

CONV 733/03

CONTRIB 321

COVER NOTE

from Secretariat
to The Convention

Subject : Contribution by Mr Gijs de Vries, member of the Convention:
- “The European criminal justice area”

The Secretary-General of the Convention has received the contribution annexed hereto from Mr Gijs de Vries, member of the Convention.

THE EUROPEAN CRIMINAL JUSTICE AREA

The Netherlands attaches great importance to purposeful European collaboration in the field of Justice and Home Affairs. Particularly in the Treaty of Amsterdam and at the European Council in Tampere significant steps were taken towards more effective European co-operation in combating organised crime. The agreements made on this topic must be carried out with great enterprise. But this is not enough. More and more, citizens are appealing to their national governments as well as the European authorities to guarantee their safety. The more open national societies become towards one another and the more movement of persons and goods takes place between them, the more dependent national governments become on police and judicial co-operation to ensure the safety of their citizens and to effectively fight crime. This means that the Convention must provide for a solid, sustainable legal basis for this co-operation. The way we construct this will be decisive for the way our co-operation develops and thus for our capacity to adequately combat crime and guarantee safety.

The proposals, intended to provide a legal basis within the framework of the Convention for police and judicial co-operation in the field of criminal justice, focus on the manner of decision-making. These proposals (Articles 15 to 22 of Title X on the area of freedom, safety and justice of part II of the Constitution) are clearly aimed at further integration in the field of criminal justice and they clearly show that – in the eyes of the authors – this should be achieved only in one way: by changing the decision-making procedure. It is proposed to introduce decision-making by qualified majority and co-decision into the legislative procedure. However, the amendments introduced by Member States and Members of the European Parliament and national parliaments to the proposed articles show that views on criminal justice are still widely divergent. Two lines can be clearly distinguished. Some of the amendments, while accepting the legislative procedure, are intended to limit the scope of the articles, while others are intended to limit decision-making by qualified majority, while accepting the proposed scope.

The Netherlands intends this memorandum to be a further contribution to discussion in the Convention. This was in fact already promised when the Netherlands submitted its amendments to the JHA articles, and the ideas contained in this memorandum are related to the amendments. The basic tenet is that altering the decision-making procedure is a too one-sided approach to the issues involved in police and judicial co-operation. It causes the focus one-sidedly onto harmonisation and approximation of legislation and regulations, while it is quite doubtful that this is the most effective way of dealing with issues in this field. Crime is not fought primarily by means of legislation; what counts are the actions of the police force, justice authorities and other public services. To accomplish this, they need adequate legal instruments and means; these are defined in national law. For the time being, co-operation in this field thus involves co-ordination and mutual legal assistance and recognition between separate and distinct legal systems. The institutions that have arisen from this co-operation – Europol, Eurojust and Olaf – are based on this same starting point.

With respect to Eurojust and Europol, the proposed articles are based upon the principle of co-ordination and co-operation between various national jurisdictions. This co-operation can still be expanded and improved in numerous respects. Ultimately, however, the effectiveness of co-ordination depends on whether it has binding force, and in what cases. Will Member States be

obliged to institute investigations at the instigation of Eurojust or Europol, or will they be able to ignore such requests? Although it can be very effective if this is made an obligation, it does mean that it will be decided – from a single point of view and in a limited field of work – which forms of international crime must be the focus of attention of the authorities of the Member States. This means that deliberations at national level whether these efforts stand in the proper proportion to the need to fight other – national – crime, which will in all cases constitute the large majority of crime, will no longer be possible.

The core of the objection to mandatory co-ordination by Eurojust and Europol is that decision-making on the fact that action will take place is done at a different level (the Union) than its implementation. Implementation must take place in the Member States and must be carried out by the national authorities who are also charged with enforcement of all other forms of crime. The proposals for the European Public Prosecutor comprise the same mixture of decision-making on priorities at a European level and implementation by the institutions of the Member States, thus at a national level. As a result, there will be continual competition between the interests of the Union and the interests of the Member States, and therefore attention must alternate between the national and the international legal orders. But stability and continuity of law enforcement both at a Union and a national level must form the foundation for the European area of criminal justice.

Clearly, there is a need for measures in the field of criminal justice, measures to which the Member States commit themselves. At the same time it is desirable that the Member States of the Union retain their own identity. The criminal justice system constitutes a central element of each society and is to a large extent determined by the political system, which includes the relationship between the police and the judicial system of that society. Citizens feel very closely involved in its organisation and application. This accounts for the fact that different systems of national criminal justice exist within the Union. Despite this diversity, there are also clear similarities, which means that even now it is possible for us to work together. This means that, where we enlist scarce resources, we must be sure that national priorities are not systematically subordinated to attention to crime that must be dealt with at a common level.

