magistrates, the Joint Actions of 29 June 1998 on the establishment of a European Judicial Network and on good practice in mutual legal assistance in criminal matters, and the Joint Action of 3 December 1998 on money laundering, the identification, tracing, freezing, seizing, confiscation and confiscation of instrumentalities and the proceeds from crime. Maastricht also encouraged the drafting of new Conventions (the Convention on simplified extradition procedure, the Convention on extradition between the Member States, the Eurcopol Convention, the Convention on the use of information technology for customs purposes, the Convention on the protection of the European Communities' financial interests, etc.) but the traditional reluctance of Member States to ratify them continued.

The difficulties raised by Maastricht were considerable. The Treaty merely required judicial cooperation as a matter of 'common interest' between Member States. It did not clearly define the objectives to be achieved and the priorities in the JHA area and accorded excessive weight to unanimity in the cooperation process. It made entry into force of the Conventions conditional on ratification by the Fifteen and did not give the other rules approved in the JHA area clear binding effect. This was compounded by a staunch defence by Member States of the importance of cultural differences in the way justice was conceived and their belief that judicial action, particularly in criminal matters, was essentially an issue of national sovereignty, a view inconsistent with the feeling of mutual trust required for any type of integration. 4

4. The Treaty of Amsterdam marked a new stage in the process of European construction, in which judicial cooperation ceased to be a matter of 'common interest' and came one of the main objectives of the European Union. The proposal presented by the European Commission in 1996 on the creation of an area of freedom, security and justice had highlighted the need to provide citizens with a high level of security in a Europe which was rolling back its borders and which had achieved significant progress in the Schengen area.

Amsterdam gave the European Union a new objective: the area of freedom, security and justice, as provided for in Title IV of the Treaty establishing the European Community (Rome, 1957), Title VI of the Treaty on European Union (which Maastricht had decreed to cooperate in the fields of justice and home affairs and which, as amended by Amsterdam, incorporated 'provisions on police and judicial cooperation in criminal matters') and Title X of the Treaty establishing the European Community (Rome, 1957) concerning customs cooperation. As from the entry into force of the Amsterdam Treaty on 1 May 1999, the Community was not solely concerned with achieving a common market or an equivalent area of free movement of persons with no internal borders; the area in question also had to provide the citizens of the Union with a high level of protection and easy access to justice in any part of the territory of the Member States. Thus, European construction under the Treaty became a project at the service of people as well.

Amsterdam was the beginning of a key stage in the consolidation of the legislative framework of the Communities and the Union, particularly as regards matters which had hitherto come under the Third Pillar.

1 MIRANDA RODRIGUEZ, A./LOPES DA MOTA, J. L.: Para uma Políticas Criminal Europeus (Towards a European Policy in Criminal Matters), pp. 5 et seq.
Council committed Member States at the highest level to creating a European Judicial Area by 2004. Subsequently, the Council and the Commission each drew up their programmes of measures for applying the principle of mutual recognition of judicial decisions—considered by Tampere to be the cornerstone of European construction—in civil and commercial matters 11, on the one hand, and in criminal matters 14 on the other.

4.1. In order to establish progressively an area of freedom, security and justice, Article 61(a) TEC authorizes the Council to adopt «measures in the field of judicial cooperation in civil matters». Article 65 TEC provides that such measures shall include those aimed at «improving and simplifying the system for cross-border service of judicial and extrajudicial documents, the taking of evidence and the recognition and enforcement of decisions in civil and commercial cases, as well as measures intended to promote the compatibility of the rules concerning the conflict of laws and jurisdiction and those whose purpose is to «eliminate obstacles to the good functioning of civil proceedings», if necessary by promoting «the compatibility of the rules on civil procedure applicable in the Member States».

The following acts have been adopted under Article 65 TEC in the area of judicial cooperation in civil matters: Council Regulations Nos. 44/2001 of 22 December and 1347/2000 of 29 May 2000, which replaced the Brussels I and II Conventions (the second of the two latest Regulations has recently been substituted by a new one), Regulation No. 1348/2000 on service of judicial and extrajudicial documents Regulation No. 1206/2001 of 28 May 2001 on the taking of evidence and Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings. Article 65 TEC also provided the legal basis for the adoption of Directive 2000/36/CE of 29 June 2000 on combating late payment in commercial transactions.

