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Appreciating Approximation

Using common offence concepts to facilitate police and judicial cooperation in the EU

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1 Introduction

Approximation is the adoption of measures establishing minimum rules related to the constituent elements of offences and sanctions. It aims at overcoming legal differences and creating the common ground required for cooperation. This contribution is part of a PhD research centred around necessity and feasibility of approximation of offences and sanctions. The central research question in this contribution is *whether and to what extent approximation of the constituent elements of criminal behaviour is necessary to ensure the smooth functioning of both police and judicial cooperation in criminal matters in the European Union*. Hence, police and judicial cooperation on the one hand and approximation on the other hand, are the lead concepts in this contribution. The lack of coherence in European criminal policy with regard to those concepts will be demonstrated and a remedy will be suggested.

In this introductory section, first, the concept of approximation will be introduced. Second, the authors' vision with regard to the discussions found in literature will be elaborated on. Third, the choice of case studies to analyse the development of police and judicial cooperation will be underpinned.

1.1 Approximation

First "approximation" will be introduced. Besides "approximation", terms such as "harmonisation", "convergence" and "coordination" appear both in literature and legal texts (Klip, 2009; Nelles, 2002; van der Wilt, 2002; Vander Beken, 2002; Weyembergh, 2006). Most often they are used as synonyms, but occasionally distinction is made between them, however without sufficiently explaining the nature of the distinction (Bantekas, 2007).

In essence, approximation is not a legal term as it is most commonly used in exact sciences and mathematics. There it is defined as *the inexact representation of something that is still close enough to be useful*. Surprisingly this definition turns out to be more useful in the context of law than one might expect. In the context of law, Vignes defined approximation of laws as *reducing the distance between two objects* (Weyembergh, 2004), the aim of which is of course to eliminate differences that render justice systems incompatible and thus cooperation cumbersome or even impossible.

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This consideration will form the basis of how approximation is perceived. For the purpose of this contribution, approximation is defined as a technique used to overcome legal differences and create the common ground required for cooperation.

The possibility to approximate offences and sanctions was formally introduced at EU level in Artt. 29 and 31(e) TEU as amended by the Amsterdam Treaty. They allowed for the adoption of measures *establishing minimum rules relating to the constituent elements of criminal acts and to penalties* in the fields of organised crime, terrorism and illicit drug trafficking. To that end Art. 34 TEU introduced the framework decision. The Union's overall objective is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia. Approximation, where necessary, is considered to be one of the means to achieve that objective.

In literature, a series of discussions are held with regard to *the effectiveness of framework decisions* (Tadic, 2002), *other possible instruments used to approximate* (Bantekas, 2007; Weyembergh, 2005a), *the functions of approximation* (Bosly & Van Ravenstein, 2003; Kaiafa-Gbandi, 2001; Spencer, 2002; Weyembergh, 2005b), *the use of the acquis for its purpose* (Vermeulen & De Bondt, 2009) and whether or not that purpose is *limited to judicial cooperation or could also encompass police cooperation* (Vervaele, 2004).

Second, it is more than useful to briefly elaborate on the authors' views before going into the choice of case studies. However, the elaboration is limited to the two aspects relevant to understand the discussion in this contribution, being the scope of the approximation acquis and the combination of both police ánd judicial cooperation.

1.2 Authors' views

1.2.1 The scope of the approximation acquis

Traditionally, the scope of approximation is limited to the adoption of framework decisions. Therefore the traditional acquis, the assembly of approximated offences and sanction, is also limited to framework decisions only. That traditional "framework decision only"-view on approximation is left in favour of a very wide and progressive scope encompassing all relevant EU and even non-EU instruments. The following paragraphs clarify the rationale behind this choice.

Including a variety of EU instruments

Firstly, besides framework decisions, a variety of EU instruments are eligible for inclusion in the approximation acquis.

Previous paragraphs mentioned that Art. 34 TEU introduced the framework decision (FD) as the new instrument to establish minimum rules relating to the constituent elements of criminal acts and penalties. This legal basis is recalled to highlight the traditional link between approximation and the adoption of framework decisions.

However, analysis has revealed the pursuit of approximation in other EU instruments. The Union can adopt *Conventions* that possibly contain substantive criminal law provisions. Examples can be found in the 1995 Europol Convention which intro-

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duced definitions of “illegal migrant smuggling”, “motor vehicle crime” and “traffic in human beings”(OJ C 316 of 27.11.1995). More obvious are the 1995 Convention on the Protection of the Communities’ Financial Interests (OJ C 316 of 27.11.1995) and the 1997 Convention on the fight against corruption involving Community Officials (OJ C 195 of 25.6.1997). Furthermore, the European Court of Justice (ECJ) has ruled that approximation of legislation can also be pursued in *first pillar instruments* (Cases 176/03 and 440/05). It is argued that even though criminal law is a third pillar matter and as such is subject to an intergovernmental decision making process, this does not prevent the Community legislature from taking measures related to criminal law in the first ‘supranational’ pillar when the application of effective, proportionate and dissuasive criminal penalties is an essential measure (Dawes & Lynskey, 2008; Jans, Sevenster, & Janssens, 2008; Kuhn, 2005; Siracusa, 2008; Somsen, 2003). The environmental directive 2008/99/EC (OJ L 328 of 6.12.2008) can serve as a striking example, adopted in the aftermath of the ECJ decisions. However, older examples such as the 2002 directive on the facilitation of unauthorised entry, transit and residence, also exist (OJ L 328 of 5.12.2002) (Adam, Vermeulen, & De Bondt, 2008).

Based on this analysis, it is indisputable that within the European Union, substantive criminal law has originated from various sorts of instruments. It has developed rather fast and organically in the sense that it is strongly dependant on the political climate, lacking a long term consistent policy plan (Swart, 2001; Vermeulen, 2002b, 2007; Weyembergh, 2004). When trying to assemble all the relevant provisions, analysis of framework decisions alone is insufficient.

