁶⁹ http://www.consilium.europa.eu/cms3_fo/showPage.asp?lang=en&id=1317&mode=g&name= (accessedd 22.09.2007).

(3), that national law is interpreted in line with the rules on civil liberties protection (see Egger, 2005: 654).

This new development means that the establishment of law in the third pillar must be judged against an established level of civil liberties protection, emanating both from the domestic and the European level.

The preambles of many third pillar measures refer to the protective clauses for fundamental rights and freedoms as contained in art 6 TEU and the European Convention on Human Rights, to which all EU member states are signatories. This implicitly assumes that a common level of civil liberty protection exists in the member states as they are all signatories to the treaties above. This notion has been criticised by EU scholars of the third pillar (Guild, 2004; Weyembergh, 2004), who argue that the current level of protection in EU member states is often higher than required in these treaties and thus the use of them as a point of reference can lead to a lowering of standards. Another point is the repeated reporting of human rights infringements by prominent NGOs (amnesty international, HRW) on West European states, including Germany and the UK (International, 2005; Haubrich, 2003: 7). Secondly, to subject individuals (victims and suspects) to foreign legal systems faces normative problems of legitimacy, because the individual did not consent to the rules set by the foreign state and thus cannot be held legitimately accountable for a potential breach of these rules. While the convention and democratic tradition encompass a certain hard core of protection mechanisms, their expression in the countries varies significantly. The subjection under foreign criminal procedure can also be detrimental to the provision of due process rights for the lack of knowledge by the individual. Finally, the reference to these treaties implies an obligation of the member states to adhere to the standards set out in the treaties. This obligation is however subject to the same restrictions as noted above. Not only the lack in knowledge about foreign procedures subjects the individual to potential infringements, but also the degree of protection might vary across countries, even though a common minimal basis exists in all countries (Spencer, 2002b: 42 ff).

All this means that the effect of EU measures on the national provision of individual civil liberties can only be assessed on the basis of national transposing laws and the interpretation of courts of the relevant norms. The nature of the EU regulatory framework alone does not suffice. Liberty in the context of EU policy is limited to general references to substantive liberties and fundamental rights. These are not spelled out separately, though, and therefore cannot form the basis for a conceptually clear approach to liberty. This discussion does not answer the question what liberty is in the context of the project, but has helped to determine the focus of analysis on the domestic level.

7.2.4. Developing an empirical approach to liberty

Having discussed how police interacts with liberty, it remains unclear what liberty actually is empirically in the analysis. The liberty dimension cannot attain to answer whether the operation or internal structure of the police is accountable (for that see Recasens, 2000). Nor is it a model of civil liberty represented by a combination of a particular set of material civil liberties.⁷⁰ While material rights constitute a core element of the rule of law (O'Donnell, 2004; Kasack, 2007), they are only relevant when they have a legal base in the constitution and when their exercise is enabled through the provision of restrictions on the infringing tendencies of the state (cf. Feldman, 2002: 12; Wildfeuer, 2003: 357).⁷¹ No development in recent years fundamentally called in doubt the provision of the set of these rights. Changes concerned the form and content of these rights. In other words, developments did not introduce new nor did they abolished old rights, but spelled out the restriction on existing liberties (Haubrich, 2003). Against this background, the question of liberty is the boundary of police activity. The protection of constitutionally and legally guaranteed liberty as expressed in particular freedoms and procedural guarantees providing a recourse against infringements is one dependent variable. While certainly it would make a lot of sense to include internal and organisational guarantees for civil liberty in the analysis, such mechanisms are normally not decided by the legislator, but internally by administrative decision.⁷² They are, thus, not in the centre of the analysis unless they are formally regulated, for example in the English case through the statutory establishment of police authorities. The focus is on constitutionally guaranteed civil liberties and the way they are affected by the adoption of new measures. Substantive civil liberties are established in the constitution. They are neither entirely undisputed nor remain the same over time (Ewing and Gearty, 2000). Constitutionally guaranteed liberty encompasses substantive and procedural liberties. Substantive rights are fundamental to every democratic political system. They are the basis upon which a democratic order builds. Procedural guarantees are important as they

⁷⁰ Even though it is sensible to assume that a certain set of material rights are particularly affected in the exercise of the legitimate monopoly of force in the fight against organised and serious crime. Haubrich (2003) names privacy and informational self-determination, freedom of the person, freedom of expression, private property and freedom of movement (asylum/immigration) as the material rights most directly affected by anti-terrorism policy. Bradely (2003) lists a similar set of rights when discussing the relationship between individuals and the state.

⁷¹ The golden age of the civil liberty state (cf Genschel, 2005) was probably in the early 1980s, after the women's movement had officially discrimination on a gender basis, the civil liberty movement had led to the introduction of regulations removing (reducing) racial discrimination. In 1981 the Council of Europe adopted the convention on minimal standards of data protection. In Germany, the Constitutional Court strengthened the role of individual informational self-determination in 1983.

⁷² Internationally especially the Council of Europe has been active in the establishment of a code of police ethics (Council of Europe, 2001).

serve to guarantee the provision of substantive rights. Without procedural guarantees, the formal guarantee of substantive rights is of limited use. When this argument is turned around restrictions of liberty are provided in liberal democratic societies in Western Europe primarily by procedural laws. Thus the question of liberty, understood as individual protection mechanisms for the freedom against a overwhelmingly powerful state, is addressed in a combination of two ways. On the one hand, the actual effect of new measures⁷³ and, on the other hand, a cursory analysis of the role this dimension plays in the discussions on new measures⁷⁴.

The following empirical analysis assesses whether developments in police policy affected the degree of control. For this indicators are identified, which are derived from the literature on the police and the state (e.g. Aden, 1998; Loader, 2002; Recasens, 2000; Storbeck, 1999) and distinguish two kinds of control.

Judicial control

Judicial Control is an actor-focussed variable and looks at who controls the activity of law enforcement in the pre-trial phase. In the pre-trial phase, the area of law enforcement is open to numerous actors, which fulfil different roles. In this criterion for liberty all possible institutional forms for control mechanisms are theoretically included. While an individual treatment of each of them is beyond the scope of this analysis, there are certainly differences among different types of control.

- Most fundamentally, parliament through its legislative activity exercises control over the pre-trial phase, by providing the rules of the game. This function is fundamental since without it none of the following actors could exercise control. Control by parliament is *not* directed at the executive activities of the police, but at the institutional configuration within which they act.⁷⁵
- On a somewhat less abstract level courts interpret laws and thus control (1) the constitutionality of law enforcement rules/laws and (2) the lawfulness of executive action of law enforcement.
- Finally, direct control of the executive function of law enforcement outside of court have supervisory bodies, which can have general competence or be restricted to a certain area. Examples would be British police authorities or Europol's joint

⁷³ This analysis is very legal and thus will be based predominantly on an analysis of secondary literature and primary governmental and parliamentary sources.

⁷⁴ The analysis of discussions is limited to expressions in the public domain. This means that mainly parliamentary debate, explanatory documents by the government and partially references to outside sources, such as reports or newspaper articles, are taken up.

⁷⁵ The main exception here is, of course, the constitution, which is taken as pre-existing and the basis upon which in turn parliamentary powers depend.

supervisory body for data protection.⁷⁶ If applicable, ministerial oversight falls in this category as well as do parliamentary control committees (similarly, although more restricted to courts, see Hetzer, 2006: 22).

The role of these actors is guaranteed by constitutional principles and substantive civil liberties, such as a right to fair trial or the right to personal self-determination.

Procedural regulations define the roles of different actors in law enforcement proceedings. This can on the one hand concern the role with regard to protective mechanisms. On the other hand, it can limit previously regulated powers of control. In the first case, judicial control would be positively affected, in the latter case, negatively. This assessment does not stop here, though. Depending on the actors involved, the type of effect varies. Judicial control by courts, for example, is a strong type of control, but only when access and speed of investigations are at least marginally guaranteed.

Among the formally established control actors are internal police control bodies, which can investigate alleged wrongdoings from within the police, there are civilian control boards, courts, parliamentary committees and administrative accountability. While the formality of control could be used as an indicator for control, they tend to be cumbersome and difficult to realise. This would decrease their empirical usefulness as an actor of control for the individual. At the same time informal control mechanisms without formal sanctioning powers can be used effectively, e.g. by informing the public. Material law can also affect control. When, for example, a misdemeanour is upgraded to a crime, different rules apply and the victim and the prosecutor have different instruments and degrees of control at their hand.

Legislative Control

Legislative Control focuses on process matters and asks whether and when there are mechanisms to control the impact of law enforcement measures on the life of the individual. When analysing the effect of EU measures, the focus lies on the type of procedures that exist independent from the actor to which it applies, the consequences of the procedures on the protection of individual liberties, and the role protective processes play in the new measure. Among legislative control indicators are legal guarantees provided to suspects, the right to be informed, rules on the treatment, use and correction of personal data, but also rules on the applicability of police methods. In other words, legislative control to a large degree overlaps with procedural law and the guarantees contained within it. There is a difference between the two, though, in that

⁷⁶ In addition, there is a tradition in the Anglo-Saxon tradition of civilian oversight bodies. After World War II the allied forces introduced this in Germany as well, but over time this imposed structure has been removed almost entirely (Goldsmith and Lewis, 2000; Boldt, 1996).

procedural law not only takes side with the individual, but also provides rules for the ‘other’ side, i.e. the state. In looking at legislative control, we see a focus on rules concerning the treatment of (personal) data. This is due to the characteristics of the policy field, which increasingly relies on methods traditionally employed in intelligence and not in law enforcement. Furthermore, the movement of criminalisation to the stage before a crime has been committed also increases the usefulness and subsequently the use of personal intelligence.

Legislative control is not fully independent from judicial control in that it is linked in many respects to particular actors. Control mechanisms generally do not work in themselves, but need an executing agent. The obligation of law enforcement to report, for example, certainly works in itself, unless we introduce a requirement of public reception to see control exercised. This would lead too far, especially as the addressee of a report is clearly designated. Then a direct link to the actor is established. When it comes to process rights, such as the right to legal representation, a third party is necessary to exercise the right. These considerations are not meant to indicate that the one aspect of control cannot be thought without the other, but that the two indicators of control are likely to be related to each other. The differentiation between process and actor also implies that there is a link. Processes must be exercised by actors, otherwise they will not work. On the other hand, there is a obvious difference. While there can be certain competences for the actors of the criminal justice process (*judicial control*), *legislative control* addresses the quality of the control and to a stronger degree addresses substantive liberties. Control by the aforementioned actors does not have a directional focus. Parliament, courts and administrative actors do not necessarily take the individual as their frame of reference. For them the efficiency of law enforcement, for example, might be more important. Legislative control, on the other hand addresses procedural matters, which are instituted to provide a level of protection to the individual against the intrusion of the state.

This semi-complementarity of the two categories of the liberty dimension shows the complexity of the liberty concept. While partially the two categories often interact – so is it necessary for the individual to be able to challenge police activity in court before the latter may become active –, this interpenetration is insufficient to produce a two-dimensional matrix.

7.3. *Reducing the multi-dimensional complexity of security*

7.3.1. **Defining security**

The second dimension of interest is security. Like liberty security is a multi-faceted concept and requires a precise definition to be made useful for the analysis. Glæßner

(Glaeßner, 2003: 18) differentiates eight dimensions of the concept of security. Most general, security is certainty of the future. It is the reduction of risk through precautionary measures and includes a forward looking element. We can be certain that a particular event will happen under certain circumstances. Security becomes *insecurity* about the future, when the past is taken as a point of reference, which needs to be re-established. It includes material security – which links back to the orientation to the past and the status quo. Status quo maintenance is important for this understanding of security.

Most of these different understandings are encompassed by the working definition of security, which includes both prevention and averting of dangers. Security is not directly lodged with the individual. Each of the understandings of security mentioned above conceptualises security with reference to the situation of individuals. Whatever concrete property the security conception has (backward, status quo, forward), to each individual aspect comes a state aspect. Irrespective of all definitional approximation, security is an inherently subjective concept. Individual perceptions of security can be independent from formal and external situations, but merely based on individual circumstances (Glaeßner, 2003: 18-20).

The last aspect goes a long way to explain the difficulty in discussing security in the public sphere. Security addresses a fundamental of individual, survival, and a fundamental element in the legitimacy of the state. The provision of security to its citizen is the main justification for the existence of a state, which is equipped with a monopoly of the use of violence and the right to impose restrictions on the liberty of its citizens. In turn security is a powerful political frame in political discourse and thus a omnipresent tool in the development of internal security policy (Wæver, 1995). Within individual experiences, interests of the state and normative understandings of situations and processes collide. Often a simple aggregation of individual interests to the interest of the state is accepted and underlies public opinion responsiveness. Beyond that, however, the security concept applied focuses on the interests of the state. A difference is made in the discussion between the meaning of security, i.e. the ability to avert and prevent dangers and risks, and the content of security, i.e. the scope of these competences seemingly required to avert the (perceived or real) dangers and risks and depth of competence defined by the types of measures the police can employ.

The focus is on the latter. *Security is understood as the ability of the state to avert and prevent dangers to state and society.* Once again, the breadth of the definition is intentional. The three temporal properties are included as follows: the aversion of danger is usually linked to public order maintenance and thus the status quo and the re-establishment of a ‘golden past’, especially in a time where the perceived ‘risk’ by forces, which seem beyond the

power of the individual and partially even the state, is ubiquitous (Beck, 1992; Daase, 2002). Prevention, by definition, is a pre-emptive concept. It looks into the future and focuses on the prevention of security decreasing acts, which have not taken place yet. Material security is only marginally concerned where public order is the point of reference against which the approach to the fight against crime is developed.

7.3.2. Security provision by the EU

Contrary to liberty, the EU plays an explicit role in the provision of security. While it does not have a legitimate monopoly of force, title VI TEU stipulates that the EU may take measures which help to coordinate and approximate policies in the fight against crime. The aim of this enterprise is primarily the provision of security in the sense of acting against crime and other activity considered criminal which is seen to disrupt or even endanger the peaceful together of a community. The structure of the AFSJ thus follows the security concept laid out above. It aims to provide an effective framework for successful cooperation among law enforcement forces. The approximation of law enforcement systems aims to remove obstacles to the establishment of an area of freedom, security and justice (art. 29-32 TEU). Policy-making thus focuses on delineating common standards and definitions of crimes and punishments with the aim to abolish obstacles to law enforcement cooperation. Such a focus approximates the security definition in the EU member states.

The EU itself does not have the competence to develop a full-fledged criminal justice policy of its own (Lords, 2006). The EU treaty allows for cooperation among national law enforcement forces. Approximating laws is a means to improve that cooperation. The complementary element for criminal justice police, an EU competence to legislate civil liberties in detail is limited as shown above. In addition, the institutional features of the policy field make agreements on security easier to reach. A predominance of security interests in combination with a limited role of the European parliament has led to policies which disproportionately favours the improvement of security over the justice and freedom aspect in the development of the area of freedom, security and justice (Mitsilegas et al., 2003; Guiraudon, 2003; Knelangen, 2001). The focus on efficiency tends to favour a law enforcement focus. The virtual exclusion of the Commission in many areas of the third pillar closes other venues through which alternative interests can be fed in the decision-making process (Friedrichs, 2005). Thus, policy-making in the EU regulates predominantly the competences of law enforcement bodies to fight crime. This is due to similar security concerns emanating from the increasing integration of the EU, which call for common responses, and widely diverging traditions in the provision and guarantee of fundamental rights and freedoms, which makes an agreement on their provision very difficult (Ewing and Gearty, 2000). That combination has lead many

students of the third pillar to state that the EU ‘securitises’ those policy fields and offers insufficient protection mechanisms for civil liberties (Huysmans, 2000; Guiraudon, 2003; Weyembergh, 2004; Mitsilegas et al., 2003; Alegre and Leaf, 2004; Lavenex and Wagner, 2005).

The activities of the EU do not necessarily improve the security situation in the member states. What we see is the embodiment of the political security concept presented above. Irrespective of the actual, empirical use, a law enforcement framework is established, tailored to the requirements of law enforcement as perceived by the political domain. This indicates an understanding of security as the scope and depth of state competences and is the focus of the security aspect of the analysis.

7.3.3. Security in the empirical analysis

Approaching the subject more precisely, security is a particular institutional configuration, which has the goal to minimise risk to and avert danger from the population through the exercise of the legitimate monopoly of the use of violence. So empirically security is defined by the scope and the depth of the competences of law enforcement forces. Beyond better operationalisation, the narrow definition has the additional advantage to avoid the normative discussion about the standing of security in the national legal and constitutional context. It neatly overlaps with the traditional understanding of the tasks of the police to avert danger and prosecute perpetrators. The discussion about security as a right is important to interpret the developments on the national and the European level. For the analysis of changes in the structure of the policy field, however, the normative legitimacy of security is only of secondary importance. It cannot be entirely ignored in this discussion, though. The question of the normative role of security defines the scope and depth of power the state can legitimately take up by itself.

Institutionally, our security definition is inspired by a material concept of police (“*materieller Polizeibegriff*”). It refers to the task of the police to avert dangers from the community or the individual, which threaten public security and order and to prosecute perpetrators who endanger this order (Merten, 1995 (1985): 502; Pieroth et al., 2005: 13). In order to enable the police to fulfil their task, the political domain must provide them with a clearer definition of what dangers are and especially which competences the police has to avert these dangers.

The security concept advanced here thus consists of two aspects:

1. The definition of danger, which defines the *scope* of the area, in which the police can act.

2. Within that area the *methods* to be employed are defined for the police to attain the tasks set out, i.e. their depth.

Both aspects are enshrined in laws and political documents and defined by public discourse. This in turn means that the definition of danger might entail aspects which are empirically difficult if at all measurable and that the methods introduced might overshoot the mark in their attempt to provide security.

To analyse security development empirically we understand security to be composed of tasks (scope) and methods (depth) of law enforcement work. While logically the organisational structure of law enforcement should be included in the development of security, it is only marginally taken up in the analysis. Organisational reconfigurations are taken as functions of changes in tasks and methods and thus are effectively captured by the aforementioned categories. Introducing them as a individual category means running the danger of overanalysing individual aspects of the policy field. The reader ought to keep in mind that this definition of security is inherently political. There is no guarantee that the provision of a particular constellation of competences and the application of methods reduce the risk of danger to the public. There is no necessary link between the concept of security defined as the scope and depth of state law enforcement purposes and security understood in the more common sense as the absence of danger (e.g. Heinz, 2008: 23).

Tasks

The variable *tasks* focuses on substantive tasks of law enforcement agencies, which define the scope of law enforcement competence. This can be the fight against organised crime in general or human trafficking, drugs and money laundering in particular. Tasks are affected, for example, when incriminating particular actions. A decision to overcome a particular *malum* in society by using the legitimate monopoly of force would constitute an extension of the tasks of the police.

While a large degree of the tasks are embroidered in substantive law, the political development of new crimes or new areas of activity for law enforcement actors plays a role as well. The focus of law enforcement policy on organised crime in the 1990s was reflected in law making, even though most laws do not contain a precise definition of what organised crime is (Fijnaut and Paoli, 2004). Still the police had their tasks expanded into the fight against organised crime. This is particularly relevant, because ill-defined legal concepts open up an indeterminate area of activity for law enforcement actors. In the analysis the range of tasks, which can be affected, are determined by the EU policy. It can be adopted to improve the fight against crime in general. The examples provided in the treaty, however, are all serious crime offences or, in the case of money

laundering, elements of broader serious crime categories, such as organised crime. The competence of the EU to contribute to a more effective fight against crime by approximating the crime definitions thus directly affects the tasks of law enforcement actors.

Methods

Secondly, *methods* look at the operational methods these actors are entitled to use in order to fulfil their tasks. The EU in particular has always focussed on the methods aspect of law enforcement cooperation. Rules on the exchange of law enforcement data or on operational cooperation in border regions are examples of the expansion of methods. Similarly would the establishment of European institutions have an effect on the methods. In these cases, the police did not have their tasks extended, as they could only investigate those crimes, for which they previously had the competence. But they obtained new methods to execute these competences. These direct effects of EU measures are an aspect of the methods criterion.

The two dimensions can be understood to concern the scope and the depth of law enforcement powers, where tasks define the scope and methods the depth. As with the indicators for control, they are in many ways related to each other. Tasks are defined by offences which can be prosecuted by the police and law enforcement agents. Methods are procedures, which they can follow in order to fulfil their tasks. Different tasks require and allow for different methods. For example, more serious tasks, such as the investigation of murder, require and justify methods which are more intrusive in individual liberties, such as DNA sampling or restrictions on the freedom of the person. This relationship between the two categories, however, is not true the other way round. Or at least it should not be reversible. The availability of new methods should not lead to the introduction of new crimes in order to legitimise the application of new methods. Unfortunately, this seems to be the case especially in internal security policy, where a tendency can be observed to politically define certain behaviour as a criminal activity to which law enforcement then can apply methods developed for other purposes, which were considered serious crime before. There are good reasons for doing so in situations where a new threat develops, but as the policy field in general exhibits a tendency to react to short term public opinion concerns (Aden, 1998), the severity of particular crimes and the subsequent instruments available for the fight against it, are sometimes out of proportion. This has been argued with respect to anti-social behaviour orders in the UK (e.g. Glaeßner, 2005: 94), the designation of political protest as terrorism in Russia or the establishment of DNA databases for rape and a subsequent expansion to all types of serious crime. The availability of new technologies and their criminal use (Cybercrime) have also been used to make the case of using new methods for fighting new crimes (cf.

Koops and Brenner, 2006).

Both tasks and methods are inextricably linked to actors, which employ them. As the focus lies on the pre-trial phase the actors are primarily the police and intelligence services, but also customs authorities. Involved in the process, especially when dealing with international law enforcement cooperation is the administration, e.g. justice and home affairs ministers. Effects on the security dimension occur when certain actors have their tasks or methods modified. The right of intelligence services to exchange data on suspects, for example, would have a different quality than police data exchanges, because the quality of the data and the control over the different bodies varies qualitatively.

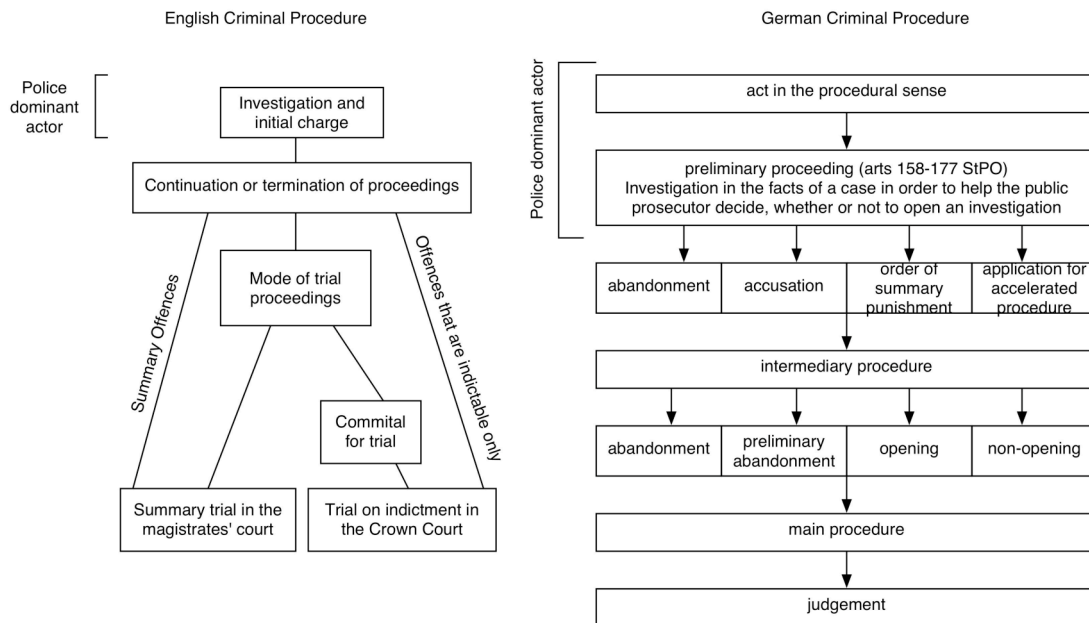
The aspect of organisational structures is important for the execution of law enforcement tasks as well. But generally structure is (intended to be) a function of tasks and methods, and thus only secondary to the two other categories. Furthermore institutional structures can have an influence on both dimensions. The establishment of central contact points for operational cooperation would be a development on the methods criterion, because the police can now use new venues to investigate crimes. The establishment of joint supervisory bodies affects the judicial control variable. For this reason structure is not included in the analysis as an independent category. Institutional effects are taken into account in the analysis of the development of serious crime policy.

7.4. *Liberty and Security in the empirical analysis*

In the previous paragraphs the properties of the two dimensions liberty and security have been discussed. They are used in the following to assess the changes of the boundaries of state competences and the defensive mechanisms available and applicable to individuals. The two broad and disputed concepts were made as empirically accessible as possible, while maintaining core elements of the two dimensions. Liberty is captured in defensive mechanism against the state. Security is the form, in which the state can exercise its legitimate monopoly of the use of violence.

In this endeavour the analysis is restricted entirely to the pre-trial phase (Bailey et al., 2002: 784ff). This phase exists in all legal systems and begins with the reporting of a crime, includes the identification of its author, the collection of evidence and the official drawing up of charges. After that point in most cases the public prosecutor takes over. Figure 2 illustrates the criminal procedure in Germany and England.

Figure 2 English and German Criminal Procedure (adapted from Spencer, 2002c; Heinz, 2004)



In both cases the police' role is restricted after the initial investigations into the crimes have been completed. Once the stage has been reached, where a decision had to be taken about whether to continue proceedings or not, the police' only role is to provide evidence, on whose admissibility the courts decide again.

A restriction to the pre-trial phase is adequate, because police policy is at the centre and the police gives up most of its competences upon the official drawing up of charges (Mathias, 2002: 459). This focus is common to most police studies and is necessary to meaningfully distinguish this study from a study of judicial cooperation. Such a focus is also necessary to employ the aforementioned holistic understanding of police, which is not restricted to the police proper, but includes other actors, such as courts, secret services and customs authorities as well.

Having said that, it is necessary to keep in mind that the whole preparatory phase certainly is part of criminal proceedings and in particular in Germany the judiciary is involved from the very beginning. But the state at that point most directly interferes with the liberty of the individual. It acts upon general authorisation against somebody who is not yet proven to be the culprit. So if an investigation is launched into a murder, the people questioned, arrested, searched or observed are merely suspects. As that, their position is that of an innocent person whose liberty is infringed upon by the state. This

gives them particular protection as, for example, the principle of *in dubio pro reo* applies. The state, represented by its various law enforcement agents that exercise the legitimate monopoly of the use of violence, directly and intrusively gets in contact with its citizens and non-citizens. State activity thus requires strong legitimation in this phase and equally strong control measures.

Not only procedural considerations recommend a focus on the pre-trial phase, but also the notion that the development of policy in a critical area of criminal procedure – an intrusive procedure, which highlights the quality of the legitimate monopoly of the use of violence – provides a good case to analyse processes of policy change and to embed this analysis in a general debate on the changing boundaries of the state. If policy in this phase is externally influenced, one dimension of state sovereignty is transformed (Thomson, 1994).

In addition exclusively the areas of serious crime are looked at. In the context of the EU this encompasses money laundering, trafficking of humans, drugs and arms, fraud and counterfeiting – in other words most dimensions of organised crime. Among them is also terrorism, even though it can be doubted if terrorism is really a subcategory of organised crime – as indicated by the wording of the TEU – or whether it does not rather have particular characteristics, which make it a category on its own. In either case, terrorism undoubtedly is an instance of serious crime and thus falls in the scope of this study. In addition, the law enforcement methods employed in the fight against terrorism, mainly pre-emptive and preventive measures, are increasingly tailored against OC as well.

Taking into account the difficulties with combining law and political science methodologically and the substantial differences in the data due to differing legal and political systems, the following categories have been proposed (see Figure 3). The indicators for the categories are not exhaustive, but serve to illustrate their focus.

Figure 3 Indicators for liberty and security in the empirical analysis

	Liberty		Security
Judicial Control	<ul style="list-style-type: none"> • Parliament • Courts/judges • Administrative supervisory bodies 	Tasks of the police	<ul style="list-style-type: none"> • Crime definitions • Defined by scope of EU policy

Legislative Control	<ul style="list-style-type: none"> • Rules on access to data • Rules on data exchange and data use • Access to judicial procedure for individuals 	Methods of the police	<ul style="list-style-type: none"> • Arrest • Detention without warrant • Interrogation • Collection of personal and non-personal data • International cooperation • Use of data bases/data exchange

7.5. *A methodology for the following steps*

The dimensions *judicial control*, *legislative control*, *methods* and *tasks* are assessed at the national level by looking at the effects of the implementation of binding EU framework decisions, conventions and decisions. The question is whether changes at the national level can be observed and if so, what kind of changes can be seen. The point of reference for these changes is the police, in the holistic understanding informed by the focus on the pre-trial phase. How is the situation of the police affected by European measures. Judicial control thus refers to the control the relevant actors exercise over the activity of the police. Legislative control concerns the processes which are in place to enable the individual to defend them against state intrusion.⁷⁷ They can be in laws, administrative orders and political declarations. The effect is evaluated in comparison to the situation as it was just before the EU measure was implemented. So, for example, a measure that introduces a joint supervisory body for a structure for data exchange (whether new or old), has a positive effect on *judicial control* as an actor attains the right to exert control over law enforcement activity, which is potentially liberty infringing.

By using the status quo ex ante, the observed effect is going to be rather detailed. From this detailed data on the effect of the transposition of EU third pillar measures in Germany and the UK, a more generalised picture of the effect can be drawn. This is in line with the interest of this research project, which focuses on the assessment of change across the range of different policy developments within the broader field of the fight against organised crime.

Rather than trying to find every category of liberty and security affected, political, legal and (partially) societal developments are systematically interpreted on their basis. The analysis thus goes beyond mere interpretation by making the yardsticks against which developments are measured transparent. But it falls short of a formal content analysis of these developments. It strikes a viable middle ground between a fully quantifiable

⁷⁷ This not necessarily implies that individuals must be able to employ these processes themselves. But the focus of these processes must be the protection of the individual.

approach to the study of internal security and a thick description of the rich concepts approached in the analysis. The aim of the study is to present a systematic, theoretically informed and traceable analysis of police policy developments in the UK and Germany under European influences embedded in a detailed understanding of the longer-term dynamics of the policy field. A structured narrative with a qualitative focus is most suited to cater to all three demands. It also helps to avoid pitfalls of most existing literature, whose normative focus in either the security or the liberty dimension preclude the results and thus partially discredit them.

7.5.1. Are the results comparable?

The pressing question with such an approach is the baseline against which the changes are evaluated. Can the results of looking for changes on the liberty and security dimension be compared? Germany and England have very different legal systems, so any difference between the two concerning their pattern of reaction to the EU level could be attributed to this difference. The different historical traditions concerning civil liberties, the role of the state and the structure of the police could fully account for the differences in the effects of the transposition of EU measures at the national level. The dominant conception of civil liberties constitutionally guaranteed defensive rights of the individual against the state in Germany erects much higher hurdles against an intrusion than the understanding of civil liberties as institutions vested in the supreme doctrine of parliamentary sovereignty, whereby parliament can in principle restrict liberties by simple law.

Notwithstanding these differences, the two countries show significant similarities, as argued in the introduction. These allow drawing certain conclusions from the observations gained by looking for effects on the two dimensions of liberty and security in the development of internal security policy under EU influence.

Policies to fight serious crime in the two countries had already been in place before EU policy came into the picture as an additional element. EU measures also allow the states to keep their national approaches in complying with the EU requirements. This would, if the EU actually had an influence, lead to similar reactions in both countries. The fact that the countries already had policies in place for those areas, where the EU became active, i.e. financial crimes, terrorism and organised crime, the changes that can be expected concern the substance of policies. The effect of EU measures in these cases would be comparable, because the effect can be observed on a comparable basis. In doing so, different approaches to the transposition are taken into account, too. Common law

countries regulate more through administrative measures (Lepsius, 1997).⁷⁸ That different legal systems would show different patterns of adaptation was one of the underlying assumptions of the choice of cases. Irrespective of the form, however, the effects can be assessed within the respective system on the two analytical dimensions.

The observed changes need to be taken in relation to the status quo ante and on two issues not directly comparable. This is not the intention of this undertaking anyway. The primary comparative intention concerns the overall degree of EU influence on domestic internal security policy, thus addressing the Europeanisation of internal security policy. The developments on the status quo ante allows this assessment irrespective of the approach and type of policy in place before. No statement about the two dimensions is made in this context.

Statements about the direction of the effect on the two dimensions for the two countries are possible. It could be observed, for example, that on the security dimension effects abound in Germany, whereas no changes could be observed in England. The conclusion could be that the EU influence on the German system has led to a stronger emphasis of this dimension, whereas in England the effect was less pronounced. This does not imply that German policy is subsequently more security oriented than English policy. The main conclusion is that the way EU policies are transposed in the Germany more strongly affect the security than the liberty dimension.

The reason for this could admittedly be the different configuration of the policy before the EU measure was transposed. But to make a statement of EU effects on domestic policy it is less relevant how comparable the situation was previously, but that effects materialised due to EU policies. Thus observations are qualified with a view to the actual requirements of EU policy ('Are the changes actually and to that degree required by the EU measures?') and by discussing the policy framework as it stood before the EU measure was transposed ('What are the background conditions against which these effects take place?'). By taking into account these two additional considerations, the effects of the two measures can be ordered across the countries.

7.5.2. On the selection of measures: the EU level

The amount of data in the form of policy plans, administrative orders, regulations and laws over a period of more than ten years is too large to be made useful for a qualitative in depth analysis as a whole. As the first chapters showed, there was a large amount of change during that time. The goal is to assess the effect of EU anti-crime policy measures on the German and British regulatory system for law enforcement. The analysis

⁷⁸ And in criminal law the difference is less pronounced than in other policy areas.

thus starts by looking at the time and those measure from which a strong influence can be expected. This is the case since the treaty reforms of Amsterdam (Smith and Wallace, 2000), where the third pillar was fundamentally renovated. New, binding types of measures bind the member states and oblige them to adapt their national regulatory framework accordingly. These are framework decisions and conventions (art. 34 TEU). Müller (2003: 265) has shown that since the introduction of these new measures, not only the quantity of adopted measures has changed, but also the quality. Similarly Monar (Monar) claims that between 1999 and 2004 more than 400 measures have been adopted by the JHA council. So by looking at the time since 1999 and the binding measures adopted during that time, the strongest type of influence on the national systems that we can expect is captured.

In a subsequent step, binding pre-1999 measures are included, which were adopted under the third pillar framework. These measures include mainly conventions and some decisions (where they pertain to the establishment of institutions at the EU level). Joint positions and joint actions were not included here as there continues a debate about the legal bindingness of these measures (Fortescue, 1995: 23).

A third step includes the analysis of non-binding measures. They are not expected to lead directly to changes, but to function as glimpses into the future. They list the measures that the member states plan to adopt over time and which could be used by the member states to formulate their national policy accordingly.

Framework decisions in the analysis

For the analysis of how the developing EU law enforcement and policing system impacts on the national system, framework decisions are primary units of analysis. Their goal is to approximate national regulations in certain bare by defining the goal, but leaving the form up to the member states. As of September 2007 twenty framework decisions had been adopted (Table 8), their number is fairly manageable. Framework decisions are also a suitable starting point for an analysis of the impact of the EU on national policy.⁷⁹ They are not the only instrument influencing organisational structures of national policy of internal security, but their influence is direct and explicitly intended.

Framework Decisions can be analysed on two levels. First analyses of framework decisions proper count them to the area of European law (Peers, 2003; Alegre and Leaf, 2004). But they do not entail direct effect and are thus not an inherent part of the 'European constitutional order' (Weiler, 1999). Therefore it is necessary to assess them in

⁷⁹ The mutual evaluation mechanisms, adopted by the Council in 1998 means that there are reports on the degree to which the MS have transposed the legislation.

their national context. Then their analysis is no longer European law, but concerns national criminal law (Weyembergh, 2004). The following analysis will take the second perspective.

Table 8 Adopted and transposed framework decisions from 1999–2007 (as of 31.12.2007)

Framework decision	Transposed in	
	Germany	England
Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union; OJ L 386, 29.12.2006		
Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; OJ L 328, 24.11.2006		
Council Framework Decision 2005/667/JHA of 12 July 2005 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution; OJ L 255, 30.9.2005		
Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties; OJ L 076 , 22.03.2005		
Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems OJ L 69, 16.3.2005	X	X
Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property; J L 068 , 15.03.2005		
Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking; OJ L 335 , 11.11.2004		
Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography; OJ L 013 , 20.01.2004		
Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; OJ L 196 , 02.08.2003		X
Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector; OJ L 192 , 31.07.2003	X	X
Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law; OJ L 029 , 05.02.2003		
Council framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence, OJ L 328, 5.12.2002	X	X
Council Framework Decision of 19 July 2002 on combating trafficking in human beings; OJ L 203 , 01.08.2002	X	X
Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision; OJ L 190 , 18.07.2002	X	X
Council Framework Decision of 13 June 2002 on combating terrorism; OJ L 164 , 22.06.2002	X	X
Council Framework Decision of 13 June 2002 on joint investigation teams; OJ L 162 , 20.06.2002	X	X
Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro; OJ L 329 , 14.12.2001	X	X
Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime; OJ L 182 , 05.07.2001	X	X

Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment; OJ L 149 , 02.06.2001	X	X
Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings; OJ L 082 , 22.03.2001	X	X
Council framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro; OJ L 140 , 14.06.2000	X	X

Their intention to approximate national laws while respecting national traditions, and the previous developments of policy making under the rules of the Maastricht treaty have had the effect that this limited number of measures encompasses some of the most contentious aspects in the policy field. In 2001 we see a long demanded approximation of the standing of victims in criminal proceedings. The 2000 extension of Europol's competences to money laundering was complemented with several Framework Decisions on fraud and counterfeiting of non-cash payments, the laundering of money and criminal sanctions regarding counterfeiting of the Euro.⁸⁰ This development was also influenced by the imminent introduction of the Euro as the single currency. For example the 2000 framework decision explicitly refers to the criminal protection of the Euro. The events of 9/11 allowed the adoption of the framework decision on combating terrorism and the European arrest warrant (EAW) in 2002, for which political agreement had already been reached at the end of 2001. This does not mean, however, that these external developments were the reason for the adoption of highly contested measures (Alegre and Leaf, 2004; Guild, 2004; Jachtenfuchs et al., 2005). With regard to the European Arrest Warrant (EAW), for example, 9/11 only presented a window of opportunity for the adoption of measures which beforehand were blocked due to sovereignty or data protection reasons (Friedrichs, 2005). Beyond that, framework decisions deal with sanctions for human and drugs trafficking (Obokata, 2003) and the mutual recognition of criminal sanctions. The fight against crime also provided the backdrop for the agreement on the execution on EU freezing orders and corruption in the private sector, which were both seen to facilitate terrorism. The amount shrank in 2004 and 2005, when framework decisions were adopted on the exploitation of children and minimal sanctions in illicit drugs trafficking, as well as the confiscation of crime-related proceeds and mutual recognition of financial penalties. The renewed eminence of terrorism as the driving factor for the development of EU police policy played a role in almost all measures adopted since 2001.

⁸⁰ Here a parallel development of the development of European policy and the endeavours to approximate national structures can be seen. So did the extension of Europol competences to money laundering in December 2000 come shortly after the member states had agreed in October of the same year to approximate national rules on money laundering.

Each of the Framework Decisions significantly brings forward the development of the Area of Freedom Security and Justice. Many commentators, however, regard the European Arrest Warrant as one of the biggest steps forward, because it institutionalises the principle of mutual recognition for the first time, a principle that had been a driving force in the development of the common market (*Cassis de Dijon*) (Lavenex, 2007; Douglas-Scott, 2004). Alegre and Leaf (2004) criticise it for the strong assumption this principle makes about the protection of liberties, as a measure of control is replaced by an assumption of equal standards across borders. The importance of this assumption for the development of the policy field⁸¹ is highlighted in the Vienna action plan, where point 19 refers to the sufficient degree of procedural safeguards, which is implicitly guaranteed through the ECHR and the jurisdiction of the Strasbourg court. This interpretation has been severely criticised by practitioners and lawyers as being too weak (Guild, 2004) and the annual report of human rights NGOs, for example Human Rights Watch and amnesty international, regularly point out shortcomings in the protection of fundamental rights. The EAW was also important as it touched upon fundamental principles of the legal order of the member states, namely double criminality, that is the requirement of having committed a punishable offence in the requesting and the requested state.⁸² Through other framework decision major advances against trafficking and drugs related criminality.

The Police Relevance of Framework Decisions

To what degree are framework decisions relevant for the police? Most of the aforementioned measures belong to the area of judicial cooperation in criminal matter, than to police cooperation. Measures of mutual recognition are executed among judicial actors without the involvement of third parties. But they are crucially important for the police, as criminal law is in all member states the basis for police activity. The approximation of substantive and formal characteristics of national legal systems can force the police to become active in cases which previously had not been subject to criminal policy treatment to the same degree as after the Framework Decision or enable them to pursue cases which were beyond their capacities before.

