

# Shaping the competence of Europol.

## An FBI perspective

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### 1 Introduction

The European Police Office (Europol) is the European Union (EU) law enforcement organisation that handles criminal intelligence. Its aim is to improve the effectiveness and cooperation between the competent authorities in the Member States in preventing and combating serious forms of international crime. Europol was not established to deal with local or minor offences, but to give a European dimension to the investigation of crime of a European dimension (KLIP, 2009). The list of Europol-crimes has become longer over the years. The Europol Council Decision further extends the competence of Europol, as the existence of an organised criminal structure is no longer a limiting element (DORN, 2009). The forms of crime over which Europol has competence are to be assessed by the competent national authorities in accordance with the national law of the Member States to which they belong. This often leads to the result that the competence of Europol is being interpreted in different ways throughout the EU. It has already been suggested for the sake of coherence to rely on uniform definitions for so-called 'EU core crimes' that would also fall within the competence of bodies and agencies dealing with security related issues (e.g. Europol, Eurojust, Frontex) (VERMEULEN, 2002).

In two parts and a conclusion, this contribution will elaborate on the overall-question: *How to shape the competence of Europol?* The latter also in comparative perspective, by looking at the United States (US). Two research methods are combined throughout this contribution: a study of relevant literature and a critical analysis of relevant legal and policy documents, including the very latest.

The first part is devoted to the competence of Europol. The first section (2.1) introduces Europol and identifies three 'eras' for further analysis. In the second section (2.2) the extension of the competence of Europol is analysed for the pre-Convention era (2.2.1), the Convention era (2.2.2) and the post-Convention era (2.2.3). Our main questions are: *Was there a trigger to extend the competence of Europol time and again? Was there a genuine 'need' to do so?* In the third section (2.3) the definition of the competence of Europol is examined, or rather the non-existence of definitions of Europol-crimes (2.3.1). We ask ourselves the question: *What could fill the absence of definitions of Europol-crimes?* (2.3.2). The first part is used as a steppingstone for the second, comparative part. We compare EU law enforcement organisation Europol to its US counterpart, the Federal Bureau of Investigation (FBI). The only comparisons between Europol and the FBI that have been carried out so far mainly concern executive powers (ELLERMAN, 2002 & 2005), leading to the conclusion that Europol is in no way a European equivalent of

the FBI (BRUGGEMAN, 2000; CORSTENS & PRADEL, 2002), although the role of Europol in joint investigation teams could be a foretaste of an executive European Police Office (DE MOOR, 2009). The question of competence *ratione materiae* has hardly ever been raised, whereas a comparison in this respect could be very useful for the Europol-case. The first section (3.1) introduces the FBI with its dual responsibility for law enforcement and national security. The second section (3.2) deals with the competence of the FBI, which is responsible for more than 200 categories of federal crime. *How is the competence of the FBI defined?* is our main question. First some basic constitutional features of the US criminal justice system are given (3.2.1). Then the federalisation of criminal law is examined (3.2.2), as the extension of the competence of the FBI and the extension of federal criminal law go hand in hand. Mirroring the first part, both the extension (3.2.3) and the definition (3.2.4) of the competence of the FBI are covered.

## 2 The Competence of Europol

### 2.1 Introducing: Europol

The EU was originally established largely to promote the economic integration of its Member States. Economic integration, however, brought with it new opportunities for criminals, above all the ease with which they could cross national borders. Because crime was perceived to be organised increasingly at a European level, politicians agreed that an organisation was needed that could coordinate national law enforcement resources to effectively tackle crime on a pan-European level (HABERFELD, McDONALD & VON HASSELL, 2008). The acknowledged forerunner of Europol was the intergovernmental cooperation under the umbrella of TREVI (Terrorism, Radicalism, Extremism and International Violence), which took place in the margins of the European Community from the mid seventies until the early nineties (FIJNAUT, 1992; ANDERSON et al., 1995; PEEK, 1998). To the attentive observer it came as no surprise when Germany proposed at the Luxembourg European Council of 28-29 June 1991 the creation of a European Criminal Investigation Office (FIJNAUT, 1994). This had always been the dream of former German Chancellor Helmut Kohl, who was in fact promoting the idea of a European Federal Police, modelled after the American FBI. Half a year later, at the European Council of 9-10 December 1991 in Maastricht, a modified proposal was formally adopted that a European Police Office (Europol) should be recognised under the new Justice and Home Affairs Title (JHA) of the equally new Treaty on European Union (TEU) (BUNYAN, 1993).

The TEU was signed in Maastricht on 7 February 1992 (OJ C 191 of 29.7.1992). It entered into force on 1 November 1993 and marked a new step in the European integration. The Treaty of Maastricht, which established the European Union (EU), divided EU policies into three main areas, referred to as 'pillars'. The supranational first pillar (European Communities) was complemented by the intergovernmental second (Common Foreign and Security Policy) and third (Cooperation in the Fields of Justice and Home Affairs) pillars (GUILD, 1998). Article K. 1 TEU, the core provision of Title VI (Provisions on Cooperation in the Fields of Justice and Home Affairs) provided that Member States would consider as a matter of common interest: "9. police

cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of 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 (Europol)”. In this provision there was no question of the assignment of executive powers to Europol (WOODWARD, 1994; BRUGGEMAN, 1996). It has to be noted that it was not until the Council adopted the Joint Action of 10 March 1995 (OJ L 62 of 20.3.1995) that Europol – or rather its predecessor the Europol Drugs Unit (EDU) – was formally housed in the third pillar.

The initial legal basis of the EDU was the Ministerial Agreement on the establishment of the Europol Drugs Unit, signed in Copenhagen on 2 July 1993 (BUNYAN, 1997). The TREVI-Ministers had in fact agreed on a step-by-step creation of Europol, beginning with a drugs intelligence unit, which would then be further developed. From 1995 to 1999 the EDU acted as a non-operational team for the exchange and analysis of information and intelligence, as soon as two or more Member States were affected, in relation to *inter alia* illicit drug trafficking, together with the criminal organisations involved and the associated money-laundering activities (MONACO, 1995). The objective of the EDU was to help the police and other competent agencies within and between Member States to combat these criminal activities more effectively. The Member States’ liaison officers and the EDU analysts joined forces in The Hague (NL). The essential feature of the EDU was the fact that no personal information could be centrally stored, whether automatically or otherwise. Europol replaced the EDU on 1 July 1999.

The Europol Convention (OJ L 62 of 20.3.1995) was signed on 26 July 1995, to enter into force on 1 October 1998, after its adoption by the Member States in accordance with their respective constitutional requirements. However, it was not until 1 July 1999, following a number of legal acts related to the Europol Convention, that Europol commenced its full activities as the EU law enforcement organisation. Yet again, no executive powers. This also showed from the declaration on the police which is annexed to the Europol Convention and which only mentions databases, support of the national investigations, analysis of information, the development of preventive strategies... (BRUGGEMAN, 1997).

Under the Europol Convention, the organisation was made competent to support law enforcement action against a whole ‘shopping list’ of crimes, where an organised criminal structure is involved and two or more Member States are affected (*infra*). Europol’s core task is to support the competent authorities in the Member States (mainly police forces, immigration and customs authorities) in their intelligence work. In addition to the facilitation of exchange of information and the development of criminal intelligence, Europol can assist with advice and training. The backbone of Europol is its computerized system of collected information consisting of an information system (IS), analytical work files (AWFs) and an index system. The national unit situated within each Member State liaises between Europol and the competent national authorities. Europol liaison officers are seconded by their national unit to represent the interests of the latter within Europol.