Harmonisation of legislation does not offer a solution to this question. Moreover, it has the unintended side effect that the vast majority of national criminal law will have to be harmonised in the very near future. Generally speaking, harmonisation of legislation cannot be limited to mutual assistance in combating crime. The unintended side effect is that it almost always affects other aspects of criminal law, which has consequences for the national administration of justice. The reason is that each Member State has only one system of criminal law. Harmonisation in respect of certain crimes relevant for the Union therefore by definition must also cover all similar national crimes. An example is the recent discussion about maximum penalties in the framework of JHA. The clear opinion was expressed that they could not be fixed without further consideration at a European level because within the national legal systems, those maximum penalties need to fit in with the maximum sentences for other offences. The uniform formulation of provisions of criminal law – by means of a European law – must be ruled out as well, because the result will not be in line with the terminology of all national legal systems. The discussion, which has just started on procedural safeguards for suspects and defendants in criminal proceedings, will also bring to light this side effect of harmonisation on the law of criminal procedure. Harmonisation of national criminal justice systems is not an objective of integration, and it would also be disproportional. Crime against the interests of the Union and serious cross-border crime will always constitute a relatively small proportion of overall crime. Quite likely, approximately 90% of overall crime will be of a non-cross-border nature in Europe, just as it is in the United States of America.

Nor is mutual recognition of decisions by national judges an alternative. Mutual recognition can be useful in that it helps speed up co-operation, but not all co-operation can be based upon the recognition of judicial decisions. Recognition is neither an alternative for harmonisation. As indicated in its final report by the working group X of the Convention on the area of freedom, security and justice, it will be necessary to start with a certain degree of harmonisation of legislation before mutual recognition is possible.

The Netherlands is prepared to make adjustments to its criminal law, provided this promotes mutual co-operation in criminal matters. However, the Netherlands wants to be able to scrutinise in each new case whether a proposal to improve co-operation will genuinely result in improved co-operation, and that it does not become ineffective because of unintended side effects. Moreover, all methods considered thus far – co-ordination, harmonisation and mutual assistance and recognition – will not in the long run resolve the problems stemming from the existence of separate national jurisdictions. Precisely because crime is fought not by legislation, but by the concrete actions of police and other investigative services, the effectiveness of these services will be limited if their work to prevent and investigate cross-border crimes is hindered by the territorial boundaries of their competence and of their legal instruments.

In the long run, effective combat of crime against the interests of the Union (counterfeiting of the Euro and fraud committed against the financial interests of the Community) and of types of serious cross-border crime - which must be more closely defined - will require a single, uniform jurisdiction, that is not limited by national borders. This implies establishing a single jurisdiction with its own standards and procedures, within which the combat of types of crime which fall within its scope can take place by common appointed authorities. Not only will investigations and criminal prosecutions of offences take place within this jurisdiction, but also trials will be held and sentences imposed and will be carried out. This means, instead of an isolated European Public Prosecutor working through the national authorities, a complete criminal justice system. A more highly evolved Europol and Eurojust could also operate within such a system. This jurisdiction would need to function independently in its own field of work, separate and distinct from the national legal systems. However, this does not mean that it could not have any links with the national authorities and institutions. Such a set-up would ensure that where necessary, crime could be fought in a uniform and integral manner, without brushing aside the necessary national efforts and without leading to the gradual approximation of the national legal systems.

The Netherlands realises that, in the present state of development of the area of freedom, security and justice, the time is premature for the introduction of this separate jurisdiction. In view of the fact that criminal law is closely intertwined with national identity and diversity within the Union, it is not desirable to achieve harmonisation of penal law and the law of criminal procedure [in large areas of criminal justice]. Unfortunately, the proposed JHA articles entail that very risk because of the one sided focus they place on harmonisation of national legislation. It is the opinion of the Netherlands that, for this reason, a provision ought to be included in the treaty at this point that opens a second avenue: the possibility to set up a jurisdiction as explained here. An article, in other words, offering a basis so that, when this should prove to be necessary, it will be possible to decide to institute our own separate jurisdiction for certain offences. The Council should decide to institute this jurisdiction by unanimous vote, but its further implementation should be decided by qualified majority.

Enterprising developments in European police and judicial co-operation are urgently needed. However, the methods that we have chosen thus far, as well the alternatives proposed, have fundamental limitations and drawbacks. With the idea developed here, the Netherlands aims to propose a form to be taken by the European criminal justice area that will not have these limitations and drawbacks. The proposed option expands our possibilities to develop a long-term vision on the basis of the results of the Convention. For this reason, the Netherlands commends to the consideration of the Convention and its Presidium that the new treaty should include a legal basis for – in the longer term – establishing an independent European jurisdiction for criminal justice.