In order to demonstrate the relevance of the twenty adopted framework decisions for the police, a difference can be made between the texts of the norms themselves and their effect when transposed in the national system and between procedural and substantive

⁸¹ and also for the problems concerning trust among law enforcement agencies,

⁸² The principle of mutual recognition has since then gained high significance, particularly for judicial cooperation.

framework decisions. In the texts references to the police were looked for.⁸³ The results show that of the twenty adopted framework decisions so far less than half of them directly mention the police. And these references in the texts mainly refer to the definition of a ‘relevant authority’ or designate law enforcement agencies as participants in the prosecution. The most direct references are in the preambles.

Interesting are the findings for the substantive measures. As substantive law does not concern itself with actors, but merely defines crimes and the level of punishment, a reference to the police was not expected. That the police are mentioned at all points to the hybrid nature of many EU third pillar measures aiming at the approximation of criminal law. Rather than being restricted to criminal or procedural regulations, they often mix both. This is more foreign to continental criminal justice systems than common law systems in the Anglo-Saxon world. In the EU measures, the reference to the police then appears in those regulations on information exchange or operational cooperation (Table 9).

Table 9 Direct police reference in the texts of framework decisions

	Yes In Preamble	Yes In text	Total yes	No
Procedural	2	3	3	5
Substantive	5	2	6	6
Total	7	5	9⁸⁴	11

What is further interesting is that police are more rarely mentioned in procedural than in substantive measures, even though the police play a prominent role in proceedings, but are only indirectly affected by substantive law. This can be explained by the increasing number of measures focussing on mutual recognition. This mode of governance applies not to police operations, but only to judicial cooperation in the trial phase. So in an

⁸³ Search terms were ‘police’ and ‘authorit*’. The latter was taken to represent the holistic understanding of police and was shortened to include both singular and plural forms. In addition the context of the occurrence was checked to ensure that they actually referred to the activity of law enforcement actors in the pre-trial phase.

⁸⁴ The lower total is due to the fact that two procedural and one substantive measure referred to police in the preamble and the text.

analysis of changes to the competences of the police in the pre-trial phase measures focussing on mutual recognition in judicial matters can be excluded. Up to now, five framework decisions have no influence on the pre-trial phase. The framework decision on the mutual recognition of confiscation orders, financial penalties, the confiscation of proceeds of crime and the freezing of property, as well as the EAW focus solely on proceedings once a trial has been opened. Thus they fall not within the scope of police cooperation. This is not to say that they cannot have an influence on the activity of the police. But either the police only act as executive agents of the public prosecutor (as possible in Germany) or the influence will be in any case very indirect and should be evident mainly in the empirical data on police activity. The argument is that the improvement of judicial cooperation in the trial phase on a list of crimes increases the motivation for the police to become active.⁸⁵ When the table is adjusted to measures relevant for the pre-trial phase the following situation emerges. All procedural measures directly address the police. They focus directly at the methods available to the police, whereas material criminal law functions as a hinge as it enables the police to become active in response to certain acts and determines the scope of competences they have in (repressively) prosecuting such an act.

Table 10 Direct police reference in texts pertaining to the pre-trial phase

	Yes In Preamble	Yes In text	Total yes	No
Procedural	2	3	3	0
Substantive	5	2	6	6
Total	7	5	9⁸⁶	6

Substantially, the framework decisions have led to a revolution in international criminal law, especially in combination with paragraph 44 of the Tampere conclusions, which calls for mutual recognition as a building pillar of the AFSJ. Previously national sovereignty

⁸⁵ A counteracting force here is the persisting aversion or insufficient knowledge of many lower police ranks against international police cooperation, which involves the transmission of information.

⁸⁶ The lower total is due to the fact that two procedural and one substantive measure referred to police in the preamble and the text.

was the highest standard and the principle *ne bis in idem* and the requirement of double criminality were often serious obstacles to successful cooperation in criminal law. Increasing integration and approximation as well as the growing application of the principle of mutual recognition have removed many safeguards for criminals to evade judgement. Thus framework decisions have exerted a significant influence on the normative design of national police policy.

Decisions

Decisions can be adopted for any other purpose consistent with the objectives of title VI, excluding any approximation of the laws and regulations of the Member States. Decisions are binding and do not entail direct effect on the member states (art. 34(2)c TEU). They were used in a large variety of contexts, for example to expand Europol's remit (doc 6314/1/99 EUROPOL 11), to agree on Europol staff regulations (e.g. OJ C 364, 17.12.99), in the context of Schengen (e.g. SCH/Com-ex (99) 18) or to define a new type of drug (OJ L 244, 16.9.99). In the communication 'Enhancing Police and Judicial Cooperation in the European Union' the Commission presents a concise overview of the relevant legal obligations in the area of police cooperation (Commission, 2004d). Regarding the instrument 'decision' it observers that not only were most subjects relating to Europol addressed through Council Decisions, but also most issues listed in the action plans from Tampere and Vienna. Still many measures that had been adopted on the European level yet required ratification and implementation (Commission: 14, 19). The mere fact that issues were adopted as decisions does not mean that they were inconsequential for national frameworks. They have played a central role in the establishment of the EU framework for police cooperation. In the future they will become more important, as can be seen from the decision to change the legal basis of Europol from a convention to a decision, in order to more flexibly adapt the framework. Therefore they need to be taken into account when analysing national internal security policies. But as they are not being transposed nationally and thus less likely to be direct sources for changes at the national level, they will be considered as the constituent elements of the European regulatory framework, which indirectly influences national regulation.

Conventions

In the Amsterdam treaty conventions were maintained, but their adoptions and ratification was simplified. No longer was it necessary for all member states to ratify it for it to come into force, but once adopted by at least half of the Member States, it enters into force for those Member States. The cumbersome procedure behind the adoption of a convention led to a strong reduction of the use of this instrument. After

the Europol convention had finally entered into force at the end of 1998, but remained not fully operational as disagreement over nature of supervisory body remained and eight member states had not ratified the protocol on immunities, within the third pillar framework, only one convention on mutual legal assistance in criminal matter was adopted on May 29, 2000 by the JHA Council. When a binding decision was desired, the instruments of decision and framework decision were more suited and less cumbersome. Protocols to existing conventions, which need to be ratified nationally as well, continue to be adopted. The conventions are taken up in the analysis as well, especially as their content in many cases overlaps with that of framework decisions. In the analysis of the post-Amsterdam phase, they play a quantitatively minor role, but their qualitative impact on policy production and their content will be shown to remain substantial.

7.5.3. Selecting at the national level

Having restricted the amount of measures to take up for analysis at the EU level, the even more extensive amount of data at the national level needs to be reduced. In Germany and England the last decade has seen numerous reforms of the regulatory framework, concerning the scope of what is defined as deviant behaviour (Johnston and Shearing, 2003), as well as the competences of law enforcement actors (Roggan, 2000).

The research question is the effect of growing European integration in internal security matters on the national regulatory framework. Therefore it seems indicated to first select measures, where we have a direct influence of the EU level on the development of national policy. This seems the case in those measures which the member states must implement. The obligation to implement, however, depends on the willingness of the state to actually fulfil the voluntary obligations arising from having signed the treaty on European Union. There is no sanctioning mechanism for non-compliance. Despite this 'softness' of law, these measures have the highest likelihood of affecting domestic policy directly.

In order to select those domestic measures which might have been affected by EU measures references to the respective EU measures were sought in parliamentary debates, explanatory notes to acts and bills or government speeches. In order to direct the search, thematic and temporal overlaps between framework decisions and conventions and new legislative initiatives in Germany and England were looked at. Very helpful for the identification are implementation reports by the EU Commission, which provide details about the legal structures, through which framework decisions are transposed nationally.

8. An empirical analysis of EU measures transposed in Germany and England

In the second part of the analysis, reforms of law enforcement policy will be analysed in more detail. Temporally the analysis proceeds backwards, as it analyses the effect of binding EU measures on the national arena. Framework decisions were adopted in the second period (1999-2006), while conventions were only adopted in the first period (1990-2000). The number of framework decisions (21) is higher than the number of conventions (11).⁸⁷ The analysis focuses on how these measures were transposed in Germany and the UK and the effect these measures had on the law enforcement system. Particular attention is paid to their on the four categories for liberty and security.

Framework decisions can be modified to fit national requirements more closely than conventions.⁸⁸ As the principle of mutual recognition and ‘gentle’ approximation of criminal law underlies many framework decisions the expectation is that they are less disruptive to the national system of criminal law. But as framework decisions go further than conventions in approximating national regulations and at the same time tend to have a more specific focus than conventions, their overall impact on the criminal justice system could also be much greater.

8.1. *Police and judicial cooperation*

Most issues addressed by framework decisions do not directly concern the police. The approximation of ‘rules of criminal matter’ concerns the activity of the police only indirectly. Changes occur on the norm level in the criminal and procedural code and other laws. This leads Kugelman to differentiate explicitly between police cooperation and criminal justice cooperation, where the latter encompasses legal approximation (2006: 95-6). While this is certainly correct from a legal point of view, especially with regard to the German legal system, which strictly separates between material and criminal law on the one hand and police and public order law on the other hand (Pieroth et al., 2005; Kugelman, 2006; Hecker, 2005), politically and functionally the two areas can only be heuristically distinguished. EU criminal justice policy affects the police through their possibility to engage in more issues through legal approximation. The police in a democratic system are bound by material and procedural law. Police and judicial

⁸⁷ As of December 2007.

⁸⁸ This is not to say that national parliaments actually use this opportunity to participate in shaping the transposition laws. Töller (2004) shows that the German lower house (*Bundestag*) possesses insufficient institutional structures to fill their role in the decision-making process. Only in 2006 the *Bundestag* has established an office to deal with inputs coming from the EU and a representation in Brussels, the 20th of national parliaments.

cooperation thus need to be treated jointly in line with the book's functional understanding. The better differentiation is the restriction to the pre-trial phase. Differences in the domestic law enforcement systems lead to different addressees of measures, due to the differences in the police-judiciary relationship and other systemic differences. In third pillar policy, however, the two areas are linked as a functional approach to law enforcement dominates. This is not to say that all measures are equally important for the activity of the police. Formally, all framework decisions are based on art 29 TEU, which declares the fight against organised crime to be a cumulative effort of police and judicial cooperation and an approximation of criminal regulations. So some EU measures address more directly the police, while other exclusively deal with cooperation among, for example, judges. The following analysis addresses all measures which impact on the police in the pre-trial phase.

The effects of the model developed above are looked for. The measures that have been transposed in Germany and England and their effects on the regulatory framework are analysed individually. Proceeding measure by measure, conventions and framework decisions are assessed separately where possible in order to identify individual effects and jointly when necessitated by the subject matter. Given the differences in the legal standings of framework decisions and convention more direct effects are expected from framework decisions whereas indirect effects are likely to be more important for conventions due to the fundamental role the conventions currently in force play for the development of the third pillar. Also conventions do not aim to directly change the national system, but establish international structures in addition to existing national regulations.

8.2. *The problem of transposition or: is there one?*

Framework decisions can be transposed through laws and administrative documents (Reichelt, 2004). The latter encompass circulars and orders (UK), *Dienstvorschriften*, and *Verordnungen* (D). While these tertiary legal instruments play an important role in the application of national law, the Commission has analysed them more critically than statutes, because their legal standing does not always satisfy the requirement of legal certainty (Commission, 2004h: 25). This runs against the interpretation of the dominant opinion, which is informed by first pillar directives, according to which these tertiary instruments can be used to transpose EU directives, as long as they can be enforced.

The full transposition of framework decisions does not necessarily mean that all articles are transposed into national law. This is due to the nature of framework decisions, which not only contain legal definitions, but also operational guidelines and cooperation requirements, especially concerning data and information exchange. These cannot be transposed, but require the establishment of adequate operational structures.

The general problem identified by the Commission and expert groups in all third pillar policies is low transposition. This is particularly pertinent regarding conventions and their protocols. Of eleven adopted conventions and twelve protocols only eight are currently in force. In addition, there is a delay between adoption in the Council and national transposition. In Germany and the UK most framework decisions adopted until 2003 have been transposed. The transposition record for later framework decisions shows significant gaps, even though some framework decisions are transposed very quickly. The record of those two countries is similar to those of the other member states. This seems to replicate an old problem: member states are active in adopting measures at the EU level, but when it comes to fulfilling these commitments domestically, problems seem to arise (cf. Mastenbroek, 2003; Falkner et al., 2004; Falkner et al., 2007). Framework decisions contain a deadline, by which member states must ensure the compliance of their legal system with the framework decision, and which are legally binding (Reichelt, 2004: 41). Without direct effect and no possibility to take member states to court for non-compliance⁸⁹, the Commission can name and shame those member states, which have not (or not correctly) transposed the framework decisions.

Furthermore the Commission has to rely on the transmission of member states on their national rules. Due to its restricted resources the Commission cannot proactively assess the compliance of 27 member states with widely diverging legal systems. Member states, however, not only trail behind in transposing the framework decisions in time, but often do not provide the required information to the Commission. Many Commission communications on the transposition of framework decisions show that the Commission has to remind the member states repeatedly of their obligation to submit information (e.g. Commission, 2001d; Commission, 2003c; Commission, 2004c; Commission, 2007). In the Commission's reports this weakness is manifest in only partial assessments. The Commission has to complement member states' information with publicly available information, such as the Council of Europe secretariat. This can also help to explain the partial ambiguities of the Commission reports on the national legal situation. While such a position is understandable from a resource and a legal point of view, it also indicates that the regime does not work as intended.

As a further consequence, the reports were published between three months and two years after the date given in the framework decision. Legally this means that at least one member state has in all cases violated the requirements arising from the framework decisions. This is, however, only a unsatisfactory measure as it does not capture the essence of the delay. When looking at the laws, through which framework decisions were

⁸⁹ This is a standard measure for assessing the compliance of EU member states (Börzel and Risse, 2000: 4).

transposed, a delay between formal adoption at the EU level and the adoption of national regulations or the notification of the Commission about transposition is around one and a half years for Germany and England.

Given recent research on compliance with directives in the first pillar, these numbers can be put in perspective. Ellen Mastenbroek (2003) shows for the Netherlands, that first pillar directives were delayed between three months and one year beyond the foreseen date of implementation. Falkner et al. arrive at a similar conclusion for all member states (Falkner et al., 2007). Not only is the delay between adoption of a directive and a framework decision and their transposition similarly long in the first and third pillar, but the numbers reported for several countries show a high degree of transposition through measures other than laws (Steunenberg, 2005: 295). Therefore the existence of a transposing law alone is insufficient as an indicator for compliance. Rather the transposition must be analysed for each framework decision individually. From a quantitative point of view, the accusation of delayed transposition in the third pillar is not justified for the German nor the British case, when compared to first pillar measures.⁹⁰ The fact that the development of the AFSJ depends crucially on the simultaneous adoption of the measures in all countries, however, sheds a more critical light on the variation of transposition across member states.

Commission communications repeatedly disagree with the assessment of the member states about the need for implementation and the compliance of national regulations with the requirements arising from framework decisions. The German government, for example, expressed the opinion that no new legislation was necessary to implement the framework decision on joint investigation teams⁹¹, as the judicial system, considered as a whole, already contained legally binding rules that assure the full application of the framework decision (Commission, 2004h: 9). The Commission, however, concludes that the legal situation 'is not compliant with the requirements of the Framework Decision' (Commission, 2004h: 9). In its report on the framework decision on combating terrorism, the Commission concluded that Germany complied with the framework decision except for the 'key provision' of article 1 (Commission, 2004f: 5). Based on the draft law, which changed article 129a Criminal Code ('establishment of a criminal or terrorist organisation') to conform with the framework decision, the Commission concluded that only terrorist acts when committed by organisations could be punished, whereas terrorist acts carried out by individuals would remain to be simple crimes only.

⁹⁰ Some factors influence this record. For example, the fact that after the events of September 11, 2001 governments were intent on transposing the newly adopted EAW on the definition of terrorism, strongly affected the result given that the overall number of framework decisions remains relatively small.

⁹¹ OJ L 162, 20.06.2002.

As this is against the intention of the framework decision, the Commission concluded that Germany insufficiently complied with the key provision of the framework decision. The interpretation that terrorist offences committed by individuals are not punishable in line with the requirements emanating from the framework decision was not followed by German lawyers (Hecker, 2005 385-6; Miebach and Schäfer, 2005).

The UK was criticised by the Commission for using circulars or other non-binding instruments to transpose framework decisions. Additionally, the reports mention lacking transposition of several articles in different framework decisions, but refer to the common law tradition, which provides effective transposition. While this, in the Commission's view, not fully adheres to the requirement of legal certainty, the reports mention it, but in their assessment do not come to a negative result.

Irrespective of the transposition record, Gusy (2006: 15) remarks rightly that in the area of police cooperation there remains a large gap between programmatic declarations and actual legal and practical developments. Felgenhauer (2007) remarked with regard to Europol's competences, that they had not changed considerably since the inception of formal police cooperation in Europe in 1992. While this can be questioned in the light of the new protocols to the Europol convention, the sentiment clearly applies to political programmes. Comparing the content of the Palma Document of 1991 and the Hague programme of 2004, it is striking how many similar issues were mentioned as objectives for policy-making, yet never came into being. So while the implementation record is not worse than in the first pillar, the record for transposing political declarations into binding policies is dismaying. The Lisbon Treaty foresees an expansion of qualified majority voting in internal security matters, but the competences still address similar issues as at the beginning of EU police cooperation.

8.3. Problem or not – what are the consequences?

The continuing legal differences among the criminal justice systems of the member states are not only problematic from the point of view of an adequate protection of individual security and liberty by the state, as argued above, but also serve to illustrate some preliminary insights in the politics of the third pillar. In the light of the strong reservations of the member states against a common EU criminal law system and its own limited resources, the Commission does not officially pursue this project. Anne Weyembergh, though, argues that EU criminal justice policy follows an internal logic, which requires substantive changes in national systems (Weyembergh, 2004: 1574-84). Her evidence on national compliance with framework decisions seems to refute the idea of 'soft' approximation of national laws with little adaptive demands on domestic systems.

The Commission and the European Court of Justice pay attention to national transposition and uphold the pressure on the member states. The result is a continuous demand on EU member states to modify their national legal system. A 'full compliance requirement' emerges when transposing framework decisions. So while framework decisions seem to leave more freedom to the member states, the use the Commission makes of its competence to name and shame in reality limits the leeway for countries.

There are countervailing forces, though. No degree of naming and shaming of the Commission can coerce the member states into compliance. As representatives of the member states have indicated, they remain the decisive players through their power to halt any developments in the policy field (cf. Lords, 2006: 31). As long as 'peer pressure' is not high, the likeliness of member states to react to Commission criticism is low. This, at least, seems to indicate the lack of reference to previous Commission criticism by the German government when re-transposing the framework decision on joint investigation teams.⁹²

In the UK problems of coherence between civil and common law arise. In the interpretation of the Commission, framework decisions require the use of statutory instruments in order to attain legal certainty. This runs counter to the traditional common law system with its stronger reliance on non-statutory instruments, such as precedent or orders. Out of this conflict develops a 'hybrid' system between civil and common law, which meets obstacles of legal and political doctrine and tradition (cf. Walker, 2000).

The impressionist analysis above suffers from the same problems that have been identified in compliance research (Börzel, 2001; Falkner et al., 2004). The data available is fragmented and the Commission only publishes the data it receives from the member states. The weak sanction mechanisms in the third pillar further aggravate the problem as legal proceedings cannot be taken as a starting point. The increasing number of cases concerned with third pillar issues at the ECJ, however, indicates that there seems to be a problem.

The following chapters address, among others, the question of compliance with third pillar measures for Germany and the UK. The intention is to go into the details of anti-crime policy and identify the effects of EU policy domestically. The main question thus is: Has the EU had an effect on the domestic crime policy framework? But also questions where and when the effects took shape are being investigated.

⁹² See the debate in the German parliament on the law transposing the MLA convention. Available at <http://dip.bundestag.de>.

Instead of aiming to explain the effects, results are qualified with regard to the two dominant dimensions of the policy field – security and liberty. This results in an empirical, though normatively grounded, presentation of the internal security policy field under the influence of an increasing dense network of EU regulations.

9. The effect of the transposed measures in Germany

Guiding questions:

1. Which measures have been transposed in Germany?
2. How were they transposed? Fully, did the national law go beyond the minimum requirements?
3. What effect did the measure have on the overall law enforcement framework?

9.1. *Direct effects*

The transposition of framework decisions falls into a period, during which the German law enforcement system changed significantly. The most important changes were the two anti-terrorism packages adopted in late 2001 and early 2002. But also more generally, observers identified a growing degree of changes in the Criminal and the Procedural Code as well as the general political framework (Hettinger, 1997; Ladeur, 2003). They were seen to tighten the rules for the individual and to constrain legal guarantees (Busch, 1995; Haubrich, 2003).

Against this background of shifting structures, binding EU measures address issues linked to serious crime, irrespective of how ill-defined this concept might be. In addition, the spectrum of measures adopted in the fight against serious crime is not restricted to the third pillar. A successful restriction of crime builds on a combination of preventive and repressive measures, bridges criminal justice with economic planning and encompasses a large number of policy fields, including the regulation of migration, police cooperation and financial transactions (Fijnaut and Paoli, 2004), some of which fall in the first pillar. Even though they only cover a part of the phenomenon, the analysis is restricted to third pillar measures. Framework decisions cover almost all aspects often brought along in trying to define organised crime (Kilchling, 2004).⁹³

As outlined in chapter seven, the analysis focuses on the law enforcement activity of the state in the pre-trial phase. This means that rather than departing from an institutional focus on the police, competences, boundaries for and actors of policing in a broader sense form the basis for the study.

⁹³ In Germany transposition is affected by a competition among the ministry of interior (BMI) and the ministry of justice (BMJ). The former sees police cooperation to be in its domain and is critical towards the BMJ for interfering too much. At the same time, it moves the responsibility for the transposition of the more judicial framework decisions to the BMJ. There I met indignation upon asking about the transposition, as in the BMJ's view the BMI is just as capable of telling me about transposition.

In difference to legal analyses, the focus of the analysis does not lie only with the absolute changes in norms, but on the direct and indirect effects they have on liberty and security. This requires the interpretation of potential effects. First the form through which framework decisions are transposed is discussed, including a brief description of the affected norms and then the impact of the individual measures on the general development of the policy field is assessed.

In Germany twelve framework decisions have been transposed until 2007. The remaining eleven were either not transposed yet, were in the decision-making process or have been ruled invalid. Whether a framework decision had been transposed was either determined upon the basis of reports by the Commission or when framework decisions were mentioned in the GESTA data base, which documents the parliamentary passage of legislative measures.⁹⁴ This selection mechanism does not include the case where the German framework already fully complies with European requirements, but the Commission has not published a report yet, for example due to a delay in member states transmissions. As a qualitative approach is taken to assess the type and degree of effect of the EU at the domestic level, this selection bias deselects cases, where no effect would be found. For the assessment of their effect, these cases can thus be treated as having no effect at all. The framework decisions for which information are available can be separated into three broad groups. The first group deals with the financial aspects of crime. The second group addresses operational issues of law enforcement, while the third group primarily aims at harmonising material law.

9.1.1. Money and crime: breaking the link

FD fraud

On 22.12.2003 parliament adopted the 35th law changing the criminal code (BGBl I 65, 27.12.2003)⁹⁵. This law comprehensively transposed the requirements from the framework decision on combating fraud and counterfeiting of non-cash payments into German law. The law came into force half a year later than foreseen by the framework decision.⁹⁶ The German government, in the explanatory note to the bill, points out the close relationship between the framework decision against fraud and the one against counterfeiting (Bundesregierung, 2003: 6). Germany fully complies with the framework decision (Commission, 2004g: 17). Only articles 11 and 12 are not explicitly transposed,

⁹⁴ GESTA can be found at <http://dip.bundestag.de>.

⁹⁵ This is the reference to the Federal Law Gazette, where all laws are published. It can be found at <http://www.bundesgesetzblatt.de>.

⁹⁶ The reasons for this delay are unclear. Parliamentary protocols do not offer an explanation. Maybe the only limited need for change can account for the delay (low priority) (cf. Falkner et al., 2007).

which concern operational cooperation and information exchange. This serves to illustrate the procedural effect of framework decisions, which go beyond the approximation of legal. The effect of the framework decision on German law was limited, because German law had already conformed to the requirements of the framework decision (Commission, 2004g: 10).

The law introduces a new article 152 in the criminal code. It criminalises the fraudulent use of non-cash means of payment, which was necessary to fully comply with the framework decision, but did not significantly change the content of the German law enforcement system (Erb, 2005: 819-20). It extended the criminalisation to certain additional means of payment, however.

The extension of the definition of fraud expanded a crime. Fraudulent use of non-cash payments can now be punished by imprisonment between 1 and 10 years, thus treating it as a crime instead of an offence. Especially the criminalisation of the development of computer programmes, which enable the user to engage in fraud, can be viewed as problematic, because these types of computer programmes are not restricted in their use to fraudulent behaviour, but can potentially be used to test the security of computer systems. The upscaling of the offence also means that fraud offences fall under regulations for international cooperation in the fight against crime. This allows the exchange of data across borders to a larger degree than previously possible. In the annex to the Europol convention fraud is listed as an area in which Europol can become active and thus exchange data on and set up analytical work files for detailed investigation.

The effects on the two dimension and the four categories are addressed individually. The subsequent analysis of the other measures will follow this format.

Concerning *judicial control*, there were no changes through the framework decision concerning the protection mechanisms enshrined in the German code of criminal procedure. The law in itself does not affect the established frame of protection mechanisms provided by courts, lawyers and banking supervision (in this particular context). The context of fraud has changed, though. By moving it into the category of crime, fraud has become an extraditable offence as it is listed in the annex to the Europol convention and according to the Council of Europe convention of 1957, an extradition is possible for all crimes with a minimal maximum sentence of one year.

The second category of liberty, *legislative control*, concerns possible control processes. Changes through the framework decision partially affect the procedures that apply. For fraud with certain non-cash means of payment the type of offence has been set to misdemeanour, which allows for a summary conviction, but only for a fine or a probation sentence when the offender is represented before court (Heinz, 2004: 5). Concerning the exchange of data, individuals concerned have the (limited) right to have

the data corrected and deleted if inaccurate. This procedure is however cumbersome and weighted down by the numerous possibilities to refuse information, the most prominent being national security (Weichert, 2005: 7).

On the security side, *tasks* of law enforcement have been affected. The scope of fraud has been expanded and now carries a higher sentence. A different criminal procedure can be applied unless fraud is committed using certain cards. Most of the fraud cases covered by the framework decision had been criminalised in Germany before (Bundesregierung, 2003: 7). So the tasks are not entirely new for the police. But the expansion and the upgrading of the offences plus the salience of fraud for the fight against terrorism and organised crime, qualitatively affects the tasks of law enforcement. In the former case, funds are necessary for the execution of terrorist attacks and the latter is closely related to such criminal activity, as card fraud often has organised crime background (Gallant, 2005). The scope of law enforcement has been expanded.

Concerning *security methods*, the upgrading of the crimes also allows for more extensive law enforcement measures to be applied. Particularly the application of wire-tapping has sparked some debate between the upper and lower house of parliament (2003: 19). The framework decision calls for more cooperation among the member states in the field of fraud. Extradition is possible on the grounds named in the framework decision and information on fraud offences can be exchanged through existing channels. These channels have their basis in the federal law on data protection (*Bundesdatenschutzgesetz*), which has not been changed by the law transposing the framework decision. However, the possibility to use channels of international data exchange for fraud purposes had not been available previously.

Overall, the framework decision had limited effects on the German framework. Direct effects on the liberty dimension were not discernible, while some effects were found on the security dimension. The scope offences was extended in response to the framework decision and in particular the embedding of fraud in EU cooperation structures has an effect on the methods, which has in turn effects on the applicability of EU-based law enforcement instruments.

FD money laundering

Germany complies with the framework decision on money laundering. In the development of EU (and German) policy against organised crime, money laundering by criminal and terrorist organisations plays a central role. The concept of money laundering was introduced in Germany in the law against organised crime of 1992 (art. 261 StGB). In the coming years this concept, which had been imported into German law in response

to its existence in foreign criminal justice system,⁹⁷ was central to the development of German organised crime policy (Kilchling, 2004). Since then, the repressive and the preventive side of the fight against money laundering have been subject to a large number of changes. The scope has expanded significantly. In 1993 Germany transposed the Council directive 91/308/EC on money laundering in the law against money laundering (*Geldwäschebekämpfungsgesetz*). The act focuses on the proceeds of serious crime. In 2002 a new law on money laundering was adopted (BGBl I 2002, 57). This time, the focus was on terrorism, in line with the revised directive 2001/97/EC. Over the course of ten years, the discourse on money laundering had changed from drug trafficking to organised crime to transnational terrorism.⁹⁸

The framework decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime⁹⁹ did not induce changes in German law. The measure aimed to ensure the full application of the 1990 Council of Europe Convention on money laundering and foresaw minimal maximum sentences of 4 years, the possibility of value confiscation and put foreign and national requests on an equal footing. The framework decision is a follow-up to a joint action of 1998 on the same topic.¹⁰⁰ The framework decision aims to make these old agreements more binding and to harmonise penalties (Commission, 2004e: 6). Germany already complied with the requirements of the framework decision. The confiscation of the proceeds of crime had been possible before (art. 73ff StGB). Value confiscation (art 73a StGB/art 3 framework decision) was introduced in the 1970s and since expanded (Heinz, 2007: 4). In 1992 Germany acceded to the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and no reservations to it were upheld. The criminalisation of money laundering (maximum penalty five or ten years) already complied with the minimum maximum penalties required by the framework decision (four years). Relevant regulations are found, further, in the criminal code and the narcotics act. Germany did not need to introduce new legislation. The compliance with EU law did not lead to changes in the structure of German police governance.

In general, though, money laundering has been increasingly criminalised in Germany over time. This certainly expanded the scope of law enforcement capacities through the

⁹⁷ BR-Debate 1991, 140; cf. <http://www.organized-crime.de/organisiertekriminalitaet.htm> (accessed 20/04/2008).

⁹⁸ 1993: Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten; 2002: Gesetz zur Verbesserung der Bekämpfung der Geldwäsche und der Bekämpfung der Finanzierung des Terrorismus.

⁹⁹ OJ L 182, 5.7.2001, 1.

¹⁰⁰ OJ L 333, 19.12.1998, 1.

introduction of new elements of a crime. Substantive liberties of possession and freedom of the person are restricted by increased penalties and expansion of the base to which money laundering rules can be applied. Policy-making has pushed the restrictions on state activity further back by restricting the bank secret and including lawyers among those groups who must provide law enforcement agents with information. By framing money laundering competences with reference to the political ‘crime hype’ of the time (drugs, organised crime, terrorism), politics ensured that the issue was and remains in the forefront of policing crime and terrorism. In particular those offences, which are difficult to identify, such as financial support of a terrorist organisation, mean that the methods employed in the fight against money laundering can be broadly applied.¹⁰¹

Despite the domestic formulation of most money laundering legislation, the development of the German money laundering and value confiscation regime is based on a European model. Almost all laws directly concerned with money laundering transpose measures from the EC or the CoE. EU measures, however, rarely play a role. They are predominantly complementary measures to the development of a common market. In other words, they are annexes to the functional criminalisation emanating from the EC directives or address deficiencies in the application of Council of Europe measures.

On the two analytical dimensions, the effects are accordingly limited. The laws on money laundering do not directly affect *judicial control*, i.e. the way the police and other law enforcement actors are controlled by third actors. Those building on European measures, however, have significant influences on privacy and informational self-determination. The obligation of banks and financial institutions to gather information and transfer them to the BKA moves the control of personal data from the public to the private sphere and thus to different actors. No longer only state actors with supervisory bodies (*Datenschutzbeauftragter*) but private actors collect and disseminate information. Even lawyers are compelled to transmit information to law enforcement. This can lead to a lower degree of data protection as private actors are subject to different data protection rules than public offices. In addition, it might reduce the confidence in such constraints, depending on the politically advanced definition of money laundering.

Focussing on processes, i.e. *legislative control*, the dominant control mechanisms are constitutional. Neither the framework decision nor the transposing law (or in this case the *GWG*) explicitly provide for control mechanisms. The rights of individuals are mentioned in related laws, such as the federal law on data protection (but see Aden,

¹⁰¹ There are some side effects as well. Since the introduction of these offences, the new competences were used to gather information on tax evasion and to ward off financial losses for the state. In Germany this is particular obvious as the definition of money laundering in article 261 StGB includes tax evasion (par.1 sentence 3).

1998: 368ff) and the *BKA* law. They mainly concern the right to have incorrect data deleted and information rights about the extent of data held by law enforcement agencies. While these rights are extensive, the restrictions that apply, such as national security concerns, limit the usefulness of these control rights (Weichert, 2005). Concerning proprietorship, the codified right of the state to seize and confiscate private possessions as a means of compensation certainly is a restriction. But this situation was not a result of the framework decision, but of previous developments in German law. And confiscation is foreseen as a compensatory punishment, not an additional one.

Through the lack of changes directly effectuated by the framework decision, the scope of *tasks* for law enforcement actors has not been affected. More important changes were brought about independently in the 1990s (Kilchling, 2004). In the light of the focus of EU policy-making against money laundering, the German framework certainly developed in response to EU measures. But the framework decision did not have an influence. On the administrative level, the rules in RiVaSt¹⁰² had been in place before the framework as well.

The increasing criminalisation of money laundering and its extension beyond the laundering of proceeds of classic crime to tax offences has led to extended *methods* for law enforcement to freeze, confiscate and seize proceeds of crime. While the fundamental methods employed have not changed, the enforced cooperation of financial institutions and the broader basis upon which these methods can be applied, expand the scope of methods of the law enforcement authorities in the fight against money laundering. The obligation arising from article 4 FD on cooperation with foreign actors when they request assistance extended jurisdiction beyond the previously only national prosecution of such crimes. The explicit mention of data and information exchange in the framework decision also impacts on the methods available to the police. Directly encouraging law enforcement officials to cooperate in substantive measures goes against the German tradition of separating procedural and substantive law. And while the exchange of information is not new, the fact that it is part of the EU measure points to its political salience.

Once again, the direct effect of the framework decisions on the German regulatory framework was limited, but more extensive than concerning fraud. Mainly due to the embeddedness of German money laundering policy in a EU framework, which opens up the use of EU-level resources, domestic policy can be qualified as being not affected by the framework decision.

¹⁰² Directives on relations with foreign countries in criminal law matters. Available at http://www.datenbanken.justiz.nrw.de/pls/jmi/ir_rivast_start (accessed 12.12.2007).

FD counterfeiting of the Euro

Adopted in August 2002, the act transposing the framework decision against counterfeiting of the Euro meets the deadline of the framework decision.¹⁰³ Its aim is to criminalise the counterfeiting of currency and, this is the major invention, the counterfeiting of currency not yet designated for circulation. This ensures the protection of the Euro also in countries which are not part of the Eurozone. The first part has been an offence in almost all countries for long time. The International Convention for the Suppression of Counterfeiting Currency and its Protocol were adopted in April 1929. The German law transposes those requirements of the framework decision, which had not been part of German law. It adapts the wording of article 149 (3) *StGB* to the framework decision. The act extends the set of punishable offences to non-cash means of payment and brings the means of counterfeiting in line with technological development. Furthermore, the legal persons can be punished more extensively in line with the requirements of the framework decision. They can be charged a fine up to a million Euro and can even be wound up. Punishments of natural persons are increased as well. Financial and custodial sentences can be applied. The framework decision requires a maximum sentence for fraudulent making or altering of money of not less than eight years (art. 146 par 3 *StGB*). The changes through the new law do not fundamentally change the norms of the protection of the currency. But they extend criminalisation to legal persons, thus expanding the scope of law enforcement. From a normative point of view, the changes are not particular, because counterfeiting means of payment had internationally been a crime since the 1929 League of Nations convention. The major inventions are the inclusion of new technological means of counterfeiting and the extension to future currencies in the light of the imminent introduction of the Euro. The law is closely connected to the law transposing the framework decision on combating fraud and counterfeiting of non-cash means of payment.

Counterfeiting is a serious crime and the link to organised crime is evident in the high technological costs involved in producing counterfeit money. Despite different dominant frames criminal justice policy over the last years, from organised crime to terrorism, counterfeiting remains on the agenda. But it is not as high profile as other aspects (cf. European Council, 2004a).

In assessing the effects, we see that *judicial control* is rarely affected, because the new act does not directly affect the mechanisms to control the police. The activity of the police to investigate counterfeiting offences has no other controls than beforehand. The measure does not provide for special representatives of the persons concerned nor does

¹⁰³ OJ L 140, 14.6.2000, 1 and OJ L 329, 14.12.2001, 3.

it institute new law enforcement or control structures. Concerning actors (*legislative control*), legal persons have the right to challenge a conviction for counterfeiting in court. This had not been possible previously. But then the legal persons could not be held liable. Beyond that only standard procedural control applies.

On the security dimension, no significant expansion in *security tasks* and *security methods* can be found. Counterfeiting had been under the control of the police since the adoption of the 1929 convention. The major invention was the extension of jurisdiction to legal tenders issued abroad. Arguing counterfactually (as proposed for Europeanisation research by Haverland (2005: 4)) the German situation would be no different without the framework decision. The impact of the framework decision on the security dimension is thus virtually absent.

The measure as such did not have an impact on the German policy framework. The ability to punish legal persons was marginally extended and mainly clarified the existing framework. With the new law, responsible managers face more accountability. For the development of the German policy framework against organised crime, however, the establishment of an equal level of criminalisation of counterfeiting was important for the establishment of the single currency. Overall, the effect of the EU at the national level is very limited. Only a slight extension of the security dimension can be observed.

FD corruption

The framework decision to combat corruption in the private sector builds on the Joint Action of 1998 of the same title, which obliges member states to criminalise active and passive corruption, i.e. the giving or demanding of bribes.¹⁰⁴ It extends the scope of the joint action by specifying penalties, clarifying aspects of the concept and by broadening the applicability of the offence to legal persons. The German government in its transmission to the Commission on the transposition of the framework decision maintained that the German legal framework fulfilled all requirements arising from the framework decision.

The central requirements of the framework decision, i.e. the penalisation of active and passive corruption (art. 2 FD), are covered by article 299 *StGB*. This norm was introduced into the criminal code from a so called side law (*Nebengesetz*) in 1997 with the intention to emphasise the severity of the offence of corruption (Diemer and Krick, 2006: 1022). It did not change the substance of the law, as corruption had been criminalised before (since 1909), but restructured the legal definition and relocated the offence within the dogmatic standing of the German criminal code. Some changes took place in the

¹⁰⁴ OJ L 358, 31.12.1998, 204.

course of the reform, as punishments were increased to up to three years indictment, under aggravating circumstances to five years.

In August 2002 parliament adopted another law on the transposition of the second protocol to the convention on the protection of the financial interests of the EU (BGBl I 3387). This law not only ensured the compliance of German law with the convention, but also transposed the aforementioned joint action of 1998 into German law. It effectuated an extension of jurisdiction pertaining to corruption beyond German territory (Diemer and Krick, 2006: 1040).

While the Commission agrees with the level of penalties for corruption required (maximum sentence of one to three years) and the general definition of active and passive corruption, the lack of information by the German authorities led to the conclusion that Germany only partially transposed central articles (art. 2, 5 and 6 FD). Concerning jurisdiction, the Commission finds full compliance by Germany with the requirements of the framework decision.

While the criminalisation of corruption in Germany was substantively not affected by European developments, jurisdiction seems to have been directly affected by it. The framework decision itself was not the reason for any changes, but as it merely expands the 1998 joint action, for an analysis of the origin of changes, the two can be treated as equivalent.

The discussion has shown that the substantive criminal law basis upon which law enforcement can act has not been affected. *Security tasks* were not affected by the legislative activity. A direct effect of the EU level can be observed regarding *security methods*. The extension of jurisdiction beyond German territory is clearly a result of European legislation in the development of economic criminal law (*Wirtschaftsstrafrecht*).

The *liberty* dimension, on the other hand, had been affected by the extension of the penalties for corruption in 1997. The motivation for this change, however, was not directly the EU, but domestic considerations about the social undesirability of corruption. Furthermore, the situation remains that investigations can only be started upon the application of a third person. The public prosecutor may only in cases of 'special public interest' instigate proceedings itself. The parliament ensured this control instance against the interests of the *Länder*.

9.1.2. The operational dimension

The second group of framework decisions deals primarily with operational aspects of police cooperation. But also general substantive issues are addressed.