The Treaty of Amsterdam of 2 October 1997 (OJ C 325 of 24.12.2002) brought a new dimension to cooperation in the fields of justice and home affairs. With the gradual transfer of policy on asylum, migration and judicial cooperation in civil matters from the third to the first pillar, Title VI of the TEU was renamed “Provisions

on police and judicial cooperation in criminal matters". The aspirations were wider, as it was now the Union's objective "to provide citizens with a high level of safety within an area of freedom, security and justice" (Article 29, § 1 TEU). This objective should be achieved through "closer cooperation between police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol) in accordance with the provisions of Articles 30 and 32" (Article 29, § 2, first indent TEU). Article 30. 1 TEU emphasised the importance of operational cooperation between the competent law enforcement authorities in the Member States. Europol also sees its role of information broker confirmed. In addition, Article 30. 2 TEU foresaw new tasks for Europol. In any case, there was again no question of the assignment of executive powers to Europol (ZANDERS, 1999).

Within a period of five years after the entry into force of the Treaty of Amsterdam (1 May 1999 – 1 May 2004), Europol had to be enabled to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity. Moreover, Europol had to be enabled to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases (SCHALKEN & PRONK, 2002). In November 2002 a Protocol amending the Europol Convention in this sense was adopted, adding "participation in a support capacity in joint investigation teams" and "making requests to initiate criminal investigations" to the principal – information-related – tasks of Europol (OJ C 312 of 16.12.2002).

However, by the time the JIT Protocol – and two other amending Protocols (2000, 2003, *infra*) – finally entered into force (spring 2007), a Commission Proposal to replace the Convention with a Council Decision was already on the negotiating table of the Council of Ministers (COM (2006) 817 of 20.12.2006). The Europol Council Decision (OJ L 121 of 15.5.2009) was formally adopted by the JHA Council of 6 April 2009. Europol's change of status – from intergovernmental organisation to Community agency as from 1 January 2010 – is aimed at improving its operational and administrative functioning (DE MOOR & VERMEULEN, 2010; GENSON & BUYSSENS, 2009; TOXOPEUS & BRUGGEMAN, 2009).

On the basis of this introduction, three 'eras' can be distinguished, for each of which we examine the competence of Europol more closely (2.2): the pre-Convention era (2.2.1), the Convention era (2.2.2) and the post-Convention era (2.2.3). Our main questions are: *Was there a trigger to extend the competence of Europol time and again? Was there a genuine 'need' to do so?*

## 2.2 Extending the competence of Europol

### 2.2.1 *The pre-Convention era*

As the blueprint for the EU began to take shape from the mid eighties, drugs became the primary rationale for a new security agenda based on the argument that the abolition of internal border controls would cause an explosive growth in drug trafficking (ELVINS, 1999). This argument has been remarkably influential, despite an almost total lack of supporting evidence or research (BENYON et al., 1993). Drug trafficking also provided the primary rationale for Europol during the pre-Convention era.

The EDU, which formed the nucleus of Europol, kicked off in the 1993 Ministerial Agreement with competence for illicit drug trafficking, the criminal organisations involved and associated money laundering activities affecting two or more Member States. Drug trafficking was too important an issue to ignore. A new organisation like Europol could not possibly stay away from drugs. However, it was envisaged from the outset that Europol would not be a single mission agency (VERBRUGGEN, 1995). The confinement to drug-related crime and money laundering was seen to hamper the EDU (BRUGGEMAN, 1996).

In anticipation of a Europol Convention, about which agreement could not be reached at that time, the Essen European Council of 9-10 December 1994 decided to extend the EDU's initial competence to the fight against illegal trade in radioactive and nuclear materials, crimes involving clandestine immigration networks, illegal vehicle trafficking and associated money-laundering operations. Although the extension was formalised in the 1995 Joint Action, the fact that in the absence of agreement on a Europol Convention, the EDU had been set to work with an extended competence on the mere basis of legally non-binding agreements among Ministers was described as unsatisfactory (HOUSE OF LORDS, 1995; KLIP, 1995).

The 1995 Joint Action was equally controversial. At a stroke the remit of the EDU had been extended from one area of crime to four, without any reference to the European or national parliaments and without any motivation whatsoever. It was a move described by EDU/Europol Director Storbeck as "a legally and politically relative simple extension of the ministerial agreement" (BUNYAN, 1995, p. 4). The House of Lords noted in its 1995 report that "the crimes within the initial competence reflect preoccupations of several Member States and appear on the list not because they are the most serious offences but because they are particularly transnational in character" (HOUSE OF LORDS, 1995, p. 26).

From crimes involving clandestine immigration networks to trafficking in human beings proved to be a small step. A domestic scandal<sup>1</sup> severely influenced the debate and served as catalyst to speed up the decision making process (LOCHER, 2007). During the informal JHA Council of 26-27 September 1996 Belgium put forward three initiatives concerning trafficking in human beings and sexual exploitation of children. The Irish Presidency took over the lead with a motion to extend the competence of the EDU (FLYNN, 1998). After formal approval from the 28-29 November JHA Council, a Joint Action extending the competence of the EDU to trafficking in human beings was adopted on 16 December 1996 (OJ L 342 of 31.12.1996). For the definition of trafficking the Joint Action referred to the Europol Convention, which after much delay and redrafting had been signed, but had not yet entered into force at that time (*infra*).

The Joint Action bore in mind the wish of the European Parliament. In its Resolution of 18 January 1996 on trafficking in human beings (OJ C 32 of 5.2.1996) the European Parliament had hit a nerve, referring to the abolition of border controls in an internal area without frontiers in which persons – including human traffickers – are entitled to freedom of movement. Therefore, compensatory measures of police cooperation were

1 In the summer of 1996, Belgium had been confronted with the Dutroux case, which revealed that young girls had been kidnapped, sexually abused and subsequently killed, and which raised suspicion about the activity in Belgium of (international) paedophile networks, involved in trafficking in children, inter alia for the purpose of sexual exploitation and exploitation of children in pornographic performances and materials.

also to be applied to trafficking in human beings as a serious form of international crime. Yet, under the Treaty of Maastricht trafficking in human beings – unlike drug trafficking – was not explicitly mentioned in Article K. 1 TEU.

### 2.2.2 *The Convention era*

The Europol Convention was drawn up in secret by members of the Working Group on Europol comprised of interior ministry officials and police officers. The European Parliament was not consulted under the Treaty of Maastricht at any stage during the two years of negotiations over the Convention's content, although Article K. 6 TEU explicitly stated that the Council should "consult" the European Parliament "on the principal aspects of activities" to ensure its "views" are "duly taken into consideration" (BUNYAN, 1995). This, many Members of Parliament believed, was reminiscent of the pre-TEU days when negotiations were carried out by a small group of bureaucratic elites behind closed doors (FLYNN, 1998).

Initial delays in the drafting of the Europol Convention were related precisely to unresolved dilemmas about Europol's sphere of competence (DEN BOER, 1995). The list of crimes capable of being brought within the competence of Europol was expanded greatly between the initial drafts and the final text of the Europol Convention. Europol would initially act to prevent and combat unlawful drug trafficking, trafficking in nuclear and radioactive substances, illegal immigrant smuggling, trade in human beings and motor vehicle crime (Article 2. 2, § 1 Europol Convention). This corresponded to the extended competence of the EDU. Within two years at the latest following the entry into force of the Convention, Europol would also deal with crimes (likely to be) committed in the course of terrorist activities. The reference to terrorism while it was included in the Maastricht Treaty (Article K. 1 TEU), was not included in the first drafts of the Convention. It was added at the insistence of Spain and Greece, two Member States with domestic terrorism. The two-year waiting period was a compromise, allowing Europol to have a warming up period in less stormy waters (VERBRUGGEN, 1995).

