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THESIS SUMMARY

of the Ph.D. dissertation by

Dr. FEJES Péter

Entitled

**Opportunities and Obstacles of Strengthening
European Judicial Cooperation in Criminal Matters**

Consultant:

Associate professor
Dr. habil. KONDOROSI Ferenc

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Department for International Relations and World Economics

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I. Research background and the legitimization of the topic

When I entered the Ph.D. programme in 2003, the Hungarian literature on the third pillar of the European Union, that is, of cooperation in justice and home affairs, and to be even more precise, of police and judicial cooperation reduced to criminal matters by the Treaty of Amsterdam was rather modest. Given also the fact that I am a prosecutor dealing with criminal cases, this proved a powerful trigger in selecting the topic of my dissertation. Not unlike KARSAI Krisztina¹ and LIGETI Katalin², whose books published in 2004 were also based on their dissertations in the field. Although Hungarian literature has, of course, become more extensive since then, I still do not regard the topic as a foregone conclusion as cooperation in criminal matters within European integration is still far from functioning at a Community level, is rather fragmented, and has (hopefully) more of a future rather than a past or a present. The actual progress of the EU's international cooperation in criminal matters depends not so much on the academic experts and the practitioners of law but rather on politicians. If there is a real political will, then a way to accelerate development of the area can also be found, resulting (potentially) in a (fully) 'federalised' cooperation in criminal matters. Therefore European judicial cooperation in criminal matters can not be separated from the future of the European Union *per se*. Should decision-makers have a preference for a closer and federalist cooperation among Member States, then cooperation in criminal matters will also accelerate, making first the institution of a European Prosecutor's Office and then a modified a matured Corpus Juris Europae a realistic aim. Should, however, Member States continue to stick rigidly to a system of nation states in all other areas, then judicial cooperation in criminal matters will also be highly unlikely to make dramatic and substantial progress.

The political elite do not necessarily exist for their own sake. They are subject to impacts and influences from the society, are faced with the thorny issue of the democratic deficit, with the requirement to make the EU more transparent and citizen-friendly and are encouraged by NGOs, the organisations of the civil society (cf. e.g. MISZLIVETZ [2001] pp. 9-91). I firmly believe that against the forms of international crime such as international terrorism, most dangerous for the Member States, each state is (rather) helpless standing on their own than standing together (cf. ÓDOR [2006] p. 3), and that the nationals'/citizens' need for a sense of being safe on the one hand and the need to protect the EU's financial interests by way of an increased pressure from the institutions of integration (HECKER [2005] p. 484) on the other will trigger a closer, a 'reinforced' cooperation certainly in the law of criminal procedures (mutual legal assistance in criminal matters and its further simplification), but quite likely also in the area of criminal substantive and organisational law.

The aim of the present research is to outline the continuity of European judicial cooperation in criminal matters, describe its structure and analyse its dynamics; to establish a forecast for the future, placing the whole issue into a context embedded in the development options of European integration

in general.

II. Methodology

2.1. A review of relevant literature

A clear indication of the relevant Hungarian literature becoming increasingly extensive is the fact that excellent textbooks and handbooks such as the several editions of *EK-jog* (EC Law), and *EU jog és jogharmonizáció*³ (EU Law and Legal Approximation) by KECSKÉS László, *Európai közjog és politika*,⁴ (European Public Law and Policies) edited first by KENDE Tamás and later co-edited by also by SZÜCS Tamás, *Az Európai Unió joga*⁵ (Law in the European Union) co-authored by VÁRNAY Ernő and PAPP Mónika, the revised and enlarged editions of *Kézikönyv az Európai Unióról*⁶ (A Handbook on the European Union) by a HORVÁTH Zoltán devote an increasingly voluminous section to cooperation in justice and in home affairs, then to police and judicial cooperation in criminal matters and later on to the area of freedom, security and justice. Monographies focusing specifically (also) on European criminal law have also been published such as *Nemzetközi és európai büntetőjog*,⁷ (International and European Criminal Law) by M. NYITRAI Péter, *Az európai büntetőjog kézikönyve*⁸ (A Handbook of European Criminal Law) edited by KONDOROSI Ferenc and LIGETI Katalin, *Az előzetes döntéshozatali eljárás a büntető ügyszakban*⁹ (Preliminary Ruling Procedure by Criminal Divisions), an explanatory practical handbook by CZINE Ágnes, SZABÓ Sándor and VILLÁNYI József and also the explanatory *Az Európai Unió alapító szerződéseinek magyarázata*¹⁰ (An Explanation of the Founding Treaties of the European Union), discussing the articles on police and judicial cooperation in criminal matters at length.

What strikes the reader when looking at the authors of the books is that not only university lecturers such as (without the desire to compile a full and complete list and hopefully not offending anybody) FARKAS Ákos¹¹ (University of Miskolc), GÁL István (University of Pécs), KIS Norbert (Corvinus University of Budapest), LIGETI Katalin (Eötvös Lóránd University), M. NYITRAI Péter (Széchenyi István University), NAGY Ferenc and KARSAI Krisztina (University of Szeged) deal with European criminal law (also) at a theoretical level, but also active politicians such as government commissioner KONDOROSI Ferenc; practitioners of law such as judges CZINE Ágnes, KENÉZ Andrea, OSZTOVITS András and SZABÓ Sándor, prosecutors GARAMVÖLGYI Balázs, LÉVAI Ilona,¹² and POLT Péter, lawyers BÁRÁNDY Péter and KÁDÁR Balázs and knowledgeable colleagues of European and other institutions such as CSONKA Péter (European Commission), SZÜTS Márton and VILLÁNYI József (European Court of Justice) and KADLÓT Erzsébet (Constitutional Court) do so.