Including a variety of non-EU instruments

Secondly, including only EU instruments into the approximation acquis, fails to take into account that substantive criminal law provisions can also originate from instruments adopted at other cooperation levels, amongst which the Council of Europe and the United Nations are the most significant. Incorporating non-EU international instruments in the so-called *EU JHA acquis*, justifies this approach. This *EU JHA acquis* is a list of the legal instruments, irrespective of the gremium in which they were negotiated, to which all EU (candidate) member states must conform (http://ec.europa.eu)(De Bondt & Vermeulen, 2009).

Because the Union itself underlined the importance of non-EU international instruments through their inclusion in the EU JHA acquis, the Union may be expected to take those instruments into account itself and use them to their full potential. This is exactly what is stipulated in the Vienna Action plan (OJ C 19 of 23.1.1999). Point 46 (a) concludes with the requirement to take parallel work in international organisations such as the Council of Europe into consideration.

Therefore, the approximation acquis taken into account in this contribution consists not only of framework decisions, but of a series of EU and even non-EU instruments, included in the EU JHA acquis.

1.2.2 Police ánd judicial cooperation in criminal matters

The strict reading of the relevant treaty provisions might suggest that approximation is only to be sought after to facilitate *judicial* cooperation. Elsewhere, we have discussed

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how and why to improve the supporting role approximation has for judicial cooperation (De Bondt & Vermeulen, 2009). However, a such limitation of the supporting role of approximation is criticized in literature. Vervaele's view on this needs to be endorsed: approximation should be considered a means to facilitate both *police ánd judicial cooperation* (Vervaele, 2004).

However, before producing legal and policy arguments in support of including both police ánd judicial cooperation, the development of those cooperation forms as EU competences will be briefly recalled, in order to fully comprehend the argumentation for their combinination.

Development of police and judicial cooperation as an EU competence

Police and judicial cooperation have not always been EU competences. The elimination of borders and the subsequent elimination of border controls sparked state awareness of the need to work closely together in order to tackle cross-border crime. Flanking measures were needed with regard to police and judicial cooperation in criminal matters (Swart, 2001). Nevertheless, member states remained reluctant to work together.

At the time of the creation of the European Community and its internal market, primary focus went to the economic development of Europe. The possible effects of such an internal market on the prevalence and evolution of crime did not receive much attention, neither did the potential problems caused by the differences in national legislation. In the fields of security, policing and justice, member states continued to work independently.

When the European Community developed into the European Union, this changed. With the 1992 Maastricht Treaty (OJ C 191 of 29.7.1992), the member states took an important step by incorporating *Justice and Home Affairs* into the European institutional framework. Art. K.1 of the Maastricht Treaty, clarified what constituted JHA at that time: for the purpose of achieving the objectives of the Union – in particular the free movement of persons – member states regarded the following areas as *matters of common interest*:

(1) asylum policy;
(2) rules governing the crossing by persons of the external borders of the member states and the exercise of controls thereon;
(3) immigration policy and policy regarding nationals of third countries;
(4) combating drug addiction in so far as this is not covered by (7) to (9);
(5) combating fraud on an international scale in so far as this is not covered by (7) to (9);
(6) judicial cooperation in civil matters;
(7) judicial cooperation in criminal matters;
(8) customs cooperation;
(9) police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime, including if necessary certain aspects of customs cooperation, in connection with the organization of a Union-wide system for exchanging information within a European Police Office (hereafter Europol).

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This is the first time police and judicial cooperation in criminal matters appear in EU treaties. Even where Art. K1 listed areas of common interests, it constituted only a small step forward, as no clear objectives were set. It was not until the entry into force of the 1997 Amsterdam Treaty (OJ C 340 of 10.11.1997), that the pillars were reshuffled and the policy areas concerned more elaborated on. Some of the JHA policy areas were shifted to the supranational first pillar and the slimmed down version of the third pillar was renamed accordingly into "police and judicial cooperation in criminal matters".

The Amsterdam Treaty introduced the *area of freedom, security and justice* in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime (Art. 2 TEU, OJ C 325 of 24.12.2002). Police and judicial cooperation in criminal matters are the means to accomplish the goal and create an area of freedom, security and justice.

Approximation in support of both police and judicial cooperation

The elaboration on want is included in police and judicial cooperation is split over two separate articles in the TEU. Even though the Treaty provisions elaborating on approximation are placed underneath the heading of judicial cooperation, the scope of this evaluation is broadened to *police ánd judicial cooperation*. The following paragraphs will justify the broadening of the perspective in this contribution, referring to various policy documents and Treaty provisions.

- Legal arguments
  First, Vervaele argues that it is *unlikely* that approximation covered in Art. 31(e) TEU is intended to remove hurdles and ensure compatibility in rules applicable in member states *for judicial cooperation only*. The observation that this specific objective related to judicial cooperation is already covered by Art. 31(c) TEU, forms the basis for this position (Vervaele, 2004). Furthermore, the introduction of the framework decision is covered by Art. 34 TEU, which is not limited to judicial cooperation.
  Second, in the new Art. 83(2) TFEU the competence to approximate is significantly expanded. The possibility is introduced to approximate laws when this proves essential to ensure the effective implementation of *a Union policy* in an area which has been subject to harmonisation measures. Again, notwithstanding the fact that this provision maintains its position underneath the heading of judicial cooperation, the link with judicial cooperation seems long gone if the function of approximation is now to ensure effective implementation of Union policies (De Bondt & De Moor, 2009). The assumption that approximation is inextricably bound up with judicial cooperation cannot be maintained any longer.