The Council could also decide to instruct Europol to deal with other forms of crime listed in the Annex to the Convention. The list included 18 other serious forms of international crime, divided into three categories. The first category covers crimes against life, limb or personal freedom (murder, grievous bodily injury; illicit trade in human organs and tissue; kidnapping, illegal restraint and hostage taking; racism and xenophobia). The second category clusters crimes against property or public goods including fraud (illicit trafficking in cultural goods, including antiquities and works of art; swindling and fraud; racketeering and extortion; counterfeiting and product piracy; forgery of administrative documents and trafficking therein; forgery of money and means of payment; computer crime; corruption). The third category bundles illegal trading and harm to the environment (illicit trafficking in arms, ammunition and explosives; in endangered animal species; in endangered plant species and varieties; in hormonal substances and other growth promoters; environmental crime). The Standing Committee of Experts on International Immigration, Refugee and Criminal law (Meijers Committee) told the House of Lords the list of crimes was arbitrary and argued for an objective standard (HOUSE OF LORDS, 1995). Europol's competence also extended to the related illegal money laundering activities and the related criminal

offences. The concept of related offences was added between November 1994 and July 1995 (BUNYAN, 1995).

All the Europol-crimes must satisfy three criteria, equally defining the competence of Europol (Article 2. 1 Europol Convention). As a first criterion, there should be factual indications that an organised criminal structure is involved. The Europol Convention leaves this notion entirely undefined (*infra*). Nevertheless, in the Convention era organised crime became the primary rationale for Europol (GREGORY, 1998). The use – and misuse – of the notion ‘organised crime’ is well known and well documented (See DEN BOER, 2002). The second criterion requires two or more Member States to be “affected” by the forms of crime in question. It could be that two or more Member States are confronted with a criminal phenomenon. It could also be that they are simply involved in any way (ZANDERS, 1999). Based on this broad interpretation a cross-border element would then not be a prerequisite. The second criterion is not even sufficient, the crimes should also justify a common approach by the Member States owing to their scale, significance and consequences. This third criterion is nothing but an application of the principle of subsidiarity to the Europol-case. It is the principle, defined in the Treaty establishing the European Community (TEC) (OJ C 325 of 24.12.2002), whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level. When a criminal phenomenon or a criminal organisation can be tackled more adequately at the European level, this calls for police cooperation through Europol. The mere fact, however, that forms of crime are brought within Europol’s remit does not warrant a common approach as such, even more so, now the list of Europol-crimes has become longer over the years and remains largely undefined (*infra*).

The Europol Convention had established an order of priority, which was disturbed at a number of occasions. The extension to terrorism was the first example. The two-year waiting period (*supra*) tested the patience of Spain. This had everything to do with the fact that the entry into force of the Europol Convention took longer than expected. Spain once again began to push for a more rapid inclusion of terrorism within the remit of Europol (OCCIPINTI, 2003). The Council Act of 3 December 1998 (OJ C 26 of 30.01.1999) instructed Europol to deal with “crimes (likely to be) committed in the course of terrorist activities against life, limb, personal freedom or property”, as from the date of taking up its activities (1 July 1999) (LAVRANOS, 2003).

A Council Decision of 29 April 1999 (OJ C 149 of 28.05.1999) further extended Europol’s competence to deal with forgery of money and means of payment, one of the crimes listed in the Annex (*supra*). The trigger for yet another extension was the introduction of the euro<sup>2</sup>. With the euro replacing the national currencies of the Member States the traditional (counter) argument of national sovereignty played to a lesser extent. In 2001 Europol and the European Central Bank even signed a strategic cooperation agreement, at the occasion of which Europol Director Storbeck said “organised crime was attracted by the idea of counterfeiting one of the two largest currencies in the world” (EUROPOL, 2001).

2 The euro (€) is the official currency of 16 of the 27 Member States of the EU. The euro was introduced to world financial markets as an accounting currency on 1 January 1999. Euro coins and banknotes entered circulation on 1 January 2002.

At its meeting on 15-16 October 1999 in Tampere, the European Council had called for special action against money laundering, which was seen to be at the very heart of organised crime (Document SN 200/1/99 REV 1). The Council was invited to extend the competence of Europol to money laundering in general (Tampere Milestone Nr. 56). In June 2000 the Portuguese Presidency introduced an initiative to this end (Council document 9426/00 of 26.6.2000). In November 2000 the first of three Protocols amending the Europol Convention was adopted. The so-called 'Money Laundering Protocol' (OJ C 358 of 13.12.2000) extended Europol's competence to money laundering, regardless of the type of offence from which the laundered proceeds originate.

Instead of a further incremental extension of Europol's competence (terrorism, forgery of money and means of payment, money laundering), the entire Annex was now brought within Europol's sphere of competence. The motivation for this exponential extension was that criminals obviously ignored Europol's competence (sic). Information concerning types of crime that fall outside the competence – to the extent it reached Europol at all – was to be regarded as excess information and as such unusable. Europol's support to police authorities in the Member States was consequently impaired (Council document 5134/01 of 9.1.2001). The extension did not require amendments to the Europol Convention, but a Council Decision. The discussions within Council structures did however show a number of Member States in favour of an amendment of the Europol Convention, making Europol competent for international organised crime in general, without limiting the competence of Europol to an enumeration of forms of crime (Council document 11282/01 of 31.7.2001). The initial draft Council Decision of the Swedish Presidency (Council document 6876/01 of 8.3.2001) became a joint Belgo-Swedish initiative (Council document 9092/01 of 11.6.2001). The negotiations from the Europol Working Party (EWP) over the Article 36 Committee (CATS) to the Permanent Representatives Committee (COREPER) led to a political agreement by the JHA-Council of 27-28 September 2002 (Council documents 9093/2/01 of 5.9.2001; 9093/3/01 of 13.9.2001; 9093/4/01 of 20.9.2001; 9093/5/01 of 14.11.2001) and a formal adoption on the Council Decision of 6 December 2001 extending Europol's competence to deal with the serious forms of international crime listed in Annex to the Europol Convention (OJ C 362 of 18.12.2001).

Halfway the Convention era the list of Europol-crimes had taken its final form. However, there remained room for manoeuvre with the first criterion defining the competence of Europol (*supra*). The Danish Initiative of 2002 proposed the deletion of the criterion that an organised criminal structure should be involved (Council document 10307/02 of 2.7.2002). The Europol Joint Supervisory Body (JSB) understood that practice had shown that some forms of serious crime did not fulfil this criterion. Its deletion would then prevent "that Europol is not competent in serious criminal cases that fulfil all the elements of serious international crime but lack a criminal structure. The serial rapist who victimises persons in different Member States but is not part of a criminal structure should be subject of the involvement of Europol in the joint efforts to stop him" (JSB, 2002, p. 4). The Danish Initiative also repealed the enumeration of specific crimes, claiming there was a need to extend Europol's competence to serious international crime in general (Council document 10810/2 of 10.7.2002) (*supra*). The Danish Protocol of November 2003 (OJ C 2 of 6.1.2004) was less far-reaching eventually, only adding "reasonable grounds" to the factual indications that an organised criminal structure is involved and leaving the list of Europol-crimes intact (FLOCH,



2003). Nevertheless, the tone had been set and the Danish Protocol heralded the shift from organised crime to serious crime.

### 2.2.3 *The post-Convention era*

In the post-Convention era serious crime is without a doubt the dominant theme, superseding organised crime (DORN, 2009). The Commission took it one step further in its Proposal for a Europol Council Decision. The Council agreed (Council document 10327/07 of 4.6.2007), disregarding the German Presidency Proposal to add the criterion “when there are serious grounds to believe that these offences may be related to organised criminal activities” (Council document 7539/07 of 19.3.2007). The Europol Council Decision further extends Europol’s competence, as the existence of a criminal organised structure is no longer a limiting element. This would ease support provided by Europol to Member States in relation to criminal investigations where involvement of organised crime is not demonstrated from the start. Still, given the number of crimes (e.g. murder, grievous bodily harm, kidnapping...) that are more often committed outside an organised context, this is a significant change (PEERS, 2007). Now “serious crime” has superseded “organised crime”, Europol joins in with its judicial counterpart Eurojust, which has a general competence for serious crime, particularly when it is organised (Art. 3 (1) Eurojust Decision) (OJ L 63 of 6.3.2002) (BROWN, 2008). This enhances consistency within the third pillar (DE MOOR & VERMEULEN, 2010).