As far as the international literature is concerned, the keen reader can find cornerstone works such as *Common Market Law of Competition*¹³ by Bellamy and Child, *EU law: Text, Cases and Materials*¹⁴ by Paul Craig and Gráinne de Burca, *Droit institutionnel de l'Union européenne et des Communautés européennes*¹⁵ by Joël Rideau, *EU Law*¹⁶ by Stephen Weatherill and Paul Beaumont, *Competition Law*¹⁷ by Richard Whish, *Policy-Making in the European Union*¹⁸ by Helen Wallace and

William Wallace, just like major monographies such as *Europäisches Strafrecht*¹⁹ by Bernd Hecker, *Droit pénal européen*²⁰ by Jean Pradel and Geert Corstens, commentaries like *Kommentar des Vertrages über die Europäische Union und des Vertrages zur Gründung der Europäischen Gemeinschaft: EUV/EGV*.²¹ by Christian Calliess and Matthias Ruffert, *Commentaire article par article des traités UE et CE*²² by Philippe Léger and *The Oxford Encyclopaedia of European Community Law*²³ by A. G. Toth.

One of the most outstanding of the eminent authors²⁴ is for instance the university professor Mireille Delmas-Marty Paris-I. (Pantheon-Sorbonne), the member of the French University Institute, who is a strong advocate of using the tools provided by Community law against crimes against the European Union and whose working group investigated the feasibility of the Corpus Juris Europae within the EU-15 and modified its original draft at several points. In the course of the investigation he concluded that the Corpus Juris Europae ‘is, firstly, necessary because of the need to enhance the efficiency of crime prevention and prosecution and also because of the right to protection; is, secondly, feasible under certain conditions and modifications; and thirdly, its legitimacy can be duly reinforced by the six fundamental principles, the European Prosecutor’s Office and a ‘preliminary European Chamber’ made up of judges’ (Delmas-Marty [2000] p. 645). It is only natural that, though not outnumbering its supporters, there are opponents of the Corpus Juris Europae, including for example Stefan Braum who reckons that the Corpus Juris Europae is not necessary and not legitimate and not feasible either, and Jean-Paul Sudre who believes that ‘the third pillar is an institutionalised dead end’. However, most articles and studies seem to come to a common bottom line, namely, that the economic and financial interests of the EU will sooner or later force Member States to give up more of their sovereignty embodied also in judicial and criminal matters.

2.2. Self-training

In addition to a constant monitoring of relevant literature and its careful processing with a special view to the aims of the present research, the author relied strongly on his knowledge acquired as part of postgraduate studies as a lawyer specialising in EU law, and of his studies to become a national trainer, the vast amount of information acquired in the course of study trips in other countries, more than one annually in the past 15 years or so, and at conferences as well as on his experience gained as a legal practitioner applying criminal law on a daily basis.

The dissertation contains five chapters. The Introduction is followed by Chapter I on the causes triggering European judicial cooperation in criminal matters (1). The reader is then offered a chronological overview of the legal sources including the primary, partly *pro futuro* sources and the secondary sources (2.1 and 2.2) as well as international agreements (2.3) and various other documents (3) followed by a presentation of the institutional system (4). The paper also presents and to some extent analyses the judicial practice of the European Court of Justice (5). Chapter II describes the

Hungarian status quo while Chapter III outlines the areas of European judicial cooperation in criminal matters. Chapter IV closely investigates the general situation of European integration and considers its impacts on cooperation in criminal matters, whereas Chapter V has a somewhat subjective 'Conclusions' section providing a future vision and containing the concisely put ultimate conclusion which argues that a closer European judicial cooperation in criminal matters would be capable of ensuring and safeguarding the safety and security of the European citizens better and more efficiently than any national system could do on its own, and that this cooperation lies in the very interest of the EU citizens themselves. If this is the interest of European citizens, then it must also lie in the interest of the political elite of the Member States and of the European Union, as the EU is *ab ovo* there for its citizens. In addition to the bibliography and the end notes, the dissertation is rounded off by a list of the secondary legal sources (arranged in chronological order according to the types of the legal source) and a list of the cases referred to (arranged according to the order of their reference in the paper).

III The conclusions of the dissertation

3.1 The causes bringing about European judicial cooperation in criminal matters

The first principal cause to be apparent was international, cross-border crime gaining ground, which was particularly striking in areas like drug-trafficking and terrorism. An increasingly strong presence of criminal activities also within the Community started to point at the anomalous situation, which could well be described by stating that crime is organised whereas crime prosecution is not, and that crime is international whereas crime prosecution is national.

The difference in the mobility of crime and crime prosecution is aptly illustrated by the fact that misusing a credit card can take only a few seconds on the international arena, its prosecution via mutual legal assistance can take months or even years; and to illustrate how hampered justice can be suffice it to mention that a person arrested for trafficking in human beings or for drug-trafficking will be sentenced in a number of different countries for parts of his or her crime committed, without the bodies prosecuting them would be even trying to tracing down the entire cross-border criminal organisation or to make the person accountable for all of his or her criminal actions committed elsewhere. The second cause, therefore, is the lack of an efficient cooperation in international crime prosecution and the predominance of national jurisdictions.