- Policy arguments
  In addition to the above mentioned legal arguments, four policy arguments can be produced. In the *Vienna Action Plan* of 3 December 1998, approximation received a separate heading and was not merely introduced as a subsection of judicial cooperation. Furthermore, the members of the 2002 *Working Group X* pointed to the relevance to approximate to generate sufficient mutual confidence to guarantee the

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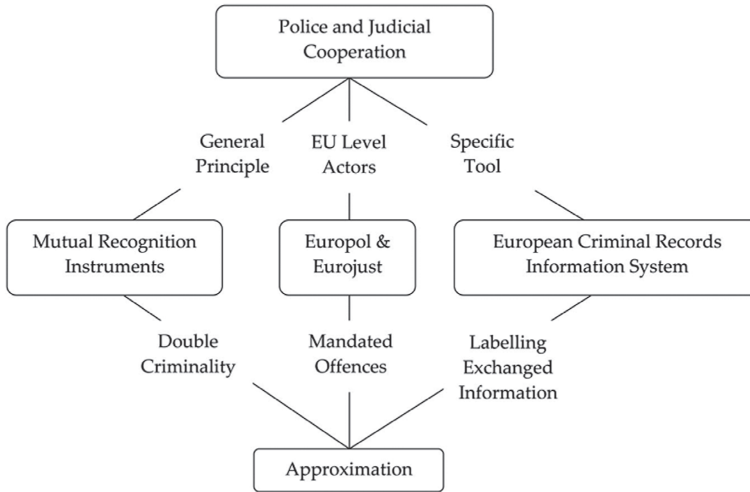
effectiveness of common tools for police and judicial cooperation created by the Union. This broadening of the scope was picked up by the drafters of the 2004 *The Hague Programme*. The European Council at that time recalled that approximation is envisioned to facilitate police and judicial cooperation in criminal matters having a cross-border dimension. Finally, the Preamble of the 2005 *FD on attacks against information systems* clarifies that its objective is to improve cooperation between judicial and other competent authorities, including the police and other specialised law enforcement services of the member states through approximating rules on criminal law in the member states.

Based on this argumentation, *police and judicial cooperation* and *approximation* are the lead concepts in this contribution. The aim of this contribution is to assess *whether and to what extent approximation of the constituent elements of criminal behaviour is necessary to ensure the smooth functioning of both police and judicial cooperation in criminal matters in the European Union*. For such an assessment, the concept of police and judicial cooperation needs to be made more operational.

1.3 Choice of case studies

Police and judicial cooperation as a concept is too vague and abstract to evaluate. Therefore a set of three case studies was selected, which all have a link with approximation. The figure inserted below illustrates how the case studies relate to both *police and judicial cooperation* and *approximation*. The following paragraphs provide a brief context and justify the selection.



1.3.3 Mutual recognition

Mutual recognition has an indisputable symbolic value. Launched as the cornerstone of judicial cooperation at the Tampere European Council, it is said to have induced one

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of the most radical and far-reaching reorientations in the field (Nilsson, 2006; Satzger & Zimmermann, 2008; Swart, 2001). Growing into the overall principle in European cooperation, mutual recognition has to play a central role when analysing police and judicial cooperation. Therefore the first case study will focus on mutual recognition. The link with approximation can be found in the traditional double criminality requirement and the abandonment thereof in mutual recognition instruments.

1.3.4 Europol and Eurojust

Undeniably important in the field of police and judicial cooperation are the EU level actors. Both Europol and Eurojust deserve to be taken into account in this analysis. The second case study will focus on their mandated offences, which link the EU level actors to approximation.

1.3.5 Exchange of criminal records information

As a third case study, a specific cooperation instrument or tool was singled out. Considering the recent evolutions with regard to the exchange of criminal records information, an analysis of ECRIS (the European Criminal Records Information System) was considered appropriate. Approximation is important in the labelling of exchanged information.

2 Case study 1: Mutual recognition

This first case study will demonstrate the inappropriate use of the approximation acquis in the context of the principle of mutual recognition. Mutual recognition instruments abandon the double criminality requirement for a series of offences, without defining them. In doing so, the scope of the abandonment is unclear, and the support for the abandonment jeopardised. First a context will be provided for both the principle of mutual recognition and the double criminality requirement. Thereafter, the inappropriate use of the approximation acquis will be elaborated on.

2.1 The principle of mutual recognition

In general, mutual recognition of judicial decisions is designed to facilitate cooperation. To a certain extent it can be seen as the free movement of judicial decisions as it intends to erase the influence of national borders. The mere fact that a decision was taken by a foreign authority, becomes irrelevant for its execution. States recognise foreign decisions as if they were their own.

In the context of cooperation in the European Union, the principle of mutual recognition was first brought up in criminal matters by Jack Straw at the Cardiff European Council in 1998, where the Council was asked to identify the scope for greater mutual recognition of decisions of each other's courts. The momentum grew in the course of the following year and was used to introduce mutual recognition as a cornerstone at the Tampere European Council in 1999 (Mitsilegas, 2006; Vermeulen, 2006). Upon the

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coming into force of the Lisbon Treaty, mutual recognition will have its legal basis in Art. 82 TFEU.

Mutual recognition has the potential to bring about a very intensive – potentially even intrusive – influence on a member states' criminal justice system, as it encompasses the willingness to attach legal consequences to situations which might have been – in some cases would certainly have been – decided upon differently by national authorities (Mitsilegas, 2006; Satzger & Zimmermann, 2008; Swart, 2001). Therefore in the Programme of Measures it is correctly argued that the implementation of the principle of mutual recognition presupposes member states to have a great deal of trust in each others' criminal justice systems. Such trust is largely based upon a shared commitment to the principles of freedom, democracy and respect for human rights, fundamental freedoms and the rule of law.

Big question marks are in order when it comes to this presumption of trust. Indeed, the yawning gap between the actual level of trust and the required level of trust often proved to be too deep to agree upon and implement mutual recognition (De Bondt & Vermeulen, 2009; Vermeulen, 2002a). The tragic events of 9/11 may have presented a window of opportunity for the *adoption* of mutual recognition instruments (Peers, 2004), their *implementation* and *application* is far from smooth.

2.2 The double criminality requirement

National police and judicial cooperation is very complex. Differences between national criminal justice systems make things even more complicated when attempting *international* cooperation. It provokes member states to stipulate conditions. A classic condition for cooperation in *double criminality*. It is precisely this double criminality requirement which links mutual recognition to the approximation acquis.