FD joint investigation teams

The German government took the view that the regulations contained in the *Richtlinien für den Verkehr mit dem Ausland in Strafrechtlichen Angelegenheit* (Directives on relations with foreign countries in criminal law matters – RiVaSt) no 138 were sufficient to ensure the full application of the framework decision. Partially, the German authorities referred in their communication to the Commission to a law implementing the MLA convention (Commission, 2004h: 9). Certain aspects not contained in German law, were to be transposed through that new law, which was already in preparation when the government transmitted information to the Commission. Thus the transposition of the framework decision proper did not effect any change in the German system. As the question in this chapter concerns the changes in German law effectuated by EU law, the transposition of the MLA convention also needs to be considered here. As the text of the framework decision had been taken directly from the MLA convention, its inclusion is adequate. By complying with the convention, the new law of 22.07.2005 also took the necessary measures to comply with the framework decision, which was only meant to be a bribe to allow the faster implementation of joint investigation teams.¹⁰⁵ This of course extends the potential for change, as the convention is much broader than the framework decision.

The original criticism from the Commission of the German position on the framework decision transposition was not addressed further, when parliament adopted the new law in 2005. The government saw the need to adapt national legislation in order to conform with joint investigation teams as foreseen in the convention (Bundesrat, 2005: 5), but had seen no need to introduce changes to comply with the stipulations of the framework decision JIT, whose regulations had been taken almost word by word from the convention (Commission, 2004b: 9). While the possibility remains that the German government did not transpose the framework decision fully because the MLA law was already in the making, the draft bill was only introduced in parliament on 29.4.2004, while the information had been communicated to the Commission before 31.12.2003 (Commission, 2004h). This treatment of EU obligations is interesting in the light of the limited effect and delays in the transposition that were reported above. In addition, the new law only assumes that foreign law enforcement authorities are present in JITs, but that only German police exercise force, which is relevant for legal proceedings (Schomburg et al., 2006: 1017). This interpretation seems out of line with that of the Commission, which in its evaluation complains about the absence of clear rules on authority in JITs (Commission, 2004b: 9).

¹⁰⁵ OJ L 162, 20.6.2002, 3.

The new article 83k IRG transposes the rules on JITs into German law. The new rules seem to be in line with the requirements of the framework decision in detailing the competences of foreign law enforcement officials in Germany. The section of the MLA convention on JITs is important insofar as Baldus argues that it is a transfer of sovereignty if foreign law enforcement actors are allowed to observe, conduct covert investigations or exercise direct force (2001: 365). As this is exactly the kind of competences which are clarified in the framework decision, the institutionalisation is significant.

In order to assess the changes effected, the law implementing the convention can be drawn on. This is in line with the approach to approximation in the third pillar. It is not necessary to transpose a particular measure, but to ensure the compliance of national law with European requirements. The law introduces the transmission of data without prior authorisation by authorities. In the discussion on the bill, the increase of data protection mechanisms was the main change introduced compared to the draft bill. This highlights the central role the question of data protection and exchange plays in this field. Finally, the jurisdiction of the federal government is confirmed concerning international data transmission (art. 74 IRG), thus leading to increased power of the federal level.

In the assessment the focus lies on the effects of the part on joint investigation teams within the context of broader legal assistance rules. *Legislative control* was affected. The adjudication against foreign law enforcement officials can be cumbersome and difficult in cases when they commit an offence while being a member of a joint investigation team. This reduces the chance for affected persons to obtain compensation. The use of potentially sensitive data affects data protection. Courts and prosecutors can stop the transmission of data if the receiving state cannot guarantee an adequate level of data protection or if the individual has special reasons for the protection of its privacy (art 61a (3) new). Unless this is the case, the law ensures the data flow across borders. The German government has repeatedly stated that the member states of the EU qua membership and qua adherence to the CoE convention on the use of private data maintain a sufficient level of data protection to allow unobstructed data exchange. In 2005 the German government signed the Prüm convention outside the EU treaty framework. The convention aims to improve the cooperation among police forces in the EU by establishing an extensive data exchange programme which removes all political obstacles to data exchange of personal and non-personal information. At the latest in connection with the Prüm treaty, data protection in international cooperation structures is no longer in the hands of German authorities. While the ECJ has limited rights to adjudicate in the third pillar, it is competent to adjudicate matter arising from the MLA convention (Schomburg et al., 2006: 994).

Courts and prosecutors exercise the control about the exchange of data (*judicial control*). Their role is limited to extraordinary cases, however. As such, they cannot ensure the protection of individual liberties in the context of international cooperation. The reference to the Council of Europe convention on the automatic processing of personal data of 1981 ensures only a minimal level of data protection. It does not maintain the level of data protection currently provided in Germany and opens up the possibility to lower the threshold. In addition, the exchange of data with member states with different degrees of data protection leads to a possible transmission of data to parties, where its use is less restricted and thus allows the data to be used more widely than intended with the transmission (cf. Hosein, 2006). Even further go Lagodny et al. (2006: 1018), who argue that even illegally obtained evidence in the course of a joint operation is not per se excluded from being used in criminal proceedings (similarly Spencer, 2002a: 603 ff). While this is common practice, the fact that the evidence might have been obtained by an official of a foreign country acting under foreign (legal and normative-constitutional) rules, is problematic for democratic legitimacy of the exercise of the use of force.

Security tasks were not extended. The exchange of data is restricted to offences with a minimal maximal sentence of five years (art. 61a IRG). This brings it in line with the requirements for 'serious crime' and had been within the competence of the police already before.

The establishment of joint investigation teams does not change the scope of law enforcement as such, but extends the area in which such tasks can be exercised. This is a not insignificant expansion. By establishing a legal basis upon which police officers of a EU member state may broadly exercise the legitimate monopoly of force, which is traditionally restricted to the home member state, the sovereignty of the receiving member state is dented. The police have, under particular conditions, a much wider playing field. They are in a stronger position vis-à-vis criminals, because the latter can no longer hide abroad nor count on the ignorance of the law enforcement actors in the receiving state. These restrictions on the criminals in turn lead to an expansion of the tasks of law enforcement. Given that law enforcement is responsible to prosecute and prevent crime, law enforcement *must* become active abroad and fulfil the tasks assigned to it. This development does not constitute an explicit change in tasks, but their broadening.

For *security methods* the effect was more pronounced. The exchange of data without prior authorisation is a change in German data protection rules. Very important is the opportunity to use wiretapping (*Großer Lauschangriff*), which strongly affects personal liberty. Using those data internationally constitutes a significant extension of methods, especially as they can be applied by foreign law enforcement personnel. The principle is

taken up again in the treaty of Prüm which was signed in the same year and governs the exchange of data among signatories on DNA profiles, fingerprints, vehicle registrations and other personal and non-personal data (Balzaq et al., 2006 1).¹⁰⁶ This means that law enforcement data can be used for the fight against serious crime (depending on a positive list of crimes) if they are available in any data system of the law enforcement forces included in the cooperative structure. The aforementioned ability of law enforcement agents to use illegally obtained evidence in their work also extends the scope of instruments available to them.

Joint investigation teams extend the area of activity for the police to the whole EU in the fight against serious crime. The extension of law enforcement beyond the borders of the territorial state allows it to become active more widely. It does not lead to new methods as such, but the area in which the state may use force against individuals is significantly extended.

Overall, both dimensions have been affected significantly by the framework decision and the convention. While the liberty dimension has been affected negatively, the security dimension, in particular with regard to law enforcement methods was affected positively.

Empirically, police officers have complained that the German ministry of justice responsible for the establishment of the JITs is rather reluctant to push for the establishment of these teams.¹⁰⁷ The reasons for this reluctance are unclear. The remaining legal differences, which have been identified as the main obstacles to cooperation, should have been removed by the new law.

FD on combating terrorism

The transposition of the framework decision on combating terrorism significantly changed the criminal code. The act (BGBl I 65, 27.12.2003) introduced new statutory offences in the relevant provisions on the establishment of terrorist organisations and the participation therein (art. 129a). They are modelled after the minimum-maximum sentences model prevalent in European measures, even though German law traditionally does not follow such an approach. In terms of liberty and security, the effect of the new law is somewhat difficult to gauge. Certainly, it is undisputable that the criminalisation of any action leads to a restriction of substantive liberties. But the state has the duty to protect its citizens. The instruments of law enforcement have been embellished as they

¹⁰⁶ In the exchange rules, Balzaq et al. (2006) see a conflict with the principle of availability as proposed by the Commission as a principle of the future. The German presidency has announced that it aims to integrate the treaty of Prüm into the EU treaty framework through a Council decision. This would reduce the friction between different systems.

¹⁰⁷ Personal communication with police officers in the context of a conference in Trier, April 2007.

apply to a broader field of offences (Saurer, 2005: 281). In addition, and this applies to the broader field of anti-terrorism legislation, the situation of the individual has been affected by the state's increasing influence on the private sphere and the restriction of rights in anti-terror legislation (Haubrich, 2003; Zöller, 2004). Especially the criminalisation of membership and campaigning for terrorist organisations as a crime means that such offenders are liable for higher punishments than those who actually execute an act (Miebach and Schäfer, 2005: 503, 05). Some developments, however, also improve the situation for the individual.

While terrorism had been criminalised in Germany before the framework decision, the new model brings the definition in line with and exceeds a large number of UN measures (Peers, 2003: 232). The act was adopted only after the security packages of 2001 and 2002, which had the aim to improve the competences of the state in the fight against terrorism. The new competences, especially the criminalisation of foreign terrorist organisations in art 129b StGB, were only slightly expanded by the act transposing the framework decision terrorism. Analysing the general policy development, Bukow (2005) argues that the changes in the fight against terrorism were not legitimised with European cooperation arguments. An analysis of debates in parliament confirms this impression. Due to the events of September 11, 2001 to which most governments first responded nationally and only secondly through European structures, the references found are predominantly international.¹⁰⁸ Oliver Lepsius argues contrarily that even the contents of the terrorism packages of 2001 and 2002 were influenced strongly by EU development and, like other commentators found for the EU level (e.g. Occhipinti, 2003: 148ff), the repeated reference to the events of September 11 were used to legitimise these developments. The criminalisation of foreign terrorist organisations, for example, was not a reaction to it, but transposed the Joint Action of 1998 (98/733/JHA), which called for the criminalisation of criminal organisations in the EU irrespective of their place of establishment (cf. also Reichelt, 2004: 68). The German law goes beyond this requirement by incriminating the participation in terrorist organisations worldwide. Such scope has a stronger impact on the rights of individuals. Many national developments in the fight against terrorism are legitimised with reference to international developments. Such a justification supports the criticism of policy-making as reacting to external policy developments and not having a long term strategy (Weyembergh, 2004).

In the act transposing the framework decision on combating terrorism, the reference to the EU is clearer. While this is not surprising when we take into account the origin of the act, many contributions in the plenary debate emphasise the embeddedness of German

¹⁰⁸ E.g. BR-Protocol 770/2001, 653ff; BT-Protocol 14/209, 20748ff.

in European developments – also in retrospect.¹⁰⁹ MdB Schröder (SPD) said that the new definition of terrorism solves the problems the German legislator had in the discussion on the anti-terrorism packages in 2001 on what constituted terrorism. Thus the law transposing the framework decision might have effectuated significant changes, but the link to the framework decision might still be a purely strategic one, where actors look for legitimacy. The contributions in the debate highlight the general embeddedness of German legal developments in EU structures.

The Commission found several instances where the new act did not comply with the requirements of the framework decision. The restriction of article 129a StGB to organisations in its view did not fulfil the requirements of the framework decision (Commission, 2004a: 7). While members of the governing coalition acknowledged a restriction of the new law to organisations and explained it with the dogmatic of German law,¹¹⁰ they argued that the treatment of perpetrators under normal law would allow them to be punished adequately. The fact that the support of terrorist organisations could fall in different categories, and thus possibly carry a lighter maximum sentence than the foreseen eight years also qualified as non-compliance (Commission, 2004a: 21, 24). So while the German government explicitly introduced a new law to comply with the framework decision, in the view of the Commission the undertaking failed in several aspects.

Substantively, not only the participation in terrorist activities, but also the support of such activities (intentional or not¹¹¹) is criminalised. This is in line with the developments in criminal law to criminalise abiding and not only execution. Such a focus indicates the changing role of the code of criminal procedure in Germany (Kilchling, 2004: 756). Rather than addressing the social origins, this kind of prevention uses repressive methods to attain its goal and their adequacy has been questioned (Johnston and Shearing, 2003). But EU measures support this development.

Punishments for the support or advertising for a criminal organisation has been increased from five to ten years. The then justice minister Zypries acknowledged that this went beyond the requirements from the framework decision.¹¹² In a subsequent contribution, MdB Strässer even said that Germany was in the top position in Europe. While his reference point remained unclear, the fact that he replied to the accusation of

¹⁰⁹ BT-Protocol, 15/41, 2003, 3419ff.

¹¹⁰ BT-Protocol, 15/67, 2003, 5835.

¹¹¹ Depending on the degree of negligence the suspect shows.

¹¹² BT-Protocol, 15/67, 2003, 5820.

the opposition that the new law was too weak on crime implies an interpretation regarding the strength of law enforcement.

The assessment of the changes through the new act is complex and a good example of the ability to develop the two dimensions simultaneously. Concerning the procedural, i.e. *judicial control*, the ability of the individuals to defend their liberties against the state has been limited regarding their personal data. By extending the definition of terrorism, more activity can be monitored and the rights of law enforcement actors to collect, store and disseminate information are farther reaching and less transparent than in 'normal crime', due to the higher likeliness of national security being at risk. The introduction of a qualification of a terrorist act as required by the framework decision (art. 1 FD) on the one hand can subject an individual to the highly intrusive procedures of a terrorist trial, which includes, for example, limited contact to lawyers and solitary confinement. It also serves to guarantee that committing a crime, which is listed in article 129a(2) StGB does not invariably lead to a terrorist trial. The focus of intent, however, can be very difficult to proof in proceedings, as *mens rea* in common law.

The actor dimension of *legislative control* has not been affected. The dominant determinants for whether an act constitutes an act of terrorism remain with the courts and prosecutors, who base their assessment on information received by the police. The increasing reliance on intelligence in the fight against terrorism makes it more difficult for any control mechanism to ensure the correctness of data and their use. This is not a problem of the framework decision law, but a problem of intelligence-led policing in general.¹¹³ In the case of terrorist proceedings, the control which can be exercised by e.g. lawyers in proceedings is also restricted, because information can be withheld from the proceedings due to national security concerns.

Parliamentary debates did not address the question of a possible reduction of individual liberties in the fight against terrorism extensively. While the opposition parties wanted to extend the scope of anti-terrorism further - which would have addressed the problem of the applicability of anti-terrorism legislation to individuals - the focus of the debate was on the extension of law enforcement instruments against terrorists.

The security side was strongly affected by the new measure. Terrorism had been among the *tasks* of law enforcement before, but the new law extended the definition of terrorism to the establishment of a terrorist organisation. The criminalisation of promotion of terrorist organisations further expanded the tasks. The catalogue of crimes, which can be terrorist offences, has been significantly expanded in direct response to the framework

¹¹³ It also is a problem for politics in general, as an informed public debates about the adequacy of the reaction is not possible.

decisions (Miebach and Schäfer, 2005: 504-5). The extension is significant, even though the breadth of the measure has been restricted somewhat through the new qualifications. As many crimes which can qualify as terrorist are ill-defined, criticism has been raised that the terrorist offence is too broadly applicable. Miebach and Schäfer even argue that this vagueness of terms might violate the constitutional requirement of precision (Miebach and Schäfer, 2005: 505). Major general changes in the field, at the same time, were effectuated in previous legislation in 2002 and 2003 (cf. Lepsius, 2004; Haubrich, 2003; Bukow, 2005). Most obvious is the relocation of investigations to the before the crime has been committed. In fighting terrorism this is no unusual strategy and an expression of a more general tendency in criminal law. In doing so, crime is extended beyond the act and so are the tasks of law enforcement.

The act itself only concerns material law and thus did not regulate *security methods*. But expanding criminalisation has consequences for the use of data. It can be collected undercover and shared with different agencies and countries to a wider degree than previously possible. The framework decision law enabled law enforcement actors to put suspects of the new offence in jail (*Untersuchungshaft*). This restriction of the right of freedom is in line with the other regulations on terrorist offences and thus can be classified as a follow-up change and not a development inherent to the framework decision. The arsenal of the state in fighting foreign terrorist organisations was brought to the same level as the arsenal available against domestic terrorists. In order to investigate abiding and attempt, the police have more, mainly intelligence-based methods at their hands.

Overall, the act transposing the framework decision on combating terrorism has led to significant changes in the domestic framework on both dimensions. The direct relevance for some categories had consequences for the categories not directly affected by the transposition as well. Security and liberty were affected and the effects did not constitute a zero-sum relationship.

FD attacks on information systems

The framework decision on attacks against information systems was adopted in February 2005 and had to be transposed by March 2007. Its goal is to criminalise the unauthorised access to and modification of data and information systems. It builds on the eEurope Action Plan (Commission and Union, 2000) and a 2002 Council resolution on a common approach to network security (Council of the European Union, 2001), which combined economic and general infrastructure security concerns with regard to information systems and called on the member states to review their policies on that matter.

Germany transposed the framework decision by August 2007 in the law to change the criminal code.¹¹⁴ The law also ensured compliance of German law with the Council of Europe convention against computer crime of 2001, which also addresses the fight against serious computer crime. The new law explicitly transposes those two measures. All changes brought about through this new law were justified with reference to the EU measure. Given the relative under-regulation of Cybercrime in the national criminal law systems (Koops and Brenner, 2006), it is plausible that this justification was not used as a means to overcome public opposition to the new measures and attribute it to the EU. The language does not emphasise the inevitability of the new measure sufficiently to justify such an interpretation.

The law introduces new offences and changes their punishment. The unlawful access to computer systems now applies to the access to private data and carries a three-year sentence (art. 202a StGB) (cf. Ernst, 2007). The collection of data by scanning the electromagnetic radiation (e.g. TEMPEST) is added as a new crime (two years maximum – art. 202b StGB), as is the preparation of such a crime (art. 202c StGB). The latter criminalises the production and making available of so-called ‘hacking tools’ which were developed with criminal intent. This met severe criticism as it was feared that it could lead to the unintended criminalisation of e.g. network administrators, who might follow procedures which fall under the broad definitions of the new crime. In particular the nature of the consultation by parliament was severely criticised by practitioners and experts alike, which accused the parliament of using their expertise as a ‘fig leaf’ to obtain legitimacy, but not take up any of the sometimes substantial criticism.¹¹⁵ More generally, the law has been criticised as being too broadly worded, which makes its usefulness and its applicability difficult to assess at the current stage.

The fact that the law is very recent means that the assessment of its effect can only be preliminary. Concerning the *liberty* categories, the expansion of the scope of criminal offence of unauthorised access to a computer system has been expanded to the access to private data, thus potentially opening a broad space. This has been criticised by the upper house (*Bundesrat*) as potentially criminalising too broad an activity, an accusation which was rejected by the government.¹¹⁶ The new law holds some improvements for *judicial control*, as the maximum penalty for the offence has been reduced to three years in the light of the broader applicability of the offence. As the likelihood of being caught in the net of the new offence is higher, the maximum sentences have been lowered for the

¹¹⁴ BGBl I 38, 1786 10.08.2007.

¹¹⁵ Süddeutsche Zeitung . 10.2007

¹¹⁶ BT-Drs. 16/3656, 30.11.2006.

normal cases. Only in serious cases the old penalty of five years, or six months to ten years if committed in the framework of a criminal organisation, has been maintained.

Despite the potentially significant impact on the development of IT industry in Germany through an ill-worded law, there was very little debate on the law in the lower house (*Bundestag*), even though the public as well as the upper house (*Bundesrat*) had been adamant in their criticism of the breadth of the new offences. This aspect of *legislative control* has thus not been very strong. The government did not change its proposal even in the light of significant opposition.

On the other dimension, *security tasks* through new offences and a broadening of the original offence were clearly expended, even though the upper house, industry and legal experts were highly critical of the scope of the new act.

Security methods, on the other hand, were not directly affected. The recent debate about the use of a ‘federal Trojan horse’ developed in parallel, but did not affect the debate about the law against the attacks on information systems. The overall effects on the two dimension are difficult to assess, as the law is very young and there are no experiences with it. But the framework decision led to changes in the German regulatory framework.

9.1.3. Protecting borders and managing migration

FD trafficking in human beings

The requirements of the framework decision combating trafficking in human beings were transposed in Germany on 18.02.2005 (37. StRÄG), half a year after the foreseen date of implementation (art. 10 FD). According to the Commission, Germany fully complies with the requirements of the framework decision.

The act introduced new articles in the criminal code, criminalising human trafficking and sexual exploitation of victims of trafficking (arts 232-233b StGB). The crimes were moved from the section protecting sexual self-determination to infringements against individual freedom. This increases the qualitative standing of the offences and is a logical reaction to the increasing recognition of sexual violence as an offence (cf. Busch, 2005). Criticism met the criminalisation of instigating, abiding and attempt of human trafficking and sexual exploitation. The mere attempt does not constitute an offence under German legal doctrine if it is aborted before an actual offence takes place. These acts are considered as crimes in the framework decision, whereas the dogmatic of German criminal law does not consider these actions as fully fledged crimes. The criminalisation is thus a further indication of pre-emptive developments in criminal law, for which this framework decision is a good example. Increasingly not only the deed is punished but the preparation as well. This criminalises a range of actions which might not lead to a

traditionally defined offence. This constitutes a fundamental change in criminal law (Kilchling, 2004: 756) and strongly limits individual liberties.¹¹⁷

The sentences were raised for trafficking crimes and now range from six months to ten years. While this goes beyond the necessary minimum maximum sentence of eight years in the framework decision, they are in line with the previous range of sentences. The increase in sentences has been regarded as a direct reaction to the framework decision (Ziegler, 2006: 97).

The assessment of the two dimensions shows that in the case of human trafficking, the instruments available to law enforcement to investigate and prosecute perpetrators and the protection of victims of trafficking have been improved (cf. Ziegler, 2006).

For *judicial control*, the effects concern primarily the victim and not the perpetrator. While the focus of the framework decision is the criminalisation of human trafficking offences, the measure also requires the member state to effectively protect victims and assist them in proceedings (art 7 FD). The German law transposes this requirement by allowing the use of video and audio recording of hearings and by granting the right to victims to act as a joint plaintiff in criminal and civil proceedings. This gives the individual more rights, especially with regard to compensation. Other than that the control measures provided are the normal rights enshrined in procedural law.

Contrary to the catalogue of offences, which fall under the new definition of terrorism, the catalogue of crimes, which constitute human trafficking or sexual exploitation, is more detailed (art. 1 no 10 of the 37. StRÄG). The criminalisation of attempt, however, remains critical as the balancing whether an action constitutes an attempt is not only difficult to establish in court, but also difficult to determine for the individual.

Legislative control, i.e. the actors dimension, is executed mostly by the courts and the prosecutors. The right of the victim to partake in the proceedings as a joint plaintiff adds lawyers to the list of people, who help to defend the right of the individual victims. The prosecutors can refrain from pursuing a crime committed by the victim when this is deemed adequate given the context of the victim (art 154c (2)). This is a derogation from the principle of legality, according to which every crime that comes to the attention of the police must be prosecuted. This exemption from the principle of legality is also in line with the increased protection of the victim in German law. In transposing the requirements from the EU level, the applicability of more intrusive measures requires an

¹¹⁷ Morally, the criminalisation of instigation, abiding and attempt in the context of human trafficking is easy to understand and follow, because the eventual crime would violate the core of human dignity, namely personal freedom, self-determination and privacy.

authorisation by a judge and is temporally restricted. Beyond that the framework decision neither provides nor restricts traditional legal guarantees.

The *tasks* of law enforcement were broadened, as the basis for human trafficking in the criminal code was moved to a more important part of the criminal code. While sexual self-determination is a part of individual freedom, the fact that the new law refers to article 2 Basic Law by locating human trafficking offences directly in the section in individual freedom, gives it another quality. This is particularly significant as the protection of individual freedom is a task for the state that is protected by the Basic Law's 'eternity guarantee' of art 79 BL (*Everigkeitssgarantie*). While trafficking had been a crime before, the severity of the foreseen punishments has been increased. The aforementioned extension of criminalisation to the attempts, to the phase before a crime is committed, also extends the tasks of law enforcement actors.

To a similar degree like tasks, the act affects the *methods* of law enforcement. Most importantly is the right to keep private rooms of suspects under surveillance (*großer Lauschangriff*). These changes were not part of the legal text, but the consequence of the upvaluing of human trafficking and the establishment of a particular level of offences. The data thus obtained can be exchanged, as trafficking is one of those crimes, which allow for the exchange of data.

FD unauthorised entry

According to the German transmission to the Commission, the framework decision was implemented in Germany without legal changes (Commission, 2006c). There was no effect on the two dimensions. German law already punished smuggling and unauthorised entry (Ziegler, 2006). The most striking thing is the criminalisation of abiding, attempt and support of unauthorised entry. This relocates the point of crime before an actual act has been executed. Concerning illegal entry, this had been introduced in German law through the 1994 OC law, which introduced art 92a in the foreigners' law (AuslG). The framework decision, thus, did not change anything directly. German criminal law already provided for the crimes and the punishments foreseen in the framework decision and even exceeded them (Neske et al., 2004: 20-22). Neither legislative control, nor judicial control have been directly affected. On the security side, no new security tasks were introduced in Germany. The rules on illegal entry had been tightened in the aftermath of the highly controversial reform of the asylum system in 1993. The same can be said for security methods, which were not affected by the framework decision.

9.1.4. Discussion of the empirical results

Before analysing the direct and indirect effects of the transposition on the German framework, it is worth looking at the effect of the transposed measures on the police. In

difference to the EU measures, the majority of the framework decisions, transposed in Germany directly addresses the police (see Table 11).

Among the transposed framework decisions, the police relevance is even stronger than among all framework decisions. This is due to the late appearance of mutual recognition measures, which have been adopted only since 2005 and primarily address judicial authorities. Their transposition is still pending and partially not yet due.¹¹⁸

Table 11 Direct police reference in texts of framework decisions transposed in Germany

	In Preamble	Yes In text	Total yes	No
Procedural	1	2	2 ¹¹⁹	1 ¹²⁰
Substantive	4	1	4	4
Total	5	3	6	5

Once again the framework decision on the European Arrest warrant and on the protection of victims in criminal proceedings are excluded, as they do not pertain to the pre-trial phase. While each measure is highly important for the policy field and the EAW has been hailed as a significant step in the development of the AFSJ – which it undoubtedly is, the police is only affected as an executing agent for a warrant, which has been issued by judge. The protection of victims also concerns the trial phase only. The text mentions the police only regarding the education of policemen concerning the needs of victims in proceedings. Once again a majority of pre-trial measures refer to the police (see Table 12).

¹¹⁸ The ministry of justice has published press releases during the negotiation processes on the framework decision on the mutual recognition of financial penalties and minimum standards in illicit drug trafficking, claiming that the current law fully complies with the requirements (press releases of 24.2.2005 and 27.11.2003, available at www.bmj.bund.de (accessed 28.11.2007)).

¹¹⁹ FD Victims; FD JIT.

¹²⁰ FD EAW.

Table 12 Direct police reference in transposed framework decisions pertaining to the pre-trial phase in Germany

	Yes In Preamble	In text	Total yes	No
Procedural	1	1	1¹²¹	0
Substantive	4	1	4¹²²	4 ¹²³
Total	5	2	5	4

A majority of the framework decisions had an effect on the national level on the two dimensions. Only the framework decision on unauthorised entry and counterfeiting of the Euro did not lead to any changes as Table 13 shows, which builds on the previous discussion. More specifically, most framework decisions positively affected the categories for the security dimension. This is not particularly surprising, as the EU cooperation arrangement aims at improving cooperation. The liberty dimension, however, has been predominantly negatively affected through the EU measures. Only the framework decision against attacks against information systems has had positive effects for those accused of a crime, while the framework decision on trafficking improved the situation for the victims.

Table 13 Absolute effect of the transposition of framework decisions on German policies

Framework Decision on	Changes effectuated independently of the dimension			Effects in issue areas on both dimensions
	Yes	Limited	No	
Fraud		X		Limited
Money Laundering		X		
Euro			X	
Corruption		X		Limited to strong
Joint Investigation Teams	X			
Terrorism	X			

¹²¹ FD JIT.

¹²² FD Fraud; FD Attacks on information systems; FD Trafficking; FD Unauthorised entry.

¹²³ FD Money laundering; FD Counterfeiting; FD Corruption; FD Terrorism.

Information Systems		X	
Trafficking	X		
Unauthorised Entry		X	Variable

This result is in line with the insight gained by studies about the characteristics of the EU system (e.g. Mitsilegas et al., 2003), which found a security orientation of the policy in the AFSJ. On the relationship between the two levels, Weyembergh challenges the idea of soft approximation through framework decisions as opposed to the direct coercive approach of traditional harmonisation. Framework decisions, in her analysis, have a strong effect on national systems of criminal law. They even lead to changes where national provision have been in place and where EC measures foresaw criminalisation in national law without being able to prescribe it. They go in scope beyond the narrow wording of the treaty (Weyembergh, 2005: 1569).

Evidence from the German case on first sight does not support this assessment. The extend of changes effectuated through framework decisions in the German system is limited. The transposition of framework decisions did not induce substantial changes over the whole range of the criminal justice system of Germany (cf. Hecker, 2005: 366-438). No framework decision was the basis for a new law. As Reichelt (2004: 71) illustrates on examples, they only amended or reformed parts of laws. This makes them rather weak instruments for change. From a legal point of view the changes effectuated were much less significant than expected from the broad range of issues concerned and the high political role of the third pillar in recent years. A significant effect can be observed on the criminalisation of terrorism. The measures were enabled directly by the events of September 11, 2001 and thus need to be treated as with care. Aside from these two measures the observed effects are low. So in Germany, the characterisation of framework decisions as instruments of soft approximation, which preserve the characteristics of the national system, seems to be an adequate characterisation.

The observed changes can be classified, though. For most issues the penalties have been increased. This is not a new phenomenon and was certainly not initiated by the EU (Weyembergh, 2004: 344; Johnston and Shearing, 2003). But it supports the hypothesis by, for example, Wolfgang Wagner (2003) that the security focus of the EU is transposed nationally. Terrorism is the most prominent example, where through the European measures both the basis and the extent of the crime were affected. But arguably, the broader European and international context were more influential on the shape of the German response to terrorism (Bukow, 2005). In other cases, the effects are more subtle. So the minimal sentence was reduced, but the maximum sentence was brought in line with the tougher European requirements for trafficking in human beings. Whether these developments actually result in more severe judgements remains to be seen, as most

reforms have only recently been introduced and no reliable data is available yet. As procedural and hedging provisions in criminal law, such as extenuating circumstances, are not affected by the new measures, scope for interpretation by the courts remains. Thus the important role judges play in this policy field during the trial phase is enhanced by these developments concerning the final effects of these policy changes. The likeliness of more severe judgements is higher, when the opportunity is provided. This is not an inescapable result, but a tendency which is more likely to realise than previously (cf. Heinz, 2008: 41; Dünkel, 2002).

An element of all framework decisions is the focus on legal persons. They cannot be held responsible in some member states, but in Germany the liability of and the possibility of (non-criminal) sanctions against legal persons are ensured in general rules laid down by Articles 30 and 130 of the Infringement Act (*Ordnungswidrigkeiten-Gesetz*). The types of punishments certainly vary. While punishments for persons can consist of deprivation of liberty, fines or deprivation of assets, only the latter two can be applied to judicial persons. So in order to hold judicial persons accountable, regulations had to include all types of punishments (cf. Commission, 2006a).

These effects, however, do not apply across the board. Their individual impact varies across the different measures. Overall the transposed Framework decisions can be split into three groups. The framework decision on joint investigation teams had virtually no effects, but through the MLA convention exercised strong effects on operational cooperation. So only through a more cumbersome measures were the effects of the framework decision eventually realised. On first sight, the effects of the framework decision on human trafficking were not strong, but upon closer scrutiny, the relocation of the offences to another section of the criminal code upvalued the offences and thus provided better protection mechanisms for victims. The framework decision on the definition of terrorism was transposed and effected significant changes on criminalisation and taps the full potential of German criminal law.

A second group of Framework decisions had a limited effect on the policy field. These include the framework decision on the counterfeiting of the Euro and the fraudulent use of non-cash payments. While especially the last framework decision effectuated significant changes for the victims, the effect on the police remains marginal.

Finally no changes came about through those Framework decisions which either were not transposed (JIT) or where the German framework already fulfilled all the requirement arising from the European measures. This was the case for the framework decision on unauthorised entry and money laundering.

When trying to systematically represent the effects of the transposed Framework decisions in Germany, the following results come up:

Table 14 Direct effect on the police through transposition

Effect	Strong	Medium	No
Procedural	1 ¹²⁴	0	0
Substantive	2	2	2
Total	3	2	2

9.1.5. Why such limited influence?

The extensive codification of German criminal laws is obviously a reason for the limited influence of framework decisions in Germany (Heinz, 2004). Especially with regard to offences, such as counterfeiting and terrorism, domestic experience led to a codification in domestic law prior to the adoption of EU measures. Such a previous codification certainly does not preclude change through EU measures. But the fact that (1) new categories of crimes did not need to be introduced and (2) approximation in the third pillar remains formally limited despite its recent dynamic (Ligeti, 2005) and (3) the form of European integration through framework decisions, which do not per se require change, but are geared to outcomes, reduces the pressure to introduce new laws.

EU rules needs to be seen in the context of general developments in national criminal law. Different authors have observed a shift in values underlying criminal justice policy in recent years towards repression and observation rather than social reintegration (Johnston and Shearing, 2003; Reemtsma, 2005; Nash, 2006). This domestic development has not been steered in another direction but has been sustained by EU demands. This would help to explain the limited amount of significant changes induced by the framework decisions adopted and transposed until now. It could also account for the often limited debate about changes which can be related back to the EU level in parliament and the relatively low awareness of the public about developments in the third pillar.

Furthermore, German law enforcement actors actively use the cooperation mechanisms, which were put in place both Europe-wide and bi/multilaterally. The German government has been very active in arguing in favour of a further development of the

¹²⁴ The measure includes the MLA convention, which had significant effects on the competences of the police. The framework decision JIT was – as presented above – not transposed and its contents only came into force through the MLA convention. So I included it in the table.

EU level structures in the fight against organised crime. The success of this endeavour is obvious in the absolute and qualitative increase in decision-making in the third pillar (Monar, 2001b). The institutional decision-making processes in third pillar areas are predominantly intergovernmental. A consequence thereof is the strong influence of national governments on the content of the decisions taken in this field. The little amount of changes directly caused by EU measures in the German law enforcement system could also be linked back to the success German uploading has at the EU level (Howell, 2004a).

These unexpected results of the analysis of the direct effects of EU framework decisions point to the importance of an analysis of the indirect effects.

9.2. *Indirect effects of framework decisions*

As the direct effects of the framework decisions on the German law enforcement framework are limited, the following section looks at indirect effects of the EU on the regulatory framework. In doing so, three trajectories of indirect effects will be followed: the *extension of tasks* through ill defined legal concepts, the *emancipation of police from the judiciary* and the legitimization of methods through *judicialisation*. They are not addressed individually for each framework decision, but in the context of empirical results obtained from the analysis of the framework decision implementation above.

9.2.1. Extension of tasks

A general problem of much law in the fight against organised crime and terrorism is the ill-definition of legal concepts. Most prominent for the analysis is the lack of a legal concept of organised crime (Pütter, 1998; Lampe, 2000). It has never been legally defined in Germany, even though it gained much attention in the 1990s, as Kilchling shows in an analysis of the most comprehensive legal data base 'juris' (2004: 719). Especially when addressing the approximation of material law, this is problematic (cf. Zöller, 2004: 478). In Germany the definition of terrorism also lacks clarity (Miebach and Schäfer, 2005: 505), where it has a particularly strong effect, because the applicability of the new norm is extensive and does not fit well into the dogmatic structure of the German penal system. For example, it is unclear when an action constitutes the punishable 'support of a terrorist organisation' (par 129a StGB). The complexity of the new rule increases the definitional problems (Miebach and Schäfer, 2005: 505). Europe-wide the use of catalogue crimes leads to similar problems (cf. Weyembergh, 2004: 280). One of the most prominent examples is that abortion is murder in the Irish Republic, thus making it an extraditable crime, whereas in the Netherlands abortion is legal. Framework decisions were meant to maintain this diversity while at the same time providing a level playing field for law enforcement. A clear definition of what constitutes a crime is a necessary

precondition to avoid the problems mentioned with regard to the protection of civil liberties (Alegre and Leaf, 2004). At the same time, the ill-definition allows the member states to fulfil their obligations more easily without having to change their domestic systems extensively. This might explain why Hecker (2005) maintains that most framework decisions did not require changes in German structures, whereas the Commission has found numerous insufficiencies in the German transpositions. The ill-definition of legal concepts in the European measures can help to explain the limited influence framework decisions have on the national regulatory framework.

9.2.2. Legitimation of methods and data protection

Framework decisions have an effect on traditional control mechanisms when governance areas interact. This concerns primarily the question of data protection and privacy. The establishment of extensive data exchange mechanisms at the EU level means that changes in the criminal law at the national level have a different effect than they would have without the European structure in the background. Small changes can have large effects. From merely looking at the formal changes occurring in the policy field, the analysis misses the area, where most changes have occurred (European Union Committee, 2005: 11). Under Trevi the member states of the EC agreed to exchange data among their police and custom authorities in the fight against serious crime (Bunyan, 1997: 14). After Maastricht the data exchange regime in the EU for the first time had a legal basis and quickly developed into an impressive structure.

These developments have led to a large debate on the adequacy of data protection mechanisms and the amount of data which can be exchanged (e.g. Apap and Carrera, 2003; Bull, 1999). Most measures in the fight against serious and organised crime, as well as most measures concerning the regulations of the work of the police, and particularly extratreaty (Schengen, Prüm) and political measures (action plans), build extensively on data and information exchange across borders. The European structures of law enforcement are primarily concerned with the exchange of information among law enforcement agencies in and beyond Europe. While the Schengen framework and the treaty of Prüm deal with operational cooperation as well, the focus remains on the regulation and extension of data exchange.

The subject matter for which framework decisions were adopted concerns almost exclusively those areas, which are explicitly mentioned in the Europol convention (art 2 and annex 2). Catalogues of crimes encompass mostly different types of organised and serious crime. Both the extent of personal and non-personal data available to the police and the methods available for their collection have become much more invasive and require a detailed legal base (Kugelman, 2006: 183). This problem is particularly pertinent in the recent German debate on undercover searches by police on private computers.

The approximation of material and procedural laws in these areas means that in combination with a wider availability of law enforcement information, obstacles to use these information in proceedings are reduced.

9.2.3. Emancipation from the judiciary

Data exchange not only affects individual liberties through its ubiquity. It is also a precondition for more extensive *preventive work* of law enforcement actors. Criminal law is no longer restricted to react to crimes. Rather instigation, abiding and attempt are criminalised. This opens up an area for law enforcement actors previously beyond their competence. While the framework decisions address mostly material law issues (Hecker, 2005: 366ff), in Germany up to now only on the definition of terrorism led to significant changes in material law (Miebach and Schäfer, 2005). These measures had a direct impact on the work of law enforcement actors. All other issues had been within their competence before and underwent changes within the previously defined scope. In other words, the scope of law enforcement remained broadly the same under the influence of framework decisions, whereas the depth changed. These developments provide ‘opening clauses’ (*Öffnungsklauseln*), which expand the independence of law enforcement actors from judicial control (Aden, 1998: 316).

This change in depth also challenges the dogmatic structure of German criminal law. As demonstrated with the definition of terrorism in article 129b StGB, the design of the legal system with regard to procedural and material law can lead to problems in the overall coherence of the legal system and thus entail problems in the provision of justice and the effectiveness of law enforcement. The obligation to transpose EU requirements can conflict with historically developed structures, which tend to be cumbersome to adapt.

The increasing focus on preventive policing and the reliance on intelligence exchange is not a development which was conceived in the EU framework (see the literature on policing of risk, such as Ericson and Haggerty, 1997; Glaeßner, 2003: 78). Already in the 1970s police practitioners called for the use of information technology in the fight against criminals to counteract the technological advantage of criminals (Herold, 1979). In the 1980s the use of electronic data exchanges was also supported by police practitioners (Ermisch, 1981). The use of information by the police is by no means new. Police have always used their competences to collect information and employ the thus generated knowledge in the fight against crime. The advance in technological development in recent decades has increased the focus on this aspect of police work. But also the developments of new crimes, such as financial crimes and Cybercrime, and the growing importance of information infrastructures for the functioning of societies have forced the police to rely on new methods to fight crime. In the last twenty years, the use

of surveillance has spread in Germany, in line with an increasing extension of law enforcement powers (Roggan, 2000; Anonymous, 2007). This shows that not reaction, but prevention and pre-emption are considered the appropriate response to 'new risks'. The measures emanating from the EU function as mechanisms, which enforce and sustain this development (see also Kilchling, 2004).