The third major cause is in all likelihood, the protection of the financial interests of the Community, which has probably proved the most powerful trigger since it was identified. Damage caused by fraudulent activities detrimental to the EU budget has been increasing, estimated to account for up to 7 to 10 % of the budget (WALLACE–WALLACE [1999] p I-121; LÉVAI [1998] p 65; FARKAS [2001] p 12; FARKAS [2002] p 25).²⁵

Finally, the ever so menacing danger, or rather the reality of illegal migration can be identified as yet another cause. This seems (seemed) to be in close relation with the alluring welfare of Western European states, with the changes in Central and Eastern Europe, with the fall of the Iron Curtain, and with the abolition of the border control in line with the provisions of the Schengen Agreement (I) planned and actually enforced as of 1 January, 1993 and the subsequent extension of the Schengen Area.

The circumstances above have been and are posing a repeated challenge for European integration; have been and are requiring a response, as they are detrimental to the interests of the Communities and the Member States; are tarnishing the sense of security of the citizens and are undermining their faith in the sustainability and growth of welfare.

3.2 The legal sources and documents of European judicial cooperation in criminal matters

The legal sources of the European judicial cooperation in criminal matters can be identified both in primary and secondary sources as well as in international agreements.

Considering the primary legal sources in the history of European judicial cooperation in criminal matters, the Maastricht Treaty (TEU) was the first step both at a Community level (i.e. the protection of the financial interests of the Community) and an intergovernmental level (i.e. third pillar: cooperation in justice and home affairs). The Treaty of Amsterdam was a momentous and far-reaching change as it moved the provisions on the control of external borders, refugee and migration policy into a Community pillar, as this absorbed yet another part of the Member States' sovereignty, which (later)²⁶ also meant that the primacy of Community law goes also for these areas, including its direct applicability and effect, the Commission's exclusive right to initiate legislation, in certain cases the majority principle in decision-making, the co-decision powers of the Parliament and the powers of the Court of Justice. Police and judicial cooperation seems to have got stuck in the third pillar, together with the fight against anti-racism and xenophobia, organised crime, terrorism, drugs and weapons trafficking, trafficking in human beings, corruption and serious crime (including fraud). The Nice Treaty brought about no drastic changes in judicial cooperation in criminal matters, but Eurojust set up subsequently did fulfill the hopes pinned on it, led to favourable experience and could (potentially) serve as a basis to step forward (towards a basis for the European Prosecutor's Office). Should it take effect, the Treaty establishing a Constitution for Europe would, as a primary legal source be indicating a potential direction of development (not quite desired right now and not by everyone), of which the Treaty of Lisbon is trying to save as much as possible. Lifted into the Treaty on the European Union (TEU), provisions on the area of freedom, security and justice have established the grounds of more effective actions on the EU's part, also relating to the fight against terrorism and serious crime. The abolition of the pillar system would certainly not do away with the difference between the institutional and procedural regimes of the Community, the foreign and security policy as

well as of police and judicial cooperation in criminal matters. However, differences have still remained in the institutional regime and the ruling procedures both in foreign and security policies and in police and judicial cooperation in criminal matters. The area of freedom, security and justice has not yet become fully ‘federalised’, although they have been lifted into the Treaty on the Functioning of the European Union (TFEU) and have officially become parts of EU policy-making, the area of freedom, security and justice has not yet become fully ‘federalised’. Suffice it to mention the so-called emergency brake clause (cf. e.g. MARGITAY-BECHT-ÓDOR [2007] p. 4), which allows a Member State to hinder the legislative procedures in judicial cooperation [Par. 3 of Art. 69 A-B of Art. 2 of the amended TFEU] and in police cooperation [Par. 3 of Art. 69 F of Art. 2 of the amended TFEU] if the Member State establishes that the draft legal instrument (directive) would affect fundamental aspects of its criminal justice system; but likewise, the establishment of the European Prosecutor’s Office can also be prevented through this measure [par. 1 of Art. 69 E of Art. 2 of the amended TFEU]. The Treaty of Lisbon actually summarises and provides for the overall status quo in judicial cooperation in criminal matters, and it envisages the future establishment of a European Prosecutor’s Office, which office is envisioned in the Treaty to have (referring also to) prosecution powers in the case of serious cross-border crime in addition to its licence to prosecute crimes detrimental to the financial interests of the European Union.

As a rule in the secondary legal sources of the Community law the prevailing acts of law are regulations and directives in the first pillar, then in all the three pillars, decisions in all three pillars, recommendations and opinions in the first pillar, framework decisions in the third pillar (cf. KENDE-SZÚCS [2006] pp. 608, 632-633). The legal acts of law in third pillar include common positions, framework decisions, decisions and international agreements, which, at the initiative of any Member State or of the Commission, may be drafted and adopted only by the Council and only by a unanimous decision. Among the secondary legal sources there is no legal hierarchy, but then they do not constitute parts of the Community law but of EU law and thus ‘the legal sources of the Community law have primacy over EU law’ (SZALAYNÉ [2004] p. 28). Mostly EU legal instruments cover the general and the specific parts of criminal substantive, as well as procedural and organisational law. The Council’s framework decision of 13 June, 2002 on the European arrest warrant and the surrender procedures between Member States deserves special attention, which opened up a new chapter in European judicial cooperation criminal matters. The novelty about the framework decision²⁷ is that it institutionalised the principle of mutual recognition (KARSAI [2006] pp. 2-3; KONDOROSI-LIGETI [2008] pp. 149-157; KARSAI-LIGETI [2008] pp. 403-404), the point of which is that the Member States accept and enforce effective decisions by each other’s courts. As a dramatic impact it (partly) annulled formal extradition (POLT [2002] pp. 3-8) as one of the traditional ways of international judicial cooperation in criminal matters, in the course of which the requested state extradites the suspected person staying within its territory for the purposes of execution of criminal procedures or executing a custodial sentence, or a security measure through intergovernmental channels, and

introduced a procedure and surrender based on the direct contact between the judicial authorities of the Member States (courts and prosecutor's offices) in its lieu, under the essence of which a person arrested pursuant to a European arrest warrant should be taken to court in the issuing Member State. The European Court of Justice found the framework decision valid and effective when it investigated the case *Advocaten voor de Wereld VZW v. Leden van de Ministerrad*²⁸.