All forms of serious crime that Europol is competent to deal with – other than organised crime and terrorism – are listed in the Annex to the Europol Council Decision. This list does not differ from the present enumeration. To join in with Eurojust, one would have expected “participation in a criminal organisation” to be considered as serious crime as well. Moreover, the offence “participation in a criminal organisation” also figures on the list of the 32 offences within the scope of the European arrest warrant (OJ L 190 of 18.7.2002), upon which the Commission Proposal was based. Remarkably enough, this means that Europol has competence over “organised crime” as form of crime, yet not over “participation in a criminal organisation” as criminal offence.

Now the extension of the competence of Europol has been covered, let us move to the definition of the competence of Europol (2.3), or rather the non-existence of definitions of Europol-crimes (2.3.1). We ask ourselves the question: *What could fill the absence of definitions of Europol-crimes?* (2.3.2).

## 2.3 Defining the competence of Europol

### 2.3.1 *Problem identification*

Although the Europol Convention defined the forms of crime, which Europol was initially competent to deal with (crime connected with nuclear and radioactive substances, illegal immigrant smuggling, trafficking in human beings, motor vehicle crime, illegal money laundering activities, unlawful drug trafficking), none of the forms of crime over which Europol subsequently gained competence have ever been defined. The Europol Council Decision does not remedy this shortcoming either. Instead the forms of crime are to be assessed by the competent national authorities in accordance with

the national law of the Member States to which they belong (Annex, *in fine*). This often leads to the result that the competence of Europol is being interpreted in different ways throughout the EU.

The Europol Information System (IS) (*supra*) is a painful illustration of the non-existence of definitions of Europol-crimes. The IS provides a general information exchange service available to all Member States through their liaison officers and the national units. It is used to store personal information about people who, under the national law of that Member State, are suspected of having committed a crime for which Europol has competence, or where there are serious grounds to believe they will commit such crimes. It allows Member States to search what is in practice “a central EU repository for serious organised crime” (HOUSE OF LORDS, 2008, p. 31). The IS is fed by input from the national units. Research has shown that officials responsible for the data transmission receive limited training on Europol’s sphere of competence and the functioning of the IS. If doubts arise as to the very scope of a Europol-crime, the national official can put a question to Europol; however this option is rarely used (DE BONDT & VERMEULEN, 2009). The consequences of the discretion of the Member States to assess the crimes within Europol’s competence in accordance with their national law are severe, as the same Europol-label (e.g. trafficking in human beings or any other of the Europol-crimes) has up to 27 possible different interpretations. We ask ourselves the question whether anyone knows what is actually in the IS.

### 2.3.2 Solution

What could fill the absence of definitions of Europol-crimes? Is there a solution? A careful analysis of legal and policy documents shows that there have been fruitless suggestions, originating both from within the Council and the European Parliament, to alter the situation.

The Swedish Presidency raised the issue whether definitions were needed for the forms of crime listed in the Annex (Council document 5555/01 of 22.1.2001). The Europol Convention (Article 43. 3) did allow the Council to – unanimously – add definitions to the Annex. It was not a matter of legal basis, but a matter of policy choice. The initial draft Council Decision of the Swedish Presidency extending Europol’s competence to deal with all forms of crime listed in Annex, noted that this extension necessitated the addition of definitions to the Annex. For every form of crime listed in the Annex the draft suggested definitions, although the Presidency was of the opinion that only those forms of crime should be defined where doubts could arise as to the limits of Europol’s competence. Where the drafters got their inspiration from is difficult to ascertain, but at least not from the early days of the harmonisation movement. The joint Belgo-Swedish initiative no longer featured definitions, to the dissatisfaction of Germany that kept calling for definitions to be drawn up and included in the Decision (Council documents 9093/2/01 of 5.9.2001; 14196/01 of 4.12.2001).

The European Parliament also proposed an interesting amendment in its November 2001 legislative resolution (OJ C 140/E of 13.6.2002). If the Council would adopt framework decisions determining the constituent elements of individual criminal offences these should replace the corresponding provisions of the (Annex to the) Europol Convention. Following justification is given in the Turco Report (European Parliament document A5-0370/2001 of 24.10.2001): “in order to maintain in the

Union a clear, uniform legal framework of definitions of criminal offences laid down at European level, the framework decisions adopted by the Council must replace the corresponding provisions of the Europol Convention and the annexes thereto". This explicitly joins in with the harmonisation efforts that have been conducted in the third pillar, on the basis of Article 29 seq. TEU.

The Treaty of Amsterdam brought a new dimension to both police (*supra*) and judicial cooperation in criminal matters. The debate on the need for common principles of substantive criminal law truly gathered momentum with the creation of the area of freedom, security and justice (DE BONDT & VERMEULEN, 2009). Article 29 TEU provides that this area of freedom, security and justice shall be achieved through closer police cooperation (*supra*), judicial cooperation and, where necessary, through approximation of rules on criminal matters in the Member States. According to Article 31. 1 (e) TEU, approximation shall be achieved by progressively adopting 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. Article 34. 2 (b) TEU finally provides that the Council may adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions are binding upon the Member States as to the result to be achieved, but leaves to the national authorities the choice of form and methods, without entailing direct effect. Through the adoption of framework decisions the so-called 'framework decision substantive criminal law' came into being (VERMEULEN & DE BONDT, 2009).

The enumeration of the fields that should be subject of harmonisation was slightly deceptive, as the open-ended concept of 'organised crime' enabled the Union to strengthen its grip on practically all criminal law of the Member States (VAN DER WILT, 2002). The 1998 Vienna Action Plan (OJ C 19 of 23.1.1999), the 1999 Tampere Presidency Conclusions (*supra*) and the 2000 Millennium Strategy (OJ C 124 of 3.5.2000) further extended the scope to trafficking in human beings, especially the exploitation of women and the sexual exploitation of children, drug offences, corruption, counterfeiting of the euro, tax fraud, computer fraud, terrorist offences, environmental crime, cyber crime, money laundering, as long as these offences are linked to organised crime, terrorism and/or drug trafficking (VERMEULEN, 2007). Research has nevertheless shown that the approximation process with regard to the constituent elements of criminal acts has extended way beyond the boundaries set by both the TEU and the principal EU policy documents (DE BONDT & VERMEULEN, 2009).

Did the forms of serious crime Europol is competent to deal with also become subject of harmonisation? Evidently. Between 2000 and 2008 Council framework decisions covered following Europol-crimes (in chronological order):

- Forgery of money and means of payment: Council Framework Decision of 29 May 2000 on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro (OJ L 140 of 14.6.2000), as amended by Council Framework Decision of 6 December 2001 (OJ L 329 of 14.12.2001); Council Framework Decision of 28 May 2001 combating fraud and counterfeiting of non-cash means of payment (OJ L 149 of 2.6.2001);
- Money laundering: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime (OJ L 182 of 5.7.2001);

- Terrorism: Council Framework Decision of 13 June 2002 on combating terrorism (OJ L 164 of 22.6.2001), as amended by Council Framework Decision of 28 November 2008 (OJ L 330 of 9.12.2008);
- Trafficking in human beings: Council Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ L 203 of 1.8.2002); Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography (OJ L 13 of 20.1.2004);
- Illegal immigrant smuggling: Council Framework Decision of 28 November 2002 on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence (OJ L 328 of 5.12.2002), complemented by Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ L 328 of 5.12.2002);
- Corruption: Council Framework Decision of 22 July 2003 on combating corruption in the private sector (OJ L 192 of 31.7.2003);
- Unlawful drug trafficking: Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (OJ L 335 of 11.11.2004);
- Computer crime: Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems (OJ L 69 of 16.3.2005);
- Organised crime: Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300 of 11.11.2008)<sup>3</sup>;
- Racism and xenophobia: Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328 of 6.12.2008).