Point 40 of the Conclusions on the Vienna Action Plan referred to the possibility of extending the concept of the European judicial network in civil matters to embrace civil proceedings. The result was the Council Decision of 28 May 2001 establishing a European Judicial Network in civil and commercial matters. The network commenced operations on 1 December 2002, and has started up an Internet page in the first few months of 2003 with information on Community norms adopted on the basis of Article 65 TEC and details of the civil and commercial systems of the various Member States.

4.2. As for judicial cooperation in criminal matters, the Treaty of Amsterdam introduced a number of surprising innovations which broke with the past 11, Articles 31 and 32 TUE.

11 Council on 15 and 16 October 1999 which, for the first time, brought together the heads of State and government of the Fifteen to discuss justice and internal security matters.


16 On the innovations introduced by the Treaty of Amsterdam and the aspects of construction in the area of freedom, security and justice, see MIRANDA RODRÍGUEZ, A., «LA CONSOLIDAÇÃO, J.L., Para un espazo jurídico penal europeo, (Towards a European policy on criminal matters), op. cit., pp. 35 to 38, which is closely followed in this introduction.

particularly in the light of the limited success of traditional cooperation mechanisms under

tion law 19.

Judicial cooperation in relation to proceedings (i.e. mutual judicial assistance in crimi-

nal matters) continues to take place under Council of Europe instruments (the European

Convention on Mutual Assistance in Criminal Matters of 20 April 1959 and its Additional

Protocols of 20 April 1959 and 17 March 1978) and the relevant provisions of the Conven-

tion implementing the Schengen Agreement (Articles 48 to 53). However, those instru-

ments have since been supplemented by the European Union Convention on Mutual Judicial

Assistance of 29 May 2000 20 and its Additional Protocol of 16 October 2001 (not yet in force),

which take into account the situation resulting from the disappearance of internal fron-

ters, new forms of crime and the development of new technologies, and which therefore pro-

vide new forms of cooperation such as under-cover agents, joint investigation teams, supervised

surrenders, hearings by telephone and videoconference, interception of international

telephone communications and control of bank accounts. These new possibilities all con-

tribute significant advances in the field of judicial cooperation.

(b) Much remains to be done under Article 31(c) TEBU to promote compatibility of rules

applicable in Member States in the areas of substantive criminal law and law of criminal

procedure, particularly as regards minimum standards for evidence, invalid trials and rights

of defendants and victims. Some steps have been taken, however, in the form of Joint

Actions 21 and, more recently, Framework Decisions.

(c) Lastly, measures aimed at preventing conflicts of jurisdiction between Member States

( Article 31(d) ) are particularly in demand. The Treaty provides sufficient legal basis to

introduce at European Union level a system of rules on criminal jurisdiction enabling in-

vestigations to be concentrated in the Member State best able to carry them out.

4.2.1.2. The second priority of judicial action within the European Union is simplifying

extradition mechanisms (Article 31(b) TEBU). The debate is no longer about overcoming tra-

ditional obstacles to extradition, which are already the subject of specific conventions with

19 Except for the Convention on the Transfer of Sentenced Persons (Council of Europe, 1983), ratified by all the Member States, and the Convention implementing the Schengen Agreement (Articles 67 to 694), the transfer of sentenced persons, and Articles 54 to 58 on the application of the one-bis in op. cit. principle, convention instruments in this area have received, in general, little attention.

20 See DE PRADA SOLARES, J. R., "Los méritos de cooperación judicial regulados en el Convenio celebrado por el Consejo de conformidad con el artículo 34 del Tratado de la Unión Europea, relativo a la asistencia judicial en materia penal entre los Estados Miembros de la Unión Europea", Judicial cooperation techniques under the Convention concluded by the Council in accordance with Article 34 of the Treaty of the European Union on judicial assistance in criminal matters between the Member States of the European Union) in Estudios Jurídicos. Ministerio Fiscal-I-2001, pp. 361 to 612.