The *acquis* of European states on international cooperation in criminal matters can also be aptly illustrated by drawing concentric circles. The first and largest circle represents the agreements concluded with the UN and the Council of Europe while the second, smaller circle is made up by the closed agreements made within the EU. The third circle indicates the Schengen Agreement; the fourth one would contain bilateral agreements whereas the fifth, the smallest circle would contain national legislation including regulation on mutual legal assistance in criminal matters, as well as on standards of substantive and procedural criminal law (cf. SCHOMBURG-LAGODNY [1998]). The efficiency rate of international agreements, whether be they concluded with the UN, the Council of Europe, within the EU or outside, is highly tarnished by their time-consuming ratification procedures or the lack of ratification by some of the signatories.

3.3 Further documents of European judicial cooperation in criminal matters

Further documents of European judicial cooperation in criminal matters include in particular the Corpus Juris Europae, the Green Paper and the Hague Programme.

The Corpus Juris Europae is a document designed to protect the financial interests of the EU, but, thinking in the long run, it might be regarded as the core of a far more extensive international penal code used within the European Union. The draft code provides both for substantive and procedural criminal law as well as for judicial organisational law. On 11 December, 2001 the European Commission presented the Green Paper on criminal law for the protection of the financial interests of the Community and the establishment of a European Prosecutor (COM [2001] 715/F). With reference to the Nice Council the Green Paper links the protection of the financial interests of the Community with the establishment of a European Prosecutor's Office. It analyses the benefits to be potentially gained with the setting up of a European Prosecutor's Office, specifies its legal status, its powers, its procedures and the control thereof. A functioning European Prosecutor's Office and a European Prosecutor would make mutual legal/judicial assistance and extradition outdated formations of the past. While Member States were inclined to reject the Corpus Juris, The idea of a European Prosecutor's Office was believed to be given careful consideration. This is how the idea of establishing a European Prosecutor's Office from Eurojust, which was a positive experience, made its way into the Constitutional Treaty and how it held its place in the Treaty of Lisbon. Following the expiration of the five-year programme adopted by the Tampere Council the Hague Council of 4-5 November, 2004 adopted another five-year programme (2005-2009) reaffirming the priority it

attached to the development of an area of freedom, security and justice. The Hague Programme (HL 2005 C 53/01) identifies, *inter alia*, the tasks to be tackled in the areas of asylum, immigration, external border control, the fight against terrorism and organised crime and of police and judicial cooperation. On 10 May, 2005 the Commission presented an Action Plan (COM [2005] 184/F) identifying ten priorities which can be summarised as follows: fundamental rights and citizenship; the fight against terrorism; a common and harmonised asylum procedure; migration management: maximising the positive impact of migration; developing an integrated management of external borders for a safer Union; data protection, privacy and security in sharing information; organised crime: developing a strategic concept; guaranteeing an effective European area of justice for all; and sharing responsibility and solidarity.²⁹ On 28 June, 2006 the Commission issued a Communication entitled 'Implementing The Hague Programme: the way forward' (COM [2006] 331/F) which, enlisting the downsides of intergovernmentalism, issued a rebuke and sees the future for the third pillar also in 'federalisation' (KENDE–SZÜCS [2006] pp. 212-214).³⁰

3.4 The institutions of European judicial cooperation in criminal matters

The very start of the institutions of European judicial cooperation in criminal matters takes us back to 1970s when the necessity and need to combat terrorism in Western Europe induced a number of meetings of ministers of the interior and ministers of justice leading to informal cooperation embodied eventually in the establishment of the TREVI group. The stages of institutional development are marked by formal and sometimes less formal institutions, organisations, committees, agencies (offices), all established on the basis of secondary legal sources, including UCLAF–OLAF, an organisation the mission of which is to protect the financial interests of the Community and which has powers to carry out administrative investigations; GAM'92, CELAD, EMCDDA, EDU, COCOLAF, EUMC, Europol, which is not an investigation authority, but a unit providing information, analyses and assistance, the European Judicial Network, the Eurojust, which is a coordination office, CEPOL, which is the European network for crime prevention and the future European Prosecutor's Office, which could be developed from Eurojust.

3.5 The European Court of Justice

The judicial practice of the European Court of Justice, which has limited powers for judicial cooperation in criminal matters basically followed the way of primary legal sources. In the beginning, its decision carefully avoided this area, but later the Court of Justice slowly moved from giving primacy to national jurisdictions (case *Casati*³¹) to giving primacy to Community law and to the requirement to adjust national substantive and procedural criminal laws to the Community law (FARKAS [1999] pp. 383-386). In its judicial practice the Court of Justice justified its rulings, *inter*