These instruments offer harmonised minimum definitions for forms of crime both the Europol Convention and the Europol Council Decision leave (largely) undefined. The Europol Convention did define the forms of crime, within Europol's initial competence by reference to certain international or European legal instruments criminalising the conduct in question. Its rationale lies in the fact that, unlike the authorities in the Member States, Europol does not work in the context of a national criminal justice system which has defined the conduct described. In this perspective reliance on a common binding instrument is a safe mechanism (KLIP, 2009).

What was available as substantive criminal law *acquis* at the time of drafting was used in the Europol Convention. Illegal money-laundering activities, for example, means the criminal offences listed in Article 6 (1) to (3) of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS no. 141, Strasbourg, 8.11.1990). Crime connected with nuclear and radioactive substances is defined with reference to United Nations (UN) and Euratom instruments. Where no common international or European ground could be found, the Europol Convention introduced its very own Europol-definitions (e.g. illegal immigrant smuggling, trafficking in human beings, motor vehicle crime), even though in the meantime some have been superseded and are no longer compatible with the new

3 Europol has competence over 'organised crime' as form of crime, but not over 'participation in a criminal organisation' as criminal offence (supra). The 2008 Council Framework Decision precisely harmonises offences relating to participation in a criminal organisation.

harmonised offence definitions. The Europol-definition of trafficking human beings for example is no longer consistent with the EU-definition (VAN BRIEL, SNEIJERS, VEREECKE & BOSSCHEM, 2002). Unlawful drug trafficking is somewhat particular. Although part of Europol's initial competence, it was only defined in 2003 by the Danish Protocol, with reference to the 1988 UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (UNTS no. 27627, Vienna, 20.12.1988).

What was not yet available in the early days of Europol, is now there for the taking: an impressive *acquis* of JHA substantive criminal law, consisting of – but not limited to – framework decision substantive criminal law. There are also other EU instruments and even JHA non-EU instruments, for within EU context approximation is also pursued via other instruments, originating from the EU (conventions, first pillar instruments) and also from other cooperation levels (Council of Europe, United Nations) (VERMEULEN & DE BONDT, 2009). This would allow to define up to 80-90% of the Europol-crimes, without even having to reinvent the wheel. We argue that formally recognising the readily available minimum definitions would not only be a safe mechanism for Europol, it would also be a coherent mechanism and a solution to the identified problem. It would in fact amount to another application of the subsidiarity principle, on top of the existing criterion that the crimes should justify a common approach owing to their scale, significance and consequences (*supra*).

When the *minimum* definitions for the Member States were to function as *maximum* definitions when shaping Europol's competence, we figure this would draw a clear(er) line between national and Union level (See for an interesting discussion DE HERT, 2004). The implementation of the framework decision substantive criminal law has brought a layered structure to national substantive criminal law (VERMEULEN & DE BONDT, 2009). Within national substantive criminal law provisions one can identify an EU inspired component (notably a framework decision component), complementing more national components. The EU inspired component has been jointly identified by all EU Member States, as framework decisions fall under the third pillar unanimity rule. If Europol were to become competent only for the top layer, this could paradoxically strengthen its position. Less is in fact more. The national law enforcement authorities would of course remain competent for both the top and the bottom layer. Europol would remain the EU organisation supporting national law enforcement action, but only for the top layer. The competence over the top layer would thus not be exclusive but concurrent.

Using strict boundaries would facilitate the discussions to extend Europol's powers, whether or not in the executive sense. We argue that the discussion on the definition of the Europol-crimes should be untangled from the question as to whether executive powers for Europol are desired, although in literature the former is seen as a prerequisite for the latter (ANDERSON et al., 1995; BENYON et al. 1993; LAVRANOS, 2003). Instead of talking in vain about executive powers, we believe there are more urgent matters. For example, Europol has to rely on the national units for its 'feeding'. It is the task of the national units to supply Europol on their own initiative with the information and intelligence necessary for it to carry out its tasks (Article 4. 4, 1) Europol Convention). There is presently no right for Europol to claim information from the Member States. Perhaps if Europol's competence was limited by agreed maximum definitions, such a right would be easier for the Member States to digest. In general, using strict bounda-

ries would simplify the facilitation of exchange of information and the development of criminal intelligence. In other words, it would simplify Europol's core business.

To conclude our first part we remind that Europol was not established to deal with local or minor offences, but to give a European dimension to the investigation of crime of a European dimension (KLIP, 2009). Our suggestion would be for Europol to do this on the basis of offence definitions which also have a clear European dimension. To support our suggestion we turn the US, where the FBI provides an interesting perspective.

### 3 The Competence of Europol in Comparative Perspective

#### 3.1 Introducing: the FBI

With a population of some 306 million people, all of whom are under the authority of competing political jurisdictions at federal, state, county and local levels, law enforcement in the US reflects a structure more complex than in any other country (INCIARDI, 2007). The dominant tradition in American law enforcement is local control. This localised approach to law enforcement was inherited from England during the colonial period (WALKER, 1992). As a result American policing is characterized by fragmentation, variety and above all decentralisation. That is, there is no national police force per se.

The US Constitution does not provide expressly for the establishment and maintenance of police services, nor does it prohibit such services. The implied powers of Clause 18 (*infra*) of Article I, Section 8, which provides for the common defence and for the promotion of the general welfare of the people, has been interpreted as enabling the federal government to establish federal law enforcement organisations. Therefore, the US Constitution is the basis for federal law enforcement. However, this is not to be confused with the concept of source, which is the act or instrument by which a specific law enforcement agency is created. The source of all federal law enforcement agencies is US Congress. It is Congress that enacts appropriate legislation for an agency's creation and maintenance (WALDRON, 1976).

In the US there is no single federal agency responsible for the enforcement of all federal laws. There are approximately 50 federal law enforcement agencies. Most federal police agencies have limited powers and their investigative powers are narrow in scope. Federal law enforcement agencies can be found in the Departments of Justice, Treasury, State, Agriculture, Transportation, Interior, Transportation, Education and the US Post Office (IBBETSON & PALMIOTTO, 2006).

The Federal Bureau of Investigation (FBI) is the primary law enforcement agency in the Department of Justice (TORRES, 1985; DOJ, 2009). The FBI gives as date of its founding 26 July 1908. Yet, the formation of what is now considered to be the elite law enforcement agency dates back to the late 19th century (DEFLEM, 2006). When it needed agents to investigate violations of the few federal criminal statutes that existed, the Office of the Attorney General, created by Congress in 1789, borrowed Secret Service agents from the Treasury Department. In 1907 President Roosevelt requested Congress to create a new law enforcement agency in the Justice Department. When Congress opposed – out of fear of a 'secret police' – Roosevelt created the Bureau of

Investigation by executive order. Congress added the word ‘federal’ in 1935 (See for a brief history THEOHARIS et al., 2000).

Many consider the FBI to be a general agency because its responsibilities extend into all major areas of federal criminal law. However, as an investigative agency, it does not bear the general peacekeeping, traffic control and social service functions that occupy much of the effort of general police agencies at state and local level (DE FEO, 1994; WALKER, 1992). In addition to the traditional law enforcement responsibilities, the FBI also has significant intelligence responsibilities (KOLETAR, 2005; POVEDA, 2007). In literature – both European (VERBRUGGEN, 1995) and American (VIZZARD, 2008) – it is seen as a problem that the FBI is a criminal law enforcement agency and an intelligence agency at the same time, reporting to both the Attorney General and the Director of National Intelligence. The traditional attitude of most countries is to give typical police tasks and intelligence functions to different agencies. The line between law enforcement and intelligence may not be a bright one, but nonetheless, they are distinct missions.