The role of the police has changed from predominantly reactive to pre-emptive strategies. The EU has played the role of a facilitator and promoter of this development. Due to its limited competence in operational matters, the EU aims to reconfigure the playing field of law enforcement in general. After the initial setup of police structures at the EU level, it now focuses on improving the ability of the police to engage in the fight of politically relevant risks by changing the legal framework. The police was directly concerned through the Schengen convention, the Europol convention, the treaty of Prüm, and bi- and multilateral cooperation treaties (Aden, 2001). These measures primarily focus on data collection and exchange mechanisms and continuously extend the interconnection of different data sources (PNR data, DNA data, Eurodac for law enforcement, Art 10 act, CCTV). In addition, operational cooperation of police and law enforcement was part of these treaties. In that area they focussed on measures that are employed before an offence was committed, such as surveillance and controlled deliveries. Consequently, the formal dominance of the judiciary in Germany has been strongly affected. Heinz (2004) has argued that the police is dominant in prosecuting petty crimes. The increasing information advantage and the ability to use data, even in cases where its obtaining is not fully legally covered, strengthens the position of the police also in area of serious crimes. The judiciary remains to have the final say, but the police are much freer in their activity than before.

9.2.4. Conventions and the development of police policy

The following section addressees the influence of other measures on the German system. Especially with regard to the conventions the focus on domestic changes means that their form and content as such only peripherally play a role in the analysis. Rather than discussing the possible problematic consequences of the form of the convention, the question is what changes can actually be seen within the national regulatory framework through conventions.

The EU member states adopted twelve conventions related to third pillar issues since 1990. The Schengen convention and the treaty of Prüm were adopted outside the EU treaty framework and the Dublin convention was adopted under the SEA framework. All other conventions are third pillar issues. Particularly the Europol convention and the Schengen Agreement and the Schengen Implementation Convention have had significant impacts on the formal structure of EU policy (Occhipinti, 2003; Lobkowicz, 2002).

Dublin I and II have had a significant impact on the use of technology for law enforcement purposes, as had the convention on the use of information technology for customs purposes (Aus, 2003).¹²⁵

The most important conventions for police cooperation are the Europol convention, the 1990 Convention implementing the Schengen agreement and the 2000 MLA convention (see Table 15). The Europol convention was the major project in the establishment of JHA policy on the European level under the treaty of Maastricht and the most important measure for the activity of the police in the last quarter of a century. Its adoption in 1995 and eventual coming into force in 1998 as well as its numerous protocols, notably the protocol on immunities of Europol staff, were culmination points of an intensive debate in academia and politics (Occhipinti, 2003). The establishment of a European policing structure was a significant divergence from established models of criminal justice cooperation.¹²⁶ Europol is located in Den Haag and has grown in personnel from 53 to 566 since 1994 (Europol, 2007: 25). It mainly works as an information hub to make police work more efficient (art. 3 Europol Convention) by possessing and collating public and confidential law enforcement information from the member states and public sources. Its two main instruments are 'analytical work files' (AFW) on particular types of crimes, such as organised drug trafficking and human trafficking, and an index system (art. 11 Europol Convention).¹²⁷ Of these currently 18 exist, and the AWF on islamist terrorism, for example, encompasses 850,000 links among information, 42,000 persons and data on 6,600 crimes (Gridling, 2007). Europol is purely a police structure. The national prosecutors' offices do not participate in Europol (Storbeck, 1999: 25). Judicial cooperation structures are since 2001 located in Eurojust and the EJC. At the same time can prosecuting law enforcement authorities beyond the police obtain and use the data within the Europol exchange structure as well, depending on national rules. In Germany the police can make use of this possibility in their function as *Hilfsbeamte der Staatsanwaltschaft* (art. 152 GVG) and thus contribute to criminal procedure (Juy-Birmann et al., 2002; Storbeck, 1999: 30). There is the restricted possibility of the intelligence services and the police to work together, even though that issue is very debated.

¹²⁵ They did have an impact on the cooperative structures for law enforcement. But their analysis goes beyond the scope of this project as their particular impact on the form and extent of data exchange, collection and storage requires a different focus than the present study. For a focus on the political effects of technological structures see Aus (2006), for an appreciation for the general developments Occhipinti (2003) and for recent developments in the data exchange regime Vermeulen et al. (Vermeulen et al., 2005).

¹²⁶ The fact that subsequent institutions, which have arguably a similar potential for changing the legal order (Eurojust), were established on the basis of more flexible and 'normal' instruments, such as decisions, also highlights the need of governments to get used to growing cooperation in an area previously in the exclusive realm of the nation state.

¹²⁷ For details see e.g. Wagner (2004).

Currently the possibility to use the structures of Europol also exists in the form of an agreement between Europol and Eurojust.¹²⁸

The Schengen convention was a laboratory outside the treaty framework (Monar, 2001b). In the form attached to the TEU it comprises almost 500 pages.¹²⁹ All decisions by the executive board are considered as part of the *acquis communautaire* as the ministers decided after a long negotiations in 1999.¹³⁰ It presents the most extensive legally binding set of rules for police cooperation. The treaty of Prüm, which was adopted in July 2005 can be regarded as a similar endeavour to the Schengen convention. But the repercussions of including wide ranging cooperative structures, which go much further than existing agreements and may undermine existing initiatives, have significant problems from a democratic perspective (cf. Kietz and Maurer, 2007).

Table 15 EU Conventions adopted in areas covered by the third pillar since 1985 (excluding civil matters, including Schengen) (as of 31.12.2007)

EU conventions	In force	Ratified D	Ratified UK
1990 Convention implementing the Schengen Agreement on the gradual abolition of checks at the common borders of 14 June 1985	01.03.1995	13.10.1993	-
1990 Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities – Dublin Convention	01.09.1997	21.12.1994	01.07.1992
1995 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union		11.12.1998	20.12.2001
1995 Convention on the use of information technology for customs purposes	25.12.2005	30.04.2004	18.06.1997
1995 Convention on the Protection of the European Communities' financial interests	07.10.2002	24.11.1998	11.10.1999
1995/8 Europol convention	01.10.1998	03.02.1998	10.12.1996
1996 Convention drawn up on the basis of Article K.3 of the Treaty on European Union relating to Extradition between the Member States of the European Union		11.12.1998	20.12.2001
1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union	28.09.2005	08.10.2003	11.10.1999

¹²⁸ <http://www.europol.europa.eu/legal/agreements/Agreements/17374.pdf> (accessed 27.10.2007).

¹²⁹ OJ L 239. 22.09.2000, 1.

¹³⁰ OJ L 176 of 10.07.1999, 1.

1997 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on mutual assistance and cooperation between customs administrations		12.11.2002	
1998 Convention on Driving Disqualifications			30.10.2003
2000 Convention, established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union	21.12.2005 02.02.2006	04.11.2005 (in force 02.02.2006)	22.09.2005 (in force 21.12.2005)

Germany is a contracting party to all twelve conventions.¹³¹ They can only enter into force once all the contracting parties have ratified the instrument in accordance with their constitutional requirements. As a result only five conventions have entered fully in force. For Germany this picture looks slightly better as some conventions have clauses allowing them to enter into force among those countries which have ratified it. Thus Germany has ratified eleven of the twelve conventions and 7 have come into force (eight if the agreement is counted between Germany, the Netherlands and Latvia to apply the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences among them – see Table 16).¹³²

Table 16 Conventions and their ratification in the EU and Germany (as of 11.11.2007)

	Signature	Ratification	In Force
EU	11	Does not apply	4
Germany	11	10	6 (7 – as the convention on the enforcement of foreign criminal sentences of 1991 applies between NL, LV and D)

A similar picture emerges when we look at the protocols to the conventions. Five of these protocols pertain to the Europol convention. The most contentious protocol concerns the privileges and immunities of Europol officials. The issue caused a lot of debate in Germany, mainly for historical reasons. Under Nazi rule, the police was not accountable and giving Europol officers immunity went against fundamental principles

¹³¹ The UK did not participate in the Convention between the Member States of the European Communities on the Enforcement of Foreign Criminal Sentences of 1991.

¹³² For the UK, the record is similar with ten ratified conventions out of eleven and seven in force (see also Chapter 10).

of post-war German tradition. Other protocols extend the remit of Europol to participate in joint investigation teams, to money laundering and all the crimes mentioned in the convention. In 2007 the protocols on money laundering and joint investigation teams came into force. The period of up to six and a half years of ratifications highlights the cumbersomeness the convention as an instrument in a dynamic policy area. This helps to understand the idea to change the legal basis for Europol to a Council decision which would not only improve the flexibility of the Council to equip the institution with necessary tasks and competences without having to go through lengthy ratification procedures, but also bring it in line with ‘younger’ institutions, such as Eurojust and Frontex, which have been established by Council decisions.

The interplay between framework decisions and conventions shows interesting characteristics. The 1995 convention on extradition has become redundant through the framework decision on the European arrest warrant. The convention on mutual legal assistance repeals the framework decision on joint investigation teams once it has been ratified by all member states. Here the high requirements for the convention to come into force have led the Council to revert to a quicker and more flexible framework decision, which deals with the same issues as the convention, against the background of very slow ratification processes.

Table 17 Protocols to the conventions and their ratification in the EU and Germany (as of 11.11.2007)

	Ratification	In Force
EU	12 (signature)	10
Germany	12	10

9.2.5. The indirect effect of conventions

The effects of the MLA convention have already been discussed in the context of the framework decision on JITs. So in the following the focus is on the effects of the Europol and Schengen convention on the regulatory framework in Germany. They do not have an equivalent measure among the framework decisions. As laid out above, the three most important areas where the conventions are likely to have an effect are the

extension of tasks, the change in methods and the emancipation of the police from the judiciary.¹³³

Conventions do not directly effectuate changes in the domestic legal system, because they are merely ratified and remain standing as texts in themselves. The Europol law, for example, only clarified the necessary elements of the Europol convention, which remains to be the relevant legal text. But once the Europol convention was ratified, it became part of the German legal system.¹³⁴

Despite the few formal changes, the effect of the EU conventions must not be underestimated. Since their ratification the amount of international cooperation among police forces has increased.¹³⁵ More importantly for the legal structure, the formal convention led to an increase in the secondary or tertiary legislation, which are decided without parliamentary involvement often remain classified (Aden, 1998: 308). They clarify the often lofty formulations in the conventions. The treatment of data, for example, has been regulated by police decree (*Polizeiverordnung*). These rules are decided without the involvement of the public and are sometimes kept classified. In addition to the problems such secret decision making poses for democracy, classified documents present an obstacle to empirical research on the topic. But leaving apart methodological problems, there are observable effects of conventions on the national regulatory framework.

On policy tasks

The tasks of law enforcement are differently affected by the two conventions. The Europol convention had effects on substantive law enforcement issues by establishing an organisational structure at the EU level. Europol, in general, can only become active when international crime or organised crimes are concerned. Even though it can now ask member states' law enforcement agencies to initiate proceedings, the final decision remains with the national police. Practitioners warned Europol to use its new powers carefully as not to put off national police from cooperating.¹³⁶ The convention,

¹³³ The empirical use of these structures is not assessed.

¹³⁴ The fact that only five conventions have entered into force means that despite the fact that Germany has ratified all twelve conventions, their effect on the regulatory framework is only hypothetical. They do not entail real effects, despite the constitutional norms on the primacy of EU law. In deviation from the argumentation in *Pupino* there is no obligation for the courts in the member states to interpret law in conformity to the rules emanating from the conventions, even in cases when they are not in force.

¹³⁵ See reports available at http://www.bmi.bund.de/cln_012/nn_163598/Internet/Content/Themen/Polizei/DatenundFakten/Die_Schengener_Uebereinkommen_Id_94636_de.html (accessed 08.12.2007).

¹³⁶ Presentations and personal communication at an ERA-conference in Trier, April 2007 on 'The Future of Europol'.

furthermore, requires only the criminalisation of a list of serious crimes, where Europol can become active. These had been punishable in all member states, even though the precise content of these measures continues to differ. The legal effects through the Europol convention did not change pre-existing structures, but codified in law existing informal or semi-legalised international cooperation agreements among police forces in the EU (Knelangen, 2001). The conventions established a formal basis for the police upon which they could act. They reduced the legal grey area in which the police had operated under the TREVI regime (Lobkowicz, 2002). This development restricted the area in which the police was formally entitled to work. But as there had not been any regulation, the ostensible restriction of the activity of the police was in fact an extension into an area, which had previously been virtually unregulated (Aden, 1998). The legalisation of international cooperation was, thus, an enabling mechanism for the police.

Schengen did not establish an organisational structure, but is the most potent institutional superstructure for policing. It has significant indirect effects. The abolition of border controls among the signatories, led to compensatory changes in the *Länder* laws. This included the regulation of registration, changed *Länder* police competences in averting danger (Mokros, 1996: 937), designated criminal and intelligence agencies as the competent authorities (art. 108 SIA) and influenced the practice of data protection in Germany through the introduction of the SIS, as some competences referred to in the Schengen convention did not have their equivalent in German law (e.g. discreet surveillance – art 99 SIA) (Mokros, 1996: 936). The federal border guard expanded its remit in response to the changing European structures and could increasingly become active within Germany. This change is reflected in its renaming to Federal Police in 2005, dropping the border aspect from its name. Their special competences are in principle in conflict with the *Länder* monopoly on the use of force and led to a change in the institutional balance in Germany.

An indirect effect common to both conventions is how they use fundamental concepts upon which a stronger EU police cooperation is to be built. The protection of personal data and (co-)operational expansion is affected by the ill-definition of those crimes on which cooperation is foreseen. The Europol convention and some framework decisions contain a positive list of relevant crimes. This encompasses broad concepts, such as ‚serious forms of international crimes’ (art. 2 Europol convention). The second periodic report on the security situation in Germany acknowledges the lack of a definition of organised crime and the vagueness of concept (BMI and BMJ, 2006: 441 ff). Rather than meaning a concrete phenomenon, organised crime is described as ‚construct’ or a ‚diffuse field’ (BMI and BMJ, 2006: 441). While the JHA ministers reached political agreement on

a framework decision concerning a common definition of organised crime and common sanctions,¹³⁷ the concept remains ill-defined. The Schengen conventions limits in art 40 (7) the applicability of surveillance to a catalogue of crimes as well. They encompass crimes such a murder and organised crime, which are intuitively accessible, but which lack a formal and, in particular, common definition.

Formally, such a restriction of crimes provides a boundary for the activity of law enforcement. The breadth of the crimes and the different legal bases in the member states once again can effective enable rather than restrict the scope for law enforcement, though. In this respect the two conventions have had a strong impact. The use of catalogues of crimes for which new or adapted operations were allowed, holds the potential to expand the legally legitimised activity beyond the previous realm. These changes were highly significant for the work of the German police. The area in which they could apply their established measures has been significantly expanded.

The extension of operational powers of Europol changes the quality of their impact on fundamental rights. This in turn changes the effect Europol's activities can have on the rights of individuals. To ensure the guarantee of fundamental rights as arising from article 6 ECHR requires, in Voß' view, the establishment of a European Public Prosecutor (Voß, 2003: 327ff) or a change in the immunity rules for Europol officers and regulations for their withdrawal (Voß, 2003: 332). These changes not only affect questions related to the immunities, but also of general control of Europol.

On the *judicial control* aspect, the two conventions also had some effects as well. Concerning data protection, the Europol convention established a joint supervisory body, which must ensure that the activity of Europol adheres to the common data protection standards. Individuals have the right to request access to their data through that body and it has published two activity reports about the data protection record of Europol.¹³⁸ The Schengen convention does not establish a new supervisory body, but obliges the member states to guarantee a level of data protection at least according to the level foreseen in the Council of Europe convention and to designate a national data protection authority. The latter did not effectuate changes in Germany, but the former provides another layer of control. Furthermore, the law on Europol provides similar legal remedies for those who suffered a damage through their activities. This additional administrative control is very limited, however, as it depends on the consent of the Europol director to lift the immunity of Europol officials.

¹³⁷ See: <http://europa.eu/bulletin/de/200604/p119028.htm> (accessed 27.10.2007).

¹³⁸ See: <http://europoljsb.consilium.europa.eu> (accessed 27.10.2007).

On procedures

This leads to the second area of indirect effects, namely domestic procedures. This applies to the control dimension, when the procedures through which certain rights can be upheld are affected, and the methods available to law enforcement.

The most prominent, most discussed (Baldus and Soine, 1999; Bull, 1999; Aus, 2003; Weichert, 2005) and – arguably – most important instrument of operational cooperation is data exchange. In this context two aspects stand out:

- (1) the protection of individuals' data and
- (2) the extension of operational methods through the extended use of data for the police.

These two aspects are empirically intimately related as the use of personal data automatically leads to data protection issues. Analytically they are fundamentally different, however. Data protection addresses a normative discussion about the extend of individual privacy and the scope of police power. It deals with control mechanisms and limitations on the use of data by the state. The point of reference in data protection is the individual.¹³⁹ The extension of operational methods is a phenomenological observation, which is independent from data protection concerns. It directly assesses the depth of law enforcement competences. The conventions form the legal basis for these two aspects. The problematic aspect, though, is the point where different data protection regimes interact, which in themselves are coherent. These procedural issues stand at the centre in the following section.

Legislative control was affected in the Schengen convention and the Europol convention. The Europol joint supervisory body exercises data protection control over the data used by Europol. National laws continue to apply for injuries caused by the application of the SIS or the exchange of data through Europol. Neither convention led to an adaptation of national data protection systems. Articles 104 (2) and (3) SIA and 14 Europol convention stipulate the application of national data protection laws. A minimal requirement is the level of data protection provided in the Council of Europe Convention of 28 January 1981 and the Recommendation No R(87) 15 of the Committee of Ministers of the Council of Europe of 17 September 1987 concerning the use of personal data in the police sector. In Germany this right of control is quite strong, because the Constitutional Court has raised the principle of informational self-determination to a fundamental right in 1983. Formally, affected persons can go to court, when they think that their personal

¹³⁹ In the discourse on data protection (mostly) practitioners argue against an overly high level of data protection. Their arguments, however, focus on the increase of law enforcement powers.

data was used inadequately. The effectiveness of this avenue has been doubted, because the immunity of Europol databases and officials mean that no court can order evidence from Europol or at least has to rely on the cooperation of the Europol director to lift immunity (Weichert, 2005; Wagner, 2004). The restricted information mechanisms of the Schengen system lead to the same problem. Overall, data protection is the most heavily affected aspect in the convention concerning individual liberties (Bull, 1999: 15-16).

There are some procedural aspects concerning the right to remedy. While the immunity of Europol officials is formally unproblematic (Voß, 2003), the activity of Europol officials is not as 'non-operational' as often claimed. It can be considered operational through their analysis of personal and non-personal data for law enforcement purposes. Europol is intended to make police activity in the EU more efficient and is not restricted to analytical research. This seems to endanger the level of legal protection of individuals against potential damages through Europol officials (Wagner, 2004).

Institutionally, Europol does not have access to the SIS, because Schengen has developed independently from EU police cooperation structures. Neither is the set of countries participating in the two structures identical. Most significantly, though, is the different purpose of Europol, whose primary function is research and advice and the SIS, which is a direct instrument for police searches and prosecution.

On the *security* dimension, the extensive use of data is particularly important for the depth of police activity, because the set of persons on which data can be exchanged not only encompasses those accused or suspected of having committed a crime, but also 'persons who there are serious grounds under national law for believing will commit criminal offences for which Europol is competent under Article 2' (art 8 (1) no. 2 Europol Convention). This expands the group of people, on whom data can be collected, almost indefinitely and may lead to keeping files on innocent people in the files.

The Europol convention introduced a new aspect to the German data protection regime, which has been accused of leading to a lowering of data protection standards (Lisken, 2001; Hirsch, 1998; Wagner, 2004: 21-22). In particular the legal obligation for law enforcement actors to transmit information in the context of the Prüm treaty to the transnational data bases in cases covered by the Europol convention (s.2 art. 2 EuropolG) clearly expand the *methods* available to law enforcement (Voß, 2003: 143; de Hert and Gutwirth, 2006).

The establishment of the Schengen Information System (art 92 ff SIA) made a lot of information available to the police in the EU member states. It contains information on persons for whom an alert has been issued and objects and vehicles (art 94 SIA). By March 2003 more than 11 million entries had been entered in the system. Germany was and is one of the most avid users of the information system (cf. BMI, 2005: 31). The

availability of information also increased the usage of the instrument by the police (Europol, 2007; BMI, 2005).

Its Europol counterpart is the Europol Computer System (TECS). It consists of an information system, analytical workfiles and an index system. While each individual component had been established quickly after Europol had become operational, only in 2005 the long awaited Europol Information System was finalised and in November 2005 Germany, Sweden and France started using the new system (Europol, 2006: 17). In difference to the SIS, TECS is not a system to find objects and persons, but a system for research. Its aim is to provide the connected authorities with information about persons and things related with crimes for which Europol is competent (Mokros, 2001: 1221-22). In Germany the BKA is the only authority, which may input data in the system. The input is governed by national data protection rules.

The problem of scope and data protection related to the 'heart' of the TECS, the analytical workfiles, which contain not only information on criminals or suspects, but also contact persons, witnesses and victims (Mokros, 2001: 1222; Wagner, 2004: 10). The combination of hard and soft data in the analytical workfiles make it for the first time possible to engage in cross-border analytical police cooperation (Voß, 2003: 145). Wagner sees in this information provision a significant extension of Europol's operational capacities. Operational cooperation had been possible on the basis of bilateral treaties beforehand (cf. Aden, 1998; BMI, 2005), but the move to more intelligence is new and brings cooperation structures in line with the developments we can observe in the structure of national policing (cf. Johnston and Shearing, 2003; Gleß et al., 2001).

Database interoperation

The number of databases established for different purposes (law enforcement, asylum, illegal immigration, visa) has grown significantly. Recently the Commission has published a proposal to connect the existing data bases. This would lead to automated access to foreign databases either a hit/no hit basis, where the decision to transfer data remains within the country (as in the treaty of Prüm), or an automated data exchange regime (the principle of availability), according to which common rules would govern all databases (Balzaq et al., 2006; Kietz and Maurer, 2007).

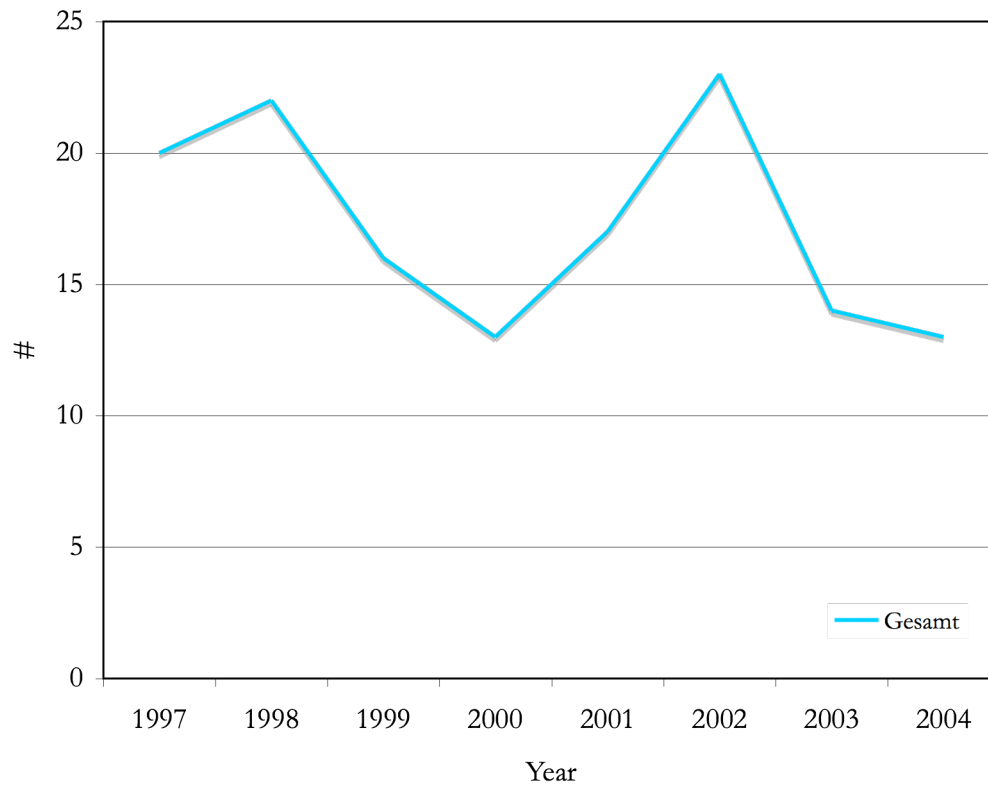
Interoperability means that the information can be used for pre-determined purposes, but also in new contexts. While the term is quite new (de Hert and Gutwirth, 2006: 23), the idea of combining the content of different databases is not new (cf. Herold, 1977). In practice, the interoperation of databases devised for particular purposes has informally been achieved by designating the same office with the role of a central contact point, the

formal combination formalises the problems regarding principally data protection. The interconnection of databases leads to problems with the German principle of *Zweckgebundenheit*, i.e. that personal data may only be collected and used for specified purposes. A prominent example is the Eurodac database, which contains the fingerprints of asylum seekers. Originally the database was adopted under the Dublin II agreement in order to determine which member state was responsible for the application of an asylum seeker and to avoid fraudulent applications for asylum (cf. Aus, 2003). Recently, it has been demanded in the light of the migratory background of many Islamic terrorists to link the Eurodac database with law enforcement database. This not only violates the principle of *Zweckgebundenheit*, but also discriminates against potentially innocent people, because the member states apply different criteria when deciding about visa applications (de Hert and Gutwirth, 2006: 25).

The discussion about the principle of availability and the interoperability of databases show that the question of data exchange, data protection and the establishment of clear rules of data protection for the police and law enforcement remains a pressing problem in the EU and is a challenge for the German data protection regime. Persisting differences among the member states are detrimental to the establishment of an area of freedom, security and justice. Thus de Hert and Gutwirth propose 'a prohibition of access for law enforcement to non-police databases' (2006: 29).

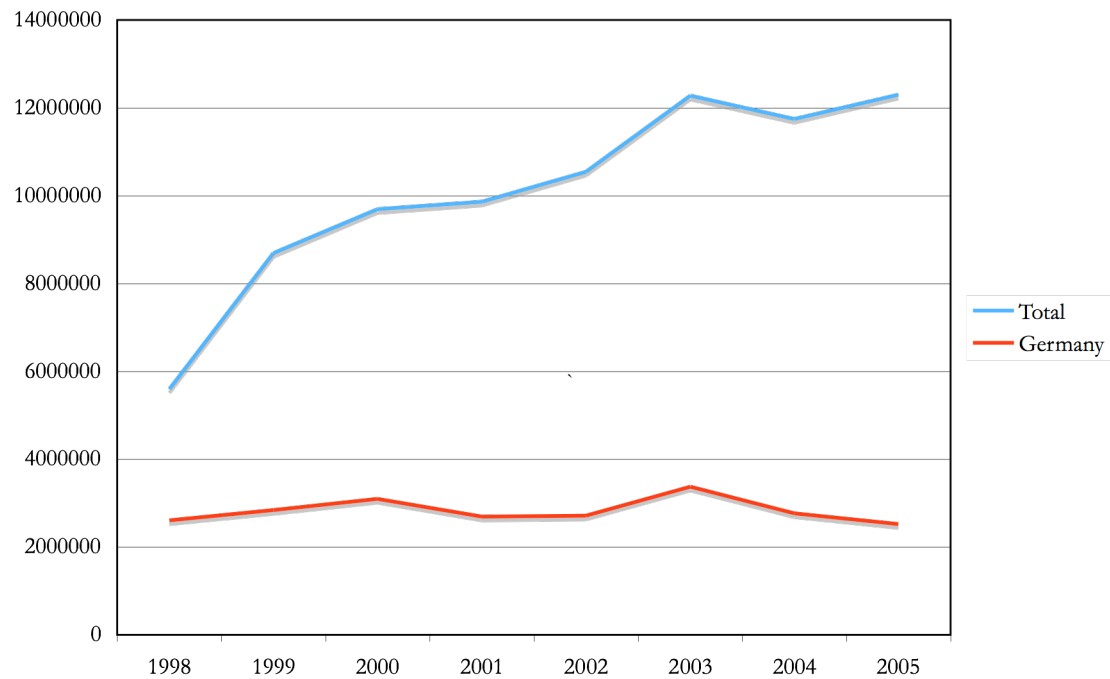
But also through the Schengen convention the possibility of operational cooperation was greatly expanded. The realisation of these measures mainly fell within the competence of the *Länder* polices. The Schengen implementation agreement formalises significant changes in the operation of police forces beyond their national borders by regulating hot pursuit, surveillance and the right to arrest on foreign territory: art. 39 spells out the obligation of police to cooperate and exchange information (through central contact points), article 40 sets out rules for cross-border observation (and was expanded in 2000), article 41-43 set out the conditions for cross-border pursuit and article 47 regulates the use of liaison officers (cf. Occhipinti, 2003). Since the ratification of Schengen in Germany the usage of these instruments has developed inconclusively as can be seen in Figure 4 and Figure 5).

Figure 4 Hot pursuit in Germany across borders



After an increase in hot pursuit, annual cases have dropped recently, but information on the Eastern border are not available, even though the bilateral agreement with the Czech Republic allows for cross-border pursuit. In a similar vein seems to develop information exchange. The overall amount of data in the SIS has clearly grown since 1997. While Germany is still the biggest individual contributor to data in the SIS, its overall contribution has not significantly changed over time (Figure 5).

Figure 5 Searches on the Schengen Information System



Convention Protocols

Another element of the influence of the convention was manifest only later through the adoption and ratification of protocols to the convention. Protocols changed the scope of the applicability of the convention and added elements to the original text. The main changes were the immunity of Europol officials,¹⁴⁰ the extension of crimes for which Europol is competent,¹⁴¹ Europol's participation in JITs and the competence to ask the competent authorities to conduct and coordinate investigations.¹⁴²

Protocols and decisions change the European regulatory framework, but leave the national regulatory framework unaffected. Only through the application to the activity of

¹⁴⁰ OJ C 221, 19.07.1997.

¹⁴¹ OJ C 362, 18.12.2001.

¹⁴² OJ C 312, 16.12.2002.

the law enforcement forces changes occur at the national level as well. So we have to count changes through protocol as indirect changes. The problematique of Europol officials' immunity has been discussed in the context of data protection. The other protocols apply more to the security dimension in that they extend the scope for which European cooperation structures can be used by German police.

Overall, the short analysis of the effect of conventions and their protocols appears more substantial on procedures than on tasks. The precise extend to which these new procedures are being used is difficult to assess, because data is incomplete and partially not available.

The relationship between police and judiciary

The third area where indirect effects might have occurred concerns the relationship between the judicial and the police sphere. Conventions have more organisational effects than framework decisions, which only in few cases lead to changes in the organisational structure. But regarding the Europol convention this effect is obvious. It establishes Europol as an overarching European structure with increasing power – also over national structures. It now even has the right to ask law enforcement agencies to initiate proceedings and can participate in JITs (Occhipinti, 2003: 138)). This change concerns the whole law enforcement structure, but concerns hierarchy and power within the organisational structure as well. The effects of the Schengen convention are more subtle.

For the formal relationship between the police and the judiciary, the protocol on the immunities of Europol staff has had a strong influence. Germany was the second country to initiate the ratification procedure of the Europol convention in 1996 after the UK¹⁴³ but due to severe discussions on the protocol on the immunities of Europol personnel only ratified it as one of the last countries. Granting immunity to Europol officials was against the intention of the German government (Storbeck, 1999: 37).

According to the protocol, Europol officials cannot be held liable for anything they do in their official function. This is not per se a problem when applied to the limited functional competence of Europol as such, especially as the immunity does not apply to the members of the national contact points (Voß, 2003: 164; see also Commission, 2002c). But the immunities of Europol officials reduce the control of the judiciary over genuine Europol staff and over the national liaison officers delegated to Europol. This is problematic from a democratic point of view, but has not been an empirical problem so far. For the general regulation of the German law enforcement system, it does not play a

¹⁴³ See BT-Protocol 13/172, 24.04.1997, 15479ff; Europol bill, BR-Drs. 957/96, 20.12.1996.

large role.¹⁴⁴ The political debate aroused in parliamentary¹⁴⁵ and academic discussions (Hirsch, 1998) was much bigger than the empirical issue until now. Furthermore the protocol is limited to the scope of EU competences as of 1995 and, for example, Europol activities in the context of a joint investigation team are not governed by the immunities protocol (Mokros, 2007a: 1343). Taking into account the interlocking of policing structures on the European and the national level and the importance of data exchange in the European policing framework and its growing importance in policing, the fragmentation of accountability mechanisms at the EU level is a more serious problem (Den Boer, 2002b). In any case the effect of the convention is a reduction of an important corrective for law enforcement.

Both conventions effectuate two major changes concerning the police-judiciary relationship: central national contact points and supervisory bodies. Information exchange through direct contact points and subsequently better knowledge about other law enforcement systems helps to develop trust, whose absence is the biggest obstacle to successful cooperation (Anderson, 2002). The establishment of direct contact points increased the power of this central structure. The addition of competences to these offices made them even more powerful in the organisational structure of the police. The informational advantage of police over the prosecutors increased through European integration further, not only through technical developments (SIS, EIS, DNA, Prüm), but also through direct access to information open and classified. In designating the same institution (BKA) and the same offices within the institution as national contact points for different cooperation structures leads to an accumulation of power. It increases the effectiveness, because different cooperation and information exchange mechanisms are operated in close proximity to each other, despite the formal separation among them. In Germany the Joint Anti-Terrorism Centre in Berlin has been following a similar approach since 2004 (Mokros, 2007b: 47).

The establishment of national contact points changes the distribution of power in national law enforcement structures. Central offices obtain more power as their role in the context of international cooperation increases (Aden, 1998). Both conventions require the establishment of contact points to ensure the intended functioning of the information exchange systems. In Germany the BKA was named as the competent national authority for all issues concerned with the Europol convention (especially art. 4

¹⁴⁴ For a discussion about the necessity and adequacy of an immunity for Europol, see Voß (2003). He concludes that it is constitutional, adequate and currently necessary. He also identifies a need for reform, especially in the light of increasing operational capacities for Europol. Mokros dissents and questions the constitutionality of the immunity (2007a: 1343).

¹⁴⁵ BT-Protocol 13/172, 24.04.1997, 15479ff.

and art. 19(1)). It is thus the only unit to have direct contact with Europol, until the new protocol is fully implemented, which allows direct communication of all police forces with Europol through the Europol computer system. All other subordinate structures are obliged to provide information to the BKA. The BKA is the only national unit to deal with Europol requests. This is particularly important in a federal system like Germany, where such centralisation reduces the independence of the subordinate structures. The same can be said for the designation of the BKA as the SIRENE¹⁴⁶ bureau and the central authority according to article 40(5) SIA.

In order to address the numerous concerns arising from the treatment of personal data and the establishment of policing bodies with an effect on fundamental rights of European citizens, both conventions establish supervisory bodies. For Europol the 'joint supervisory body' has been established at the EU level to ensure that the data protection regulations are maintained. In addition, the Europol convention foresees the establishment of national supervisory bodies (art. 23 Europol convention). In Germany the federal data protection officer (*Bundesdatenschutzbeauftragter*) was designated as the national supervisory body. He¹⁴⁷ is appointed by the minister of interior, but has developed a high reputation as an independent authority. He proposes one delegate to the joint supervisory body. The second German representative is appointed on a proposal by the *Bundesrat* (art. 6 EuropolG). Once appointed both members are free from any orders and can only be removed through a court order.

A similar body was established under the Schengen regimes. The national supervisory body (art 114 SIA) has the task to ensure the correct use of the data file of the national section. Its powers are defined by existing national laws. In Germany the federal data protection officer fulfils this function. A joint body to supervise the 'technical support function of the Schengen information system' was established according to article 115 SIA. It consists of two representatives from the national supervisory bodies.

Only a small amount of the Schengen convention deals with organisational structures, but the bit that does provides a lot of administrative leeway to the newly established bodies (Aden, 1998: 313). Especially the executive committee, consisting of representatives of the governments (officially ministers according to article 131, 132 SIA), which has the task to monitor the implementation of the SIA, is a good example of how a seemingly administrative body can affect the operational structure of policing. After giving itself rules of internal procedure, the executive committee delegated oversight to senior officials with expertise. This moved accountability from the political

¹⁴⁶ Supplementary information request on national entry

¹⁴⁷ Since the establishment of the *Bundesdatenschutzbeauftragter* no woman has held the job.

to the administrative sphere and removed executive decision-making from public control. Law enforcement actors are thus more independent in their activity and independently evaluate their working practices. The effects of such seemingly minute change in organisational structures can have a strong feedback effect on the functioning of the German system. Having an executive committee whose aim it is to oversee the functioning of an operational framework that profoundly affects the rights of individuals become independent from political control leads to democratic problems, as such far reaching infringements should be governed by representatives of the citizens.

Liaison officers are either located at Europol to function as information providers about national law enforcement structures and the distribution of competences or they are liaised to other national police authorities in a Schengen contracting party (art. 47 SIA). While this is primarily an element of changing methods, the effect of direct contacts between law enforcement actors affects the domestic balance of power. Administrative control, which is strong in traditional cross-border law enforcement cooperation, is continuously reduced. So by relying more on liaison officers, the prevalence of this new method is important as an element of institutional reconfiguration.

Thus law enforcement actors can directly communicate with each other and exchange information. This allows for less cumbersome cooperation among police without having to involve administrative or judicial actors. The Schengen convention embedded the large number of bilateral or multilateral agreements, which Germany had concluded with its neighbouring states, in an overarching framework (e.g. BMI, 2005: 15). Thus police cooperation structures are further emboldened in their institutional standing compared to judicial cooperation structures which are less strongly developed.

9.3. *Wrap-up – intermediary conclusions*

From the theoretical debate on the nature of EU police policy in chapter six, where additional reasons beyond legal obligation for this expectation were brought forward, the assessment of Weyembergh about profound changes occurring in the member states in response to EU policy seemed to be correct. But the empirical results are less clear than expected. The higher complexity of European induced developments indicates that we cannot reduce them to the concrete European measures at hand. The close interconnection of different areas of the third and increasingly the first pillar, for example concerning the financial interests of the Community, money laundering, and illegal migration and asylum, means that individual measures are limited in their direct impact, but in combination with the general establishment of European cooperation structures can have profound and far reaching effects on the national system. In particular concerning the dogmatic structures of a criminal law system, the changes imposed on a system, while seemingly insignificant, can have wide reaching effects on

the operational structures. While this potential is not always observable in reality, Heinz (2008) and Dünkler (2002) show that over time, normative changes do have an effect on the practice of sanctioning.

Only little direct changes in the legal framework in response to either the transposition of framework decisions or the ratification of conventions could be found. The effects of framework decisions identified are mostly very limited and do not provide a conclusive picture. The effects on the security dimension are more pronounced and provide some support to the claim that EU policy favours the development of the security dimension in the AFSJ. The results on the liberty dimension, however, are less clear. They do not provide evidence that the transposition of EU measures undermines the protection mechanisms available to the individual.

The executing regulations of conventions had immediate effects nationally, these changes formally do not amount to much. They do not approximate criminal offences or punishments. When crimes are mentioned in the conventions, they do not define them, but merely regulate the scope within which Europol can be active or when the operational rules of the SIA apply. The direct changes through the ratification of the conventions predominantly spell out clarifications for organisational and functional aspects of the conventions. Examples are the national contact points for Europol and Schengen, which needed to be specified to enact the conventions.

In the discussion about the effects of framework decisions as well as the discussion of the conventions the importance of data exchange was highlighted as a background structure upon which international police cooperation thrives. This has opened the analysis to the indirect effects of the EU level on the two dimensions nationally. The point of intersection of different coherent systems of data protection or (criminal) law develop friction points, which are not obvious from looking at the formal regulatory framework. In particular the reliance of a minimal level in EU regulations and leaving it to the member states to maintain their own system becomes problematic when different systems interact automatically.

As an intermediate conclusion for the German case, the following picture emerges: the more intrusive measures have little effects nationally, whereas the measures without direct influence at the national level lead in the real world of law enforcement activity to changes which affect both dimensions significantly. The EU level as a whole is highly influential for the work of the police, but the formal regulatory framework is only affected in limited areas despite a strong current of reform. This indicates that formal developments in German criminal justice policy are determined by factors other than the EU while the real world of policing is clearly Europeanised.

10. An empirical analysis based on EU measures transposed in England

10.1. *Introduction*

There are legal and political difficulties in the UK with membership in the EU. Since joining the then EC in 1972 the relationship between the British political and public sphere and the EU has been skewed at best times due to conceptual problems e.g. with the concept of parliamentary sovereignty (Jachtenfuchs, 2002), which is reflected in an EU-critical media and a low support for European integration among the British population (Eichenberg and Dalton, 1993). A particularly strong politico-legal concern is the feared constitutional(ising) effect of EU law on the common law system of England (Bradley and Ewing, 2003: 119; Jachtenfuchs, 2002). This debate has been especially strong since the *Factortame* decisions of the ECJ in 1990 and 1991 which finally codified the direct effect and supremacy of Community law in the UK from the point of view of the ECJ and is virtually universally accepted by English courts (cf. Loveland, 2006: 480 ff).¹⁴⁸ Closely connected are the legal difficulties which arise based in the interaction of civil and common law systems and the way England complies with the EU requirements.