alia, by referring to the principle of Community loyalty (*Comission v. Greece*³²); giving primacy to the Community law also in the cases *Fratelli Constanzo Spa v. Commune di Milano*³³, and *Tymen*³⁴ & *Bout*³⁵. It also limited the extent of criminal liability that can be justified on grounds of Community law (cases *Kolpinghuis Nijmegen*,³⁶ and *Ratti*³⁷); in the case of a legal action to annul a Framework Decision directly (*Commission v. Council*³⁸) the Court of Justice did not allow a ‘retreat’ to Union law from Community law status (SZALAYNÉ [2004] p. 28; RÉTHÁZI [2006] pp. 67-70); and it issued a preliminary ruling in criminal procedures concerning regulations on currencies regarding the difference between capital and methods of payment (cases *Regina v. Thomson*,³⁹ *Casati*,⁴⁰ *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro*,⁴¹ *Lucas Emilio Sanz de Lera and Others*⁴²). Its rulings also concerned the following areas: discrimination on the basis of citizenship and the place of residence (cases *Cowan v. Trésor Public*,⁴³ *James Wood*,⁴⁴ *Bickel and Franz*⁴⁵); the prohibition of resale at a loss (case *Keck and Daniel*⁴⁶); as an often recurring notion, the principle of *ne bis in idem* (according to which nobody can be prosecuted twice for the same offence) in criminal proceedings, in which cases the Court also provided an interpretation of the notion of ‘the same offence’ and of ‘judicial decision’ (cases *Gözütok and Brügge*,⁴⁷ *Miraglia*,⁴⁸ *Van Esbroeck*,⁴⁹ *Gasparini and Others*.⁵⁰ *Van Straaten*,⁵¹ *Kretzinger*,⁵² *Kraaijenbrink*⁵³); the deterrent power of more lenient penal codes (*Berlusconi and Others*⁵⁴); concerning interpretation involving the principle of interpretation in conformity with Community law, as well as on entailing direct effect in the third pillar (case *Pupino*⁵⁵). It ruled also on the interpretation and (legal) meaning of the words ‘residing’ or ‘staying’ in the Framework Decision 2002/584/JHA on the European arrest warrant and surrender procedures between Member States (case *Kozłowski*⁵⁶); on non-applicability of sanctions for games of chance pursued without police authorisation and the required concessions against the share-holders and the representative of share-holding companies listed in regulated markets (case *Placanica and Others*⁵⁷); on the obligation on lawyers to inform the competent authorities of any fact which could be an indication of money laundering (case *Ordre des barreaux francophones et germanophone and Others*⁵⁸); on the admissible applicability of the concept of ‘victim’ to legal entities (case *Dell’Orto*⁵⁹); on the lawfulness of national decisions on expulsion adopted because of criminal offences (cases *European Court of Justice v. Kingdom of the Netherlands*,⁶⁰ *Derin*,⁶¹ *Murat Polat v. Stadt Rüsselsheim*⁶²).

Legal cases suggest that national criminal legislation and the practitioners of criminal law can not afford ignoring or at least not keeping a watchful eye on Brussels and Luxembourg. Examples⁶³ seem to justify the conclusion that certain decisions and rulings are reproduced because criminal practitioners of the Member States are either not familiar with Community judicial practice, or they are, but still try to defy it if they can identify the slightest difference in the cases.

3.6 The Hungarian status quo

Hungary joined the European Union as of 1 May, 2004, a prerequisite of which was naturally the adoption of the entire Community *acquis*. In order to ratify the Treaty of Lisbon, Hungary had to modify its constitution yet again [par. 4 of Art. 57]. A verbatim reading and interpretation of the modified constitution implies not only that Hungary has to recognise a judicial decision in a criminal matter by the court of another Member State which was adopted relating to an offence which does not constitute an offence in Hungary, but also that a Hungarian criminal court may find a person guilty and impose a sentence for an act which is not an offence under Hungarian legislation. Needless to say, this modification of the Constitution will enter or will fail to enter into effect simultaneously with the Treaty of Lisbon.

Hungary not only ratified and published major international agreements entered into but also kept changing its own legislation, its substantive and procedural criminal law accordingly. Amended legislation, which are (also) based on Community law, contain a clause providing for legal harmonisation, that is, legislative approximation to Community law.⁶⁴ Act 121 of 2001 of the Hungarian Criminal Code (Btk) introduced the harming of the financial interests of the European Communities as an offence in its own rights, thus placing the financial interests of the Community under the protection of the Hungarian Criminal Code.

As for the institutional structure, the OLAF Coordination Office operates as part of the Customs and Finance Guards, and separate legislation provides for the international cooperation between Hungarian crime prosecution authorities and the European Police Office, and the Chief Prosecutor of Hungary officially ordered a Hungarian participation in the work of the Eurojust.

Separate acts provide for the procedures relating to international contracts, mutual legal assistance in criminal matters at international level, the cooperation of Hungarian crime prosecution bodies and organisations with their international counterparts and the cooperation with other Member States in criminal matters.

Hungarian courts were quick to adapt to Community law and to the preliminary ruling procedure of the European Court of Justice and proved the most active out of the ten new-comers in the first years following accession (LEHÓCZKI [2007] pp. 3-6). The first Hungarian criminal case referred to the European Court of Justice was the case *Vajnai Attila*⁶⁵, criminal proceedings for the use and display in public of a banned symbol of autocracy.

3.7 Areas of European judicial cooperation in criminal matters

Among primary legal sources one can differentiate between Community and Union competences. The first pillar came to include the following areas: visas, asylum and immigration policy, protection of the external borders and judicial cooperation in civil matters (TEUC Title IV), the

protection of the financial interests of the Community (TEUC, Art. 280); partly the abuse of drugs (EMCDDA, based on Title XIII of TEUC [Public Health] and potentially on section e) of Art. 61 of Title IV of TEUC); partly also racism and xenophobia (based on EUMC on the prohibition of discrimination, and potentially on section e) of Art. 61 of Title IV of TEUC). Police and judicial cooperation in criminal matters operate within the third pillar (Title VI, TEU).