According to the FBI however, “History has shown that we are most effective in protecting the US when we perform these two missions in tandem” (FBI, 2004a, p. 23). “By definition”, investigations of international terrorism would be both criminal and intelligence investigations. They are criminal investigations since international terrorism against the US constitutes a violation of the federal criminal code<sup>4</sup>. They are also intelligence investigations because their objective is “the detection and counter-acting of international terrorist activities” and because they employ the investigative tools that are designed for the intelligence mission of protecting the US against attack or other harm by foreign entities. Although terrorism had gradually developed as an FBI priority (*infra*), the events of 11 September 2001 have launched a new phase in the FBI’s development (MUELLER, 2003). The US Patriot Act of 26 October 2001 removed the legal barriers between criminal and intelligence operations. The FBI formalised this merger by consolidating the separate case classifications for *criminal* international terrorism investigations and *intelligence* international terrorism investigations into a single classification (number 315) for international terrorism (FBI, 2008). The National Academy of Public Administration (NAPA) recently dismissed the division of the FBI into two agencies in a report entitled *Transforming the FBI: Progress and Challenges* (NAPA, 2005), although no supportive evidence was offered (VIZZARD, 2006). For example, no comparison was made between the US and the United Kingdom with its MI5 security service. Unlike US counterpart FBI, Europol is restricted to pure law enforcement. Whereas the FBI has full investigative powers, Europol has none, although the role of Europol in JITs (*supra*) could be seen as a foretaste of an executive European Police Office (DE MOOR, 2009).

There is no Europol Convention-like ‘FBI Charter’ (ELLERMAN, 2004). Federal law gives the FBI the authority to investigate all federal crime not assigned exclusively to another federal agency (US Code, Title 28, Chapter 33 – Federal Bureau of Investigation, Section 533; Code of Federal Regulations, Title 28, Subpart P – Federal Bureau of Investigation, Section 0.85). Additionally, there are laws such as the Congressional Assassination, Kidnapping and Assault Act (US Code, Title 18, Section 351) giving

4 We note that there actually is no federal code worthy of the name (*infra*). We also note that there is no single federal law making terrorism a crime, although there are various executive orders, presidential decisions, directives and federal criminal statutes addressing the issue of terrorism.

the FBI responsibility to investigate specific crimes. The FBI has special investigative jurisdiction to investigate violations of state law in limited circumstances, specifically felony killings of state law enforcement officers (US Code, Title 28, Chapter 33, Section 540), violent crimes against interstate travellers (US Code, Title 28, Chapter 33, Section 540A) and serial killings (US Code, Title 28, Chapter 33, Section 540B). A request by an appropriate state official is required before the FBI has the authority to investigate these matters. The FBI also has authority to investigate threats to national security in accordance with Presidential executive orders, Attorney General guidelines and various statutory sources (See Executive Order 12333; US Code, Title 50, Chapter 15 – National security, Sections 401 et seq. and Chapter 36 – Foreign intelligence surveillance, Sections 1801 et seq.). Threats to the national security are defined as: international terrorism, espionage and other intelligence activities, sabotage and assassination, conducted by, for or on behalf of foreign powers, organisations or persons; foreign computer intrusion; and other matters determined by the Attorney General consistent with Executive Order 12333 or any successor order.

The FBI's dual responsibility also shows from its current priorities. There are three national security priorities (counterterrorism, counterintelligence and cyber crime) and five criminal priorities (public corruption, civil rights, organised crime, white-collar crime, violent crime). In 1998 the FBI established a five-year strategic plan to set investigative priorities in line with a three-tier structure. Tier 1 included those crimes or intelligence matters – including terrorism – that threaten national or economic security. Tier 2 included offences involving criminal enterprises, public corruption and violations of civil rights. Tier 3 included violations that affect individuals or property. On 11 September 2001 the prevention of further terrorism became the Bureau's dominant priority. In May 2002 this prioritisation was formalised by issuing a new hierarchy of programmatic priorities, with counterterrorism at the top. The current priorities were developed by evaluating each criminal and national security threat according to three factors: 1) significance of the threat to the security of the US, as expressed by the President in National Security Presidential Directive 26; 2) the priority the American public places on the threat and 3) the degree to which addressing the threat falls most exclusively falls within the competence of the FBI (FBI, 2004b). The FBI has 15 investigative programs corresponding to the 8 priorities and mirroring the competence of the FBI (*infra*). There are programs devoted to *inter alia* counterterrorism, counterintelligence, cyber crime, public corruption, civil rights, organised crime, violent gangs, white-collar crime, significant violent crime, fugitives, crimes against children, art crime, environmental crime (FBI, 2008a).

Next up, is the competence of the FBI (3.2). The FBI has a century of history as a criminal law enforcement agency (See FBI, 2008b). Initially, the competence of the FBI included only a limited number of criminal offences. Yet, the FBI would rapidly become the most important federal law enforcement organisation in the US, especially as the FBI was assigned to enforce new federal statutes. The extension of the competence of the FBI and the extension of federal criminal law go hand in hand. Before examining the federalisation of criminal law (3.2.2), we give some basic constitutional features of the US criminal justice system, or rather criminal justice systems (3.2.1). Mirroring the first part on Europol, we end by examining the extension (3.2.3) and the definition (3.2.4) of the competence of the FBI.



## 3.2 The competence of the FBI

### 3.2.1 *Basic constitutional features of the US criminal justice system*

Since the US has a federal form of government, there are two criminal justice processes – that of the federal government and that of the 50 states (COLE & SMITH, 2005). Looking from the outside, this appears to be a “pagaille de confusion” (BLAKESLEY & CURTIS, 1992, p. 334). The situation in the US is complicated by the fact that governmental power, including the power to create and enforce criminal law, is divided between two sets of sovereign powers: the federal government and the 50 states (LAFAVE & SCOTT, 1986). It is a recognised constitutional principle, deeply rooted in the American criminal justice system, that the general police power resides in the states, not in the federal government (VON MEHREN & MURRAY, 2007). The careful constitutional limitation of the federal government’s power is part of a deliberate design. Historically, centralisation of criminal law (enforcement) power in the federal government has been perceived as creating potentially dangerous consequences and has therefore been avoided (ABA, 1998).

The federal government only possesses those powers expressly or impliedly granted by the US Constitution (TRIBE, 2000; CHOPER, FALLON, KAMISAR & SHIFFRIN 2001). Only five clauses suggest express criminal law powers. One is treason (Article III, Section 3, Clause 2). Counterfeiting is mentioned in Article I, Section 8 and so are piracy, the law of nations and military crimes. However, implied powers exist to establish crimes directly related to an express power (e.g. the power to regulate interstate commerce, to establish post offices, to tax, to prosecute war...) on the basis of the so-called ‘necessary and proper clause’: “The Congress shall have the power (...) To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof” (Article I, Section 8, Clause 18).

The states have reserved all other powers which the US Constitution does not expressly deny: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people” (Amendment X).

### 3.2.2 *The federalisation of criminal law*

The ‘federalisation’ of criminal law – that is Congress’ increasing fondness for making federal crimes of offences that traditionally were matters left to the states – has been well documented and much lamented (O’SULLIVAN, 2006). The American Bar Association (ABA) Task Force on the Federalization of Criminal Law issued a report in 1998 that focused on – and criticised – Congress’ role in ‘federalising’ crime. It noted that the impetus for the increased federal presence did not appear to be grounded on considerations of respective federal and state competence: “New crimes are often enacted in patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need” (ABA, 1998, p. 14). Scholars have recognised that a crime being considered for federalisation is often “regarded as appropriately federal because it’s serious and not because of any structural incapac-

ity to deal with the problem on the part of state and local government” (ZIMRING & HAWKINS, 1996, p. 20).