21 Particularly in relation to tax fraud, xenophobia, trafficking in human beings, sexual exploitation of chil-

22 The reference here is to the Framework Decision on strengthening the protection against the con-

terferring of money with a view to the introduction of the euro (29.5.2000), on protection for victims (15.5.2001); on laundering, tracing, freezing and confiscating the proceeds from crime and invest-

ment in criminal organisations.

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terferring of money with a view to the introduction of the euro (29.5.2000), on protection for victims (15.5.2001); on laundering, tracing, freezing and confiscating the proceeds from crime and invest-

ment in criminal organisations.

Decisions are similar to Community regulations and also lack direct effect. They are mandatory for Member States and are intended for any purpose other than approximating national laws. Since decisions are directly and immediately applicable, they do not require any special legislation and States are required to adopt the necessary implementing measures internally or through the Council at Union level. Noteworthy for their impact on criminal judicial cooperation are the Decision to combat child pornography on the Internet, the Decision setting up a Provisional Judicial Cooperation Unit (Eurojust), the Decision on the protection of the euro against counterfeiting (6.12.2001) and the Decision setting up Eurojust (28.2.2002).

4.2.3. The effectiveness of judicial cooperation in criminal matters depends ultimately on the national authorities responsible for applying the relevant rules under the national systems and conventions in force. The real actors in the developing European judicial area are, consequently, the national authorities which operate in an area formed by a complex mosaic of national rules and criminal systems increasingly influenced by European instruments.

Traditional cooperation in criminal matters, as an act of national sovereignty, inevitably brought political authorities and diplomatic channels into play in the relations between the States. Required the prior approval by the executive of requests and involved the intervention of judicial authorities responsible for enforcement. Now the general rule within the European Union is that requests for judicial assistance are transmitted directly between the competent judicial authorities of Member States, which make decisions on their own without interference from other bodies.

Liaison magistrates, the European Judicial Network and Eurojust have been created to facilitate judicial cooperation in criminal matters within the European judicial area:

- The possibility of sending liaison magistrates from one State to another under bilateral or multilateral agreements was provided for by the Joint Action of 22 April 1996, 37. Assignments


37 OJ L 105, 27.4.1996.

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have resulted in the adoption of structural measures throughout the Union to make possible and foster coordinated action by national authorities. In pursuit of this objective, the Tampere European Council in October 1999 decided to boost judicial cooperation; by setting up a unit (Eurojust) composed of national prosecutors, magistrates, or police officers of equivalent competence, detached from each Member State according to its legal system. Their task should have the following: the proper coordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases, notably based on Europol’s analysis, as well as on the co-operating very closely in the European Judicial Network, in particular in order to simplify the execution of letters rogatory.  

Broad political agreement within the Council was required to set up Eurojust, following the Tampere summit.

Eurojust was set up by a Council Decision of 28 February 2002. It was preceded by a provisional unit known as pro-eurojust, which began operating in Brussels on 1 March 2001. Pro-eurojust functioned merely as a liaison structure between the judicial authorities of the Member States, but it provided useful experience in the run-up to the Decision establishing the definitive unit.

The establishment of Eurojust was a giant step in the context of structural measures adopted at European Union level, and a milestone in the creation of a European system of criminal justice.

Highly flexible in order to integrate smoothly with national systems and operate effectively, Eurojust is a unit composed of judges and magistrates, prosecutors and police officers (one per Member State) who support the national judicial authorities of the Member States. It acts in the context of investigations and prosecutions involving two or more Member States and relating to serious and organised crime. Here, Eurojust has three clearly defined roles:


23. Article 2 of the Decision provides that Eurojust is composed of judges, prosecutors or police officers of equivalent competence seconded by each Member State in accordance with its legal system. The reference to “police officers of equivalent competence” covers specifically for common law systems in which criminal investigations are conducted exclusively by the police, with no involvement by prosecutors or judges. In its present composition, Eurojust comprises 15 prosecutors and two judges, some of whom are assisted by police officers (United Kingdom and Finland).