Secondary legislation is part of both the general and the specific parts of substantive, procedural and organisational criminal law. International, and closed international agreements in particular provide for serious offences (drug abuse, organised crime, terrorism, money laundering, computer abuse and bribery) as well as for procedural issues (extradition, mutual legal assistance in criminal matters, transfer of convicted persons, prohibition of prosecuting the same person for the same offence twice, the handing over of jurisdiction over criminal proceedings and the implementation of sentences and judicial decisions by foreign courts). Documents other than primary and secondary legal sources are present in European judicial cooperation in criminal matters mostly *de lege ferenda*. Community and Union law, police and judicial cooperation all have their institutions, organisations, committees and agencies (offices).

As for the structure of crime and offences, cooperation is confined mostly in the protection of the financial interests of the Community, in the fields of terrorism, drugs and organised cross-border crime. The harmonisation of criminal codes is an essential element in European judicial cooperation in criminal matters the most significant instrument of which have become the framework decisions, which may be adopted by the Council for the purpose of approximating the national laws and regulations of Member States. From the point of view of the target to hit, framework decisions are mandatory and binding for Member States. The use of this Union legal act ultimately leads to a situation in which the national sovereignty of Member States in criminal and judicial matters is diminishing without the states themselves officially and explicitly giving it or parts of it up or conferring it or parts of it onto the Union. This is what I chose to call 'backyard federalisation' (FEJES [2005a] p. 8), since, in compliance with their obligations arising from membership and on grounds of loyalty to the Community, Member States have to include in their criminal codes on a constant basis statutory provisions (also) for legal subjects of Community law and for legal cases required by EU cooperation, or have to modify their existing provisions and subjects thereof. 'Backyard federalisation' is of course present in the obligation to modify the procedural criminal code, some of the organisational laws and in the obligation to adopt new legislation if necessary.

European judicial cooperation in criminal matters is, of course, not something in its own rights; its basis, framework and limits are set by the nature, size, powers and the state of the internal (public) affairs of the European Community/Union.

3.7 Democraticism in the European Union

The term ‘democratic deficit’ is used to indicate the lack of democratic control in the EU and the lack of social legitimacy of its institutions, and refers also to the fact that the processes and institutions of integration are nontransparent. The expression indicates the entry of a new political factor, the entry of public opinion into the integration arena (DEZSÉRI [2005] p. 27). From the mid 1990s on these factors gave rise to the notion of a ‘(more) citizen-friendly Europe’ and posed the challenge of making the European Union more democratic.

The point of issue changed long time ago and now the question is no longer whether or not the EU should be made democratic, if this is possible at all (cf. Schmitter [2000]; MISZLIVETZ [2002] p. 19), but rather who and how should do it, and in our case how it relates to European judicial cooperation in criminal matters. The answers seem rather straightforward. The democratisation of the EU is a shared interest of both its ‘top’ and its ‘bottom’. It is not feasible from one of the directions only; it needs to be ‘a democratisation taking place bottom up and top to bottom simultaneously’ (MISZLIVETZ [2002] p. 27). The way to democratisation is not the one pursued so far, that of negative coordination, but rather positive coordination: we need to establish what is to be done to reduce the democratic deficit and to enhance the legitimacy of Community institutions (MISZLIVETZ [2002] p. 43). If the EU becomes more democratic and transparent, making the nationals of the Member States feel more also like EU citizens, people will expect Brussels to do more for their protection and security, which takes us nearer to a ‘federalisation’ of criminal codes. Given, however, today’s society, this is still a very long way to go.

There is no European citizen *per se*, as European citizenship comes with citizenship of a Member State and likewise, there is no European people *per se*. The notion of a European demos refers not really to a legal relationship but rather to a sense of identity, which can still only be in its bud. A union, however, presupposes an emotional community, a sense of European identity.

The way (and cost) of arriving at democraticism in the European Union is paved by prerequisites as follows: the peoples of Member States should truly want a European demos; the European people as well as the elites of the Member States and the European Union should truly desire democratisation; the European people should truly want a European identity both on a legal basis (EU citizenship) and on an emotional basis; the elites of the Member States and the European Union should both be ready and capable of adding real weight to elected European institutions, of reducing the significance of not-elected institutions and of making the functioning of integration and its institutions more simple, more transparent and more open.

In addition to the elites of the Member States and of the EU, in the development of a transnational civil society, a European identity, a European demos, the media could play a key role. In addition to the national media, it would be necessary to have Community media such as a European

news television, Community newspapers and magazines, etc (LOSONCZI [2006] pp. 70-95) which could communicate the decisions, plans, ideas of the European Union, could support and make them easier to understand for the man in the street, and could even influence national media (FEJES [2005b] p. 312), the persuasion of which is indispensable to gain its whole-hearted and full support. In order to achieve cohesion in a European society, European parties could be necessary, parties which have their own core membership and are capable of nominating a candidate running for a seat in the European Parliament, and also European pressure groups. While the European political elite can establish written and electronic Community press, the establishment and strengthening of European parties and civil organisations are subject to what European citizens want (MISZLIVETZ [2001] pp. 66-91).

European judicial cooperation in criminal matters can not be separated from the European Union, its future hinges upon the way integration goes. Its areas, however, crime itself or (illegal) immigration are certainly ones citizens take a keen interest in. Should the European Union become more democratic and thus more acceptable for its citizens, then European judicial cooperation in criminal matters could also be deepened resulting in a more effective fight against crime, taking, in return, citizens even closer to the European Union as it could pride itself on tackling critical issues taking their attention (in the long run). It would definitely not be unprecedented to resort to the tools of criminal law to solve problems that have been long in the public eye (LIGETI [2004a] p. 18). The future of European judicial cooperation in criminal matters, therefore, can only be forecast with this background and a more comprehensive approach in mind.