This chapter presents the English approach to compliance with EU third pillar measures. Where applicable insights will be compared with the results of the German case study presented in chapter 9. Subsequently, the focus is on the analysis of direct effects through the transposition of framework decisions and conventions. In a third step, ripple effects through transposed measures will be analysed. The chapter concludes with an analysis of indirect effects on the English regulatory framework.

10.2. *The English approach to EU compliance*

In 1972 parliament passed the European Communities Act, which detailed how the UK would comply with EC law (Bradley and Ewing, 2003: 136-37). It provides for the possibility to use primary and secondary legislation to comply with European developments. The goal is to avoid overly lengthy procedures of primary law making in favour of more flexible procedures, while maintaining the veto power of parliament. At

¹⁴⁸ R v Transport Secretary ex p Factortame Ltd (No 1) [1989] C MLR 353 (CA), [1990] 2 AC 85 (HL); Case C-213/89, R v Transport Secretary, ex p Factortame Ltd (No 2) [1991] AC 603 (ECJ and HL); Case C-221/89, R v Transport Secretary, ex p Factorame Ltd (No 3) [1992] QB 680 (ECJ); Case 48/93, R v Transport Secretary, ex p Factortame Ltd (No 4) [1996] QB 404 (ECJ); R v Secretary of State for Transport, ex p Factortame (No 5) [2000] 1 AC 524.

the same time the act gives the relevant ministers leeway to circumvent parliamentary debates in ensuring compliance, as most delegated legislation is not debated in session.

Chapter 4 has shown that the principle of parliamentary sovereignty produces problems concerning the form of transposition of EU measures. Parliament alone can adopt laws and since the modernisation of the British system of government since World War II has led to an increase demand for regulation (cf. Hazell, 2006), parliament increasingly resorts to delegated legislation, or statutory instruments (SI) in transposing EU legislation. Delegated legislation does not follow the 'normal' legislative procedure, but enters into force either when the Commons do not challenge its content within forty days (in the majority of SI) or when they approve it (cf. Loveland, 2006: 149-52). Statutory instruments are frequently used to make detailed provisions that are left out of primary legislation because of their flexibility.

The Anti-Terrorism, Crime and Security Act (ATCSA) 2001 foresees a similar (restricted) approach to transposing third pillar measures. Section 111 of the act regulates the implementation of third pillar measures, saying that

- (1) At any time before 1st July 2002, an authorised Minister may by regulations make provision—
 - (a) for the purpose of implementing any obligation of the United Kingdom created or arising by or under any third pillar measure or enabling any such obligation to be implemented,
 - (b) for the purpose of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of any third pillar measure to be exercised, or
 - (c) for the purpose of dealing with matters arising out of or related to any such obligation or rights.

In particular the act mentions in s. 111 para 2 ACTSA

- (a) the 1995 Convention drawn up on the basis of Article K.3 of the Treaty on European Union on Simplified Extradition Procedure between the Member States of the European Union,
- (b) the 1996 Convention drawn up on the basis of Article K.3 of the Treaty on European Union relating to Extradition between the Member States of the European Union,
- (c) any framework decision adopted under Article 34 of the Treaty on European Union on the execution in the European Union of orders freezing property or evidence, on joint investigation teams, or on combatting terrorism, and
- (d) the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, and the Protocol to that Convention, established in accordance with Article 34 of the Treaty on European Union,

which can be implemented by secondary law. These competences are limited, as delegated powers may not be used to

- (a) to make any provision imposing or increasing taxation,
- (b) to make any provision taking effect from a date earlier than that of the making of the instrument containing the provision,
- (c) to confer any power to legislate by means of orders, rules, regulations or other subordinate instrument, other than rules of procedure for a court or tribunal, or
- (d) to create, except in accordance with subsection (6), a criminal offence which is punishable-

- (i) on conviction on indictment, with imprisonment for more than two years,
- (ii) on summary conviction, with imprisonment for more than three months,
- (iii) on summary conviction, with a fine (not calculated on a daily basis) of more than level 5 on the standard scale or (for an offence triable either way) more than the statutory maximum, or
- (iv) on summary conviction, with a fine of more than £100 a day. (s. 111 para4 ACTSA).

The provisions are subject to the assent procedure, according to which parliament has to assent for the provision to enter into force (Walker, 2002: 276-7). The government argued that this power was in line with similarly worded provisions of the European Communities Act 1972, as the section only allows the transposition of measures 'which have already been scrutinised by the UK Parliament during their passage through the European Community or Union legislative procedure' (cited in Delegated Powers and Regulatory Reform Committee, 2001: para 4). The initial initiative of the government to provide general powers to implement such measures had to be toned down and restricted to a limited number of measures due to criticism in the Lords about the potentially negative effect on the protection of civil liberty of such an approach (cf. Statewatch, 2000).¹⁴⁹ A similar provision of powers is enshrined in s. 123 of the 2000 Terrorism Act which gives sweeping powers to the Secretary of State to adopt secondary legislation including the specification of passenger information or the recording of interviews. These powers are partially subject to the annulment procedure, partially they require the consent of parliament.

To ensure the equal application of binding EU measures in all member states the transposing measures must be legally binding. The Commission maintained in its

¹⁴⁹ HL Debs Vol. 629 Col. 708 of 4.12.2001 on the Anti-Terrorism Crime and Security Act.

transposition reports that the approximation of definitions and penalties must be in the form of statutory instruments or laws (e.g. Commission, 2004b). At the very least the rules must be public, open and enforceable in court. In the Commission's view it is not sufficient to transpose them through administrative orders. The focus on these instruments is further indicated, if – as the Home Office declared in 1998 – the domestic legislation agenda had not been determined heavily by commitments arising from EU third pillar measures due to the low misfit and early mover advantage of the UK.¹⁵⁰

In the light of the difficulty national parliaments face when they try scrutinise European policy-making (e.g. Norton, 1996; Holzacker, 2002), the question is to which degree sovereign oversight in the UK is affected by giving the secretary of state or any other executive agent such far reaching powers (Statewatch, 2000; Walker, 2002 276). Similar concerns were voiced in the debate in the House of Lords.¹⁵¹ Speakers were concerned about the democratic properties of the decision-making process, where they saw their influence severely curtailed, as well as the outcome, which was seen to guarantee too little procedural safeguards to the individual. On another note, they questioned the adequacy of transposing principles from the area of economic integration, such as mutual recognition, to an area as sensitive as criminal law (Delegated Powers and Regulatory Reform Committee, 2001: para 4).

In the light of these concerns about the democratic and legitimisation shortcomings through limited parliamentary control of the transposition of third pillar measures by secondary legislation, the Delegated Powers and Regulatory Reform Select Committee declared in its report on the Anti-Terrorism, Crime and Security Bill (2001), that

‘we do not consider it would be right for all proposals to be dealt with in this way... the Committee is of the view that the powers to implement by secondary legislation proposals under the third pillar should not be granted except to allow the implementation of a measures which the Governments can demonstrate is a key element in its emergency proposals and yet not of such importance as to warrant primary legislation.’ (paras 11, 13)

The British government took up this concern. In 2002 it introduced the Crime (International Cooperation) Bill which contained the necessary amendments in primary law to comply with the framework decision on combating terrorism, on the execution of freezing orders and on fraud, the convention on driving disqualifications, the non-border related aspects of Schengen, and the MLA convention and its 2001 protocol. The act is central to the compliance of the UK in the third pillar and transposed measures that were long overdue in ratification, such as the convention on driving disqualifications, or

¹⁵⁰ quoted in HL Debs. Vol. 641 col. 979 of 2.12.2002 by Lord Dholakia.

¹⁵¹ HL Debs. Vol. 641 col. 977 ff of 2.12.2002.

measures that were fundamentally necessary for the UK government to attain the objectives it had set itself domestically concerning international cooperation (cf. Home Office, 2001). This list is almost identical to the list of measures that could have been adopted by secondary legislation according to s. 111 of the ATCSA 2001. It demonstrated that the government acknowledged the political and legal importance of the measures, even though it would have had the opportunity to use secondary legislation.

Resorting to primary legislation also addressed the criticism of insufficient public scrutiny issued against third pillar measures. That the UK government must transpose EU measures or amend regulations as agreed on the international level, the Lords see as a removal of control function of parliament, which has no way to shape legislation. Using primary legislation to transpose EU measures brings a necessary element of transparency to the process. The act introduced another scrutiny improvement, as parliament must be informed about the review of the act by the Home Secretary according to s. 122. That there is no debate on the review or any other consequence reduces the extent of control, though. It is also up to the Home Secretary to decide on the time when it shall be laid before parliament.

The compliance of the UK with third pillar measures is a difficult territory. The EU abounds with special rules for the UK. The UK does not participate in the Eurozone and does not participate in the border-related aspects of Schengen, but can opt-in on aspects concerning police and judicial co-operation, drugs and the Schengen Information System (SIS). This 'legal nightmare' (Guiraudon, 2003: 271) means that the UK – with the approval of the Schengen partners – can pick those measures which help to advance successful cooperation, but can avoid measures which unduly restrict its sovereignty. Other member states (such as Germany) feel that this option, which is being used extensively, has led to 'cherry picking'.¹⁵² They perceive that all the difficult and intrusive changes only take place in the member states fully participating in Schengen, while the UK wants to participate only in measures from which it can profit directly (European Union Committee, 2007: 30).¹⁵³ This is interesting because the extensive law enforcement rules in the Schengen framework were legitimised as compensatory measures necessary to maintain security even in the absence of internal borders. This certainly does not apply to the UK, which maintains its borders, but still participates in the 'compensatory measures'. At the same time, there are good functional reasons, why law enforcement cooperation should be improved while maintaining territorial borders. The following

¹⁵² Interview at the German ministry of interior April 2007.

¹⁵³ Cf. HL Debs. Vol. 641 Col. 1018, 2.12.2002.

paragraphs look at the way compliance with third pillar measures has been ensured for England and Wales.

10.3. *Direct effects*

Irrespective of the form of compliance, the UK claims that it complies with most measures of the third pillar and that it responds swiftly to demands arising from EU commitments. In the following, the focus on the overall compliance record of the UK aims to assess the direct effect of EU third pillar policy on the domestic regulatory framework. As before, the focus is on the pre-trial phase (Mathias, 2002). The main empirical basis are framework decisions adopted since 1999 and conventions adopted since 1993.

The British government remarked in its strategy paper “One Step Ahead” that the UK was ‘an active and leading player in developing more effective EU action against organised crime’ (Home Office, 2004c: 18). Furthermore, it mentioned that the government would seek ‘to establish whether the difficulties of operating across different jurisdictions might be alleviated by *further* legislation’ (Home Office, 2004c: 20, emphasis SD). This indicates that at least some influence of EU policy in domestic policy-making can be expected in the measures adopted before and after the strategy was published.

For this analysis on the transposition of framework decisions and conventions in the UK thirteen transposed framework decisions were identified. Of these, eight are mentioned explicitly in public acts, which provides a first indication that in transposing them the regulatory framework in the UK was changed. In addition, the Commission has published reports on ten framework decisions. For the framework decision on attacks against information systems, the Commission has not yet published a report. Similar to Germany, the UK performs well on compliance.

10.3.1. The police relevance of framework decisions in England

The transposition pattern and the relevance of transpositions for the police in the English case are similar to Germany, as they transposed virtually the same framework decisions. Only the framework decision on the execution of freezing orders of property and evidence has not been transposed in Germany. This measure together with the framework decision on the protection victims in criminal proceedings and on the European Arrest Warrant applies to the trial phase. Of the twelve framework decisions, for which transposition information is available, nine are concerned with the pre-trial phase, thus. While in the continental system the pre-trial phase is formally under the supervision and authority of the public prosecutor, in England ‘the opening and the development of the preparatory phase are entirely and exclusively handed over to the police’ (Mathias, 2002: 468, see figure 2). Restricting the analysis of compliance to the

pre-trial phase in the UK the focus lies on the different police forces and ignores the Crown Prosecution Service (Sheptycki, 2002b).

When looking at police references within the reduced set, once again, the results are similar to the German case (see Table 18). The police are addressed primarily in the substantive law measures, whereas procedural measures rarely touch upon the competences of the police. Against conventional wisdom, which would expect a stronger focus on the police in procedural law, in the UK a similar picture emerges to that which was found in Germany. The only reference to the police concerns their participation in joint investigation teams. At the same time, most procedural measures are concerned with judicial cooperation, which fall in the trial phase.

Table 18 Direct police reference in texts of transposed framework decisions pertaining to the pre-trial phase

	Yes In Preamble	In text	Total yes	No
Procedural	1	1	1	0
Substantive	4	2	4	4
Total	5	2	5	4

Beyond the political developments presented in chapter III and the theoretical considerations of chapter IV, characteristics of the measures transposed point to an influence on the regulatory framework in England and Wales concerning the police, even though the link between substantive legal measures and the police is only indirect. Substantive law is only a hinge to enable the police to become active. But given the repeated reference to the police even in substantive law measures, the likeliness of influence is even higher when transposing these measures into national law. The strong role of the police in the pre-trial phase emphasises this argument in favour for such an influence.

In the Commission reports on ten framework decisions, the assessment on the transposition of the individual articles is slightly more critical towards the UK than Germany. To a large degree, that difference can be attributed to the difference in legal systems, when the Commission finds unsatisfactory British compliance due to the lack of legal certainty. Yet another role played the lack of Commission knowledge about the common law system of the UK - especially concerning the treatment of legal persons

(see below). As a low degree of statute law is a characteristic of common law systems (cf. Lepsius, 1997), so the difference should not be overestimated.

10.3.2. Draining money from crime: fighting the financial basis

The first four measures on money laundering, counterfeiting, fraud and corruption are closely related to each other. They deal with the financial aspects of serious crime, which has become more prominent through the increasing relevance of the single market in Europe. Functional spill-over through integration in the economic sphere led to a transnationalisation of the problem of economic crime for the member states. Thus the need for common action has grown considerable. Already high on the agenda in the 1990s, money laundering and fraud have been strongly linked to terrorism in domestic official discourse (Home Office, 2004c; Levi, 2007: 793). Counterfeiting has rather been linked to general organised crime. Corruption, finally, is a crime that can lead to severe economic losses, but also be an entry door for more serious forms of crime.

Beyond the functional legitimation of single market in the criminal justice fight against money laundering, fraud, counterfeiting and corruption, a link has been construed in recent years between money laundering and fraudulent proceeds, and terrorism. The argument is that a successful fight against the financial background to terrorism and serious crime can help to avert future attacks. In this logic, the fight against these serious crimes is not an annexe competence of the EU/EC in order to achieve the fundamental goal of the common market. Rather it is a necessary and relevant step to ensure the security of its citizens. The functional link provides the institutional and legal competences to engage in this area of policy-making and ensures political legitimacy (Loader, 2002).

FD fraud and counterfeiting

The issue of fraud and counterfeiting has gained political priority in recent years. In 1998 the Commission had published a communication on combating the fraudulent use of non-cash means of payment (COM/1998/395 final). It proposed a common approach, which eventually led to the adoption of the framework decision in 2001. In particular the close relationship to the first pillar provides legitimacy. The internal market offers ample opportunity for criminals to engage in cross-border, fraudulent activities, especially as wide differences between criminal justice systems even in areas such as intimately linked with the single market remained.

As in all EU member states, fraud and the counterfeiting of means of payment had been criminalised in the UK before the framework decision had been adopted. Thus no new legislation was necessary to comply with the framework decision (Commission, 2004g).

Despite this compliance, the Crime (International Co-operation) Act 2003 (CICA) amends in s. 88 the list of documents falling within the scope of the act to bring it line with the requirements of the framework decision. But this is a minute change and takes account of the changing landscape of non-cash means of payment, particularly debit cards. Overall liability is not affected.

More generally, the 1968 Theft Act (s. 15/16) and the 1978 Theft Act (s. 1) fulfil the requirements of the framework decision in England. In January 2007 the 2006 Fraud Act repealed the 1968 regulations. Sections 6 and 7 of the new act deal with the possession and making of articles, which can be used for fraud. As the framework decision criminalises the fraudulent use of non-cash means of payment, as well as the counterfeiting of means of payment, the new law is fully in line with the requirements of the framework decision, which was, however, not the cause for this new law (cf. Wilson and Wilson, 2007). Similar to the changes effectuated through the framework decision, the new general fraud law was motivated, among others, by the lagging behind of law enforcement in technological terms (Wilson and Wilson, 2007: 36). The UK allows for the extradition of its nationals and all other suspects or committed offenders and, this being a central aspect of the framework decision, legal persons can be tried under the 1978 Interpretation Act.

The framework decision does not specify an explicit minimum maximum penalty for fraud and counterfeiting. Rather the general notion of ‘effective, proportionate and dissuasive criminal penalties’ is advanced. This gives member states a wide margin to set penalties and does not exert strong approximation pressure. In comparison with other measures, this also makes it a rather weak element in the development of the AFSJ. In the UK the measure thus did not affect the level of punishment. The maximum sentence for forgery remains at 10 years, which puts the UK in line with many other countries (Commission, 2004g: 13). Concerning financial penalties, the UK keeps the amount system where a court orders a certain amount to be paid, even though in most other countries a day rate system has gained ground, where courts issue verdicts on a payment of a number of day rates. While this is not per se a problem – both approaches provide dissuasive and proportionate penalties – it is disadvantageous that there remains diversity even regarding the type of punishment within the EU.

Concerning the two dimensions of change, the liberty dimension was neither affected on the *legislative* nor on the *judicial control* variable. JUSTICE remarked, however, that the definitions of ‘fraud’ as well as the introduction of a crime of ‘conspiracy to defraud’ presented dangers for the legal clarity and predictability for small business and individuals (JUSTICE, 2006). On the security side, *tasks* were slightly expanded through the inclusion of more means of payments in the 2003 crime act. *Security methods* were not

affected. The one probable exception being the power of the Secretary of State to designate new means of payment to fall under the s. 88 CICA 2003, which designates the means of payment whose forgery can be punished. In the bill the government said that the reform could lead to a 'slightly higher number of prosecutions' (Home Office, 2005a). This assessment is not yet possible, because neither data on recorded offences nor on prosecution and conviction are available yet.

FD money laundering

The Commission found compliance with the central aspects of the framework decision. In its report it found that the UK introduced new legislation, even though it already had complied with the requirements through the 2002 Proceeds of Crime Act, which reformed the British money laundering regime (Commission, 2004e: 4)¹⁵⁴. The UK and Germany were among the six member states which provided information on transposition to the Commission on time (Commission, 2004e).

The question is, whether the transposition of the framework decision effectuated changes in England – even if they were not directly needed. Money laundering has a longer tradition in England than in Germany. Already in 1986 the Drug Trafficking Act criminalised the laundering of money from drug-related proceeds. While the 1986 intervention was still almost exclusively influenced by American concerns about the drugs trade (and related laundering of proceeds), later initiatives were motivated by the demands of the Financial Action Task Force and the numerous conventions adopted at the United Nations¹⁵⁵ and the Council of Europe¹⁵⁶ (cf. Jones and Newburn, 2007). This process, however, is a direct function of American pressure to internationalise the criminalisation of money laundering (Andreas and Nadelmann, 2006: 149) and directly linked to the growing effort to comprehensively criminalise drugs trafficking (Elvins, 2003). A more direct European influence is the money laundering directive of the EC, which was adopted in June 1991. The fact that a decade later the EU adopted a framework decision with a money laundering focus as well as the third money laundering directive indicate that the issue has moved from a protection of financial interests to an instrument of crime policy (Gentzig, 2002: 58).

The question remains, to which degree early attempts of the EC influenced English regulations, because Britain had already by 1990 criminalised money laundering in

¹⁵⁴ See also email of 15.08.2005 from the Home Office to the Council and the Commission (in personal file).

¹⁵⁵ United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988.

¹⁵⁶ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8.11.1990, Council of Europe, ETS No. 141, <http://conventions.coe.int/treaty/en/Treaties/html/141.htm>.

response to American requests. Andreas and Nadelmann found an US influence in British money laundering policy (Andreas and Nadelmann, 2006: 103). In addition, the criminal justice focus of the 1990 money laundering directive raised concerns about a potential precedent of EC law to veer in the criminal realm. Thus Britain does not seem to have criminalised money laundering in direct response to the directive (Gentzig, 2002: 50). Even though the 2002 Proceeds of Crime Act transposes numerous parts of the EU framework decision, both Gallant (2005: 110) and Gentzig (2002: 63) argue that the British approach to money laundering both before and after the 2002 act was directly influenced by the American model (see also Andreas and Nadelmann, 2006: 51-54). Both authors base their assessment on similarities between the British and the American model of money laundering, which focuses on civil forfeiture and distinguishes between different predicate offences. The major impetus for change was national policy, not the EU (Gentzig, 2002: 84-5).

James Sheptycki, in contrast, argues that the notion of targeting criminal money has come to be a significant new paradigm in law enforcement and was strongly influenced by European developments. Following the recommendations set down by the Financial Action Task Force and the EC Money Laundering Directive of June 1991, the UK has been at the forefront of international developments in this field (Sheptycki, 2002b: 546). He finds a clear, if general, influence of the EU in UK policy. Furthermore, the Criminal Justice Act 1993 transposed several Council Directives concerning the use of the financial system for the purpose of money laundering. These measures did not require the introduction of criminal justice measure, but asked member states to prohibit certain acts. The UK government decided to implement them using criminal law. In this vein Europe influenced the English framework.

So while the overall form of UK money laundering policy, and the fact that it has gained such prominence in the criminal justice framework, is primarily influenced by the US example, the EU had an influence, when issues related to the common market and when the concrete form was concerned. Until 2002, however, the money laundering regime in the UK had an idiosyncratic form. Due to the Common Law system and the initial concern with the proceeds of drugs trafficking, the English approach to money laundering differentiated between the different predicate offences, which had led to a very complex situation for the police and the prosecutors, because they had to prove the source of the money in order to prosecute successfully. In addition, this structure was difficult to amend (Gentzig, 2002: 63). At the same time, the effective consequence of the offences was relatively similar. In all cases forfeiture was possible and money laundering criminalised. The 2002 Proceeds of Crime Act (s. 327-29, 334) changed this situation and removed the complicating differentiation of the old measures. While this consolidation represents an approximation of English law to the prevalent European

model, the government did not make a reference to European precedents in the decision-making process. The Minister for Police, Courts and Drugs (John Denham), however, referred to the need for international cooperation also within the EU in developing new legislation.¹⁵⁷ The similar form thus remains the strongest indicator of an influence of the EU on the UK framework.

The assessment of the effects of the money laundering framework is quite complex, because money laundering law intermingles civil and criminal procedures. While the predicate offences are dealt with in criminal proceedings, the forfeiture aspects are governed by civil matters (Gallant, 2005: 17). This is important as in the second context a less rigorous principle of proof applies. It also posed a problem for the assessment of UK compliance with the framework decision, as the Commission held that the fact that forfeiture was governed by civil procedures did not fit in with the criminal conception of penalties brought forward by the framework decision.

The assessment of the effects of money laundering policy on the two dimensions differentiates between a sketched effect of the overall regime and a more detailed discussion of the transposition of the framework decision. In general, however, the Proceeds of Crime Act 2002 is the only conceivable source through which the requirements of the framework decision could have been transposed.

The Financial Action Task Force is a new actor in this policy field, which was established through a Council of Europe process. It removes the fight against money laundering from the political domains to an expert forum. This can help to de-politicise a potentially sensitive policy field. It is not a reaction to an EU measure, though.

With regard to *judicial control*, the 2002 act was subject to a long and extensive discussion in parliament. Other than that the roles of lawyers or civil bodies were not affected by the new act. Judges get more control, as they decide on the course of action to be taken in relation to the confiscation of proceeds and individuals can start a civil procedure to reclaim losses, which empowers individual control. In particular those affected by money laundering have been empowered.

Legislative control has been indirectly improved, because the abolition of different predicate offences means that the law is now clearer. Money laundering offences have a more coherent statutory basis. However, the expanded money laundering offences deploy ‘a reverse onus of proof of *mens rea* (guilty mind) [on the defendant] and it effectively bases on negligence criminal liability’ (Bonner, 2002: 504). This can be a problem for ill-informed persons and lead to complications in criminal procedures.

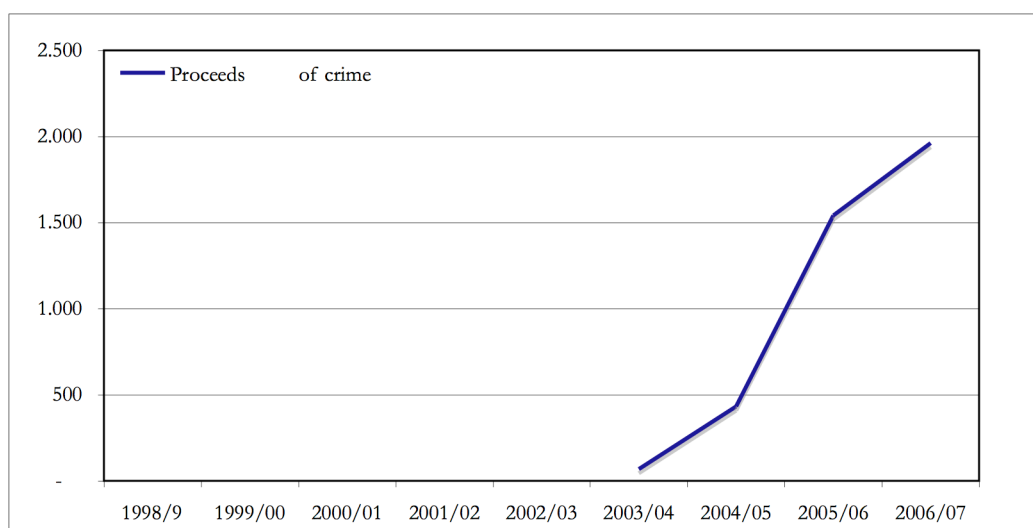
¹⁵⁷ HC Debs. Vol. 1103 Col. 758, 30.10.2001.

Security tasks were expanded. The removal of the predicate offences makes money laundering a much broader offence than before. Instead of having to prove the origin of a suspicious transaction, the police can become active immediately. This improves the practicability for police and prosecutor, as the crime can be more easily applied.

The approximation of money laundering legislation to international standards, whether they emanate from the EU or from other international bodies, expands the task of law enforcement in the fight against money laundering beyond the borders of the UK. The focus on international monetary flows extends extraterritorial jurisdiction (ETJ) to money laundering.

The *methods* of law enforcement were affected as well. Forfeiture of assets has been simplified and extended. While forfeiture had been possible before the 2002 reforms, the removal of different rules for different predicate offences made the application of this rule much easier. Money (proceeds of crime) can more easily be frozen and forfeited before the beginning of an investigation (Bonner, 2002: 503). In connection with the broader offence, these changes have significantly affected the power of the police. The embedding of UK money laundering policy in international frames opens up better international cooperation mechanisms. Data can be exchanged more easily, the access to financial data can be used for criminal law enforcement and foreign data can be employed to fight domestic and foreign crime (expansion of jurisdiction). The embedding of the anti-money laundering framework in the European extradition regime promises a higher success rate in bringing criminal to justice.

Figure 6 Recorded offences under the new Proceeds of Crime Act



These changes are reflected somewhat in crime statistics. Through the Proceeds of Crimes Act 2002 an old offence was re-introduced. But since its introduction, the number of cases per year have risen significantly from 69 in 2003/4 to 1961 in 2006/7 (see Figure 6).¹⁵⁸ This indicates that the new offence has had an impact on the work of the police. Through the effect of the EU level on this offence, the EU not only affected the working basis of the police, but also their genuine work.

FD counterfeiting of the Euro

Even though the UK does not participate in the Eurozone, it must legally comply with the framework decision on the counterfeiting of the Euro due to its international circulation and the need to protect it outside the Eurozone within the common market (Grandi, 2004). The measure is binding on all member states, irrespective of their deeper integration in certain policies.

In its the first report, published in 2001, the Commission noted that the UK had not initiated new legislation and subsequently found that the UK did not fully comply with the framework decision (Commission, 2001d: 11, 17). While its counterfeiting legislation provided dissuasive penalties, it did not, in the Commission's view, provide liability of and sanctions for legal persons. But the UK had met the deadline set in the framework

¹⁵⁸ Data available at www.homeoffice.gov.uk/rds/pdfs/100years.xls (accessed 12.11.2007).

decision to transmit the necessary information to the Council and the Commission (Commission, 2001d: 13). Interestingly the Commission did not uphold its criticism of the UK approach concerning legal persons in its second report (cf. Commission, 2003c: 5), even though the UK had not introduced any new legislation. It did maintain the stance that ‘further clarifications’ were necessary for an in-depth assessment of compliance. Legal persons can be held accountable in England and Wales in line with the Interpretation Act 1978 which stipulates that the meaning of “person” includes a body of persons corporate or unincorporate (s.5, schedule 1). Furthermore, the common law offence of negligence provides sufficient guarantees for courts to grant damages to victims.

This conflict highlights problems concerning the combination of civil and common law in the development of the area of freedom, security and justice. The UK did not have to introduce any new legislation to convince the Commission that it actually complied with the framework decision on the counterfeiting of the Euro. The criticism by the Commission seems to have stemmed mainly from insufficient information by the member state, lack of knowledge about its national legal system and the related difficulty to assess fundamentally legal systems.

To ensure actual compliance of law enforcement actors with the requirements of the framework decision, the Home Office issued the Criminal Justice Act 1993 (Extension of Group A Offences) Order 2000 to include instances of forgery and counterfeiting in its remit. This was necessary to comply with the requirements of article 7(1) of the framework decision. In a Home Office Circular the Home Secretary gave instructions to the police relating to the attention to be paid to the counterfeiting of the Euro under the Forgery and Counterfeiting Act 1981. The two administrative instruments were circulated or adopted after the framework decision had been formally adopted. Hence, there is one indicator that policy transfer has been taken place, even though no direct reference has been made to the European origin of the measures (cf. Jones and Newburn, 2007: 31).

The 1981 act is the most important statutory bases of counterfeiting of currency. It provides for the criminalisation of forgery and counterfeiting, whose definition covers the elements, which the framework decision requires. Already since the 1860s counterfeiting had been declared to belong solely to the ‘supreme power in every state’ (Andreas and Nadelmann, 2006: 89). Recognising the EU to hold this ‘supreme power’ for those member states in the Eurozone would indicate that there is no explicit need to introduce specific legislation in order to criminalise the counterfeiting of the Euro. The Accessories and Abettors Act 1861 provides for the general liability of offenders trying,

support or abet a statutory or common law offence. This fulfils the requirements of art. 3 FD.

More generally, the fight against counterfeiting of money is viewed in the context of the international approach against money laundering. Empirical research also indicates that international cooperation against this crime is necessary, as most forged money is not produced in the country of designation. Having an integrated monetary area renders national responses insufficient (Grandi, 2004: 97-8).

As the UK complied with the requirement from the framework decision without having to adopt new legislation, its effect on the dimensions liberty and security was virtually nil. The two administrative instruments adopted merely reinforced the current approach and highlighted the political importance attached to the Euro.¹⁵⁹ Neither *legislative control* and *judicial control* aspects of the liberty dimension were affected, nor procedural rules and other processes. Parliament did not adopt any new measures and control actors in the criminal law arena were not affected either. The same can be said for the security dimension. *Security tasks* of law enforcement were not influenced, as the fight against counterfeiting had been a significant element in its activity against financial crime. *Security methods* were only very slightly affected in that the Home Office addressed the issue of Euro counterfeiting in circulars, who only clarified the scope of police competences.

FD corruption

Another financial aspect of an economic focus in the fight against serious crime is corruption. Corruption has a direct negative influence on investment and growth (Mauro, 1995: 683). Thus it offers significant incentives for governments to address it as a (criminal) problem. The activity of non-governmental organisations, such as Transparency International, have successfully lobbied to establish corruption on the political agenda and to frame it as a bad practice. In addition corruption can open access to policy makers for criminals.

In 2001 the EU adopted the framework decision on combating corruption in the private sector.¹⁶⁰ The corruption of public officials is not addressed. This complemented the convention of corruption of EU officials adopted in 1997 and an increasing recognition that corruption is harmful for international economic cooperation. Corruption is seen to be a 'threat to a law-abiding society as well as distorting competition' (para. 9 preamble of

¹⁵⁹ It is interesting to note the growing importance this policy has in the context of fighting against terrorism. Terrorist financing has become central to this effort. Alongside money laundering, forgery and counterfeiting are considered central sources for terrorist financing. The closeness of the issue to the fight against offences against the financial interests of the EU needs to be acknowledged as well.

¹⁶⁰ Official Journal L 192 of 31.07.2003, p. 54.

FD). The intention of the framework decision was to ensure the criminalisation of active and passive corruption and the liability of legal persons (para. 10 preamble).

In the UK this goal could be met without changes to the domestic framework (Commission, 2007). S. 1 of the Prevention of Corruption Act 1906 in the Home Office's view fulfils the obligations of article 2 FD. The Commission conforms by saying that the UK 'correctly transposed every element of Article 2' (Commission, 2007). The Accessories and Abettors Act 1861 provides for the criminalisation of abetting and attempt of corruption. The necessary levels of punishment are contained in the Prevention of Corruption Act 1906 and the Public Bodies Corrupt Practices Act 1889. The maximum penalty is seven years imprisonment. This is clearly beyond the minimal requirements of the framework decision, which demanded one to three years' imprisonment. Legal persons are liable thanks to the Interpretation Act 1978 and the regulations on the civil recovery of proceeds of crime in the Proceeds of Crime Act 2002 (part 5). The Commission, however, sees a problem with the focus of those regulations on civil liability. It says that the lack of criminal liability of legal persons in English law does not fulfil the intention of article 5 FD. The Commission as a result finds partial non-compliance by the UK.

Concerning the process of policy-making, the UK provided necessary information on compliance with the framework decision on time. The transposition deadline for the framework decision was July 2005, and the UK transmitted the information in December 2005. The fact that the UK claimed that there was no need to introduce new legislation to conform to requirements also means that there were no changes on either the security or the liberty dimension. *Judicial* and *legislative control* remained the same, as did the *tasks* and *methods* of law enforcement actors. A direct influence of the framework decision cannot be detected. In 2002 the UK Proceeds of Crimes Act criminalised money laundering and provided means to recover a benefit that accrued to a legal person as a result of a crime. While the Commission did not find this aspect to fully adhere to the requirements of article 5 FD, this at least shows some influence of the EU level. Even though the influence did not originate in the particular framework decision on corruption EU policy on the development of a criminal policy framework against corruption was influential. If this indirect link is accepted, the security dimension would have been affected in that the methods of law enforcement would have been expanded.¹⁶¹

¹⁶¹ In a way, the rights of individuals to recover their losses were also affected, but these rights can be enforced only in civil proceedings against another actor, but not against the state.

In the analysis of four framework decisions in the fight against aspects of serious crime related to economic activities, it appears despite the fact that the EU has been very active in the last decade in this context, that the legally binding EU measures adopted had very little influence on the English regulatory framework. In later measures, some changes took place – in particular an updating to technological developments. Beyond these neither the liberty dimension nor the depth or scope of security have been changed. But the European level, which is not necessarily restricted to the EU, has provided the background against which policy was developed. Especially the protection of the financial interests of the EU and the Financial Action Task Force set up by the Council of Europe were important in that respect.

10.3.3. Fighting serious crime

In difference to the first four framework decisions, the following three measures are groups not due to their similar content, but their contribution to the fight against serious crime. The definition of terrorism, the establishment of joint investigations teams and general mutual legal assistance in criminal matters provide key aspects to policy-making in the third pillar areas. A new policy field is Cybercrime, which has increased significantly in recent years and permeates most particular criminal activities, whether trafficking or counterfeiting.

FD on joint investigation teams

The establishment of joint investigations teams (JITs) was heralded by the British government as a central element in the development of European criminal justice cooperation.¹⁶² The UK was the only member state to have forwarded information on transposition almost by the deadline given in the framework decision (Commission, 2004h). In its transmission to the Commission, the British government stated that only certain provision needed to be enacted by statute, whereas others, in particular the formal setting up of Joint Investigation Teams, only required the adoption of an administrative order or the dissemination of a circular in order to alert the relevant actors to the new situation.

The framework decision on joint investigations teams was transposed together with the MLA convention and several other central third pillar measures in the Crime (International Cooperation) Act 2003 (esp. ss. 16-19). By ratifying the MLA convention the UK government automatically transposed the framework decision on joint investigation teams, because it was adopted as a bridging measure for the MLA convention and had taken the formulations directly from it.

¹⁶² HL Debs. Vol. 641 Col. 973, 2.12.2002 Lord Filkin.

In the UK the MLA convention was ratified before any steps were undertaken to transpose the framework decision. It also transposed all requirements within the time frame foreseen by the framework decision. In addition, sections 103 and 104 of the Police Reform Act 2002 detail the liability of members of a joint investigation team by adding references to the European rules on joint investigation teams and mutual legal assistance. The relevant regulations are further explicated in Home Office Circular 53/2002 of 01.12.2002, which provides guidance on the setting up of JITs. The Police The International Joint Investigation Teams (International Agreement) Order 2004 further explicates the institutional competence to establish and run joint investigation teams. In 2005 these rules were extended to the newly established Serious Organised Crime Agency in s. 30 of the Serious Organised Crime Act 2005.

In the UK police could and did participate in common cross-border operation even before the framework decision had been transposed (Sheptycki, 2002a: *passim*). The existing rules did not suffice the increased need for operational cooperation in the EU. Furthermore, they were based on ad hoc understandings rather than stable, formal frameworks. Thus the Criminal Justice (International Co-operation) Act 1990 was replaced by the CICA 2003, which sets out the competences of members of JITs. These include the search of suspects and the direct transmission of evidence to a foreign court, but restrict the competences of participating foreign officers (without letter rogatory) to search warrants and production orders.

The combination of laws and statutory instruments to transpose the framework decision is characteristic for the UK approach to transposing EU legislation. This led to criticism by the Commission. While the UK says it complies with the requirements of the FD through old and new primary legislation in combination with the order and the circular, the Commission disagrees. The major contention is the lack of legal certainty, which the Commission did not sufficiently find in the British regulation on the setting up of JITs (Commission, 2004h: 25).

The framework decision on JITs in combination with the MLA convention had stronger effects on the two dimensions than the previous analysed measures. The abolishment of political control procedures in the transmission of evidence obtained in the context of JITs removes a layer of *legislative control*. At the same time this administrative speed-up removes political discretionary power whose exercise is not controllable. The doctrine of parliamentary sovereignty, in addition, binds courts. So they cannot allow or restrict the transmission of data against the expressed will of parliament. The direct transmission of data is, similar the German case, a restriction in the protective degree of personal data. The new framework assumes a comparable level of data protection and procedural guarantees in all EU member states, as the immediate use of evidence gathered in the

context of a JIT is possible everywhere. The possibility of non-police actors to participate in JITs means that data could be transferred to actors, which would not receive the data in the national framework.

Foreign members of a JIT are subject to the same liabilities as their British colleagues. This applies when they inflict damage upon somebody and when they suffer harm themselves. In 2005 this liability was extended to officers from the newly established Serious and Organised Crime Agency (SOCA).

Concerning *judicial control*, both houses of parliament dealt extensively with the topic of joint investigation teams, even though it was in the broader context of EU criminal justice cooperation. Parliament explicitly addressed questions of civil liberty protection and individual protection mechanisms against state intrusion.

Control of individual rights by court is maintained, because the foreign officers are subject to the same rules and conditions as English constables. The rules on police liability in the Police Reform Act 2002 were, however, introduced in order to comply with the MLA Convention, not with reference to the framework decision. Even the CICA 2003 rules on joint investigations teams are taken in the context of the MLA Convention only. The impetus for these changes was clearly the EU level. Alternative control is exercised continuously, but only more generally by the Police Authority. As Loader and Mulcahy note, the introduction of new managerialism under the 1980s Tory government led to a control focussed on efficiency (2003: 292-3), while the awareness of minority right has grown simultaneously (2003: 284).

The act is mainly procedural and does not address substantive issues. Thus the *tasks* of law enforcement were not directly affected. Indirectly, the fight against terrorism is as important an aspect as the fight against organised transnational crime. But neither aspect is particular to the transposition of the framework decision. The framework decision is rather an element in the development of a more comprehensive framework.

Security methods have been affected. Joint law enforcement teams in transborder cases are not new. Particularly in the fight against drugs and organised crime they have been in use for a while (Elvins, 2003; Sheptycki, 2002a). Their legal basis varies, as they were established for example under the UN Convention against organised crime¹⁶³ or on an ad hoc basis or within bi- and multilateral negotiations (Plachta, 2005: 286). The regulations in the framework decision go further and provide a permanent multilateral structure upon which JITs can be established. The instrument as such is therefore not new, but the form of the instrument is further reaching than before.