2.2.1 The background of the double criminality requirement

Double criminality – also referred to as dual criminality or duality of offences (Williams, 1991) – it is neglected in literature. The concept is often considered self-explanatory, whereas in practice it has almost as many shapes and sizes as the instruments it is used in.

Describing it as *requiring that the behaviour constitutes an offence in both states*, cannot suffice (Alegre & Leaf, 2003; Stessens, 2000; Thomas, 1980; Van den Wyngaert, 2003; Williams, 1991).

- Is it enough for the behaviour to be criminalised in both states? Should this be reviewed in general or should this review go into detail searching for perfectly matching constituent elements?
- Should factual circumstances that render offences not punishable be taken into account or should the review be limited to the mere abstract level?
- Can elements that cause preclusion of criminal proceedings (such as laps of time) also be taken into account?

The answers to these pertinent questions differ for each of the instruments. Analysis of legal texts and the complementing explanatory memoranda reveals the many different approaches. The following examples illustrate these differences:

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- The Council of Europe Conventions on the Transfer of Proceedings and International Validity of Judgements require *the act to be an offence if committed on the territory of the requested state* and *the person on whom the sanctions was imposed liable to punishment if he had committed the act there*;
- The European Union Conventions on Transfer of Proceedings and the Enforcement of sanctions require that *the underlying act be an offence in the requested state if committed on its territory*;
- In the Framework decision on the European Arrest Warrant, it is required that the act constitutes *an offence under the law of the executing member state, whatever the constituent elements or however it is described*;
- In the Framework decision on the mutual recognition of confiscation orders, it is required that *the act constitutes an offence which permits confiscation under the law of the executing state, whatever the constituent elements or however it is described under the law of the issuing state*;

As a conclusion it is safe to say that the more far-reaching the cooperation is, the more far-reaching the double criminality requirement is likely to be. This is of course closely linked to the rationale behind the introduction of the double criminality requirement: it is a protection mechanism which aims at preventing member states from being obliged to cooperate in the enforcement of a decision contrary to their own legal (and criminal policy) views (Baaijens-van Geloven, 1989; Koers, 2001; Thomas, 1980).

2.2.2 The erosion of the double criminality requirement

Notwithstanding the importance of the double criminality requirement, it is considered an obstacle for smooth cooperation. Member states looked into alternatives. In spite the of the existence of instruments which no longer upheld the double criminality requirement (e.g. Art. 3 European MLA Convention of 29 May 2000), scholars considered it politically unlikely that the double criminality requirement would be abandoned in European judicial cooperation (Koers, 2001).

Even though examples may have existed in 2001, the erosion of the double criminality requirement only became truly apparent with the adoption of the new mutual recognition instruments. Abandoning double criminality is an appropriate alternative, if the approximation acquis is properly taken into account. Today, two tracks appear in mutual recognition instruments. The first consists of a partial abandonment of the double criminality requirement through incorporation of a list of offence types. The second consists of a general abandonment of the double criminality requirement, regardless of the offence types involved.

Partial abandonment: no double criminality for the listed offence (types)

A first appearance of the abandonment of the double criminality requirement can be found in the *offence lists* introduced in most mutual recognition instruments. A list of offence types in compiled for which double criminality will no longer be tested.

Peers clearly and concisely explains how the list of offences was drawn up. At first a list of twenty-four crimes was considered, comprising the first eleven crimes considered during the discussions of the freezing orders proposal, one crime taken from the

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conclusions of the Tampere European Council (high-tech crime including computer crime), and twelve crimes taken from the Annex to the Europol Convention. By mid-November 2001, four more items joint the list, two (motor vehicle crime, trafficking in nuclear materials) because Europol could or did deal with them, one (rape) at the behest of France and one (facilitation of unauthorised entry or residence) because the Council had "recently adopted" a framework decision. [...] Finally, by the end of November 2001, the final four crimes (arson, crimes within the jurisdiction of the International Criminal Court, seizure of aircraft or ships and sabotage) had been added, although no explanation was offered for this addition (Peers, 2004).

The listed offences vary slightly across instruments. The list featuring in the 2005 FD on the mutual recognition of financial penalties is unusually broad as it lists more specific offences[1] and ends with the inclusion of *"all offences established by the issuing State and serving the purpose of implementing obligations arising from instruments adopted under the EC Treaty or under Title VI of the EU Treaty"* (OJ L 78 of 22.3.2005).

General abandonment: no double criminality what so ever

The second appearance of the abandonment of the double criminality requirement is not linked to offence types. The 2008 FD on the taking into account of prior convictions, does not feature a list at all (OJ L 220 of 15.8.2008). Article 3 of the FD stipulates that *a conviction* handed down in another member state shall be taken into account in the course of new criminal proceedings. Legal effects equivalent to previous national convictions must be attached in accordance with national law. It is amazing that unanimity was found to demand recognition of any conviction, which in practice includes the recognition of a conviction for behaviour not criminalised in own national criminal law provisions.

2.3 The inappropriate use of the approximation acquis

Even though the abandonment of the double criminality requirement might seem a logical consequence of the underlying principle of mutual recognition (Wouters & Naert, 2004), a sufficient level of approximation to justify that abandonment is currently lacking. The following paragraphs clarify why both the abovementioned partial and general abandonments constitute inappropriate decisions under the current legal constellation.

2.3.1 Internal incoherence

The current practice of partially or even generally abandoning the double criminality requirement completely disregards the approximation acquis and therefore causes internal incoherence in European criminal policy making.

Any abandonment of the double criminality requirement is only truly sustainable to the extent approximated offence concepts are available. Indeed, there is no longer a

1 That list includes all the offences on the equivalent EAW list, and makes a meaningful supplement considering the context of financial penalties by introducing infringement of road traffic regulations, smuggling, intellectual property offences, threats and acts of violence against persons, criminal damage and theft.