Summary of conclusions

The future of European judicial cooperation in criminal matters will more or less go the way the European Union goes. Should the vision of a federalist Europe outlined by Foreign Minister Joschka Fischer in May 2000 (Fischer, J. [2000] pp. 5-17) come true, European judicial cooperation in criminal matters would also become closer, stronger and 'federalised'. Should, however, the concept of nation states explained by President Chirac in June, 2000 become reality as a response to Mr Fischer, then cooperation in criminal matters would remain loose, slow and intergovernmental. What seems certain is that European judicial cooperation in criminal matters will not stay as we know it today. Firstly, the Community institutions will continue to work hard to protect the financial interests of the Community and will sooner or later achieve the establishment of a European Prosecutor's Office, which is, of course, not the ultimate objective, since development will have many more stages and opportunities. Secondly, in their own interests to ensure public order and security Member States will gradually make their cooperation in crime prosecution and judicial matters a lot closer, which is also triggered by a need to maintain a feeling of security and safety among their citizens. The future, therefore, depends firstly on an internal factor, on the development of the EU, which is greatly influenced by the success of the attempts to bring the European Union closer to its citizens; and

secondly on external impacts, on the most serious forms of international crime, on international terrorism, to begin with. On the basis of what has been pointed out, I envisage that European judicial cooperation in criminal matters could make its way finally into a truly different dimension, provided that (theoretically) integration moves into the direction of federalism on the one hand, and if (as a practical condition) the European Union or one of its dominant Member States were affected by an act of terrorism the scale of which could be compared to that hitting the US on 11 September, 2001.

The future of the institutions already existing could lie in their 'federalisation', that is, in converting OLAF into a fully-fledged investigating authority as a 'customs and finance guard', conferring powers on Europol to carry out (at least) certain acts of investigation and in developing Eurojust into a European Prosecutor's Office. The establishment of a European Prosecutor's Office presupposes a single judicial area. Assigning it powers to investigate would mean federal powers, which would have an impact on the entire entity of the European Union, and, strengthening its federal nature, would represent one step further towards a federal Europe.

The desired development of international judicial cooperation in criminal matters will inevitably entail yet another infringement of the Member States' sovereignty (cf. FARKAS [1999] p. 392; LÉVAI [1998] p. 88; SIEBER, U. [1998] p. 373), by overstepping century-old principles of criminal law (constitutional and international law), which is deterrent for many (BRANDSTETTER [1997] pp. 690; 692) but is logical for others (SIEBER, U. [1998] p. 374). One of the triggers that can give a powerful impetus to the process is the safeguarding protection of the financial interests of the Community ('The protection of the financial interests of the EU is the driving engine of the development of European criminal law', says Ulrich Sieber in his foreword to the German version of the Corpus Juris), and the other one will certainly remain or will become international terrorism and organised cross-border crime.

Two mainstream directions of European judicial cooperation in criminal matters have already been pointed out by now, the third one seems to be twinkling just over the horizon. One takes us towards a continuous simplification of judicial cooperation in criminal proceedings between (Member) States (e.g. mutual legal assistance, extradition), the way to which is paved with concluding primarily (closed) agreements and issuing framework decisions (such as the one on the European arrest warrant and the surrender procedures between Member States). The second direction entails the harmonisation of the substantive criminal law of the Member States, the methods of which also include the instruments of secondary legal sources; while the third direction would require Community authorities of crime prosecution such as the public administration authority and information centre OLAF and Europol, which could be turned into an investigating authority and a European Prosecutor's Office to be developed from Eurojust.

The way of European judicial cooperation in criminal matters can certainly not be separated from the direction of European integration. The democratisation of the European Union has a fundamental impact on the direction of integration, which process of democratisation must take place

both as a top to bottom process involving the political elite of the Member States and of the EU, all levels including Community and Member State level, regional and local level, and involving also the enhancing of the weight of our elected institution(s) and the cutting back of the powers of not elected bodies, making integration transparent, more simple and thus more citizen-friendly on the basis of openness, inclusion and participation, accountability, efficiency and the principle of coherence (COM [2001] 428/F), thus strengthening democratic control; and also as a bottom up, grass-root process involving the international cooperation of the organisations of the third sector, of NGOs, the identification and exploration of a European identity, which presupposes a European demos the existence of which requires (from top-to-bottom) European electronic and written media, a Brussels (news)television, (news)letters, newspaper, interactive web-sites and also (from bottom up) European parties with their own membership and can come up with representatives running for EP seats, European pressure groups and first and foremost, a real will and desire for democratisation.

Nobody can afford sitting back and relaying, which goes both for national theoreticians and practitioners of law. Both the practitioners and theoreticians of criminal law must call the attention of the politicians and of nationals/EU citizens to the weight and scale of international and European crime and to the partly administrative obstacles and the lack of means of the fight against it, and to the potentials ways of a single European crime prosecution, the drawbacks and benefits thereof by drawing up recommendations and memorandums at professional forums and conferences and they need to do so in order to ensure and maintain safety and security for our citizens. ‘This is ever so necessary because, when it comes to a specific country, it is the legal science, the judicial practice and legal culture of that particular country which have a considerable influence on the country’s laws and regulations in effect in criminal matters, on its penal system. However, when it comes to European judicial cooperation in criminal matters, it has been the politicians and decision-makers who have so far been setting its direction and framework. Criminal lawyers must yet again acquire a position to exert an influence on and to act as initiators of the EU’s criminal law’, says BÁNÁTI János in his foreword to the book *Az európai büntetőjog kézikönyve* (In: *A Handbook of European Criminal Law*, ed. KONDOROSI– LIGETI [2008] p 20).