Until the Civil War (1861-1865), only a small number of federal offences existed. Federal crimes were limited to those necessary to prevent injury to or interference with the federal government itself or its programs. After the Civil War, Congress expanded the scope of federal criminal jurisdiction to matters clearly within the police powers of the states (SCHWARTZ, 1948; BEALE, 1995). In 1872 Congress included an antifraud provision in the codification of the postal laws. Although Congress could point to its constitutional power to establish post offices, the concept of ‘mail fraud’ as a federal crime marked the first serious trenching on state criminal jurisdiction. At the turn of the century, Congress discovered the interstate commerce clause as a basis for federal criminal jurisdiction (DE FEO, 1994), an important clause because it was also the major means to establish an economic union for free trade within the US. But it was misused (HUGHES, 1997). The power to regulate interstate commerce was given a very broad interpretation. In short, “it affects interstate commerce if Congress says it does” (HUGHES, 1997, p. 155). The ABA Task Force revealed a startling fact about the explosive growth of federal criminal law: more than 40% of the federal criminal provisions enacted since the Civil War have been enacted since 1970 (ABA, 1998).

Unlike the states, whose codifications of criminal law, modelled after the American Law Institute Model Penal Code, resemble in substance the national criminal codes in Europe (LENSING, 1993), the federal government has never had a true criminal code. The closest Congress has come to enacting a code, was the creation of Title 18 of the US Code<sup>5</sup> in 1948 (O’SULLIVAN, 2006). A 19-year effort (from 1966 to 1984) to develop and enact a federal criminal code ultimately failed (JOOST, 1997). Title 18 is a compilation, rather than a code and has been described as “an odd collection of two hundred years of ad hoc statutes, rather than a unified, interrelated, comprehensive criminal code” (RAINER, 1989).

How many federal crimes are there at present? Getting an accurate count is not as simple as counting the number of federal statutes. As the 1998 ABA report stated: “So large is the present body of federal criminal law that there is no conveniently accessible, complete list of federal crimes” (p. 9). While a count of 3,000 federal crimes was made in 1989 (RAINER), the ABA Task Force found this number outmoded by 1998 (ABA). A Federalist Society study estimated in 2004 that there are more than 4,000 federal crimes, some 1,200 of which are jumbled together in Title 18, with the remainder scattered throughout the remaining 49 titles of the US Code (BAKER & BENNET, 2004).

### 3.2.3 Extending the competence of the FBI

Federal law gives the FBI the authority to investigate all federal crime not assigned exclusively to another federal agency (*supra*). The FBI is responsible for over 200 categories of federal crime. Unfortunately, there is no list. The extension of the competence of the FBI and the extension of federal criminal law go hand in hand, as the FBI was assigned to enforce the bulk of these new federal statutes (POVEDA, 2007). We illustrate this with the milestone extensions over the last 100 years.

5 The US Code is the codification by subject matter of the general and permanent laws of the US. It is divided by broad subjects into 50 Titles and published by the Office of the Law Revision Counsel of the US House of Representatives. Since 1926 the US Code has been published every six years.

The FBI started off in 1908 with competence over antitrust matters, land fraud, copyright violations, peonage and some 20 other matters. The 1910 White Slave Traffic Act (Mann Act) put responsibility for interstate prostitution under the Bureau (US Code, Title 18, Chapter 117, Section 2421). The 1919 National Motor Vehicle Theft Act (Dyer Act) did the same for interstate car theft (US Code, Title 18, Chapter 113, Section 2311). Unlike the Mann Act, the interstate transportation of stolen vehicles really was a vital part of the problem, because it made apprehension of the criminals and recovery of the vehicles much more difficult (BRADLEY, 1984). A large number of federal statutes were adopted in the 1930s, none of which broke new theoretical ground, as the interstate commerce clause had become a well-established basis for federal criminal jurisdiction (BEALE, 1995). Bank robbery, extortion and robbery affecting interstate commerce, interstate transmission of extortionate communications, interstate flight to avoid prosecution, interstate transportation of stolen property... What all these crimes had in common was an interstate nexus justifying federal intervention in general and FBI competence in particular. The 1934 Federal Fugitive Felon Act for example was only designed to provide a legal basis for FBI assistance in apprehending the fugitive (US Code, Title 18, Chapter 49, Section 1073) (SCHWARZ, 1948). During the same period Congress also enacted the Federal Kidnapping Act, in the commotion surrounding the kidnapping of the Lindbergh baby in 1932 (US Code, Title 18, Chapter 55, Section 1201) (FINLEY, 1940).

After World War II, the FBI further intensified its position, as it became responsible for the enforcement of hundreds of federal criminal statutes. In the 1950s civil rights violations and organised crime became matters of increasing concern. As in the past, lack of competence hindered the Bureau from responding to these problems (FBI, 2008a). It was under the 1964 Civil Rights Act and the 1965 Voting Rights Act that the Bureau received the authority to investigate many of the wrongs done to the African Americans in the South and elsewhere (JEFFREYS-JONES, 2007). Under the existing laws the Bureau's efforts against organised crime also started slowly. In the 1960s and 1970s Congress employed the power to regulate interstate commerce to tackle organised crime (See BRADLEY, 1984). The first of these was the 1961 Travel Act (US Code, Title 18, Chapter 95, Section 1952) authorising federal criminal penalties for interstate travel intended to facilitate gambling, narcotic traffic, prostitution, extortion and bribery – illegal activities frequently associated with organised crime. With the 1968 Consumer Credit Protection Act, Congress authorised criminal penalties for extortionate credit transactions ('loan sharking'), providing a source of funds for organised crime (US Code, Title 18, Chapter 42, Section 891). Congress also enacted the Racketeer Influenced and Corrupt Organizations Act (RICO) (Title IX of the 1970 Organized Crime Control Act). 'Racketeering activity' is an example of a compound offence, i.e. an offence that defines the violation of existing federal and state offences as elements of a new federal offence (US Code Title 18, Chapter 96, Section 1961). It is striking to read that RICO has virtually never been used in a case, which was not reachable by other means (both federal and state) on the books prior to its passage (BRADLEY, 1984). Though RICO ultimately generated more cases, the loan sharking provisions broke new theoretical ground as Congress criminalised a whole class of activity (loan sharking) based upon a finding that the class of activity 'affected' interstate commerce (BEALE, 1995). The Controlled Substances Act, a comprehensive federal drug control statute, was enacted in 1970 on the basis of a similar finding. Moreover, Congress

noted that the possession and improper use of controlled substances also had “a substantial and detrimental effect upon the health and general welfare of the American people” (US Code, Title 21, Chapter 13 – Drug abuse prevention and control). Every drug crime that was an offence under state law could now also be tackled federally (SCOTT WALLACE, 1993). The FBI however was not given the lead when it comes to the enforcement of federal drug laws. For years the FBI resisted pressure from Congress and the Justice Department and only became involved in drug enforcement in the early 1980s (VERBRUGGEN, 1995). The FBI has concurrent jurisdiction with the Drug Enforcement Administration (DEA), another agency within the Department of Justice (Code of Federal Regulations, Title 28, Subpart P – Federal Bureau of Investigation, Section 0.85). The DEA is a single mission agency, dedicated to the enforcement of federal drug laws and policies (See DEA, 2003). The rivalry between the DEA and the FBI is legendary. At present the FBI acknowledges that the DEA is the US Government’s primary investigative agency to combat drug trafficking. The FBI also has an important role to play, but seeks to complement DEA’s efforts through an integrated approach (FBI, 2004b). The 1980s and 1990s brought increased public concern with violent crime and Congress responded with the enactment of a number of new federal offences, such as carjacking and new firearms offences.

Enactment of each new federal crime conferred new federal investigative powers on federal agencies, notably on the FBI. Unlike Europol, dealing with a relatively long list of crimes as from 2001 already, the FBI was set up with a very limited number of offences it could investigate. Compared to Europol, there has been a gradual, rather than an exponential increase in the competence of the FBI over the past 100 years. The FBI has never taken the lead in drug enforcement, whereas drug trafficking provided the primary rationale for Europol during the pre-Convention era. In the Convention era this rationale was superseded by the notion ‘organised crime’. The extension of the competence of the FBI, as a correlate to the extension of federal criminal law, was carried out on the basis of interstate commerce, a notion as eroded as organised crime. The question we raised with regard to the extension of Europol’s competence, whether there was a genuine ‘need’ to do so, also proved to be a source of concern as to the extension of the competence of the FBI.