¹⁶³ U.N. Doc. A/55/383, General Assembly, 2.11.2000, Fifty-fifth session Agenda item 105, Annex I

The establishment of joint investigation teams gives foreign law enforcement officials a role comparable to that of a British constable. The direct communication between judicial actors empowers law enforcement actors with regard to their independence. This is not per se a change in methods, but elevates their position relative to the political sphere. More broadly, the CICA 2003 ratifies the MLA convention and its protocols thus ensuring that participating countries in operational cooperation adhere to a very similar set of rules. This mutuality is necessary for a deep engraining of operational cooperation in internal security matters. Empirically, however, the changes through the CICA 2003 with regard to the establishment and use of Joint Investigation Teams are not reflected in the data. The member states in general are very reluctant to use the new instrument (cf. Mitsilegas, 2006) and the UK took part in one JIT.

FD on combating terrorism

Anti-terrorism policy is the most contentious politics in the internal security sphere in the UK (Haubrich, 2005; Waddington, 2005; Feldman, 2006) and through its emphasis on extraordinary circumstances and competences also the most intrusive police for individual rights (cf. Bigo et al., 2007). In the EU, the UK continues to be in the frontline of terrorist attacks. After many years of IRA-related terrorism, most instances of Islamist terrorist plots have been reported there. For example, in July 2005 fifty two people were killed in a bomb attack on the London Underground and in 2007 a conspiracy was uncovered to explode car bombs in London and Glasgow. Since putting anti-terrorism legislation on a permanent basis for the first time in the Terrorism Act 2000 (TACT), the British government almost annually introduced farther-reaching legislative initiatives in the fight against terrorism. Between 1997 and 2005, it tabled six anti-terrorism bills.¹⁶⁴

Here the focus lies on those legislative acts which bear a (direct) reference to EU measures in the field. Continuous changes in legal structures make it increasingly difficult to understand the complexities of the policy. An assessment of the direct EU effects is embedded in an attempt to capture the general developments in British anti-terrorism policy.

The requirements arising from the framework decision on combating terrorism had mostly been met through the TACT 2000. S. 52 of the CICA 2003 further introduced extraterritorial jurisdiction for all terrorist offences. These encompass all those offences which are captured by the combination of a normal crime committed with terrorist

¹⁶⁴ In the light of this frenzy of policy-making in that domain, an analysis would easily provide the material for a whole book. From a legal perspective Walker provides such an account (2002). The debate between Haubrich and Waddington reflects differences among social scientists about the consequences of legislative measures (Haubrich, 2003; Waddington, 2005; Haubrich, 2005).

intent. This removed the main gap in British anti-terrorism policy as far as the FD was concerned. The Terrorism Act 2006 expanded terrorism to attacks directed against international organisations.

The centrepiece of the United Kingdom's counter-terrorist legislation is the Terrorism Act 2000, which came into force in February 2001. It is applicable to domestic and international terrorism. In s. 1 it provides for the first time a general definition of terrorism as the

‘use or threat of action [...] designed to influence the government or to intimidate the public or a section of the public, [which] ... is made for the purpose of advancing a political, religious or ideological cause.’

To constitute terrorism, an action must involve serious violence against a person, serious damage to property, serious risk to the public, or seriously interfere with an electronic system. In later sections, the act specifies a limited numbers of terrorist offences (e.g. s.15-19. 54, 59). In general, however, the government regards terrorism as a ‘crime, and the perpetrators of terrorism ... as common criminals’.¹⁶⁵

The framework decision defines terrorism as ‘intentional acts, which may seriously damage a country or an international organisation’, the aim must be to seriously intimidate a population, or unduly compelling a government or international organisation’, or ‘seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation.’ Substantively these aims encompass attacks upon a person's life, its physical integrity, kidnapping or hostage taking, causing extensive destruction to a government or public facility, seizure of public or goods transport, the manufacture, possession, acquisition, transport, supply or use of weapons, and the release of dangerous substances, and interfering with or disrupting the supply of fundamental natural resource or threatening to commit any of these acts’ (art 1) (cf. Peers, 2003: 228).

The two definitions are quite similar. They combine ‘normal’ offences with an intentional element to qualify them as terrorist. The overlap between the two definitions of terrorism could be explained with the model character the British legislation seems to have had for the EU. This notion is expressed in a Home Office letter to the Commission¹⁶⁶ and was also expressed in the debate in the House of Lords.¹⁶⁷ This assessment was further supplanted by the Commission communication on the definition

¹⁶⁵ Home Office letter to the Commission of 27.01.2003, in personal file.

¹⁶⁶ Home Office letter to the Commission of 27.01.2003, in personal file.

¹⁶⁷ HL Debs Vol. 641 Col. 973, 02.12.2002.

of terrorism, which referred to French, Spanish and Portuguese definitions of terrorism, but spent most time on the TACT 2000 definition (Commission, 2001c: 7). So rather than finding a 'top-down' relationship, in the case of defining terrorism the relationship seems to be the other way around.

The British definition includes a necessary political, ideological or religious element. In the Commission's view this is problematic, as it is open to a wide-ranging interpretation of terrorism when offences are intended to advance 'political, religious or ideological causes' (Commission, 2004a: 8). Such a formulation is particularly critical as it lacks legal certainty (Walker, 2007: 340). While it is narrower than previous definitions through its focus on the 'seriousness' of the level of violence, in general it rather constitutes a broadening of the legal definition of terrorism. It 'mainly serves as the platform for investigative police powers where there must be some margin of error' (Walker, 2007: 340) which evokes similar concerns as those voiced by the Commission.

Overall, the TACT 2000 fulfils all the requirements of the framework decision, except for extraterritorial jurisdiction and attacks against international organisations. The general anti-terrorism powers were enhanced by the Anti-Terrorism Crime and Security Act 2001. It contains 129 sections on issues, ranging from immigration to terrorist financing and was one of the largest adopted since World War II (Haubrich, 2003: 9). With respect to the framework decision, s. 113 criminalised the use of dangerous or noxious substances with the intent to cause harm, for which a fourteen-year prison sentence can be issued.

In addition to these provisions, rules on extraterritorial jurisdiction over actions committed abroad by British citizens or legal persons registered in the UK were introduced by the Crime (International Co-operation) Act 2003 (Commission, 2004f: 3).¹⁶⁸ This ensures that all acts committed in the UK or by UK citizens abroad can be tried in the UK and fall under the jurisdiction of English courts, as had been required by the framework decision. The Terrorism Act 2006 reforms s. 1 of the Terrorism Act 2000 and extends the definition of terrorism to acts committed against international organisation. The explanatory notes on this act almost literally address the criticism of the Commission concerning the transposition of the framework decision into national law (Information, 2006: para 158; Commission, 2004f: 8). The Secretary of State Baroness Scotland of Asthal in the debate in the Lords, only referred to the UN in her speech when introducing the bill in parliament.¹⁶⁹ The debates in both houses stressed the importance of participating in international cooperative efforts in the fight against

¹⁶⁸ Cf. also Home Office letter to the Commission of 27.01.2003, in personal file.

¹⁶⁹ HL Debs Vol 675 Col 1384, 21.11.2005.

terrorism. But most references were of a declaratory nature and, if specific, more often quoted UN Security Council Resolutions or international conventions rather than EU agreements. The changes in response to the criticism by the Commission addressed specific issues, though and did not form core elements of the laws through which English law conformed to the European requirements.

So while the overall structure of the anti-terrorism legislation was not determined by European measures, the definition of terrorism was affected and reformed. The changes are not fundamental, but are still out of line with the government's assessment that 'the proposal does not go further than UK legislation, which is considered to be adequate and not require change' (European Union Select Committee, 2000: App. 3). The Home Office reiterated this position in a letter to the Commission and the Council, but already then makes reference to the ATCSA 2001.¹⁷⁰

The Commission report states 'that the implementation of the Framework Decision has in most Member States required the adoption of new legislation or at least the amendment of certain internal provisions' (Commission, 2004a: 3). This functional link is supported by a long list of legislation adopted after 2000 in almost all member states. How these regulations pertain to the requirements arising from the framework decision remains unclear and the necessary link between EU developments and national laws is not specified. To identify this link is particularly difficult, because the UK follows a different system from the framework decision and other European states, as it only provide for a limited number of specific terrorist offences. The rest are common law offences covered by a general definition of terrorism and terrorist are tried under 'normal legislation' (Walker, 2007: 348), which has been criticised by the Commission (Commission, 2004f). From a systematic point of view this is problematic, as diverse approaches remain, which in turn may hamper the clarity and completeness of implementation of provisions on penalties and jurisdiction. '[A]lthough, from a practical point of view the approach of the United Kingdom might not lead to great divergences, the lack of a clear distinction between terrorist and common corresponding offences could hinder the harmonization of sanctions in the terms of Article 5(2) of the Framework Decision' (Commission, 2004a: 7).

Overall, the UK government did have to change several aspects of its anti-terrorism legislation in order to comply with the requirements of the framework decision, especially on ETJ and the definition of terrorist offences. Substantively, the UK has set precedents in the fight against terrorism, a prime example being the derogation from article 5 ECHR (liberty and security of the person). It even declared a national

¹⁷⁰ Home Office letter to the Commission, 27.01.2003, in personal file.

emergency to justify new rules to keep suspects in detention for 28 days without warrant and trial. This example is also an illustration of the contingency of UK anti-terrorism policy. The European normative framework sets boundaries within which national governments must locate themselves and against whose standards they are measured. The derogation from the ECHR had to be publicly declared and was received with harsh criticism from both abroad and UK civil society.

On the two dimensions of liberty and security, the limited direct effects of the framework decision had, accordingly, overall limited direct effects. Those effects it had, however, expanded the powers of the state, e.g. concerning ETJ, and, for example, expanded the scope of terrorism offences to international organisations and the use of noxious substances. The tendency to use a broad definition of terrorism and thus to run the danger of capturing not only inherently terrorist offences, but also ordinary serious crime seems to be more of a UK development, which was largely reflected in EU policies. The changes through the ATCSA 2001 and the Terrorism Act 2006, though making reference to the obligations arising from European police and judicial cooperation and contributing to the complete compliance with the framework decision on terrorism, were effected through other framework decisions.

There were some interesting developments concerning *judicial control*. Parliament debated the 2000 Terrorism Act for 232 days and the debate was neither guillotined nor subject to a programme motion (Hazell, 2006: 256). In comparison with other anti-terrorism legislation this was very long. The acts that transposed the necessary adaptations to the anti-terrorism framework in response to European requirements, i.e. the ATCSA 2001 and the PTA 2005 were discussed for 32 and 18 days respectively (Hazell, 2006: 250-66). In the light of the significant constitutional effects of the measures these discussions were very short (cf. Haubrich, 2003). On the other hand, parliament regularly reports on the anti-terrorism legislation and its effect on human rights and civil liberties (e.g. Joint Committee on Human Rights, 2006a).

As Haubrich aptly demonstrates affected the new anti-terrorism framework strongly affected protection mechanisms of criminal procedure. He argues that British anti-terrorism legislation is in significant parts not restricted to be applied against terrorist offences only, but to *any* crime (Haubrich, 2003: 13-14).¹⁷¹ The extension of detention and the massive expansion of offences pose problems for individual control. In particular the 'assertive judgements which are deferential to security concerns' of the home office (Walker, 2005: 394) reduced control as control by courts did not take hold.

¹⁷¹ For an argument, which argues in favour of such an approach by treating both serious crime and terrorism as normal offences under the same laws, see Walker (2007).

On the other hand, the judiciary also defended civil liberties in the context of anti-terrorism legislation. Law Lords' ruled in December 2004 the derogation from art 5(1) ECHR incompatible with human rights. The Home Office reacted in the Prevention of Terrorism Act 2005 by withdrawing the derogation order and replacing indefinite detention by so-called 'control orders', which restrict the freedom of individuals, but on an individual basis and, in the case of control orders derogating from the ECHR, only upon the decision of a court deciding on an application by the Home Secretary. Overall, the Terrorism Act 2000 and subsequent measures further centralised power with the Home Sec (e.g. Walker, 2000).

The deviation from article 5 ECHR is a clear restriction in the *legislative control* dimension (Haubrich, 2003). Individuals can be detained for up to 28 days without a warrant based upon the suspicion of being a terrorist. Even the control orders which replaced this rule in practice amount to deprivation of liberty and, in the view of the Joint Committee on Human Rights require stronger procedural controls (cf. Joint Committee on Human Rights, 2006a: 4). The normal procedures are only difficult to attain for defendants. In addition, the decision to be designated a terrorist by the Secretary of State can only be challenged in front of the Special Immigration Appeals Commission (SIAC) by foreign nationals (s. 21 (8) and (9) ATCSA 2001, cf. Bonner, 2002: 507). The defendant can face an unfair situation as the Home Secretary may refuse to release information, which might endanger national security. But the defendant can have a Special Advocate to represent her interests (Feldman, 2002: 503; Walker, 2005).

In difference to Germany and France, the British legislation in reaction to 9/11 was not temporarily restricted. This would have been a further in-built control aspect, which has been used in other countries. On the other hand, have both houses of parliament regularly reported on developments in terrorism legislation. Partially the measures were nullified by the Law Lords, but partially procedural safeguards were further reduced through subsequent legislation against terrorism.

Public authorities are not bound by the principle of *Zweckbindung* when it comes to fighting terrorism. Customs and Excise and the Inland Revenue can disclose information for law enforcement purposes, i.e. for means the data was not collected for. This is particularly problematic from a privacy point of view when the growing trend towards the interoperability of police data bases is taken into account (de Hert and Gutwirth, 2006). In general, the amount of information disclosed to individuals has been reduced, as the Home Secretary can decide by regulation, e.g. which countries or organisations to consider terrorist without being obliged to give reason, even in court. This might be necessary for an effective and swift reaction against terrorism, but makes it very difficult in court to challenge such a designation as terrorist.

The *tasks* of law enforcement actors were greatly expanded by the anti-terrorism measures. Despite the previous experience of the UK with terrorism, the new definition of terrorism functions as an aggravating intent for many normal criminal offences (Glaeßner, 2005: 88). At the same time there still is no offence of 'terrorism'. In 2006 hate speech was criminalised in order to transpose article 5 of the CoE 2005 convention on terrorism. The punishment for the incitement of racial hatred was increased threefold (Bonner, 2002: 504). This is a further extension of the restriction of freedom of expression in the ATCSA 2001 (s. 37-41), which removed the restriction of previous legislation against religiously motivated offences to the UK and Northern Ireland. The new step but was criticised as disproportionately restricting freedom of expression.¹⁷² The feared all-encompassing criminalisation of activity directed in some way against the state, which in a similar way had been expressed vis-à-vis the framework decision on terrorism (Peers, 2003), did not materialise, as e.g. the participation in strikes or passive civil disobedience are clearly excluded from terrorism (Walker, 2007: 341).

These changes, however, were not a direct response to the framework decision or specific European requirements. An exception is the introduction of extra-territorial jurisdiction, which expands the fundamental tasks for law enforcement for certain offences beyond the borders of the UK. This is not a fundamental shift, as ETJ had been provided for other offences before, but the changes through the C(IC)A 2003 were directly caused by the framework decision.

Security methods, finally, were affected. The Home Secretary has more powers and can exercise more influence over the investigation and prosecution process than before. He can define whether a person or organisation is to be considered terrorist. This power to make secondary legislation has been received critically, as s. 124 of the ATCSA is 'not confined to details, but can even extend to primary legislation (Walker, 2002: 276). While this interpretation seems correct to the letter of the law, it would be difficult for the government to uphold such a decision in political reality.

The police can detain people for 28 days without a warrant. A longer detention time of 90 days planned by the government in the Terrorism Bill 2005 was rejected by parliament after severe criticism. Haubrich finds that the use of the longer detention time only led to very few convictions for terrorist offences and none under the new powers of the ATCSA 2001, even though the new methods had been used in a considerable number of cases (Haubrich, 2006: 408).

¹⁷² This development is not directly linked to the framework decision, but a CoE convention, which shows the European contingency of English anti-terrorism law.

Overall, the effects of the framework decision on combating terrorism were restricted. They mainly reduced the controls available to non-governmental actors. This restriction in the liberty dimension was not accompanied by an increase in the security dimension. In some respects, the Home Office increased its powers, but these extensions did not originate in the EU measure.

Empirically, however, there are some interesting results. Until March 31, 2007 the UK police terrorism arrest statistics showed that 1228 arrests were made. Of these arrests 241 were charged with terrorist offences in some way or other, whereas 195 were charged with other serious offences.

Especially in the light of the developments in immigration control policy those charges, as well as the fact that 76 people were handed over to the immigration authorities are noteworthy, because it shows that the powers in one field of activity can lead to effects in areas not functionally related to the original area. 123 people are still being processed through the system, whereas 55 per cent of the arrested people (669) were released without any charge. Of the 436 people charged 224 have been convicted to date, but only 42 of offences under the TACT.¹⁷³

FD information systems¹⁷⁴

The issue of the criminalisation of attacks on information systems is highly interesting. Some authors consider Cybercrime a new genus of crime (Savona and Migone, 2004), others maintain that 'for the most part they are simply old and familiar crimes using a new medium' (Andreas and Nadelmann, 2006: 57). Irrespective of this discussion, the EU has taken several measures to address the increasing importance of computers and networks for modern societies, and to develop a common approach to the criminal use of and attack against this vital infrastructure. The definition of terrorism included a reference to attacks against critical infrastructures, the Council adopted a framework decision on the sexual exploitation of children, which focuses on child pornography on the Internet, and in 1999 the Commission published an action plan for a safer internet.¹⁷⁵ These acts thus regulated content as well as computer crime or Cybersecurity (Mendez,

¹⁷³ <http://www.homeoffice.gov.uk/security/terrorism-and-the-law/> (accessed 17.11.2007).

¹⁷⁴ The decision was debated for the first time in 1999, initiated by the European Commission in 2001 and sent to the European Parliament for advice in the spring of 2002. In October 2002 the EP gave its recommendations and on 28 February 2003 the ministers of Justice had reached an agreement. It is unclear why it took the Council 2 years to actually adopt the proposal. At the time, parliamentary scrutiny reservations were made by the Irish, French, Swedish, Danish and Netherlands delegations. Civil society raised many objections to the proposal, most notably the broad scope of illegal access and the fact there is no exemption for security experts to test the security of systems. (<http://www.edri.org/edrigram/number3.5/attacks>).

¹⁷⁵ Official Journal L 33, 6.2.1999, 1.

2005: 512). The framework decision on attacks against information systems exclusively deals with the latter issue.

Cybercrime is not only a very young field for criminal law, but some argue that the fact that national criminal law has in many cases not developed a coherent approach to the problem of how to deal with the new medium of internet and computer criminality, that this could be an area, where the EU could develop its own criminal law (cf. Reichelt, 2004).¹⁷⁶ Whereas the development of a European criminal code is impossible in traditional areas of criminal law and only limited approximation is aspired, internet and computer crime is a relatively new field, which is seen to contain holes in its regulation. From a European point of view the use of information systems and the exchange of information is a central element of the cooperation framework established in the European treaties and their subsequent measures. Due to this importance of the issue for EU police cooperation, the advantages of a common approach to this criminal area are pervasive.

In the UK the requirements from the framework decision were transposed in s. 35 of the Police and Justice Act 2006.¹⁷⁷ Once again the transposition of the EU measure is relegated to the ‘miscellaneous’ section of a more general act, where the focus is on the transposition of the community focus of policing as laid out in the White Paper of 2004 on a ‘better police service’ (Home Office, 2004a). The issue of internet crime is mentioned shortly as a field of activity for organised crime (Home Office, 2004a: 42), but does not receive further attention. This indicates that the European elements of the act were once again attached to a domestically motivated bill, which functioned as a ‘vehicle’ to transpose European legislation.

Since the act, the unauthorised access to computer material is indictable, which transposes the requirements of article 2 FD. The penalties were raised from six months to two years. Denial of service attacks and other unauthorised acts to impair the functioning of computers is now subject to an unlimited fine or up to ten years imprisonment (s. 36, art 3 FD). The act thus doubles previous penalties in response to European requirements. The act also contains a ban to develop, own and distribute “hacker tools” (s. 37). The framework decision, and the CoE Cybercrime Convention, which introduced the offence of illegal system interference, are directly mentioned as a reason for this change to the Computer Misuse Act 1990. The introduction of new

¹⁷⁶ This certainly only is true if Cybercrime is considered a new type of crime.

¹⁷⁷ Due to the fact that the framework decision only had to be transposed in February 2007, there is no report by the commission out yet. The UK was very early in adopting transposing legislation.

crimes and the increase in penalties were thus directly linked to the EU (Home Office, 2006: paras 297, 301).

In 2003 the UK government announced in response to a parliamentary question that it saw the need to legislate in response to the framework decision. Such an open justification of the UK government for changes with EU requirements makes this act remarkable. Usually there is only a more general reference to the influence of European policies on the content at the national level or the need is cited to improve operational cooperation. While there are regularly references to the necessity of European cooperation, especially in action plans or work programmes, these are usually more of a background factor. For example the changes in certain areas would be legitimated by reference to changing issues of transborder crime, which necessitates the cooperation of the police across border and with European counterparts (Home Office, 2004c). This is one of the rare instances, where the UK government clearly linked changes in national policy to requirements of the EU level.

In the decision-making process, the All Party Parliamentary Internet Group published a report on the need to legislate in a reform of the Computer Misuse Act. The group warned about 'gold plating' European legislation, due to differences in the legal language used. The demands from the contributors on a new legislation on Denial of Service attacks, however, were taken up (All Party Parliamentary Internet Group, 2004: no 84-58). What is interesting is that the APIG 'received very few comments' on the Framework Decision in their consultation exercise, while both the CoE cybercrime convention and the framework decisions were considered to be very important.

Secretary of State Mr Clarke justified the amendment of the Computer Misuse Act as necessary to strengthen international police cooperation. While the extradition aspect in the act gets a mention of the EAW, Mr Clarke remains quiet about the framework decision on the attacks against information systems.¹⁷⁸ In the debate all sides of the House of Commons agreed with the need to legislate against hacking.¹⁷⁹ Overall the issue received very little attention, which speaks for the low importance this aspect was awarded relative to the rest of the act. In the House of Lords the situation was the same. The Home Office minister responsible for internet crime, Paul Goggins, emphasised in 2005 the goal of the UK government to agree on a common approach to the retention of data in the fight against crime, citing the long time it takes to investigate terrorist offences (Mathieson, 2005). This is not directly related to the attack on information systems, but forms another element in the overall jurisdiction of cyberspace. The picture

¹⁷⁸ HoC Debs Vol. 306 Col. 618, 6.3.2006.

¹⁷⁹ HoC Debs Vol. 306 Col. 632 and *passim*, 6.3.2006.

that emerges is one where the main actors emphasise the need to cooperate internationally, but especially with regard to the issue of computer crime, no clear preference is given to the European forum.

Legislative control was affected, as the criminalisation of the use of computers regularly arises concerns about privacy and informational self-determination. But problem arise in particular when law enforcement obtains access to private data stored on computers. The criminalisation of the attack on information systems does not carry the same risk. The penalties for all types of attacks on information system mentioned in the framework decision were raised by the new legislation. The doubling of penalties reflects the growing importance of information systems in the functioning of modern societies and expresses the punishment focus of modern criminal law.

Beyond that the effects through the new law are small, as far as it relates to the framework decision. The fact that Cybercrime now carries a tougher sentence requires a stronger proof of guilt. On the other hand leads the breadth of the definition of hacker tool to potentially wide uses. A general problem concerning the control of the use of information technology and law enforcement is the ability of the legislator to address issues in a quickly changing technological context. Especially the use of hacking tools has been seen to endanger certain economic areas, such as network security. The mere provision of tools potentially useable for hacking or cracking could lead to indictment without necessarily having a criminal intent. To a certain degree, *judicial control* addressed some of these problems. Parliament and parliamentary committees ensured that DoS attacks were criminalised, but softened the formulations so that e.g. security providers could use these instruments to test system security.

Security tasks were also affected through the introduction of new and the expansion of old offences with view to the use of computers as criminal instruments expands the tasks of law enforcement. In particular the relatively vague definition of ‘articles for use in computer misuse offences’, which could include computer programs used to probe the security of computer systems. On the other hand, the necessary intent to perform a criminal act goes some way to alleviate this problem. *Security methods*, finally, were not affected through the new rules. Both search and seizure and the interception of data wer regulated in other legal acts (Walden, 2006: 302ff). Now the applicability of these methods has been widened, but their substance has not. Overall, the effects of the framework decision on cyber law in the UK have been limited.

The impact of this group has varies across the measures. While the framework on the attack against information systems was most directly responsible for the changes that took place in the legislative framework and the other two EU measures also were mentioned in the decision-making process, in all cases the EU-induced changes were

peripheral. Even though all EU measures can thus be argued to have effectuated changes nationally, the strength of this link varies. The most interesting case is the framework decision on combating terrorism. It is a very nice example to demonstrate the independence of the two analytical dimensions liberty and security. The framework decision on joint investigation teams, finally, presents a special case as in Germany, because it was transposed in the context of the MLA convention, whereby a much broader effect was achieved on the domestic framework than the framework decision in itself could have done.

10.3.4. Protecting the borders of a sovereign UK

The next two policies address the protection of the UK's external borders. As Josef Joffe wrote it in the *Zeit* 'states with long borders and liberal tradition, such as the US and England, do not know an obligation to register or carry an identity document; this laxness to the inside implies fierceness to the outside'¹⁸⁰ (cf. also Geddes, 2006: 375). Dora Kostakopoulou argues that the UN and the EU have taken the lead in the issue of trafficking and "will be catalysts for juridicopolitical developments in the UK" (Kostakopoulou, 2006: fn14).

Such an attitude is also reflected in the non-participation of the UK in the border aspects of the Schengen process. The UK's participation in non-border aspects of Schengen mean that criminal law aspects related to border control find their way into English law. The following two measures address such issues. While they focus on border-related issues, they use criminal sanctions to ensure the criminalisation of these activities in all EU member states. At the same time, the reason behind them remains the abolition of internal border controls and the need for compensatory measures to maintain the security previously provided by borders (Andreas and Nadelmann, 2006).

While there are many and good reasons not to deal with migration issues through criminal law, the EU has taken this approach since Maastricht (Huysmans, 2000). So even though border control is a genuine task of the police, the approach to illegal migration through these measures goes beyond that in that it brings a strong element of criminalisation to the traffickers, but partially also to those who enter illegally into a country.

¹⁸⁰ "Staaten mit langen Küsten und liberaler Tradition wie die USA und England kennen keine Melde- oder Ausweispflicht, aber dafür umso schärfere Grenzkontrollen; die Laxheit im Inneren bedingt die Strenge im Äußeren" Wir wollen nur fliegen Josef Joffe in: *Die Zeit*, 16.08.2007, p. 1.

FD trafficking

The framework decision on combating human trafficking obliges the member states to criminalise the trafficking of humans for exploitation, including sexual exploitation (Peers and Rogers, 2006a: 809). The member states had to comply by August 2004 (art. 10(1) FD). In its report on the transposition, the Commission found no deviation from the requirements of the framework decision.

In the UK, the criminalisation of trafficking offences is ensured through the Sexual Offences Act 2003 s 57-59 and s. 4 of the Asylum and Immigration (Treatment of Claimants) Act 2004. Previous steps were taken already in the Nationality, Immigration and Asylum Act 2002, which introduced the offence of trafficking for prostitution (Kostakopoulou, 2006: 364). The maximum sentence for human trafficking lies at fourteen years, which exceeds the required eight years of maximum imprisonment. In the word of the Commission the regulations thus “more than satisfy” the requirements of article 3 of the framework decision (Commission, 2006b: 11). Abiding, abetting and attempt had been incriminated since the Abettors Act 1861, and the Interpretation Act 1978 allows for the punishment of legal persons and for civil litigation the Proceeds of Crime Act 2002 can be drawn upon. The Sexual Offences Act 2003 criminalises trafficking in its first part and is thus located quite prominently.

Even though the requirements very much resemble the European measures in content, neither the act itself nor the explanatory notes directly refer to a European origin of the part. David Blunkett (Home Secretary) said in the Commons’ second reading that the consultation on the Bill and its preparation lasted two and a half years.¹⁸¹ In 2002 the Home Office had published a White Paper on the reform of criminal law pertaining to sex offenders and offences (Home Office, 2002a). In that White Paper the Home Office stressed the need for European cooperation and referred to the need to introduce a new offence of human trafficking linked to sexual exploitation (Home Office, 2002a: 13 and 31). This need was justified with empirical increases in the amount of human trafficking but also with regard to international obligations arising from government commitments in the UN and under the EU framework decisions on trafficking. Mr Blankett also made a reference to the G8. Especially in the context of internet pornography, an international approach seemed to be considered more important, than the European dimension.¹⁸² In the debate, the Home Secretary also referred to the successful operational cooperation

¹⁸¹ HoC Debs Vol. 409 Col. 177, 15.07.2003.

¹⁸² This is a link to the FD on information systems, as child pornography is a central aspect in the fight against Cybercrime. The UK government considers these issues to be intimately related (*‘Closing the net on crime: Plans to track our communications have caused uproar, but the government says some rights are more important than others’*. The Guardian, 20.10.2005). The Sexual Offences Act 2003, however, refers to the *content* whereas the framework decision on information systems concerns access and the soft and hard infrastructure.

among French and British police forces, thus highlighting the importance of bilateral agreements. The framework decision on trafficking was only referred to once,¹⁸³ when a Tory MP referred to the UK's obligation from the framework decision to demand a regulation beyond sexual exploitation. Positions of UNICEF or the protocol on trafficking of children were more regularly referred to, but neither played a significant role in the debates. This contributes to the emerging picture of UK police policy-making where international cooperation is cited to justify the legislative activity, but dominant impulses originate at the domestic level. Virtually no reference is made to the legislative precedent at the EU level.

The Asylum and Immigration (Treatment of Claimants etc.) Act 2004 in section 4 introduces new criminal offences of trafficking for the purpose of (non-sexual) exploitation. While the explanatory note does not make a reference to the European requirements, in a letter of 2.11.2004 the Home Office referred to this section as transposing article 1 and 3 of the framework decision.¹⁸⁴ Section 5 ensures ETJ, an issue that requires regularly changes, as seen before. This act was adopted in November 2002, while the framework decision had been adopted in June 2002. Therefore the link is more spurious, but there are indicators that the act was adopted with a view to a common European approach to the issue. The explanatory notes, in paragraph 360 refer to the relevance of the new regulation to comply with Schengen requirements and with the framework decision on unauthorised entry. This emphasises the close connection between the two measures.

In difference to the German transposition of the FD, the British approach focuses on the intent on the part of the trafficker. The offences of trafficking in the Asylum and Immigration 2004 and the Sexual Offences Act 2003 do not need to entail the execution of the exploitative treatment. The intent of the trafficker is sufficient.

On the *procedural* side, the situation for the offenders as well as the victims of trafficking has been affected. The reform of the 1971 Immigration Act established a strong law enforcement framework (in particular if seen in the broader issue of border control), but has done little in the way of protecting victims (Kostakopoulou, 2006).

The role of victims was emboldened in criminal proceedings, even though politicians and academics criticised that the protection was not enough (Obokata, 2003).¹⁸⁵ The new regulations also increased the criminalisation of those unlawfully in the UK. So the new measures not only increase the protection of the victims by adapting the criminalisation

¹⁸³ HoC Debs Vol. 409 Col. 219, 15.07.2003.

¹⁸⁴ The letter is in personal file with the author.

¹⁸⁵ HC Debs Vol. 409 Col. 177 ff, 15.07.2003.

of trafficking and smuggling by also makes the situation of victims in the UK more precarious. In principle normal criminal procedure applied, which can lead to problems in the case of foreign victims, whose knowledge of English and the legal system of England is limited. This can raise obstacles for the procedural protection of the most vulnerable.

Concerning the *actors of control*, parliamentary debates focussed almost exclusively on the national level and rarely concerned itself with the European political dimension of the trafficking issue.

The introduction of new crimes extended the *tasks* of law enforcement. The extension of crimes for sexual exploitations and for other types of exploitation transferred new competences on law enforcement. The regulatory framework in the fight against illegal immigration has become robust and the protection of border security has been upshored. *Security methods* were affected as well. Customs officials can arrest suspects which commit an offence according to the new act without warrant (Immigration and Asylum 2004 Act s 14). In principle this power existed beforehand, but was extended through the 2004 act. In addition, the extension of extraterritorial jurisdiction means that the incentive to engage in international operational cooperation is higher.

Overall the changes to the regulatory framework against trafficking have been changed considerably through the new laws. The framework decision on trafficking, however, seems to have had only a slight effect on the eventual outcome. In particular, the analysis has shown that looking at this measure independently is insufficient. Thus the analysis now turns to the framework decision on unauthorised entry.

FD unauthorised entry

Where the previous measure addressed the trafficking of human beings, the framework decision on unauthorised entry concerns the smuggling of persons. The difference between the two offences lies in the state of mind of the person crossing the border. In the former case the person crossing the border is deceived or forced and usually the trafficker intends to exploit the trafficked person in the country of destination. Smuggled people, on the other hand, usually agree to cross the border and pay somebody to help them. This journey might still end up in an exploitative situation for the smuggled person. So this rather artificial differentiation does not do justice to the real world situation of those living clandestinely (Kostakopoulou, 2006: 366), but is heuristically serves to differentiated between the two framework decisions.

The framework decision on unauthorised entry focuses on the crossing of the border proper. It requires the criminalisation of the facilitation of unauthorised entry, transit and residence (Apap, 2002: 314). The measure builds on those parts of the Schengen Acquis,

which the UK has decided to participate in.¹⁸⁶ Peers and Rogers question the correctness of this legal basis, because the framework decision is broader in its application than the Schengen measure (Peers and Rogers, 2006b: 832). This is in line with the (disputed) assessment by the Commission in COM (2005) 583 of 23.11.2005 on the implications of the ECJ ruling on its criminal competence, wherein the Commission argues that the framework decision should be replaced by a first pillar directive, as it relates to migration matters rather than crime fighting.

The UK complies with article 1 of the framework decision in s. 25 of the Immigration Act 1971 in the version as substituted by s. 143 of the Nationality, Asylum and Immigration Act 2002, which sets out the offence of assisting unlawful immigration to a member state. Assisting illegal immigration into another state can be punished by a fine or imprisonment up to eight years. If the trafficking of people is undertaken in order to exploit the trafficked, the penalty increases to fourteen years (s. 4 AITCA 2004). Art. 1(3) FD foresees a maximum penalty of not less than eight years when the offence is committed under aggravating circumstances. This number was 'partially based' on a UK proposal, as the British government considered serious facilitation to warrant the same punishment as counterfeiting of the Euro (European Scrutiny Committee, 2001). Peers and Rogers show that it was quite difficult to agree on a common level of punishment among the member states (Peers and Rogers, 2006b: 829-31). So the eventual influence of the UK government remains unclear, even though the available documents indicates some influence. But the penalties available clearly exceed the requirements of the framework decision.

Legal persons can be held liable for their support and facilitation of illegal entry into the UK as well, as long as they are committed by a senior representative of that legal person¹⁸⁷. This liability is based on the Interpretation Act 1978. But the fine is always in addition to the penalty of the natural person. These regulations ensure that the UK law complies with article 2 FD.

The reform of s. 25 of the Immigration Act 1971 in 2002 was justified by the government with reference to article 27 of the Schengen convention, which compels member states to apply 'appropriate' sanctions for assisting unlawful entry to a Schengen member. The article is one of only two of the Schengen regulations concerning the abolition of borders and the free movement of persons, which the UK applies under

¹⁸⁶ Cf. Official Journal L 131 of 01.06.2000

¹⁸⁷ Home Office Letter of 02.11.2004 to the Commission, in personal file.

Council Decision 2004/926/EC.¹⁸⁸ The decision to participate in this article subsequently also led to the participation in the framework decision, because the framework decision replaces article 27 of the Schengen convention (art. 10 FD). In February 2002 the government already referred to the need to adapt legislation in response to the framework decision (Home Office, 2002b: para. 5.23), even though the framework decision was formally adopted in November 2002. With a view to the rather long negotiations concerning the framework decision, which had been introduced by the French government in 2000 (Peers and Rogers, 2006b: 829) and the active involvement of the UK, the pre-emptive explanation of the government can be followed. So even though the British law was prepared, discussed and adopted *parallel* to the EU measure, the latter has had an influence on British legislation.

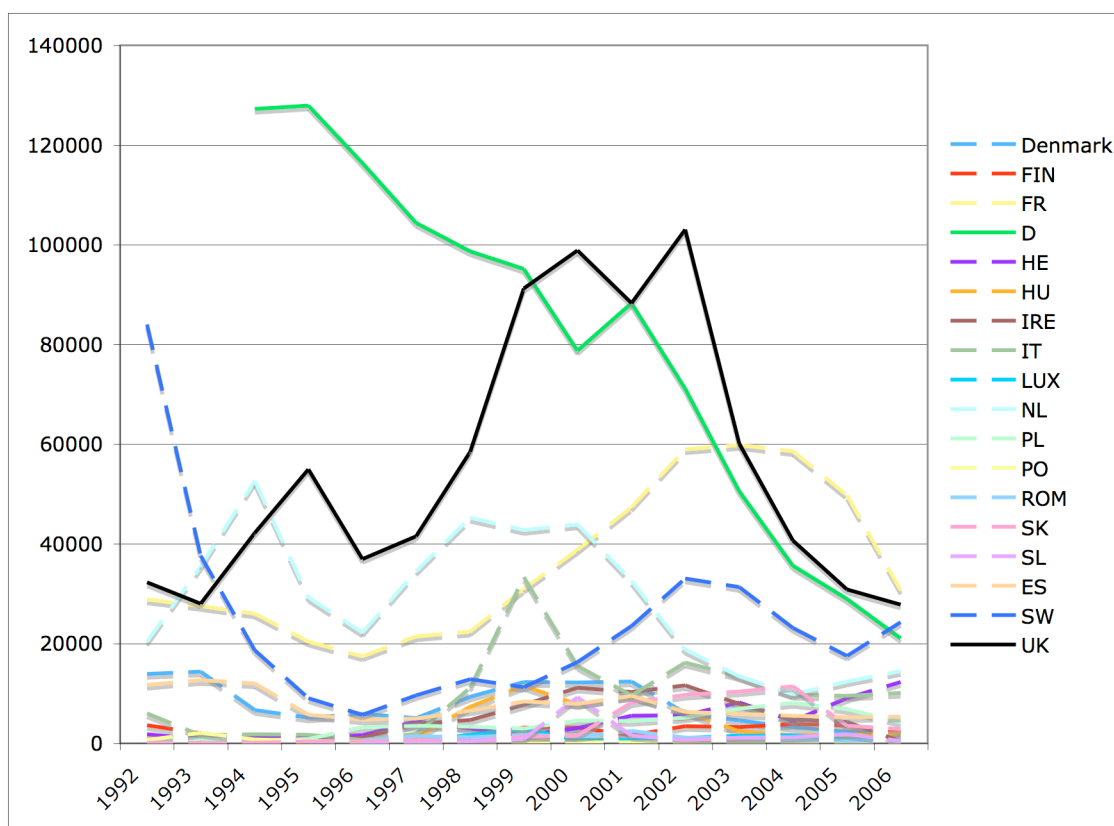
The Asylum and Immigration (Treatment of Claimants) Act 2004 in s. 1 amends s. 25 of the Immigration Act 1971 by giving the Secretary of State the power to designate the states to be treated as EU member states, which introduces necessary flexibility in the view of future accessions of countries to the Schengen area. According to the explanatory notes this was ‘necessary’ to comply with the directive 2002/90/EC and the framework decision on unauthorised entry (Home Office, 2004b: para. 17).

The transposition of the framework decision is tied to the ongoing plan to fundamentally overhaul the British immigration and asylum system (Home Office). British immigration policy differed from its continental counterparts considerably. In times when they had restricted systems (1940-1980), the relationship of the UK to its Commonwealth meant that its borders were open to migrants from these countries and they could get citizenship in the UK. At the time when the UK started to tighten their migration system in the early 1980s the continental countries increasingly opened their systems (Boswell, 2003: 13). Since the 1990s developments have become more similar, with Great Britain introducing controls slightly later than continental countries. The development of the number of asylum applications in the UK compared to other member states reflects this to a certain degree (see Figure 7).¹⁸⁹

¹⁸⁸ Council Decision of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland, OJ L 395 of 31.12.2004, 70.

¹⁸⁹ The numbers in the chart do not intend to provide an adequate picture of the asylum or migratory situation. They help to illustrate the changing tide of political focus in the fields. In the case of asylum figures, strong increases, such as between 1998 and 2003 in the UK or before 1993 in Germany, are usually a motivation for policy actors to change policies. Falling figures, over time, are in particular against a general trend, as in the case of Germany since 1993 (figures for 1992 (438190 lodged asylum claims) and 1993 (311160) are not reported for reasons of readability), they can indicate a new approach to a previously ill-regulated situation.