European judicial cooperation in criminal matters is not a threat but an opportunity for Europe.

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Notes

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- ²⁵ For official data, see the OLAF web-site:
http://ec.europa.eu/anti_fraud/site_map/index_en.html
- ²⁶ In line with The Hague Declaration the Council (unanimously) decided on 22 December, 2004 to apply the qualified majority procedure and the co-decision procedure as specified by Article 251 of TEUC for the almost all the areas covered by Title IV of TEUC (except for legal migration).
- ²⁷ In secondary legal sources the principle of mutual recognition was first applied in the Council Framework Decision of 26 June 2001 (2001/500/JHA) on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, and then in Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, in Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders.
- ²⁸ *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* (C-436/04. [2006] ECR p. I-2333.)
- ²⁹ Ld.. pld.: <http://europa.eu/scadplus/leg/de/lvb/l16002.htm>
- ³⁰ Vö. pld.: <http://europa.eu/generalreport/de/2005/rg75.htm>;
http://europa.eu/pol/justice/print_overview_de.htm;
- ³¹ *Casati* (203/80 [1981] ECR p. 2595.)
- ³² *Comission v. Greece* (68/88 [1989] ECR p. 2979.)
- ³³ *Fratelli Constanzo Spa v. Commune di Milano and Impresa Ing. Lodigiani Spa* (103/88 [1989] ECR p. 1839.)
- ³⁴ *Robert Tymen* (269/80 [1981] ECR p. 3079.)
- ³⁵ *Daniel Bout* (21/81 [1982] ECR p. 381.)
- ³⁶ *Officier von Justitie v. Kolpinghuis Nijmegen* (80/86. [1987] ECR p. 3969.)
- ³⁷ *Criminal proceedings against Tullio Ratti* (C-148/78. [1979] ECR p. I-1629.)
- ³⁸ *Commission v. Council* (C-176/03 [2005] ECR p. I-7879.)
- ³⁹ *Regina v. Ernest George Thomson*, criminal proceedings against Brian Albert Johnson and Colin Alex Norman Woodiwiss (7/78. [1978] ECR p. 2247.)
- ⁴⁰ *Casati* (203/80 [1981] ECR p. 2595.)

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- ⁴¹ *Graziana Luisi and Giuseppe Carbone v. Ministero del Tesoro* (joined cases 286/82 and 26/83 [1984] ECR p. 377.)
- ⁴² *Criminal proceedings against Lucas Emilio Sanz de Lera and Others* (C-163, C-165 és C-250/94. joined cases [1995] ECR p. I-4821.)
- ⁴³ *Ian William Cowan v. Trésor Public* (186/87. [1989] ECR p. 195.)
- ⁴⁴ *James Wood v. Fonds de garantie des victimes des actes de terrorisme et d'autres infractions* (C-164/07. HL C 2008.07.19. p. 3.)
- ⁴⁵ *Criminal proceedings against Horst Otto Bickel and Ulrich Franz* (C-274/96. [1998] ECR p. I-7637.)
- ⁴⁶ *Criminal proceedings against Bernard Keck and Daniel Mithouard v. French Republic* (C-267 and C-268/91. joined cases [1993] ECR p. I-6097.)
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- ⁵⁰ *Criminal proceedings against Gasparini and Others* (C-467/04. [2006] ECR p. I-9199.)
- ⁵¹ *Jean Leon Van Straaten v. the Netherlands and Italy* (C-150/05. [2006] ECR p. I-9327.)
- ⁵² *Criminal proceedings against Jürgen Kretzinger* (C-288/05. [2007] ECR p. I-6441.)
- ⁵³ *Criminal proceedings against Norma Kraaijenbrink* (C-367/05. [2007] ECR p. I-6619.)
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- ⁵⁷ *Criminal proceedings against Massimiliano Placanica, Christian Palazzese and Angelo Sorricchio* (C-338/04., C-359/04. and C-360/04. joined cases [2007] ECR p. I-1891.)
- ⁵⁸ *Ordre des barreaux francophones et germanophone and Others* (C.-305/05. [2007] p. I-5305. – 26 June, 2007)
- ⁵⁹ *Criminal proceedings against Giovanni Dell'Orto* (C-467/05. [2007] ECR p. I-5557. – 28 June, 2007)
- ⁶⁰ *The Commission of the European Communities v. The Kingdom of the Netherlands* (C-50/06. [2007] ECR p. I-4383. – 7 June, 2007)
- ⁶¹ *Ismail Derin v. Landkreis Darmstadt-Dieburg* (C-325/05. [2007] ECR p. I-6495. – 18 June, 2007)
- ⁶² *Murat Polat v. Stadt Rüsselsheim* (C-349/06. [2007] ECR p. I-8167. – 4 October, 2007.)
- ⁶³ For a more detailed analysis of the judicial practice of the European Court of Justice in criminal cases, see *Id.: Czine-Szabó-Villányi* [2006] VII. Fejezet; *Kondorosi-Ligeti* [2008] pp. 719-737.
- ⁶⁴ Required by paragraph 3 of Article 7 of the Ministerial Decree of 29 December 1987 No. 12/1987, as amended by Ministerial decree of 29 June, 1995 No. 13/1995. Cf. Points 87-96 of the Ministerial order No 8002/1999 (IK 10) on the procedures relating to legal harmonisation.
- ⁶⁵ *Criminal proceedings against Vajnai Attila* (C-328/04 [2005] ECR p. I-8577.)