### 3.2.4 *Defining the competence of the FBI*

The reason for putting Europol in comparative perspective in the first place is to find support for our suggestion to shape to competence of Europol on the basis of offence definitions which have a clear European dimension, instead of leaving it up to the Member States in accordance with national law (*supra*). *How is the competence of the FBI defined?* is the main question of our second part. Our research hypothesis is that federal notions and definitions, emanating ‘federal competence worthiness’, shape this competence. We look beyond the obvious fact that the US has a federal form of government and that the EU can at the most be termed ‘quasi-federal’ (See SCHMIDT, 2006; MENON & SCHAIN, 2006). Content-wise the resemblances are far greater, which makes we are not comparing apples and oranges. Today one can no longer maintain that criminal law in the EU is solely matter of national sovereignty (TADIĆ, 2002). The Treaty of Amsterdam has drastically increased the influence of the EU on internal decision-making and room for autonomy of Member States concerning co-operation

in criminal matters, notably the approximation process with regard to the constituent elements of criminal acts with a European dimension (*supra*).

Federal notions and definitions indeed shape the competence of the FBI. As mentioned earlier, the source of all federal law enforcement agencies, including the FBI, is Congress. Federal law gives the FBI the authority to investigate all federal crime not assigned exclusively to another federal agency. The source of federal substantive criminal law is Congress as well. Federal crimes, scattered throughout the US Code, are distinct from neatly codified state crimes, at least for their enactment and their enforcement. However, we have demonstrated that the substance of federal criminal law has come to duplicate much of state criminal law. Therefore, the boundaries between the federal top layer and the state bottom layer are not as strict as they would seem.

Federal substantive criminal law also presupposes ‘federal competence worthiness’. The erosion of the commerce clause, makes that this may not be the case for all 4,000 federal crimes. It is even particularly hard to find important offences because they are surrounded by trivial ones (Joost, 1997). Also within the competence of the FBI there are more significant crimes and less significant crimes in terms of seriousness (SHAPIRO, 1995). Misuse of ‘Smokey Bear’, the mascot of the US Forest Service, is a federal crime, for example (US Code, Title 18, Chapter 33, Section 711). The same goes for the crime of interstate transportation of a defective refrigerator (US Code, Title 15, Chapter 26, Section 1211). In both cases the FBI is competent. Nevertheless, this does not alter the fact that the FBI, being a federal law enforcement organisation, enforces federal criminal law. The enforcement of state law is left to state law enforcement agencies. In practice, most criminal conduct has always been – and still is – defined by state law, investigated by state agents, prosecuted by state prosecutors, tried in state courts and punished in state prisons. Federal law enforcement for criminal activity essentially local in character should generally not be undertaken. Translated into ‘Eurospeak’ this almost amounts to an application of the principle of subsidiarity. Subsidiarity is already the guiding principle for Europol and is ‘revamped’ in our suggestion (*supra*).

#### 4 Conclusion

In two parts we elaborated on the overall-question: *How to shape the competence of Europol?* We devoted the first part of our contribution to the competence of Europol. We introduced Europol as the EU law enforcement organisation handling criminal intelligence and identified three ‘eras’ for further analysis: the pre-Convention era, the Convention era and the post-Convention era. We analysed the extension of the competence of Europol. Our main questions were: *Was there a trigger to extend the competence of Europol time and again? Was there a genuine ‘need’ to do so?* Drug trafficking provided the main rationale for Europol in the pre-Convention era. The EDU, which formed the nucleus of Europol, kicked off with competence for illicit drug trafficking. However, it was envisaged from the outset that Europol would not be a single mission agency. In anticipation of a Europol Convention, Europol’s initial competence was extended from one area to four – adding illegal trade in radioactive and nuclear materials, crimes involving clandestine immigration networks, illegal vehicle trafficking – without

any reference to the European or national parliaments and without any motivation whatsoever. The extension to trafficking in human beings was prompted by a domestic scandal, rather than responding to an identifiable need. In the Convention era, organised crime became the primary rationale for Europol. The list of crimes capable of being brought within the competence of Europol was expanded greatly between the initial drafts and the final text of the Europol Convention. The Europol Convention had established an order of priority which was disturbed at a number of occasions (terrorism, forgery of money and means of payment, money laundering). Instead of a further incremental extension of Europol's competence, the entire Annex, including 18 other serious forms of international crime, was brought within Europol's sphere of competence. Halfway the Convention era the list of Europol-crimes had taken its final form. However, there remained room for manoeuvre. In the Europol Council Decision the existence of an organised criminal structure is no longer a limiting element. This makes that in the post-Convention era serious crime is the dominant theme, superseding organised crime.

Although the Europol-Convention defined the forms of crime, which Europol was initially competent to deal with, none of the forms of crime over which Europol subsequently gained competence have ever been defined. Instead the forms of crime are to be assessed by the competent national authorities in accordance with the national law of the Member States to which they belong. The non-existence of definitions of Europol-crimes leads to the result that the competence of Europol is being interpreted in different ways throughout the EU. The Europol Information System is a painful illustration, as the same Europol-label has up to 27 possible different interpretations. We asked ourselves the question: *What could fill the absence of definitions of Europol-crimes?* A careful analysis of legal and policy documents showed that there have been fruitless suggestions, both from within the Council and the European Parliament, to alter the situation. The European Parliament explicitly joins in with the harmonisation efforts that have been conducted in the third pillar, on the basis of Art. 29 seq. TEU. We endorsed this suggestion. We demonstrated how the forms of serious crime Europol is competent to deal with also became subject of harmonisation, through the adoption of framework decisions. These instruments offer harmonised minimum definitions for forms of crime both the Europol Convention and the Europol Council Decision leave (largely) undefined. What was not yet available in the early days of Europol, is now there for the taking: an impressive *acquis* of JHA substantive criminal law, consisting of – but not limited to – framework decision substantive criminal law, allowing to define up to 80-90% of the Europol-crimes. We argued for the sake of coherence to formally recognise the readily available minimum definitions. When the *minimum* definitions for the Member States were to function as *maximum* definitions when shaping Europol's competence, we showed how this would draw a clear(er) line between national and Union level, although Europol's competence over the top layer of substantive criminal law with a clear EU dimension would not be exclusive but concurrent. In general, using strict boundaries would simplify Europol's core business (information-related tasks). It would also facilitate the discussions to extend Europol's powers, whether or not in the executive sense.

To support our thesis we turned to the US, where the FBI provided an interesting perspective. We introduced the FBI, with its dual responsibility for law enforcement and national security. Then we dealt with the competence of the FBI. The FBI has a

century of history as a criminal law enforcement organisation and is responsible for more than 200 categories of federal crime. We gave some basic constitutional features of the US criminal justice system. We illustrated how the extension of federal criminal law and the extension of the competence of the FBI went hand in hand. The question we raised with regard to the extension of Europol's competence, whether there was a genuine 'need' to do so, also proved to be a source of concern as to the gradual rather than exponential increase in the competence of the FBI. *How is the competence of the FBI defined?* was the main question of the second, comparative part of our contribution. We looked beyond the obvious fact that the US has a federal form of government and that the EU can at the most be termed 'quasi-federal'. Content-wise the resemblances are far greater. We were largely confirmed in our views that federal notions and definitions, emanating 'federal competence worthiness' shape the competence of the FBI. Ergo, we were provided with yet another argument to also use European notions and definitions, emanating a 'Europol competence worthiness', to shape the competence of Europol. This would make all the more sense in the light of Europol's change of status from intergovernmental organisation to Community agency as from 2010.

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