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need to check double criminality when a criminalisation obligation has been included in the EU JHA acquis. If the function of approximation is to facilitate and support mutual recognition, the approximation acquis should be used to its full potential; but not beyond that potential. Trusting other member states to have implemented the relevant instruments and criminalised offences to the extent constituent elements were agreed in approximating instruments, is already a huge step forward. This is especially so since the implementation track record of some member states is disappointing. It is not realistic and even unnecessary to expect member states to have mutual trust beyond the approximation acquis. Cooperation would already significantly benefit from the abandonment of the double criminality requirement to the extent it is justifiable, i.e. to the extent approximated offence concepts exist.

2.3.2 Political utopianism

The abovementioned position is reinforced by the German *demarche* with regard to the 2008 FD on the European Evidence Warrant (EEW) (OJ L 350 of 30.12.2008). It is a striking illustration of the false presumption of criminalisation of the listed offences and the abandonment of the double criminality requirement. Germany had made the lack of clear and common definitions and the possibility of having obligations with regard to behaviour not criminalised under German legislation, one of their key issues during negotiations. The compromise reached allows Germany a temporary derogation from the provisions of the FD and make execution of an EEW subject to verification of double criminality in the case of the offences relating to terrorism, computer-related crime, racism and xenophobia, sabotage, racketeering and extortion and swindling. These offences were highlighted by the German constitutional court in its 2005 ruling on the EAW (2 BvR 2236/04), expressing its apt concern about the fact that there is no EU wide definition of these crimes and therefore the substance of the allegation against a suspect may not be clear to him. This German *demarche* would not have been necessary, if the abandonment of the double criminality test was limited to the approximation acquis. Building on the discussions held with regard to the EEW, both Poland and Hungary are in favour of similar exceptions in other mutual recognition instruments. A full on return to nationally defined offences and the traditional double criminality requirement is an important setback for the progress made over the past years and has a negative impact on the coherent development of the EU JHA area.

2.3.3 Legal counter indications

Abandoning the double criminality requirement without taking the approximation acquis into account, renders some mutual recognition instruments inapplicable. The fundamental legal difficulties that arise can be illustrated using the 2008 *FD on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions* (OJ L 337 of 16.12.2008) as an example. In sum, this FD regulates the enforcement of foreign convictions. When the nature or the duration of the foreign conviction is incompatible with the law of the executing state, a solution needs to be found. Art. 9 holds the possibility to adapt the foreign conviction. Such adaptation should be carried out

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considering the conviction that would have been rendered in the executing state. This is exactly where the problems begin: a conviction cannot be adapted unless the double criminality requirement is met. How else to adapt a foreign conviction if the behaviour is not punishable in the executing state? It proofs to be crucial from a more technical legal perspective, to limit the obligation to automatically recognise and execute foreign convictions to situations where the double criminality requirement is met. Hence the suggestion to only abandon the double criminality requirement to the extent approximated offence concepts exist.

3 Case study 2: Europol and Eurojust

The second case study focuses on the *mandates* of Europol and Eurojust, as their mandate links the EU level actors with approximation. Before going into the inappropriate use of the approximation acquis, the composition of the mandates will be briefly recalled.

3.1 EU level actors and their mandate

3.1.1 Europol mandate

Europol was not established out of thin air. In the course of 1971 and 1972, a number of intergovernmental meetings were held with a focus on terrorism. Those meetings led to the setting up of TREVI (short for Terrorisme, Radicalisme, Extremisme et Violation International), the acknowledged forerunner of Europol, which took place in the margins of the European Community. Unlike Europol TREVI was not an institution, instead it operated around a system of confidential meetings where good practices, experiences and initiatives could be discussed and exchanged. The TREVI Working Groups and the development of the Europol Drug Unit (hereafter EDU) – the first phase of Europol – clarify the origin of the Europol mandate (Fijnaut, 1992; Flynn, 1997; Monaco, 1995).

In 1976, five TREVI Working Groups were set up: TREVI-I was responsible for the measures to combat terrorism; TREVI-II was responsible for police training and was later on expanded to public order and football hooliganism; TREVI-III initially set up to deal with civilian air travel, was redefined in 1985 to prepare the creation of the EDU. Offence wise, it also worked on offences related to stolen vehicles, to non-cash means of payment, to cultural property, to immigration and on armed robbery; TREVI-IV was tasked amongst others to ensure the safety and security of nuclear installations and transport; TREVI-V was to deal with contingency measures to respond to emergencies.

It is clear that the functions set forth for EDU and Europol mirrored the ones carried out by the TREVI Working Groups. On 3 January 1994 EDU started off tasked to fight against drug-related offences (Ministerial Agreement of 2.6.1993). In December of that year, the Essen European Council extended the mandate with trafficking in nuclear and radioactive substances, clandestine immigration networks and trafficking in stolen vehicles (SN 300/94). The Europol Convention was adopted on 26 July 1995 (OJ C 316 of 27.11.1995). It considers as serious international crime: *crimes committed*

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or likely to be committed in the course of terrorist activities against life, limb, personal freedom or property, unlawful drug trafficking, illegal money–laundering activities, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings, motor vehicle crime and the forms of crime listed in the Annex or specific manifestations thereof. The offences listed to define the Europol mandate are clearly inspired by the offences connected to TREVI and EDU.

3.1.2 Eurojust mandate

To compose the Eurojust mandate, reference is made to the Europol mandate, which is supplemented with a number of offence types. Article 4 of the Eurojust Decision stipulates that the general competence of Eurojust shall cover the Europol offences, *supplemented by computer crime, fraud and corruption and any criminal offence affecting the European Community's financial interests, the laundering of the proceeds of crime, environmental crime and participation in a criminal organisation within the meaning of Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union* (OJ L 63 of 6.3.2002).

When drawing up the mandates of both EU level actors, the approximation acquis is not properly used.