Figure 7 Asylum Applications in the EU member states (source <http://www.unhcr.org/statistics.html>)



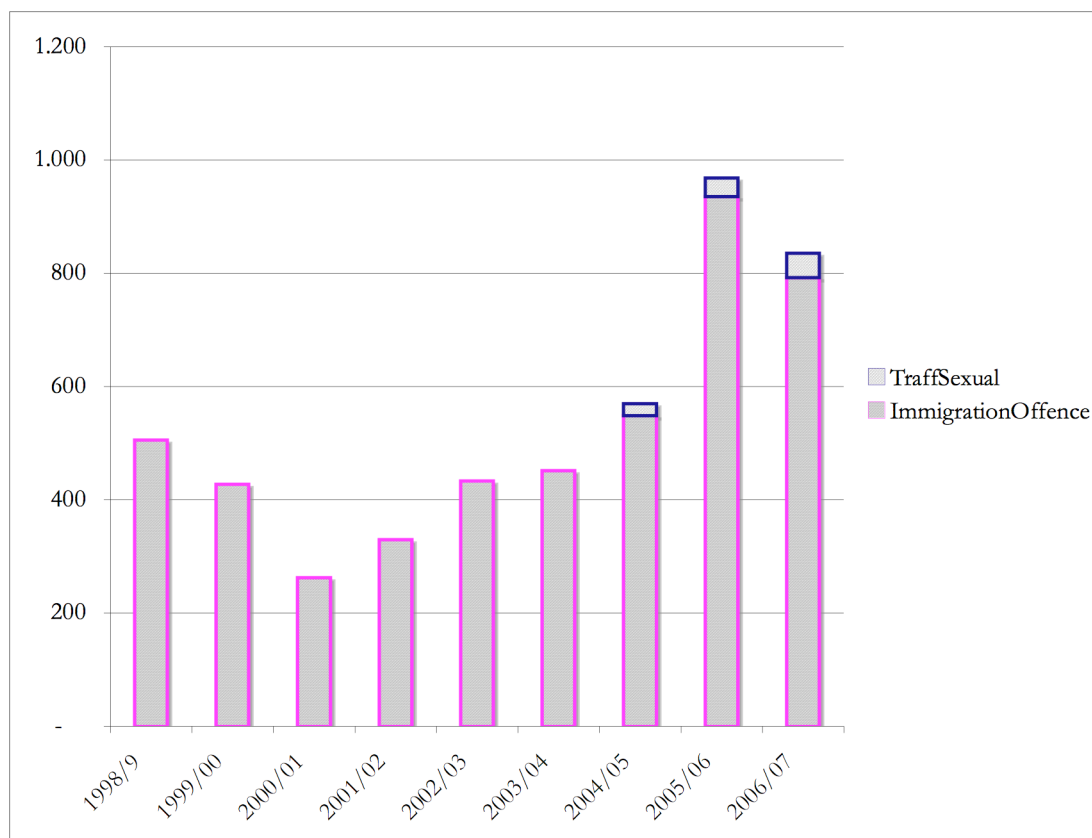
In migration policy, which is arguably a very unique policy field (Lahav, 2004), EU and British government actors show a high degree of similarity in attitudes with respect to extending or restricting the rights of migrants, thus fostering mutual influence. The judiciary is very visible in the policy field and more positively disposed towards the concerns of migrants (Statham and Geddes: 253-54) and can function as a corrective for the liberty dimension. Such a position has only developed since the early 1980s. In the 1970s the courts supported the restrictive line of the government and only in the early 1980s changed their course and allowed for more civil libertarian arguments to take hold (Kostakopoulou, 2006: 354-55).

Currently, the overall aim of the new British Asylum and Immigration System is to 'robustly prevent the abuse of the asylum system' and 'encourage managed, legal migration'.¹⁹⁰ The then Home Secretary David Blunkett introduced a point system to

¹⁹⁰ Lord Falconer of Thornton in HoL Debs Vol. 659 Col 49-50, 15.03.2004.

steer immigration in 2002 which was not covered by statute. The Asylum and Immigrations (Claimants) Act 2004 put this point system on a legal basis and at the same time increased the scope of criminalisation for breaching it. In 2005 the Home Office published a five year strategy on asylum and immigration further detailing the point-based system. The management of migration increasingly focussed on the contribution immigrants can make on British economy. The whole remodelling of the British asylum and immigration policy focussed on the migrants.¹⁹¹ This reorientation begins to show up in crime statistics already. While the real amount of illegal migration is notoriously difficult to measure, the increasing numbers of migration offences in the British crime statistics show that the issue has become more important since the new laws had been adopted in 2002 and 2004 (see figure 6).

Figure 8 Recorded offences under the new trafficking regulations



¹⁹¹ HoL Debs Vol. 659, Col. 53, 15.03.2004.

The criminalisation of unauthorised entry is an important element in the new immigration policy. Despite the thus generally fitting content, the framework decision on unauthorised entry only had a restricted impact on the development. These developments were in the criminal justice domain accompanied by a increasing criminalisation of those who smuggle and traffic persons into the UK (or attempt to do so). So while the UK immigration system has been made less receptive of asylum seekers and migrants over the last years, EU third pillar issues focussed not on the criminal law offences of migrants, but on the traffickers and smugglers. This is not to say that the migrants are not affected by real life decisions in reaction to this criminalisation as in particular the previously not illegal activity to help somebody entering the UK without financial gain or on humanitarian grounds has been affected by the new regulation.

The criminalisation of migration policy has a strong normative and empirical effect on the liberty of migrants and, in parallel, provides a whole new field for law enforcement. Formally, neither the framework decision nor the transposing acts directly address questions of data protection or procedural guarantees (*legislative control*). The extensive debates in the Houses of Parliament show the problematic effect the intended broad criminalisation of illegal entry and, especially, entry without valid identity documents has on the right of individual and her procedural guarantees. Even the principle of equality before the law was seen to be in danger. The repeated criticism in both houses brought the government to provide for more guarantees by changing the court which is responsible for handling appeals cases. Against a decision to refuse entry, a person can appeal to the Special Immigration Appeals Commission. This procedure provides the appellant with certain rights, but a decision cannot be challenged. For those being accused of trafficking, the whole legislative process applies.¹⁹²

Judicial control has worked to a certain degree in the decision-making process. In the debate in the House of Lords the government reacted to criticism by introducing better judicial control.¹⁹³ 'The courts' role has thus been strengthened. This on the one hand shows the continuous influence of parliament in the development of policies. On the other hand the effect was a strengthening of the role of the judiciary. It further served to clarify the intent of parliament as a guide for judicial decisions. The only viable way to challenge a decision about whether or not a persons is legally in the UK is the

¹⁹² In a more general vein and not directly connected to the discussion above, it is important to note, that in the last years the debate has increasingly linked illegal migration and migration in general to the growing threat of terrorism. While this link is rarely made explicit, recent public outcry of the first 'home grown' terrorists in Germany and the UK highlight the deep ingrained perception in the public that migration and terrorism are linked. This negative predisposition towards migrants can be a liability when it comes to jury trials and political decisions about their rights and liberties.

¹⁹³ HoL Debs Vol. 659 Col. 51, 15.3.2004; HoC Debs Vol. 423 Col. 1162, , 12.07.2004.

independent Special Immigration Commission, which gives it a strong institutional role in migration policy. The Home Secretary can withhold information, which can make it difficult for the defendant to argue her case. This can affect the fairness of the proceeding and empirically the courts seem reluctant to challenge the Home Secretary over its decision to withhold information (Feldman, 2002: 503).

In terms of *tasks*, the change was limited. The fact that the UK does not participate in Schengen means that the protection of its territorial borders remain central to its migration policy. Thus the criminalisation of unauthorised entry did not per se change the tasks of law enforcement actors. But the quality of the tasks changed. The new offence of 'assisting illegal entry to member state' extended ETJ of the UK to the whole EU, whereas previously only the unlawful crossing of the British border was illegal (Kostakopoulou, 2006: 364).

By heavily criminalising illegal entry law enforcement tasks were expanded, as the new law introduces new crimes of unauthorised entry to the UK, whether done individually or in the context of a criminal organisation. In this context there seems to be a certain degree of influence of the framework decision on the form of the new regulation. As shown above (see Figure 8) the new rules increased the perceived criminal justice importance of illegal immigration.

Another expansion of the task stems from the Schengen convention. The 2002 NIAA reformed the offence of aiding the crossing of borders of *any* member state of the EU. Even though the UK itself does not apply the border aspects of the Schengen convention, Sheptycki argues that if the UK were to decide to implement Schengen fully, it could do so in most respects by using administrative procedures (Sheptycki, 2002b: 538). So despite the resilience of British authorities to the Schengen integration, Britain has implemented most 'complementary measures' and its statutory framework is to a large degree compatible with Schengen requirements.

The new offences introduced through the acts were accompanied by new *methods* for the police and immigration officers. S. 9 of the 2004 Act foresaw in particular for customs and immigration officials an extension of their methods. Giving them the right to arrest people without warrant, whom they deem having committed an offence (Kostakopoulou, 2006: 359), enhances their law enforcement function in a repressive dimension. This development did not begin in this act and was certainly not induced by the framework decision, but it expanded the basis upon which immigration officers could act.

The Immigration and Asylum Act 2002 increases the penalty from previously ten years (Kostakopoulou, 2006: 359) to fourteen years. This took place in the context of complying with the requirements of the Schengen convention and the framework

decision. Neither of which, however, requires such a high penalty. The Schengen convention only talks about ‘appropriate’ penalties, while the framework decision requires a maximum sentence of not less than eight years (art. 1(3) FD). The UK thus clearly exceeds the requirements of the framework decision without having to do that in response to the EU (cf. documents in Peers and Rogers, 2006b: fn 10).

Concerning international cooperation, the selection of methods available to law enforcement has grown. The Secretary of State can request another member state to prosecute an individual, when he thinks that the individual has breached those aspects of UK immigration law which are defined by the Council Directive (art. 1(1)). This power goes back to the Schengen convention and was transposed in the 2002 act. Such infringements can be communicated to other member states through all police cooperation channels: Interpol, Schengen liaison officers and direct contacts. The effect of this competence, however, remains within the traditional sphere of intergovernmental politics, whereas the states decide themselves whether to cooperate or not. In the light of the successful cooperation in the EU and the increasing assumption about a certain equivalence, the likeliness for serious offences to be prosecuted by other MS is relatively high, however. The establishment of *iconet*, through which strategic information can be exchanged within a web-based intranet, provides law enforcement with a new method to prosecute suspects or offenders. This goes beyond the mere information about asylum seekers. The strategic nature of *iconet* in the fight against illegal immigration provides a powerful instrument for law enforcement also in the fight against criminal structures behind illegal immigration. This is a new powerful instrument in the hands of law enforcement, which makes migration data available for law enforcement.

Overall the migration related transposition is more influenced by the Schengen convention than by anything else. This is unexpected, as the UK regularly emphasises that it does not want to participate in the border aspects of Schengen. When it comes to the criminal law enforcement aspects of the EU migration system, this aversion seems to be smaller. The participation in the law enforcement aspects of the Schengen convention, has not determined the shape of UK migration policy, but affected its reach and individual aspects of its form. Overall, the influence of the EU level is minor, as most reactions were longer developing (Cwerner, 2004; Home Office, 1998). Overall, the framework decision and the EC directive had an effect on extraterritorial jurisdiction and the level of punishment.

10.3.5. Intermediary results of the analysis of the transposition of framework decisions in England

The discussion above has shown that those policy areas the framework decisions address have changed a lot in recent years. This provides an indication that EU measures might

have had an influence at the national level. Overall the **direct effects** of the framework decisions seem **limited** in the UK, though. The transposition of the framework decisions fell in a time period where police had undergone significant changes in their powers in the 1990s (Reiner, 2000; Walker, 2000). Only in the Crime (International Co-operation) Act 2003 framework decisions or other EU measures were a primary reason for a new law, which was fundamental in ensuring the compliance of England with legally binding third pillar measures. In the other cases they were transposed in the ‘miscellaneous’ section of acts in a related policy area. But in Germany no laws were introduced for the sole purpose of transposing third pillar legislation at all.

Sheptycki has said that the ‘need for enhanced European police cooperation in the fight against ‘organised crime’ goes hand-in-hand with national efforts’ (Sheptycki, 2002b: 553). This is certainly true for England. None of the policies affected by EU legislation ran counter to existing policies. Differences exist, but the strategies pursued are broadly similar. Deviant behaviour is increasingly criminalised and wrongdoers face higher punishments (Mitsilegas et al., 2003; Jones and Newburn, 2007: 74ff). The provision of security, in other words, is more central to the policy field, than the protection of liberties. Moreover, the modernisation of British criminal justice and, in some areas an Americanisation (Jones and Newburn, 2007), in connection with the active role of the UK in the development of central EU measures reduced formal misfit between EU and English policies. The EU has adopted minimum standards in policies where the UK already had strong legal measures. The UK was relatively advanced in the fight against money laundering, counterfeiting and corruption. At the same time the protection of information systems and migration issues only recently topped the agenda, arguably due to general exogenous pressures. An extensive legislative framework in these areas was missing and subsequently changes did occur.¹⁹⁴

In its assessment of the transposition of framework decisions, the EU Commission seems to have had problems with the British legislation in particular with respect to the liability of legal persons. In several cases, it criticised the fact that legal persons were not explicitly included in the definition of crimes, even though the Interpretation Act of 1978 in combination with the principle of vicarious liability seems to cover the problem in all relevant cases (Allen, 2003: 239). Such an assessment might be partially due to the insufficient knowledge of the EU Commission with British law, partially to lack of information transmitted by the British government to the EU Commission.

Following the requirement of having public, compelling and enforceable transposition of framework decisions (e.g. Schroeder, 2007), the criticism of the EU against the use of

¹⁹⁴ Despite recent analyses pointing to other factors, *misfit* in these cases seemed to have played a role.

circulars and orders, i.e. administrative instruments, seems to have more justification concerning the transposition of EU framework decisions in England.

This emphasises the important aspect that the effect of framework decisions in the UK varies across the different measures (see Table 19). These results do not differentiate between the two dimensions of liberty and security, but capture whether changes at the national level can be linked to EU measures. The overall result is inconclusive, as one half of the measures had virtually no effect, whereas the other half did have effects. More helpful is it to look individually at the three broad issue areas, in which the framework decisions can be grouped. This shows a more obvious difference in their effects. Whereas the fight against the financial aspects of crime was only marginally affected by the transposition of EU measures, the fight against computer crime and terrorism was clearly affected, as were migration issues. But even in the latter two groups, it would be far fetched to construe a deterministic influence of EU policies on the national framework. As demonstrated in the empirical discussion, EU measures merely represented add-ons to the original intention of the acts.

Table 19 Absolute effect of the transposition of framework decisions on English policies

Framework Decision on	Changes effectuated independent of the dimension			Effects in issue areas on both dimensions
	Yes	Limited	No	
Fraud			X	Very limited
Money Laundering		X		
Euro			X	
Corruption			X	Limited to strong
Joint Investigation Teams	X			
Terrorism		X		
Information Systems	X			Strong
Trafficking	X			
Unauthorised Entry	X			

10.4. *Indirect effects in England*

10.4.1. Indirect effects of framework decisions

The analyses of ripple effects is more difficult for England than for Germany, as the concept implicitly assumes a codified legal framework upon which the transposition of EU measures can exert an effect. The common law system of the UK does not provide such an extensive legal system. At the same time the majority of criminal law is based on

statute (Allen, 2003: 13)¹⁹⁵, which improves the likeliness of finding ripple effects also in a common law system.

In the following the approach to punishment, the power of the central executive and the issue of extraterritorial jurisdiction are addressed in more detail. In particular the broadening of crimes and the increase in punishments, especially in the case of offences which can be tried either way (English and Card, 2005: 27), make it more likely that they will be tried Crown Court, instead of magistrates courts, which in turn increases the likeliness of higher sentences. The reason for a different approach than to the German case, where question of tasks, the legitimization of methods and the relationship to the judiciary were addressed, lies in the characteristic of the regulatory frameworks. In England, the police hold a much stronger position in criminal proceedings than in Germany. A direct analysis of their relationship to the public prosecutor thus is systematically unpromising. The question of extraterritorial jurisdiction, however, addresses a similar issue on the boundary between the two institutions. The indirect effect on police task is addressed by looking at punishing and criminalisation, which helps to understand the function of police better. Finally, the question of centralisation addresses institutional developments which are also important for the indirect of the more general EU policing framework in the subsequent section.

European measures were transposed with relatively few changes and when direct action was taken they were added onto domestically initiated reforms of the criminal law framework. Usually the framework decisions were only mentioned in the ‘miscellaneous’ section of the acts. But what substantive effects did the framework decisions have on the content of the British criminal justice framework?

Framework decisions have led to an **increase in punishments**. The characteristic approach of minimum maximum sentences in EU laws is, in difference to Germany, not systemically foreign to the UK. The UK did raise the sentences concerning money laundering to fourteen years thus clearly exceeding the minimum requirement of eight years required by the framework decision. The same effect can be seen with regard to unauthorised entry. In both cases the offences can now be punished much harsher than the EU level demanded. As Peers and Rogers have shown, the UK also lobbied at the EU level for higher punishments (2006b).¹⁹⁶ The direct effect of framework decisions on the general level of punishment is difficult to assess, because the new measures in policy

¹⁹⁵ Only murder and manslaughter still do not have a statutory basis.

¹⁹⁶ The German minister of justice, Zypries, in a radio interview on data retention argued that the British government was instrumental in extending the scope of the measure by changing the legal basis from framework decisions (unanimity) to a directive (QMV). Germany, in her account, rather blocked progress on these issues due to data protection concerns. (9.11.2007) www.dradio.de.

fields addressed by framework decisions, were not necessarily legitimised with reference to the framework decision or any EU measure at all. The increase in punishments in the aforementioned cases needs to be seen in the light of a general tendency to develop a stronger stance towards serious crime (Johnston and Shearing, 2003). The focus on increasing criminalisation and punishment is also in line with the waning of the 'platonic guardians', which aimed to balance 'effectiveness and humanity, liberty and order' (Loader, 2006: 563), a development which is reflected in the statement by secretary of state, Lord Filkin, when he said that 'the defence of "quiet enjoyment" [...] seems to be to be just as important as civil liberty'.¹⁹⁷

In addition to the severity of punishment, the laws within which framework decisions were transposed also expanded **criminalisation**. New crimes were introduced and existing crimes expanded. Partially the EU measure was the source for the form of completely new crimes, as in the case of trafficking for non-sexual exploitation, while in other cases the influence pertained to more or less important elements in the definition of crimes, as in the case of terrorism. In both instances, the scope of crimes was extended.

The focus on punishments is also reflected in the growing number of people in prison to over 80000 in 2006 (Ashworth, 2007: 1018). In addition courts and prosecutors are seen to increase the prison population by reacting to a social (and medial) demand for harsher sentences.

The **power of the executive was increased** especially through the empowerment to adopt secondary legislation with limited involvement of parliament in order to transpose third pillar measures. While this power was not always exercised, it is in line with an ongoing development in English police governance, whereby central ministerial competences have become more important in the day to day (Reiner, 2000: 192-3) and strategic (Walker, 2000: 108-9) governance of the police. Centralising developments began with the 1964 Police Reform Act and can thus not be originally attributed to the EU. With the regulations of the ATCSA 2001, however, the powers were extended to actually setting policy which could potentially affect the liberty of individuals. Delegated legislation can be problematic from a democratic point of view, because parliament is not directly involved in its development and then is only given a take it or leave it option. In addition, the multiplication of the amount of secondary legislation reduces the likeliness of proper scrutiny, especially when the increasing amount of primary legislation, which parliament must deal with, is taken into account. The tendency to adopt 'parent legislation' (Walker, 2002: 275) transfers strong power to the executive and reduces

¹⁹⁷ HoL Debs Vol. 641 Col. 1015 of 02.12.2002.

parliamentary involvement in policy-making. The Delegated Legislation Scrutiny Committee assesses all secondary legislation and decides whether they warrant the attention of the House. While this procedure falls short of several democratic standards, as it is not representative and gives the individual members of the committee probably too large discretionary powers, it increases the information of parliament concerning delegated legislations and enables it to make at least better informed decisions. The issue of secondary legislation and its effect on parliamentary scrutiny was also addressed in the 6th report by the HoL Select European Committee 1997 (para 29ff), which held that Home Office information on EU measures to be transposed by secondary legislation was insufficient. Observing a ‘normalisation’ of EU third pillar policy-making, a 2007 report lamented that the departmental standing committees still took too little notice of EU developments and that scrutiny thus often fell short of its potential (House of Commons Home Affairs Committee, 2007: 87-88).¹⁹⁸ Especially in internal security measures, a recourse to secondary legislation can lead to severe problems from a democratic point of view as the democratically deficient political processes at the EU level, which e.g. lack parliamentary involvement (Kietz and Maurer, 2007), can not be counterbalanced by national parliamentary proceedings. Intrusive competences of e.g. the British Transport Police, foreign law enforcement officials and immigration officials were expanded in response to EU measures, too.

Finally, **extraterritorial jurisdiction** (ETJ) is one of the areas, where the UK had to adapt their law often. This is partially due to the fact that ETJ is not normally accepted in common law (Walden, 2006: 300). It is a direct effect of EU integration and the growing internationalisation of law enforcement (e.g. Home Office, 2003: 19). Whereas civil jurisdiction over foreigners by courts is generally accepted (McLachlan, 1996: 50), an extension to criminal liability is not equally taken for granted. In this context the EU seems to be a driving force. Only through explicit legislation can ETJ be ensured, even though this is not done so regularly (Walden, 2006: 301), despite the growing international dimension of crime (Home Office, 2004c). This growing importance has led to ‘[f]urther provision ... for the expansion of the territorial jurisdiction of English courts’ (Allen, 2003: 287).

ETJ has effects on methods, as law enforcement can prosecute foreigners if they violate domestic laws and hold British citizens responsible for offences committed on foreign territory, even if the act does not constitute a crime there. Legislative control is affected as citizens can be prosecuted abroad and, assuming the application of extraterritorial jurisdiction by EU member states, also under the criminal law of foreign states.

¹⁹⁸ See also <http://euobserver.com/843/25087> (accessed 12.11.2007).

Furthermore ETJ enables the police to collect evidence abroad and engage in cross-border investigations with foreign police forces. Thirdly, the extension of English law to the activity of British citizens or bodies incorporate abroad allows British law enforcement actors to engage in cross-border cooperation in order to ensure the extradition of a British national. Finally, everyone who commits a serious crime against a British citizen or a 'protected person' can be tried under English law, irrespective of where the crime had taken place and the nationality of the offender.

This can lead to problems as EU criminal law in many cases uses ill-defined concepts, thus widening their applicability from only serious cases to every day crimes, which might affect the principle of proportionality. But even in seemingly serious cases ETJ can have detrimental effects on the rights of the affected persons. The trouble *Indymedia* faced when some of its servers were seized upon the request of foreign law enforcement, illustrates the effects of extraterritorial jurisdiction on *habeas corpus* and other procedural rights (cf. Hosein, 2006: 37ff). While the example concerns the use of US structures to seize a server, in principle the assertion of ETJ by any government for a growing number of offences can have widespread effects, especially as the growing interconnection within the EU through the MLA convention in combination with the growing application of mutual recognition as a 'cornerstone principle' in the development of the AFSJ can lead to an undermining of safeguards for individuals.

The effects of the individual measures for the police based on the two dimensions of civil liberty and security present an unclear picture. The general effect seems to be a reduction of lowering control measures both concerning the actors and the procedures. On the security side, the tasks and methods of law enforcement were expanded rather than reduced. The initial impression seems to support the common knowledge that liberty and security form a zero-sum relationship. If security is to be ensured liberty invariably loses.

Neither of the empirical results show up identical across all measures and there does not seem to be a direct relationship between the two dimensions, though. Table 20 shows the limited impact of EU measures on liberty and security at the national level. It is based on the combined assessment of the results of the empirical analysis. While on both dimensions the effect is concentrated on limited effects, the distribution shows that the focus on security of the EU measures has also led to a stronger effect on the security dimension, whereas the liberty dimension remained less affected. We need to keep in mind, though, that no measure showed a strong effect on one dimension and no effect on the other. The assessment of their effects always falls in neighbouring categories.

Table 20 Effect on liberty and security across measures (numbers of measures)

Effects Types	Strong		Limited		Low/No	
	Liberty	<i>Security</i>	Liberty	<i>Security</i>	Liberty	<i>Security</i>
Procedural	-	<i>1</i>	1	-	-	-
Substantive	1	<i>2</i>	4	<i>4</i>	2	<i>1</i>
Total	1	<i>3</i>	5	<i>4</i>	3	<i>1</i>

Compared to Germany, the effects of the framework decisions in the UK were weaker. In the UK three measures had a strong effect on either of the dimensions, but most of those measures, which have a medium effect, are located close to the ‘no’ camp. At the same time, most procedural measures, which mainly concern mutual recognition, were not transposed yet, due to their only recent adoption in the Council. The one procedural measure transposed, however, had a strong effect on the security and a medium effect on the liberty dimension. The introduction of joint investigation teams is an important element in the operational embedding of UK police in European structures. In this area the effects have been more pronounced, as could also be seen in the stronger effects of the migration related issues. Why effects were stronger in this field could be explained by exogenous factors, such as the terrorist threat and increasing migratory pressures on the UK.

The introduction of the chapter showed a slight majority of the measures transposed and pertaining to the pre-trial phase refer to the police. Even though this indicates high likeliness of a measurable effect on the policy framework, the data on the transposition does not support this expectation.

10.4.2. Indirect effects of the general EU police framework

The indirect effects framework decision, while not having a formal basis in the European measures, could still be linked to the EU. In this section, however, the effects of the EU framework in a broader understanding are taken up. Indirect effects of the general EU police cooperation framework, which is primarily provided by EU structures established by conventions or, more recently, Council Decisions, are independent from the transposition of binding EU measures in the UK. Indirect effects mean the interaction of the EU framework, which does not have a direct bearing on English law and policy, and its nonetheless existing ‘push’ on the latter. James Sheptycki, for example, observes the establishment of Europol Liaison Units in the Kent constabulary (2002a: 41). While such developments are clearly a reaction to developments within Europe, the current study does not allow the necessary in depth analysis for such a study. Conventions may be ratified by the Crown alone, but it is incorporated into British Law only by an act of

parliament. The UK has ratified the EU conventions, which subsequently became the law of the land on the basis of a parliamentary ratification.

In order to illustrate indirect effects, a first example is the European Convention on Human Rights (ECHR).¹⁹⁹ The UK was the first signatory to the ECHR and since 1966 acknowledged the right of individuals to litigate individually at the Strasbourg court (Feldman, 2002: 72-73). But it was only in 1997 that the newly elected first Blair government presented in October a White Paper to parliament in which it set out the plan to introduce a Human Rights Act.²⁰⁰ So for over thirty years the ECHR had had a formative influence in the UK, but did not have a statutory basis in English law.

Since 1998 the Human Right Act (HRA) has provided a statutory basis for the rights and duties contained in the ECHR. And even this provision remains hedged by the predominant legal doctrine of parliamentary supremacy. The legislature is in principle still able to pass primary legislation which violates the guarantees contained in the HRA. That such a situation is not far fetched shows the regular indictment of the UK at the European Court for Human Rights in Strasbourg (cf. Feldman, 2002). Given the implicit guarantee of democracy contained in the principle of parliamentary supremacy (Allen, 2003: 282-84), it is not likely that this will have fundamental effects on democracy in the UK. But the discussion about the ATCSA 2003, in which the UK derogated from article 5 ECHR shows that these seemingly guaranteed rights can still be severely curtailed. Such a situation could effectively develop in Germany as well, but the additional safeguard of constitutional rights raise the formal barrier for such decisions.

The ECHR did not have a direct effect (Feldman, 2002: 73). But by accepting to be challengeable under the 1966 declaration, English law repeatedly had to be adapted to give effect to the decisions of the Strasbourg court. Before the HRA had been adopted, the ECHR had already exerted significant indirect effects on the exercise of law in England, according to Lord Bingham MR:

‘First, ... where a United Kingdom statute is capable of two interpretations ... the courts will presume that Parliament intended to legislate in conformity with the convention and not in conflict with it ... Secondly, if the common law is uncertain, unclear or incomplete, the courts have to make a choice; ... they will rule, wherever possible, in a manner which conforms with the convention and does not conflict with it ... Thirdly, when the courts are called upon to construe a domestic statute enacted to fulfil a convention obligation, the courts will ordinarily assume that the statute was

¹⁹⁹ Cf. <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (accessed 10.11.2007).

²⁰⁰ Cf. <http://www.archive.official-documents.co.uk/document/hoffice/rights/rights.htm> (accessed 10.11.2007).

intended to be effective to that end ... Fourthly, where the courts have a discretion to exercise ... they seek to act in a way which does not violate the convention ... Fifthly, when ... courts are called upon to decide what, in a given situation, public policy demands, it has been held to be legitimate that we shall have regard to our international obligations enshrined in the convention as a source of guidance on what British public policy requires. Sixthly and lastly, matters covered by the law of the European Community ... on occasion give effect to matters covered by convention law. The Court of Justice takes the view that on matters subject to Community law, the law common to the Member States is part of the law which applies. All Member States are parties to the convention and it so happens from time to time that laws derived from the convention are incorporated as part of the law of the Community. That of course is a law which the courts in this country must apply since we are bound by Act of Parliament to do so, and that is a means by which , indirectly, convention rights find their way into domestic law'.²⁰¹

This assessment is complemented by the contributions to a 1983 volume on the 'Effect on English Domestic Law of the Membership of the European Communities and of Ratification of the European Convention on Human Rights' (Furmston et al., 1983), where the ECHR receives almost as much attention as the (then) EEC, even though the latter through its direct effect and supremacy in EC law (Hix, 2005: chapter 4) had even then a more profound effect on British law. This highlights the importance of international and European conventions and of the fact that the Human Rights Act 1998 established the ECHR as the most direct indirect influence on domestic English law through an indirect instrument.

Such a position concerning indirect effects is not restricted to the ECHR, but can be applied to all international treaties, which the UK ratified. Also it is a convention which aims to influence the life of individuals instead of most EU conventions which rather aim establishing an EU framework for police cooperation. Looking at those measures provides another approach to the question of indirect effect. The following presents a short discussion on the compliance record of the UK and a subsequent exemplary approach to the analysis if indirect effects of the EU framework on English crime policy.

²⁰¹ HL Debs Vol. 573 Col 1465-1467, 3.7.1996.

10.4.3. English compliance with conventions²⁰²

Concerning signature and ratification of conventions, the UK shows a very similar picture to Germany. Both countries have ratified nine (UK) and ten (D) of the eleven conventions adopted in the third pillar (see Table 21). The UK's record is only different from Germany, because it is not party to the convention on the enforcement of foreign criminal sentences, which was adopted still under European Political Cooperation in 1991 and is currently only applicable between Germany, the Netherlands and Latvia. Of the 11 conventions adopted in the third pillar, six have come in force.²⁰³

The time it takes the countries to comply varies significantly and puts their overall compliance record in a different light. Germany takes much longer to ratify the EU conventions than the UK (1731 days on average against 1347 days). In themselves these numbers are a clear indication of the often observed compliance deficit in the third pillar. On average conventions are almost seven years old by the time they enter into force. It took Germany on average 4,5 years and the UK 3.7 years to merely ratify a convention. The difference is even more pronounced if we take into account those conventions only, which are in force as of today. For those it took Germany almost 5,5 years to ratify a convention, whereas the UK was almost fast with only 2,5 years for ratification. This also meant that Germany had to wait for 1,5 years after ratification for the entry into force of the convention, whereas the UK sat on a ratified convention for more than 3,5 years. In the case of the Europol convention, Germany delayed the coming into force of the institution because of concerns about the immunities protocol. In the case of the convention of the use of information technology for customs purposes, of the old EU member states only Belgium deposited the notification later than Germany, whereas the UK had been the second member state to ratify it. This early ratification has also institutional reasons. In the UK the government due to the electoral systems has a strong majority in the upper house and thus can more easily force through its projects to which international agreements belong as well.²⁰⁴ But there are also substantive reasons. The Europol convention met criticism in particular regarding the protocol on the immunities of Europol staff for historical reasons, which delayed the ratification.

²⁰² All the following numbers and calculations are based on the information contained in the Database of Agreements available at http://www.consilium.europa.eu/cms3_applications/Applications/accords/search.asp?lang=EN&cmsid=297 (accessed 10.11.2007).

²⁰³ Of the remaining, some have become redundant, such as the convention on extradition, whose content has been expanded and applied through the EAW, for example. Others still await ratification and entry into force. For example, the UK complied with aspects of the convention on driving disqualifications through the CICA 2003 but is not listed as having notified, even less having enforced the convention.

²⁰⁴ Ratification does not mean that the measure comes into force immediately. Normally it needs an additional administrative measure to 'activate' it. Of course, the actual coming into force depends on the ratification by the other parties to the conventions.

Table 21 Conventions and their ratification in the EU and the UK (as of 27.10.2007)

	Signature	Ratification	In Force
EU	11	n/a	6
UK	10	9	6

The situation concerning the protocols to the conventions is similar (see Table 22). The UK has not ratified the protocol on the establishment of a data base to the customs convention. What is striking, however, is that they take on average to come into force. As these protocols constitute usually attempts to adapt existing regulations, the frustration of many policy-makers with the convention instrument in such a volatile field as law enforcement. The protocol on the right of the ECJ to give preliminary rulings on the interpretation of the IT Customs convention²⁰⁵ took an impressive 9 years to come into force. Once again, the UK had ratified it within a year of its signature, whereas Germany took more than seven years. In a similar vein, practitioners, politician and academics alike complained about the delay in ratifying and transposing protocols to the Europol convention, which took around four years to be ratified thus leaving Europol in a legal limbo, because it could not meet the demand for increased operational support on its current legal basis.

Table 22 Protocol to the conventions and their ratification in the EU and the UK

	Signature	Ratification	In Force
EU	12	n/a	10
UK	12	10	9

10.4.4. The effect of EU conventions on the English police framework

The next section focuses on central conventions for the policy field, namely the Europol convention and the Schengen convention. The MLA convention has already been analysed in the context of the framework decision on JTTs.

The Europol convention was ratified quickly in England and since its inception the UK was an active participant in Europol coordinated activities (Europol Report 1999, quoted

²⁰⁵ OJ C 151 of 20.05.1997.

in Sheptycki, 2002b: 538). The same can be said for the non-border related aspects of Schengen. Even though the UK is only partially party to the Schengen convention, both conventions have exerted strong pressure on the regulatory framework in the UK (Newburn and Reiner, 2007: 939). The CICA 2003 transposed several requirements of the Schengen convention into English law in 2003. So there is a direct influence, e.g. on the protection of data or the ability to extradite. Beyond that direct influence there is also an indirect influence through the framework decision on unauthorised entry, which has been transposed in the England, but had its formal basis in requirements arising from the Schengen conventions. In a third step, the Schengen convention has also contributed to the centralisation of the English policing framework. The Europol convention was crucial for the establishment of a European policing framework through which national police forces can cooperate more effectively and exchange law enforcement information.

A central effect of the establishment of a European framework for police cooperation is further support for the ongoing centralisation. This concerns organisational centralisation, on the one hand. Even though Den Boer does not find a strong influence of the EU on the developments of the domestic regulatory framework, there are some indications that the increasing embedding of English law enforcement in European cooperation structures emphasises an existing domestic development. Since 1964 observers of the policy field have noted a tendency to pool competences with the Home Secretary.²⁰⁶ But the EU also plays a role in this development. As Lord Dholakia remarked in the debate on the Crime (International Co-operation) Act 2003, in order to comply with EU policy, the UK established ACPO and NCIS.²⁰⁷ Over time several central offices in the context of European police cooperation were established. One example is the Europol contact point, which is today part of the Serious and Organised Crime Agency (SOCA) and had previously been a part National Crime Intelligence Service (NCIS). Similarly, the Schengen-related Sirene office is part of SOCA, as are the contact points for the European judicial network (EJN). Their establishment had been required by the respective conventions, which designated central contact points to minimise the friction between different systems.

Such a limited development in itself only becomes important when their function and importance in the domestic framework is taken into account. In particular the emergence of intelligence-led policing in the early 1990s with its focus on strategic information and the use of new technologies of analysis needs to be kept in mind (Sheptycki, 2007). With the focus on the future, knowledge about present development and imminent threats

²⁰⁶ This has also been discussed in chapter 4.

²⁰⁷ HoL Debs Vol. 641 Col. 979, 2.12.2002.

become more important for the work of the police in the fight against serious crime (cf. Ericson and Haggerty, 1997). The more important role of data bases and the collection of information on the population for dragnet searches or DNA matching increases the internal standing of organisational sections which have access to such data bases.

EU policing structures primarily focus on the establishment of data exchange structures, the interoperability of data bases (de Hert and Gutwirth, 2006) and the better availability of data which are important for the more effective work of law enforcement. For data protection reasons, access to and management of European databases is in many cases restricted to the aforementioned central contact office within national law enforcement structures. In combination with a growing awareness of the political sphere that policing needs to be international (Home Office, 2004c: 18; Home Office, 2002b: 16) and the growing operational cooperation of the English police (cf. SOCA, 2007), leads to an increasingly important role of those offices which were established in response to EU conventions. In this respect the EU framework has a stronger centralising effect than the mere look at organisational charts might indicate. In a somewhat different vein, the establishment of financial intelligence units, which are now merged into SOCA as well, were established in response to European measures, even though not measures emanating from the EU.

The growing inclusion of the English police in the cooperative structures have been considered to bring the English policing framework closer to the continental model of policing. This is seen to encompass a centralisation of overall control and the devolution of significant powers to external agencies. NCIS, NCS and SOCA are the most prominent examples of this development. Neither development has been a requirement of EU developments and compliance with the requirements of, for example, the Europol convention, could be imagined without fundamental reforms of the structures upon which the English policing system builds.

In particular the Serious Organised Crime Agency is a case in point. Its establishment was on the one hand motivated by the perceived need to improve the cooperation of domestic law enforcement and intelligence services and to provide a common governance structures to the serious crime related aspects of the work of different law enforcement agencies (SOCA, 2007: 23). At the same time, the justification was brought forward to establish a 'one stop shop' for international police cooperation (Home Office, 2004c: 22). At least to a certain degree the embeddedness of English police in European and international structures was a motivation for organisational centralisation.

But not only within the police, a reconfiguration of governance structures has taken place. A central development since the mid-1900s has been the growing power of the

Home Office in the governance of the police.²⁰⁸ Tim Newburn notes that the ‘central government capacity to steer policing has been increased’ (Newburn, 2007: 237). The growing requirement by EU structures to have a central contact point has increased the relative power of the Home Office through the concentration of all direct contact points in SOCA, which is under the direct supervision of the Home Office.

Finally, the strongest effects pertain to procedural matters. This includes formal criminal procedures and the operational cooperation of the police. Through the introduction of the principle of mutual recognition for an increasing number of offences the principle of double criminality is weakened as crimes no longer require to be an offence in all affected countries. In connection with the increasing asserting of extraterritorial jurisdiction individual control against prosecution under foreign criminal systems is undermined. While the relevance of mutual recognition in the actual work of the police is currently still limited, the ratification of the MLA convention and the relatively successful functioning of the EAW²⁰⁹ as well as the growing use of this instrument is likely to have a stronger impact on criminal procedures in the future. The general trend to use ill-defined terms in the fight against organised crime is also a factor in the UK and thus enables the police to become active in an ill-defined area.

Concerning the methods of the police in fighting transnational organised crime, Andreas and Nadelmann stress the importance of US influence on the development of international crime control cooperation, especially in drugs and money laundering (Andreas and Nadelmann, 2006: 148-49; Elvins, 2003). This general influence of the US can be found in the UK as well (Jones and Newburn, 2007). A European influence on the operational cooperation of the police is observable as well. The growing use of data stored in European data bases is repeatedly alluded to in the annual report of SOCA (2007: 18, 19, 22, 29) and constitutes an important element in the fight against transnational crime (cf. Sheptycki, 2002a). The availability of more and, through improved work by Europol, better data bases adds a new element to the methods available to the police. Through the broader embedding in European structures, they also extend the interaction of the police with their counterparts beyond the direct establishment of cross-border cooperation structures, as described by Sheptycki (2002a).

These changes in the way the police work also involved a centralisation of accountability structures. The Police Reform Act 2002 established the Independent Police Complaints Commission, which ‘achieved the long-standing demands of civil libertarians’ to have an accountability structure, which is not part of the governing structures itself (Newburn

²⁰⁸ See chapter four.

²⁰⁹ Though here significant problems remain, as Sievers (forthcoming) shows.

and Reiner, 2007: 923).²¹⁰ The 2003 Crime International cooperation act in part 4 extended the competences of the Information Commissioner to check data in the SIS, EIS and CIS without warrant. This is an amendment to the Data Protection Act 1998 and brought the data protection level within the SIS up to national standards as ensured in the 1998 act. The rules stipulate that obstructing access of the data protection commissioner constitutes an offence, which can be punished with a fine of up to £ 5000. The problem remains, however, that especially regarding the fight against terrorism, the Home Secretary has a wide margin of discretion about which information to disclose on the basis of national security. This has been identified as a problem in criminal proceedings against alleged terrorists, where the courts were not given evidence for the basis of the terrorist accusation, but upheld the Home Office's assessment based on a declaration by the Home Office that they had the necessary proof for a (reasonable) suspicion (Walker, 2005).