3.2 The inappropriate use of the approximation acquis

3.2.1 Different meaning across instruments

First, it is regrettable that similar or even the same offence concepts have a different meaning across instruments. The Europol list is similar to the lists in Art. 40(7) and Art. 41(4)(a) of the Schengen Implementation Convention (SIC) (OJ L 229 of 23.9.2000). However, the offences on the lists are not interpreted in the same manner. For the definition of the offences on the Europol list, it is explicitly stated that *they shall be assessed by the competent national authorities in accordance with the national law of the member states to which they belong*. In doing so the scope of the Europol mandate is left to the discretion of the individual member states. This is an unfortunate choice as no such clause can be found in the SIC. What is even more, there are strong indications that an entirely different interpretation is envisioned in SIC. When updating the Art. 40(7) SIC list to include participation to a criminal organisation and terrorism, references to the 1998 joint action (OJ L 351 of 29.12.1998) and the 2002 framework decision (OJ L 164 of 22.6.2002) were included. In doing so the SIC list tends towards the use of common offence concepts as included in the EU JHA acquis. As a result, mirroring offence concepts have a different meaning across instruments.

Second, some of the supplementing offences listed in Article 4 of the Eurojust Decision are seemingly redundant as they partially overlap with offences already included in the Europol mandate. The following example can serve as an illustration. The Europol mandated offences include "illegal money–laundering activities" defined in the Annex as *the criminal offences listed in Article 6(1) to (3) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed at Strasbourg on 8 November 1990*. In spite of this, the European legislator con-

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sidered it necessary to include "laundering of the proceeds of crime" as a supplement in the Eurojust Decision without clarifying the difference with the mirroring Europol category. One could argue that supplements and refinements were necessary because the scope of the Europol mandate was not crystal-clear. However, money-laundering happens to be one of the *clearer* offences as it was further clarified by inserting a reference to a legal instrument. This confusion could have been avoided is the approximation acquis was used in a consistent manner throughout all instruments.

3.2.2 Incomplete and inconsistent referencing to the approximation acquis

Third, notwithstanding the choice to leave the assessment of the offences to the discretion of the individual member states, own Europol definitions were elaborated for three of the listed offences, namely "illegal immigrant smuggling", "motor vehicle crime" and "traffic in human beings". Knowing that in the initial convention a reference to the approximation acquis was included where possible – i.e. for *crime connected with nuclear and radioactive substances, illegal money–laundering activities* and *unlawful drug trafficking*[2] – it is regrettable no such reference to the 1997 joint action (OJ L 63 of 4.3.1997) was made when updating the definition of trafficking in human beings in 1999 (OJ C 26 of 30.1.1999).

Uncertainty, vagueness and contradiction at least incoherence are the result of the current policy to combine references to approximating instruments, with own definitions and leaving the assessment of the offences to the discretion of the individual member states. At least a debate should be considered as to whether it is appropriate to delineate the scope of the Europol and Eurojust mandates using the approximation acquis. In doing so the *minimum definitions* for the member states are deployed as *maximum definitions* for the EU level actors. Such an approach would increase coherence in the EU JHA area as well as be to Europol and Eurojust's advantage as it would facilitate communication, data exchange and data analysis. Indeed currently it can be difficult to interpret data as member states individually assess which cases fall within the scope of the actors' mandates. Using strict boundaries would simplify procedures for all parties.

In light of that argumentation, it is commendable that the Eurojust Decision refers to the 1998 joint action to clarify what constitutes participation in a criminal organisation. It is unfortunate however that the Eurojust Decision fails to refer to the 1995 Convention on the Protection of the European Communities' Financial interests (OJ C 316 of 27.11.1995), nor to the 1997 Convention on the fight against corruption involving Community Officials (OJ C 195 of 25.6.1997). Furthermore, it is unfortunate that

2 According to the Annex to the Europol Convention, crime connected with nuclear and radioactive substances means the criminal offences listed in Article 7(1) of the Convention on the Physical Protection of Nuclear Material, signed at Vienna and New York on 3 March 1980, and relating to the nuclear and/or radioactive materials defined in Article 197 of the Euratom Treaty and Directive 80/836 Euratom of 15 July 1980; Illegal money–laundering activities means the criminal offences listed in Article 6(1) to (3) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed at Strasbourg on 8 November 1990; Unlawful drug trafficking means the criminal offences listed in Article 3(1) of the United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances and in the provisions amending or replacing that Convention.

the reference was not updated when the 1998 joint action was repealed by the 2008 FD on organised crime (OJ L 300 of 11.11.2008).

4 Case study 3: European Criminal Records Information System

4.1 Exchanging criminal records information

The third case study focuses on the exchange of criminal records information. The exchange of such information is far from new. It dates back to the 1959 Council of Europe Convention on mutual assistance in criminal matters (CETS no. 047, Strasbourg, 20.5.1959). Article 22 of that convention deals with the exchange of information from judicial records and stipulates that the Ministries of Justice shall communicate information on criminal convictions and subsequent measures of other countries nationals at least once a year (De Busser, 2008; Vermeulen, Vander Beken, De Busser, & Dormaels, 2002). The recent development of ECRIS – the European criminal records information system – is linked to that and has its EU roots in The Hague Programme which says that efficient and swift exchange of information on the criminal history of individuals constitutes an important priority (OJ C 53 of 3.3.2005) (Jacobs & Blitsa, 2008; Marin, 2008; Stefanou & Xanthaki, 2008).

ECRIS (OJ L 93 of 7.4.2009) is set up to enable the efficient exchange of information on previous convictions. It is annexed to the FD on the organisation and content of the exchange of information extracted from the criminal record between member states, itself adopted on 27 February 2009. It is based on the classification system elaborated by Unisys and IRCP in the 2005 criminal records study and sets up a general architecture for the electronic exchange of information, laying the foundations for future IT developments, related to the interconnections of national criminal records.