Once again the ill-defined criterion of 'national security' can be invoked to lawfully withhold data. But the degree of privacy protection has been increased through the centralised establishment of a control instance. In this case the reason for the extension of tasks for the Information Commissioner was the EU regulatory framework, whose development made the domestic amendment necessary.

In contrast to Germany the extension of operational methods for the police in England is not as extensive through the conventions. The UK does not allow hot pursuit across its borders for police officers, for example. That is a remote possibility anyhow, as the UK only has sea borders, which make chases across borders unlikely. Similar to Germany, however, the effects of the European governance framework seem to be mainly on the security side, i.e. expand the methods and tasks of law enforcement. Surprisingly, however, there are some developments on the liberty side as well. While especially the principle of mutual recognition carries the danger of subjecting the individual to reduced procedural guarantees, as has arguably happened in the *Indymedia* case (cf. Hosein, 2006) and the extradition of British bank managers to the US,²¹¹ the protective mechanisms of data protection have been improved. At the same time, the German minister of justice, Brigitte Zypries, argued in an interview on 09.11.2007 that the British government was very keen to expand the use of personal, in this case telecommunication, data for law enforcement purposes.

²¹⁰ Even though research indicates that these kinds of civilian control instances are not necessarily better in controlling the police (cf. Goldsmith and Lewis, 2000).

²¹¹ See BBC News 'MPs angry at 'unfair' extradition', http://news.bbc.co.uk/1/hi/uk_politics/5171266.stm (accessed 13.11.2007).

10.5. *The results for the English case*

‘[T]he term “organised crime” has underwritten changes in the English policing system, James Sheptycki writes (2002b: 553). Instead of establishing a causal link between the EU level and national policy, he conceives of the police policy development as a functional reaction to a changing reality. Jones and Newburn explain central developments within criminal justice policy in the UK by ideologically influenced policy transfer from the US with a domestic twist (2007). In a third vein, Andreas and Nadelmann highlight the role of the US for European police policy in general and the UK in particular, but advocate an ‘eclectic approach’ which combines power considerations, ideational factors and the social construction of crime (2006: 7). Complementing the functional explanation with a (domestic) power perspective might help explain the ambiguous situation of Britain in the European policing structures, which can be characterised as ‘cooperative yet critical’. What neither analysis of English crime policy convincingly provides is an analysis of the EU influence on the English regulatory framework. This chapter has tried to provide a first theoretically guided assessment of this influence.

The EU has adopted a number of conventions and framework decisions, which carry the potential to significantly adapt domestic regulatory frameworks. Of these the UK has transposed measures in three issue areas, which address the fight against the financial aspects of crime, general policing issues, and border-related law enforcement.

Looking at the effect of EU law on the two dimension, **overall the effect of the EU measures in England is limited**. No fundamental changes in the domestic framework can be directly attributed to specific EU measures. Nonetheless, there were effects, which **vary across the individual measures as well as across the three issue areas**. Migration policy was most strongly affected. This has been seen as an area, where the English framework had been least developed and is and where its was least integrated in the EU due to concerns about its sovereignty. In anti-terrorism policy the influence of the EU is difficult to disentangle from domestic reactions to national and international developments as well as idiosyncratic developments. Given the continuing legislative activity in anti-terrorism policy and the repeated reforms of central parts of the regulatory framework, the EU component seems limited despite the fact that this issue area ranged in the middle of the analysed policy areas. Financial crime, finally, carries a strong functional link to the European economic integration, but substantively, regulatory changes seem little connected to developments at the EU level. The domestic regulatory framework for these policies changed considerably in the last twenty years, however.

An interesting issue concerns the amount of *misfit* as understood in the Europeanisation literature. In the (likely) case of strong misfit in an area central for national sovereignty,

limited and possibly faulty transposition and strong substantive changes when measures were transposed can be expected. While the analysis has shown some gaps in transposition, substantially EU pressures **did not counter developments** in England, but supported established developments, such as criminalisation, penalisation, and a decreasing amount of offenders' rights.²¹² Furthermore, they fit with the wish of UK law enforcement and senior political actors to engage in stronger operational cooperation.

Looking at the available data about the activity of the police based on recorded crime statistics, there is no effect of EU legislation on crime. But many EU measures against serious crime employ expansive crime definitions and tended to increase punishments. In the few instances where data on the new crimes are available, the areas that were most affected the number of recorded offences has increased dramatically. In other areas, such as proceeds of crime and terrorism, the increase was markedly as well, but, due to the limited effect of the EU measures on the domestic framework, cannot be linked to EU developments. At least the migration related cases indicate that where European developments have a strong effect, they not only affected the formal regulatory framework, but also have a direct effect on the activity of the police.²¹³

It was argued above that the mixed picture could be linked to the existing regulatory framework on in England prior to the adoption and transposition of EU measures. It highlights domestic developments and favours a functional approach. The functional component can be further amended by a political component. In the debate on the Crime (International Co-operation) Act 2003 (CICA) senior government officials argued that the management of migration and the fight against organised crime and trafficking was a matter to be addressed in the JHA Council. Lord Filkin, State Minister, rejected an unilateral UK approach to tackling the problem, despite the UK's maintenance of external border controls. Similarly Lord Clinton-Davies argued that the EU is 'a very good starting point' for the development of a more effective approach to capturing criminals.²¹⁴ At the same time he held that '[i]t should also be emphasised that national authorities should choose how and by which methods the enforcement of European Union law should be utilised. I am currently not totally convinced that they do that.' (Ibid.). This ambiguity about the influence of the EU on anti-terrorism policy is reflected in the legal structures. While both White Papers and senior officials regularly stress the

²¹² For this debate see Nash, who questions the adequacy of the term 'public protection' in the light of reduced procedural rights of those accused of terrorism, but increasingly also of anti-social behaviour (2006: 176ff).

²¹³ For the indirect effects, i.e. the general embedding of English policing structures in international cooperation networks, this influence is less controversial (as numerous analyses of policing in England have shown), but there is little hard evidence, such as data to support it.

²¹⁴ HoL Debs Vol. 641 Col. 998, 2.12.2002.

importance of international cooperation in the fight against crime and terrorism, a concrete influence on policy making is difficult to discern. Glaeßner has argued that the UK has problems to implement international law, and EU in particular, domestically due to the conflicts this would have concerning parliamentary sovereignty (Glaeßner, 2005: 103; Schieren, 2001). From the policy analysis of the preceding pages this assessment cannot be confirmed without hesitation. The problem in the third pillar is less parliamentary sovereignty and more a politico-functional problem emerging from a clash of the goal to protect national sovereignty over the monopoly of force and the operational necessity to engage in European and more broadly international cooperation. Furthermore, the EU has developed a normative frame of legitimated police cooperation over the last decades, which cannot be broken without significant costs (Jachtenfuchs et al., 2005: 39). The struggle of central actors in the policy field to deal with this complex and contested relationship is reflected in the inconclusive results of the empirical analysis of EU criminal justice policy under EU influence.

11. Conclusion

How do the empirical results fare with regard to the theoretical expectations? The project posited that the development of JHA policy in the EU has reached a stage where the effects of its 'hardness' (a la Abbott and Snidal, 2000) could be found in the characteristics of domestic governance frameworks for police policy. It further asked the question whether the effects of EU policies reconfigured the relationship of liberty and security in internal security policy. This question was motivated by the ubiquitous assessment that EU third pillar policy showed a clear dominance of the security paradigm while lesser attention was paid to freedom and justice (e.g. Mitsilegas et al., 2003; Monar, 2002b; Chalk, 2000). In combination with the first expectation, a domestic transposition of the EU policies would result in observable effects on the domestic regulatory framework for the police.

In order to test these expectations, the book first presented a structured analysis of relevant policy developments on the two levels. On the EU level, the increasing consolidation of problem-solution relationships in EU police policy and the massive increase of binding policy measures since the treaty of Amsterdam has shown that the coherence of the European approach has strongly increased. This supplanted the initial expectation that the hardness of the policy field increased both formally and politically. The analysis of national developments in policies covered by the EU treaties also revealed significant dynamics since the 1980s. The focus of police policy became more pre-emptive and focussed on the prevention of crimes. In addition, the scope of serious crimes as well as their punishment was expanded over time. EU policy has been shown to be driven by content, rather than by organisational considerations. So the broad understanding of police, which includes all actors involved in the (repressive) fight against serious crime, is the adequate way to analyse the policy field.

Building on this overview, the book developed an empirical approach to the study of liberty and security in police policy. These were subsequently tested on the transposition of framework decisions and conventions in domestic policies in Germany and England.

Contrary to the expectations, the direct effects of the EU framework had very little influence on the domestic regulatory framework. EU policies rarely ever initiated policy-making, but generally supported and furthered pre-existing domestic policies. Indirect effects of the EU governance framework have a larger impact and even more potential to be influential in the future. This effect does not emerge from the nature of EU policy, however, but from the interaction of different levels of governance, which have not been developed with this kind of cooperation in mind. As a consequence, the emergence of ill-

fitting systems of governance, which are expected to work well together, leads to problems for democratic governance and to a stronger effect on liberty and security, than the analysis of the direct effects would indicate. The negative empirical results for the implementation study must not be taken to mean that the EU is unimportant for the domestic framework. The results rather indicate that processes beyond formal transposition are at work in the reconfiguration of police governance in the EU.

11.1. The indirect effects of the EU framework

Germany and the UK have transposed more than half the framework decisions adopted the same measures and are party to all EU conventions. This result in itself contributes to the debate on the compliance deficit in the third pillar. In comparison to the compliance record of the first pillar, third pillar policies do not show such a bad implementation record as the literature and the centrality to the core of national sovereignty would indicate. Both would have been expected to be an obstacle to high compliance. At the same time, the amount of time it takes to transpose a framework decision still higher than for a first pillar directive and the Commission has found instance of incomplete compliance in virtually all cases where framework decisions have been transposed.²¹⁵ Both countries claimed that they already complied with the requirements of most framework decisions and only to adopt later new measures with reference to the requirements of the framework decisions. So even if the substantive changes through framework decision are quite limited, they are being used in political discourse as a reference frame. The police are addressed in the majority of these measures and their activities changed by them.

Empirically the observation has shown that EU framework decisions did not have a strong direct influence on the domestic framework (cf. Hecker, 2005). From this does not follow, though, that the EU level is irrelevant for police governance. In particular the indirect effects and interaction effects between domestic arrangements and EU level regulations seem to have a strong effect if not on the formal governance framework, then on the operation of the police in the context of cooperation structures.²¹⁶ These effects were partially investigated in the empirical section as well. Conceptually, they were called indirect effects, as they do not stem directly from the implementation of EU measures at the national level. Rather they constitute adjustments to the amended

²¹⁵ These results, again, have to be treated with care, as their critical assessment seems sometimes based on insufficient knowledge about a particular legal system.

²¹⁶ A definite answer to this hunch requires another research project using a more police sociological and empirical approach.

international framework that are not explicitly requested by the European measures, but which are taken to make use of the new framework more or most effectively.

There has shown that while not aiming to adapt the national regulatory framework, **indirect effects** through this EU level structures are in both countries more important for the regulation of the fight against serious and organised crime on an international scale than direct effects. European integration aims to improve operational cooperation and the integration of domestic law enforcement structures into an European level framework provides extended operational capacities for law enforcement, but often does not require any changes in the national regulatory framework. Institutional adaptation can rarely be linked back to a EU impulse, but the new structures are capable to make more effective use of the EU cooperation structures and data bases.

The type of indirect effects is similar in both countries. New structures at the EU level, such as Europol or the Schengen Information System, expand the methods of law enforcement by giving them better and more powerful tools. Using broad and ill-defined concepts in regulating the situations when the new tools can be used indirectly extends the tasks of law enforcement. They delineate the area where international law enforcement cooperation may take place and where concepts such as double criminality, *ne bis in idem* and similar concepts are changed in their applicability. The promotion of cooperation extends the range of activity of police beyond the territorial boundaries of the nation state. Equally important is the legitimization of methods. The existence of European cooperation structures brings public scrutiny, but also a firm legal basis and public legitimacy to the previously informal cooperation arrangements. In particular the increasing use of data exchange mechanisms strongly affects the type of methods available to law enforcement. Furthermore, the availability of hot pursuit or the right to exercise force on the territory of another member states of the EU extends the methods available to the police in fighting cross-border crime. Similarly, the extent of extradition procedures is an aspect where the international agreements through national ratification expand the scope and depth of law enforcement capacities.

Interestingly, the strongest positive effect on the liberty dimension improving the protective mechanisms came about through an indirect effect.²¹⁷ The Crime (International Co-operation) Act 2003 subjects data accessible in the Europol computer system, the Customs Information System and the SIS to the oversight of the data protection commissioner, and thus subjects them to an equal layer of protection to other data held in the UK. At the same time, indirect effects are more directly determined by pre-existing national structures (e.g. data protection framework in the UK less extensive

²¹⁷ Rarely any positive effect could be observed in the German case.

than in Germany). In the UK the data protection framework is comparatively toothless, which has been named as one reason for the recent loss of two discs containing personal information of more than 25 million British citizens (cf. Economist, 2007). In this case European integration has not led to a lower, but a higher data protection standard. At the same time it highlights the problems in particular connected with the procedural protection of individual liberty. The shortcomings of a formally extensive national data protection regime which is insufficiently endowed with enforcement mechanisms become worse when this regime is embedded in an international framework of law enforcement cooperation with its own, not necessarily compatible data protection rules. Under conditions of internationalisation a spillover of rules onto citizens of other member states is possible. When they have provided their data under from their point of view sufficient data protection standards, these national processes of accountability do not function any more. In the interaction of different spheres of governance, national rules can no longer be fully enforced. In the light of ill functioning and difficult to enforce national accountability framework for data protection, the growing use of data in international police cooperation can have profound effects on procedural control of the individual even without necessitating changes in the formal regulatory framework. De Hert and Gutwirth have illustrated the problems connected to the mere reliance on technical opportunities without paying equal attention to the political and social consequences and intentions of such developments (de Hert and Gutwirth, 2006). Positive effects in this context thus need to be seen before the background of the different national regulatory system in an international context.

Another area, where the indirect effects can be clearly observed concerns the relationship between police and the judiciary, which is in turn related to the aforementioned process of centralisation. The growing embeddedness of police dominated fight against organised crime in international cooperation frameworks has extended the lead the police had over the judiciary in Germany and has strengthened their hold over the pre-trial phase in England. The inclusion of policing methods in EU structures supports the centralising developments which can be observed since the middle of the twentieth century. These centralising tendencies not only increase executive oversight by giving the central authority for law enforcement (Home Office, Ministry of Interior) more competences in determining the course of law enforcement activity, they also lead to more competences for federal or central law enforcement bodies, such as the federal office of criminal investigations in Germany or the Serious Organised Crime Office in the UK. Such a centralisation of competences and intelligence in the fight against serious and organised crime further impacts on the advantage in knowledge the police has over the judiciary. In Germany these developments affect the ability of the judiciary to function as a corrective for the execution of the legitimate monopoly of the use of force by the police.

11.2. *Limited direct effects of binding rules*

As the indirect effects seem relatively strong, what direct effects did the transposition have on the regulatory framework for criminal justice policy in Germany and England? Based on the literature on Europeanisation, the ‘hardening’ of justice and home affairs policies at the EU level and the high political relevance of the policy field, an at least clearly observable effect of the formal EU policy framework in the national arena had been expected. The results of the empirical analysis did not confirm this expectation and direct effects were weaker than anticipated. In most cases the transposing measures were hidden in the miscellaneous sections of the acts or were one of many motivations for undertaking the reform. The formal national regulatory framework in the fight against serious crime was only changed insignificantly through measures adopted at the EU level. There were some effects, but they concerned mostly minor amendments to pre-existing domestic legal frameworks.

The reasons for this are manifold. From an institutionalist view on decision-making the dominant role of Germany and the UK in internal security policy making in the EU since its inception – albeit with different emphases (cf. Occhipinti, 2003: 35, 82) – could have played a role, as both countries would be well equipped in terms of resources and political clout to upload significant portions of their policy approach to the EU level. Unanimity as a mode of decision-making requires a compromise, so the outcome of the EU political process in a policy field, which is still young – at least when it comes to adopting binding policies – is not likely to pose fundamental challenges to established policies at the national level. Furthermore all EU policy measures addressed issues that had already been regulated at least to a certain extent nationally. Whether it was terrorism, money laundering or the regulation of illegal immigration, the UK and Germany already had extensive regulatory frameworks in place. European measures thus had to be ‘docked onto’ these existing frameworks, which could also contribute to explain the limited influence of the EU framework. There was never a situation as in the Netherlands, where only through the framework decision on combating terrorism, terrorism as such was made a punishable offence (Den Boer, 2003: 17).

When direct effects of EU measures were found, they mainly concern the **substance** of criminal law. The definition of crimes and the scope of competences of law enforcement have been directly affected. As a result existing offences have been broadened, some new offences been introduced and in some instance the applicable sentences have been increased. The overall changes through the EU measures at the national level are more pronounced in Germany than in England. The effect on the two countries varies across policy fields, though. The single most strongly affected issue in the German case was terrorism policy, which was fundamentally overhauled and expanded after the events of

9/11 in the US, and in response to European measures introduced far reaching powers for the police. But also in the fight against the financing of crime Germany introduced more changes in response to EU measures than England. In England, on the other hand, the area of law enforcement concerning border control has been most strongly affected.

The amount of regulation of a certain policy field prior to the transposition of EU measures seems to have played a role. The UK, for example, had earlier and more extensive experience with the fight against e.g. money laundering, which started in response to US pressures earlier in the UK than in continental European countries (Andreas and Nadelmann, 2006). A similar explanation could account for the stronger change in England concerning immigration policy. Germany is a founding member of the Schengen group and has extensively emboldened its immigration system since 1993. The requirements from the EU thus did not lead to adaptation pressures in Germany.²¹⁸ The effect of EU policy at the national level **varies across segments of the internal security policy field** and these segments are differently affected in the two countries.

The strong effect at the domestic level in England is interesting as it takes place in a field where the UK has traditionally been very hesitant to integrate (Givens and Luedtke, 2004: 161). The protection of its borders has been a central element where the UK has been adamant with regard to European integration. This, at the same time, could be an explanation for the changes which have taken place. As the UK has not been a full Schengen member it did not transpose the requirements arising from the Schengen convention. It was also later that the UK faced illegal immigration pressures to the same extent that Germany did in the early 1990s. The two measures analysed in more detail above by name address migration issue, their main concern is border control. While the UK would be ready to join Schengen as a full member by adopting a number of administrative regulations (Peers and Rogers, 2006a), the notion of subjecting border control to a supranational regime is politically not feasible. The data basis for such a claim is very thin, but if policy-making was to continue in the observed vein, which takes a law enforcement approach to the management of borders in the 'disguise' of migration management, it could open a backdoor, through which the UK would approximate its regulatory framework to the requirements of the full EU framework, including Schengen, without abolishing border controls. This could be called a Schengenisation through the backdoor.

Beyond these substantive effects of EU measures, a difference in the type of reaction to the European requirements between the two countries would have come at no surprise

²¹⁸ This is not to say that the migration framework was not influenced by EU measures, but third pillar measures did not noticeably influence the German regulatory framework.

due to their fundamentally different legal systems and law enforcement systems. Differences in the formal way through which the two countries responded to EU requirements were found, in that Germany adopted much more laws than the British parliament, while in England more elements were transposed using administrative measures. At the same time the British government did not take up the opportunity to transpose EU requirements through statutory instruments as provided by the Crime (International Co-operation) Act 2003, but resorted to primary law in response to criticism. Simultaneously this approach provided broader leeway to adopt farther-reaching reforms. Their content, however, was not primarily based in European measures. Substantively, however, different legal systems have not led to different reactions to the requirements.

Except for differences in form, the common and the civil law country have reacted similarly to EU requirements. The different police systems have not shown significant different reactions to the requirements emanating from the EU either. The dominant reactions – beyond the aforementioned criminalisation and task expansion – are organisational and competence **centralisation** and an increasing reliance on **intelligence-led policing** methods. These developments can be observed in the formal setup and legal structures of both countries and precede the development of European level structures. In the UK the power of the Home Secretary in internal security measures has been formally and empirically increased since the Royal Commission's report in 1964, while in Germany the role of the BKA has moved from a coordinating structure to an almost operational police, while the federal police has had its competences gradually expanded. These developments were therefore not caused by EU requirements. The establishment of a EU structure for law enforcement has, however, continued and cemented this development by requiring the establishment of e.g. central contact points for Europol. So also in this instance has the EU not been the primer of a development, but in recent years has functioned as a motor, which ensures the continuing development in a particular direction. The focus of the EU framework on the exchange of data has been reflected in the laws adopted in transposing EU regulations. In doing so the transposition strengthened the development towards pre-emptive and proactive policing, which could be observed in Germany and England since the early 1990s.

11.3. Liberty and security in national crime policies

As the introduction already remarked the question of security and liberty is at the core of virtually all debates on internal security policy on the national and international level (e.g. Lepsius, 2004; Wagner, 2005; Guild, 2004). This goes for the political discussion in the fight against terrorism, where the question has been posed whether the expansion of the

competences of law enforcement may thwart the very values which this policy it supposed to protect (Biermann, 2007). In the light of increasing surveillance measures the question of the privacy both online and offline has come into the centre of debates about internal security (Lepsius, 2004; Hosein, 2006). At the same time the functional need for increased cooperative efforts to counteract terrorist endeavours and transnational criminal enterprises are central for the aversion of dangers of a society which is fully included in an international societal network.

This is reflected in the central research question addressed in this book, whether growing EU policy-making against organised crime has a discernible impact on the relationship between security and civil liberties in national internal security policy. To circumvent the normatively laden discussion of the opposition of liberty and security the concepts were conceptualised in an empirically testable way. Security encompasses accordingly the breadth of the competences of law enforcement and the depth of the methods available to fulfil that task. Liberty does not encompass a list of substantive civil liberties, as their reduction cannot be assessed in a sensible way. Rather it is conceptualised as a measure of the degree to which the provision of any substantive civil right can be ensured. In order to capture the most important elements, the actual processes and actors which can exercise these control functions were looked at. The empirical analysis has shown that by using these normatively thin concepts, the two dimensions can be grasped empirically and the discussion of their development put a footing, which can be debated, as the underlying concepts are public.

A concern that has been voiced repeatedly in the literature on the development of a European anti-crime policy is that growing integration in this field would lead to an overemphasis on the provision of security to the detriment of individual liberty protection (Wagner, 2003; Wagner, 2005; Mitsilegas et al., 2003). The empirical analysis of the way in which European third pillar measures were transposed nationally, did not confirm these concerns. The findings of the study seem to contradict the findings of other studies dealing with third pillar policies in the EU. The prioritisation of security objectives by dominant practitioners in the internal security policy field, whether it is anti-terrorism or drugs policy (Lavenex and Wagner, 2005; Elvins, 2003; Mitsilegas et al., 2003) does not seem to cause a similar development at the national level.

Such a reading of the results is too simplifying, though. On the one hand is the claim of the empirical analysis more modest. It merely shows that the results of the *transposition* of *binding* EU measures does not *in general* affect the competences of law enforcement and their control *significantly*. But there were obviously some effects of the transposition of the measures on the two central dimensions of the policy field. More changes through the EU measures concern the indicators of the security dimension than those of the

liberty dimension. But all these results do not hold over all analysed measures nor does the strength of the observed effect allow the identification of a causal link from the EU level to the domestic framework. In a more nuanced view of the results, there are certainly indications which tie in with the results of analyses of EU policy (Mitsilegas et al., 2003; Chalk, 2000) and the national level (Busch, 1995; Aden, 1998; Aden and Busch, 2006). The results do not allow a linkage of these two levels, though.

Looking at some issues in more detail helps to shed light on some of these seeming contradictory statements. Through EU measures often the level of punishment and the definitions of crimes were expanded. A good illustrative example is the expansion of criminalisation to abetting and attempt. It expands the competences of national law enforcement to prosecute more acts and actors. In addition, such an expansion means that more and more data can be exchanged as through the extension of criminal definitions, also 'soft' data, i.e. data which may encompass suspicions and non-provable facts, falls in the realm of international cooperation (cf. Aden and Busch, 2006: 564). Through the European requirements, the reach of national criminal law has been extended beyond the territorial borders. This expansion of extraterritorial jurisdiction is a novelty in criminal law and a direct response to its growing internationalisation. It also extends the security dimension.

The problems of data protection and their effect on the ability of the individual to seek remedies have been addressed. There are rarely new actors introduced and the competences of existing control actors are not explicitly applied to new laws. The more intrusive methods for law enforcement, for example, concerning the collection and use of personal data have not been accompanied by a strengthening of the data protection framework. At the same time, the procedures have rarely been explicitly reduced. The problem arises more from the persistence of an old protective framework, which in many cases is no longer fully adequate for the new law enforcement against which it is intended to act.

Legislative control of policy-making in the transposition of EU measures at the national level has been limited. In particular parliaments rarely dealt to a mentionable extent with EU internal security issues, even though they devote more time to internal security in general. Governments very rarely mention EU policy as a motivator for new laws or put forward the EU as a reason to rally support for a controversial policy measure. Even when a EU measure is transposed nationally, parliamentary debates rarely address the European issues of the new policies, but concern themselves predominantly with domestic issues.

Policies at the domestic level have clearly led to an increase in the security dimension through broader definitions of offences. In particular the growing availability of data

exchange mechanisms for law enforcement has negatively affected the protective mechanisms for substantive individual liberties as either no procedures have been put in place for those areas, where national and international data regimes interact, or the catch-all clause of national security for non-disclosure of, for example, the amount and kind of data held about individuals. At the same time European policies have in some cases shown significant problems with regard to civil liberty standards. A case in point is the recent report of Dick Marty to the Council of Europe, where he condemned the 'black lists' of the EU and the UN as constituting a 'death sentence', because there is no possibility to appeal such a decision. So from a more indirect perspective EU policy has had a stronger impact on liberty and security in their empirical conceptualisation.

At the same time the aforementioned examples do not provide a picture across the board of policies of the EU as a whole. The effects through the transposition of EU measures on the two dimensions differ in line with the general effect of them on the domestic framework. So the effect of the EU policy is variable across the policies subsumed under serious crime as has been shown above.

As the transposition of binding EU measures affects the liberty and the security dimension only to a limited degree, a normative analysis of the situation as it presents it now using the indicators for liberty and security would need to come to the conclusion that the liberty dimension has not been positively affected, in the sense that protective mechanisms would have been established, while the security dimension experienced significant growth, especially through the use of new technologies. Evaluating these developments leads to the assessment that problems of civil liberty protection and an expansive security state, if that is the correct description of the situation, are 'home made'.

At the national level a 'culture of control' can be found (cf. Garland, 2001), which emphasises the strong role of state control over issues related to the maintenance of internal peace and internal sovereignty and an development towards the 'de-individualisation of liberty' (Lepsius, 2004: 455; Nash, 2006). The relationship between the two levels remains shady. There is clearly very limited 'hard' Europeanisation in domestic criminal justice policy.

Remaining in the language of top-down v bottom-up Europeanisation, from a focus on the policy process bottom-up relationships are more important. EU policy follows in many instances national examples. When looking at the development of internal security policy, especially in recent years, a strong emphasis on security concerns and very little attention to human rights or civil liberties can be seen (Fitzpatrick, 2003). The focus on a strong executive thus is a fact in domestic politics (Töller, 2007), but the European influence on that development in internal security matters seems limited.

In concluding this section, a note of caution is in order. The results from this study do not in any case constitute a normative statement about the developments in internal security policy in recent years. The intention of the study was to address the often-made claim about the EU influence in internal security and its assumed contribution to the establishment of a European surveillance or even a police state. There certainly are developments which are worrying to the eyes of a critical observer, whether these are the retention of telecommunication data or the growing availability of private data of millions of innocent citizens for the fight against serious (and sometime not so serious) crimes. What the study has shown is, however, that irrespective of the evaluation of the policies that take place, a direct obligation by the EU to develop these policies is not directly observable in Germany and England. If a normative statement was to be made it would emphasise the responsibility of the domestic political actors for the securitising developments in serious crime policy. The EU level is in this argument not the originator, but at worst continues a domestic development. The central developments, and most of the more fine-grained issues, are 'home made'.

What can be further drawn from the analysis is that the EU measures have until now not been contrary to the developments at the national level. Their lack of impact at the national level could be explained with their close adherence to the predominant model of 'late modern policing', which focuses on risk prevention and pre-emptive repression (e.g. Johnston and Shearing, 2003; Bayley and Shearing, 1996; Jones and Newburn, 2002), mediated by the unanimous decision-making procedures at the EU level, which lead to compromise decisions. The further going decisions at the national level in transposing these measures could indicate that the normative overlap of EU and domestic politics leads to an easy adherence to this model of EU internal security policy, without the restraining requirement of unanimity. Therefore domestic policies go further than EU policies, even when they merely claim to transpose them, such as with the EAW and the data retention directive in Germany.

Such focus of the emergent police policy, which is not intended nor will it likely ever develop into the equivalent of a European *corpus juris*, locks in a particular focus of internal security for the foreseeable future. This has been evident in the discussion of the problems and solutions in the different EU measures and frameworks. The analysis of the transposition has supported this argument by also finding a focus on criminalisation and punishment as a primary means to fight crime. Having established a certain frame for an issue makes it very hard to change this frame. The focus on improving law enforcement cooperation – for all the good it does – carries the danger of losing sight of alternative mechanisms through which problems covered under the third pillar can be addressed.

11.4. *Europeanisation or complex covariation?*

What do the empirical results say about the usefulness of the theoretical concepts used? The empirical analysis of the effect of binding EU policies at the domestic level has drawn strongly on compliance research and its special form of Europeanisation research. To find instances of Europeanisation, the characteristics of the EU framework were drawn on, such as the debate of hard versus soft law (Abbott and Snidal, 2000; Zürn, 2005: 23). The expectations, which arose from this framework about an observable impact of the EU level on domestic policies, could not be confirmed in the empirical analysis. This leads to the question of the usefulness of these theoretical concepts in the study of international criminal justice policy and what reasons there are for the lack of empirical support for this theoretical approach. Is Europeanisation an adequate theoretical tool to understand European police policy or is it more adequate to speak of a complex covariation, where directions of influence are impossible to identify?

Compliance, understood as the agreement of proscribed and prescribed rules (Young, 1979: 3), has proven to be a useful descriptive tool in the analysis. The lack of strong effects of the EU measures and generally similar developments of policies descriptively led to strong compliance even in cases where the member states did not undertake efforts to transpose EU measures. As this was relatively often the case, the observation of change, which has been considered a prerequisite for the study of Europeanisation (e.g. Radaelli, 2003; Cowles et al., 2001; Börzel and Risse, 2003), was not possible, but for compliance does not pose a methodological problem. The empirical analysis has yielded high compliance of the national regulatory framework with the requirements of EU policies. Domestic policies in Germany and England in virtually all analysed instances virtually fully complied with the requirements of the EU level.²¹⁹

Non-compliance²²⁰ can be voluntary or involuntary (Falkner et al., 2004; Zürn, 2005: 18). While the former requires enforcement mechanisms, the latter requires the management of rules (Mayntz, 2004). The analysis showed that in particular the numerous cases where the Commission found incomplete compliance, the member states in most cases claimed that their national systems did not require adaptation rather than reject the EU rules as such. Further complications were added by the different legal systems, whose interaction

²¹⁹ While this was not the direct thrust of the research concept, it seems as if not only the formal framework of the domestic and the EU system were highly compliant, but also the underlying normative concepts in the fight against serious and organised crime were (at least) compatible. A stronger focus on punishment, more extensive definitions of crimes and organisational developments were similar in all three policy arenas.

²²⁰ This seems to be the more often researched concept, rather than compliance. In this research project, however, the positive concept of compliance was at the centre of the analysis. The question was not whether domestic policy was in line with EU requirements or not but how the effects of compliance could be found in the domestic regulatory framework.

led to problems of transferability of the concepts across legal boundaries. Similar developments in Germany and England in criminal justice policy, which are also reflected in EU policies, when analysed on the liberty and security dimension, show a basically compatible approach to the issues. This is not only reflected in the type of policies adopted in the approach to social problems, but has been also reflected for the German case in interviews with officials from the relevant ministries and law enforcement officials.

In the conceptualisation of compliance as put forward by Zürn (2005: 2), the analysis of compliance also links the way rules are made to their application. These mechanisms could not be confirmed, however. In several cases the domestic regulatory systems conformed to the requirements of the EU level without any transposing measures. Using the characteristics of the EU system as a mechanism to explain domestic compliance, is conceptually sensible in that it includes decision-making modes on the international scale in the analysis of domestic policies, but in my empirical analysis does not seem to have played a role.

11.5. The problem with Europeanisation

The link of the mode of rule-making at the EU level and the compliance of the domestic level, highlights a fundamental problem with the application of an extended, explanatorily oriented concept of compliance to the study of EU policies. In the concept of compliance proposed by Zürn as well as in virtually all analyses of Europeanisation, a clear differentiation between independent and dependent variables has been made. The EU is usually conceptualised as the independent variable, while changes of domestic policies are the dependent variable.²²¹ This conceptualisation presupposes the development of some sort of coherent model at the EU level, which is to be transposed nationally, or the rigorous pursuance of a particular approach, which builds on a functional link between previously existing policies and subsequently developed externalised demands for new regulation. An example of the former would be the establishment of a single market programme, which centrally built on deregulation and market liberalisation (cf. Apeldoorn, 2002), whereas for the latter environmental policy is an example, as it addresses the externalised effects of an integrated European market and reflects the acknowledgement that the collective problem cannot be solved unilaterally.

Police policy against serious crime does not exhibit such characteristics. Primarily, there is no coherent European model and the Commission cannot adopt policies without the unanimous consent of the member states. EU policies in the fight against crime thus

²²¹ Often intervening variables are identified to explain the outcome at the national level (Radaelli, 2003).

always reflect a compromise of member state approaches and preferences. But there is also no such clear collective action problem, as could be argued to underpin the development of environmental policy in Europe. So there is no conceivable variable which could be used to analyse national police policy. Neither has the abolishment of internal border led to a significant increase in serious crime (Barclay and Tavares, 2003), nor has there been, and this is probably the more important cause, no previous horizontal cooperation among the relevant actors in addressing the problem of cross-border criminality (cf. Sheptycki, 2002a; Knöbl, 1998; Anderson et al., 1995). Not without reasons has the third pillar been described as ‘intensively transgovernmental’ (Jachtenfuchs and Kohler-Koch, 2004: 22; Bigo, 1996). So the inroads against crime adopted at the EU level met upon pre-existing structures of operational cooperation.²²²

These characteristics of the policy do not allow the clear separation of independent and dependent variables. EU policies are a reflection of a compromise of pre-existing national positions and thereby constitute something new, but do not in themselves establish a new approach to the policy field.²²³ It is impossible to say that one causes the other. Until now both have advanced each using similar approaches with a similar normative model.

This close interrelation of domestic and European policies and political developments²²⁴ also makes the conceptualisation of top-down versus bottom-up Europeanisation difficult to maintain. The development of different third pillar policies over time can only be heuristically explained by acknowledging the complex interrelation of the domestic and the European level. It seems more adequate to describe the policy field as a complex governance network than as two separate levels, which interact. Democratic governance on the domestic level needs to take into account the effects of intersecting governance spaces. While the regulation and control mechanisms of the respective levels are, generally speaking, elaborate, the effects of their interaction are insufficiently understood and thus not factored into policy-making. When analysing liberty and security and the role of the EU the focus of further analyses must be on the empirical observation of intersections of governance spaces.

²²² This is why Aden speaks of retroactive legitimisation of law enforcement methods (Aden, 1998: 265) and Lobkowitz described the ministerial meetings under Trevi as exercises to provide political legitimacy to decisions already taken and enacted by law enforcement actors (2002).

²²³ Rather than in what *is* adopted at the EU level, European influence makes itself felt in what is *not* adopted in policies. The gaps rather than the chunks of policy are important in that respect.

²²⁴ Which is also reflected in the *vogues* of the time in policy making (crime, migration, terrorism etc.).

11.6. Lock-in and decision-making modes – time and different levels

Having discussed that the Europeanisation approach is not a good explanatory tool for the study of EU criminal justice policy, the question arises whether the mechanism proposed for the analysis of the Europeanisation of domestic policy are of any use in understanding the policy field. This was primarily the hardness of EU third pillar policy (cf. Abbott and Snidal, 2000), which refers to the degree of obligation and precision of the policy process and the delegation of enforcement. It provides helpful insights for the understanding of the policy field, even though this function is different from its initial purpose.

The description of the third pillar as an area, which shows strong characteristics of hard law, in that measures are legally binding, precise, and the enforcement mechanisms are effectively delegated to the Commission and the European Court of Justice did show a stronger influence on the domestic framework. When a temporal element is added to the analysis of the third pillar, understood as a governance field rather than a two level game which is played over several rounds as Europeanisation approaches could be conceptualised, which acknowledge the mutual dependency of the levels, the relevance of the hardening of EU criminal justice policy further increases the likeliness of finding domestic change.

By gradually developing an increasingly binding framework a certain policy at the EU level is 'locked-in'. While in certain instance a conscious locking in of decisions has been found before changes in the decision-making mode became reality (cf. Aus, 2003), in this book the focus lies on the overall characteristics of the policies adopted. The empirical analysis found that EU policy initiates only limited changes in the domestic framework, because the general developments on the two levels go in the same direction. The increasing amount of legally binding measures increasingly locks-in this particular approach to the fight against serious crime. In the light of the unanimous mode of decision-making third pillar policy-making that prevails and is deemed to prevail in the future, it will become increasingly difficult to overturn this approach. Such an approach creates path dependencies by raising the costs to change the overall framework and by establishing a normative framework, both of which are adverse to change (Thelen, 1999: 385ff). Such a lock-in not only solidifies a certain approach to crime at the EU level, but also reduces the set of options available to the member states in deciding about their national criminal justice policy. The bindingness of European rules and the assertion of the control by an increasingly strong and self-confident Commission (Ucarer, 2001) and the development of case law of the European Court of Justice embeds sovereign decision-making over the use of force in a restrictive framework, which only allows for a

particular policy in order to conform with the requirements for successful police cooperation within the EU.

Europeanisation is not the approach of choice to best describe internal security policy in the EU. Conceptualising police policy as a governance space, within which European and national policies co-vary in a constant exchange with each other, and supplanting it with a stronger focus on horizontal policy transfer (Jones and Newburn, 2007), holds more potential to capture the complexities and processes better. An approach to explain the developments can profit strongly from process tracing, a focus on the developments of policy-making over time in the different policy arenas with a focus on the gradual processes of locking-in a particular approach to criminal justice policy in the interplay of different institutional settings. A further analysis of European policy-making in third pillar policies must not restrict itself to an analysis of formal structures, but must include normative frames and their development over time.

11.7. Policy Considerations

The analysis of policy developments in internal security policy has beyond the methodological shortcomings and theoretical discussion also yielded conclusions which are relevant for policy-making.

Politicians should be careful in not to think about liberty and security as mutually exclusive concepts. While this truism is often used in public utterances of politicians, policy-making often still treats the two concepts as mutually dependent. This book has proposed an alternative understanding of liberty and security, which reduces the ease with which the two concepts can be linked. By capturing the concept of negative freedom (cf. Berlin, 2002) through a focus on the (normatively) positive mechanisms for individual control of the exercise of the legitimate monopoly of force, a well-grounded restriction of the substantive liberties can be balanced by accessible and useable control mechanisms, e.g. through enforceable data protection rules. These rules must be available to offenders and citizens alike. The debate about internal security would benefit from a re-orientation towards the rights of individuals, irrespective of whether they are criminals or not. The recourse of attributes (safe/unsafe; free/unfree) to society renders the liberty security debate in a normative frame, within which the rights of the individual have taken second place behind a conceptualisation of security which refers to the society as a unitary community (cf. Lepsius, 2004; Berlin, 2002; Nash). Such as de-individualisation of liberty runs a danger to consider every individual less as an law abiding citizen, but as an addressee of risk-averting and intelligence-led policing methods and thus as a potential suspect. The use of a positive concept of negative liberty would subject this development public contestation and would also raise the awareness of these developments.

In a more institutional vein, the empirical and conceptual results argue strongly against using the EU as a scapegoat for policy-developments, which might be considered liberty infringing or undesirable in another way. The developments at the EU level are only marginally influential in the domestic policy arena. The course and content of internal security policy is home made and national governments and parliaments are primarily responsible for the developments in internal security policy. While an accountability deficit remains in EU policy-making (Kietz and Maurer, 2007), the focus of public accountability on policy-making must remain for the time being and the foreseeable future on the domestic arena.

12. Bibliography

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