4.2 Inappropriate use of the approximation acquis

4.2.1 Exchange of criminal records information

The development and architecture of ECRIS are not free from critique. The main problems are the poor compatibility with the approximation acquis and the inclusion of phenomena that do not constitute offences. These phenomena will not appear as such in criminal record information and should therefore not appear in an information system such as ECRIS. Three examples are singled out to illustrate the problem.

- *Domestic violence* is a criminological phenomenon that occurs when a family member, partner or ex-partner attempts to physically or psychologically dominate another. It has many forms, including physical violence, sexual abuse, emotional abuse, intimidation, economic deprivation, and threats of violence. However, as it is not an offence type, it should not be included as such in ECRIS.
- *Shoplifting* is defined as theft from a retail establishment. It might very well be the most common way theft offences are committed, but it does not constitute a separate offence in the sense that there is no legal difference between forms of theft according to the location.

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- *Theft of a car* is a similar example. This time the additional specification does not concern the location, but the *object* of the offence. Similarly, it should not be included as an offence type in ECRIS.

First and foremost, the design of a criminal records information system should be based on offences, because the criminal records system itself is based on offences. Furthermore, it should take into account the similarities in offence types which can be deduced from the approximation acquis. Labelling exchanged information as to whether or not it corresponds to an approximated offence concept has the potential to considerable facilitate the comprehensibility of such information.

4.2.2 Use of exchanged criminal records information

In addition, there is a huge difference between on the one hand *informing* other countries of convictions of their nationals and exchanging information to keep each other's criminal records system updated, and on the other hand *taking those foreign convictions into account* in the course of new criminal proceedings and attaching legal effects *equivalent to previous national convictions* to it. When ECRIS is intended to be used in the mutual recognition sphere to support the taking into account of a previous conviction, it becomes all the more important to use the approximation acquis to its full potential, as this would significantly facilitate the interpretation of the *foreign conviction* and the attaching legal effects equivalent to previous national convictions to it. Indicating that the foreign conviction falls within the minimum constituent elements of offences as agreed in an approximation instrument, would not just facilitate the taking into account of the conviction in the course of new criminal proceedings: the lack thereof will potentially render interpretation impossible.

5 EULOCS: Appreciating Approximation

For each of the case studies, the use of offence concepts has been analysed in light of the approximation acquis. Analysis revealed a need to carefully (re)consider the technique of approximation, the function thereof and the use of the acquis.
When abandoning the double criminality requirement, when defining the mandate of an EU level actor or when exchanging criminal records information, the scope thereof needs to be clarified. It needs to be clear which offences are involved and how they are defined. The latter part would benefit from more appreciation for the approximation acquis. There are various possible approaches to put that into practice.

A first approach consists of inserting a direct reference to an approximating instrument immediately behind the offence type. Instead of referring to *terrorism*, a reference would be made to *terrorism as defined in the 2002 FD on combating terrorism (OJ L 164 of 22.6.2002), amended by the 2008 FD (OJ L 330 of 9.12.2008)*. This approach is not uncommon. Even though references were never included in a coherent manner, examples are legio:

- *Participation in a criminal organisation*: The Council joint action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organi-

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sation in the Member States of the European Union is referred to in Art. 40 (7) SIC (OJ L 229 of 23.9.2000) and Art. 4 Eurojust Decision (OJ L 63 of 6.3.2002).

- *Terrorism:* The Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism is referred to in Art.40 (7) SIC (OJ L 229 of 23.9.2000).
- *Fraud:* The 1995 Convention on the Protection of the European Communities' Financial Interests is referred to in Art.1(3) 2001 MLA Protocol (CETS no. 182 Strasbourg, 8.11.2001) and the standard offence list in the mutual recognition instruments (e.g. OJ L 190 of 18.7.2002).
- *Crime connected with nuclear and radioactive substance*s: The Convention on the Physical Protection of Nuclear Material, signed at Vienna and New York on 3 March 1980, and relating to the nuclear and/or radioactive materials defined in Article 197 of the Euratom Treaty and Directive 80/836 Euratom of 15 July 1980 are referred to in the Europol Annex (OJ C 316 of 27.11.1995).
- *Illegal money–laundering activities:* Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, signed at Strasbourg on 8 November 1990 is referred to in the Europol Annex
- *Unlawful drug trafficking:* The United Nations Convention of 20 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances is referred to in the Europol Annex (OJ C 316 of 27.11.1995).

The most important benefit of this approach is the proximity of the references and the offence concepts, whereas the most important disadvantage is the poor prospect of being able to stand the test of time. It is important to take the rapidly changing nature of the approximation acquis into account. The past has learnt that it is unrealistic to keep all references updated by repeated amending initiatives. It was already mentioned that the references to the 1998 joint action on participating in a criminal organisation were not updated when that joint action was repealed by the 2008 FD on organised crime (OJ L 300 of 11.11.2008). Inserting a suffix "*and all amending and replacing provisions*" is a way to by-pass this inaccuracy and avoid legal discussions. It is exactly what has been done in the Europol Annex when defining "unlawful drug trafficking". However, such a by-pass operation is extremely user unfriendly as it expects users to be fully updated.

A second approach consists of developing a *separate reference index* which brings together and structures the entire approximating acquis. Instead of referring to individual approximating instruments, a reference to the separate index can suffice. One would not refer to *terrorism*, but to *terrorism as it is defined in the separate reference index*. The most important advantages of such an approach lie in a certain consistency and a limited amending requirement, as only the separate reference index needs to be kept updated. In absence of an appropriate instrument to refer to, this approach has never been deployed before. EULOCS – the EU level offence classification system – represents the practical implementation of this second approach. Its design allows it to be used as such a separate reference index. Before elaborating on the added value of the use of EULOCS in the analysed case studies, some background as to the development and structure of EULOCS is provided.

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5.1 EULOCS' background

In March 2007, the European Commission launched a call for tender for a "Study on the development of an EU level offence classification system and an assessment of its feasibility to supporting the implementation of the Action Plan to develop an EU strategy to measure crime and criminal justice" – The Crime Statistics Project. The main objective in the study's terms of reference was to create a EULOCS for the purpose of exchanging comparable statistical information on offences throughout the EU. The classification system should serve as a first step towards the development of a more comprehensive and sophisticated EU level offence classification system (Mennens, et al., 2009). The momentum created by this study was seized to develop a more sophisticated EULOCS with the potential to have an added value beyond crime statistics.

In essence, EULOCS is a list of offence labels grouped in families and sub-families and broken down into subcategories, based on their constituent elements according to the way these offence labels appear in legal instruments relevant for the European Union. Grouping offence labels is inspired by the fact offence labels sometimes appear in groups in legal instruments. Breaking down is similarly inspired by the fact some legal instruments only refer to parts of offences. The 1997 Corruption Convention for example, does not deal with corruption in its entirety, but deals with corruption involving officials of the European Communities or officials of member states of the European Union. Similarly, the 1995 Fraud Convention does not deal with fraud in its entirety, but only with fraud affecting the financial interests of the European Communities.

This exercises has lead to a simple but at the same time complex architecture which forms the backbone of EULOCS.

Illustrative extract from EULOCS

0905 00	**Corruption**
0905 01	*Offences jointly defined as corruption*
0905 01 01	Active corruption in the public sector involving a EU public official
0905 01 02	Passive corruption in the public sector involving a EU public official
0905 02	*Other forms of corruption*

The offence labels are then combined with reference to instruments which hold approximated offence definitions and the definitions themselves. As a result, EULOCS is the ideal reference instrument to use if one wants to limit certain applications to behaviour that is criminalised in all member states. The idea is to keep one separate reference index updated which can then be referred to in various legal instruments (Vermeulen & De Bondt, 2009).

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5.2 EULOCS' added value for the case studies

5.2.1 Facilitating cooperation whilst clarifying mutual recognition obligations

The first case study illustrated that the obligations arising from mutual recognition instruments are usually insufficiently clarified: the double criminality test is abandoned for either a list of offence types or simply for all offence types. This approach presupposes a degree of mutual understanding and mutual trust with regard to those offences which is not available today. Failing to make reference to an agreed minimum definition to clarify the extent to which the double criminality test is abandoned and/or leaving the assessment of the offence and thus the scope of the abandonment of the double criminality test to the discretion of the national authorities, is a considerable concern for some member states. The German demarche with regard to the EEW is a striking example of the confidence problem arisen from the abandonment of the double criminality test. Considering the efforts and progress made to establish minimum rules related to constituent elements and penalties, the double criminality test can be abandoned in mutual recognition instruments, but only to the extent approximated offence concepts exist. Indeed, the test is no longer meaningful in cases concerning offences for which minimum definitions are agreed upon in the EU JHA acquis. Offences falling outside the approximation acquis should remain subject to a double criminality test.

The matter deserves in-depth debate as to the desirability to limit the abandonment of a double criminality requirement to the approximated offence concepts. EULOCS can be an interesting tool to refer to in mutual recognition instruments. Three advantages can be highlighted.

First, it would be a welcome clarification of the extent to which the double criminality requirement is abandoned.

Second, inserting a reference to EULOCS – as opposed to a reference to an agreed minimum definition in a specific legal instrument – has the additional advantage of being able to stand the test of time. Above we have already pointed to the need to take the dynamic and rapidly changing nature of the JHA field into account. In that respect a reference to a generic reference index such as EULOCS would get priority over a static reference to a specific legal instrument.

Third, a standard reference to EULOCS in all instruments would considerably decrease the risk of internal incoherence or even incompatibility between instruments.

5.2.2 Facilitating cooperation whilst clarifying the scope of mandates

The second case study discussed the use of offence concepts to define the mandates of Europol and Eurojust. The choice to leave the assessment of the offences to the discretion of the national authorities, gives way for confusion and unnecessary complications. Furthermore, some of the offence categories are specified via the inclusion of a reference to an agreed minimum definition, whilst others are specified via the creation of an own internal definition. Most of the offences however are left open.

Clarifying the scope of the mandated offences via reference to agreed minimum definitions, would facilitate the work of EU level actors. A reference to EULOCS would

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simplify communication, data sharing and data analysis. Indeed currently it can be difficult to interpret data as member states individually assess which cases fall within the scope of the mandates. Using strict boundaries would simplify procedures for all parties.

5.2.3 Facilitating cooperation whilst clarifying the meaning of exchanged information

Criminal records information is not exchanged merely to inform one another. The 2008 FD *on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions* (OJ L 337 of 16.12.2008) proves member states are ready to move ahead and use foreign criminal records information as if it were their own. This of course requires member states to fully grasp the nature of foreign convictions. From that perspective it becomes more and more important to fully exploit the advantages approximation can bring.

The architecture of the information system should be linked to the approximation acquis and exchanged information should be tagged as to whether it concerns a conviction based on an agreed minimum definition or a conviction that still needs to be tested for double criminality.

6 Conclusion

Police and judicial cooperation has passed the stage of infancy, but is far from fully grown. The current chaotic development reveals the lack of a long-term policy plan. Three case studies have illustrated how the use of approximated offence concepts can facilitate cooperation. Therefore, during the coming maturing process, more attention should be paid to internal coherence between the development of police and judicial cooperation on the one hand, and approximation on the other hand.

The creation of EULOCS is mainly a plea for coherence and internal consistence in the EU JHA area, which deserves in-depth debate. Police and judicial cooperation would benefit from a well founded and well considered strategic policy plan in which the added value of approximation is appreciated more and the acquis used to its full potential.

The authors welcome the initiative of the European Commission to launch a Study on the future institutional and legal framework of judicial cooperation in criminal matters in the EU. It is encouraging to find that the Study is to provide the Commission with an independent, long-term strategic view to ensure consistency in future policy making (tender n° JLS/2009/JPEN/PR/0028/E4). Let us hope the subject matter of this paper will not be ignored during the discussions on the Stockholm Programme, detailing the future of cooperation in the area of freedom, security and justice.

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