INTRODUCTION

The development of the legal instruments that regulate the co-operation in the field of judicial and police co-operation. These changes relate essentially to the inclusion of the Eurojust the European Union Treaty and to the modification of the system for reinforced cooperation.

The Nice Treaty the European Union's Letter of Basic Rights was also passed, and its legal nature was largely debated until it was finally included as an article of the Draft Treaty establishing a Constitution for Europe.

In the development of the Declaration found in the Nice Treaty and in accordance with the aims and the work plan established by the Ljubljana European Council, the Convention for the Future of the European Union began its task on March 1st 2002. For eighteen months the Convention examined the main questions affecting the future development of the European Union. Its principal objectives were to bring the European institutions closer to the citizens and to infuse them with a higher democratic content, to determine the role of Europe in the present international panorama, to improve the distribution and definition of the responsibilities within the Union and to simplify its institutions and substitute the co-operation system of rules with a simpler and more coherent one that integrates the European Union's Charter of Fundamental Rights.

With respect to the Area of Freedom, Security and Justice, the Working Group X approached, under the Presidency of Mr. Brutton and with the help of other prestigious experts, the present situation and its needed reforms: the requirement of unanimity as a general rule in the Convention web site http://europa-convention.eu.int

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eral rule in order to make decisions and the resulting difficulties in advancing in the elaboration of legal texts, the traditional reliance on part of the Member States towards various Conventions and adapting internal ordinances to the norms approved by JHA, the lack of control and sanction mechanisms guaranteeing the effective compliance of the obligations assumed by the Member States, the complexity of the applicable legal norms and their pertaining to different «pillars» of the EU, and the scarcity of legal authority in Parliament and in the Tribunals of Justice for creating the European Judicial Area are a few of the main points of debate. The possibility for Eurojust to request the national police services to undertake criminal investigations and the reinforcement of its parliamentary and judicial control, the impulse to Eurojust and to the possible formation of a General European Public Prosecutors Office, through this organ, also made way for interesting debates in the summary of the X Group, as presented in their final document on December 2nd 2002. 

The Draft Treaty for establishing a European Constitution has followed the X Group’s indications very closely and in line with the evolutionary lines of the Maastricht Treaty, followed by Amsterdam and Nice. Chapter IV of the Constitutional Section, dedicated to the «Area of Freedom, Security and Justice», substitutes the current instruments for judicial cooperation (directives, regulations, Framework decisions, conventions...) with laws and Framework laws, although it maintains certain peculiarities in relation to the norms of a criminal nature – it considers questions related to the elaboration process of norms separately from those related to applying the norms, it entrusts greater power to the Commission, the Parliament and to the Tribunal of Justice of the European Communities and to the national Parliaments during the process of elaborating legal norms, it decisively gives a thrust to Eurojust and, through this body foresees the possible organization of a European Public Prosecutors Office. 

During the Intergovernmental Conference held in the Autumn of 2003 under the Italian presidency it was not possible to reach an agreement on the Proposal for a European Constitution, Italy took over the presidency in January 2004. As a result of the way in which it has evolved, the European Judicial Area currently combines rules of differing legal natures. Some of these rules are binding and others are merely guidelines. Some are to be applied directly by the judicial authorities of the Member States. Others are obligatory for national legislators, who are required to adapt their internal legal systems to the guidelines laid down by the European Union. There are also differences in terms of the efficacy of these rules. Some have already come into force. Others, however, are still awaiting the end of the statute legis expressis and the obtaining of sufficient qualifications by Member States. It is very important to be aware of these circumstances in mind when consulting the instruments created within the JHA sphere.

42 CONV 42002.
43 Vide also: C. A. Espagne Judiciaire Européen. Situation actuelle et perspectives futures, in 1st International Conference on the European Judicial Area held in Toledo on the 29th, 30th and 31st of October 2003, with the support of the European Commission's AGIS Programme. Published in the press.
44 All of the information related to the Intergovernmental Conference is available on the web site http://oeoe.int/gci/index.asp

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ver, a Recommendation on the improvement of investigative and preventive methods used in the fight against organized crime related to the trade of humans was adopted.

This steady increase in the number of Criminal Justice rules in the European Judicial Area is therefore a further obstacle to the preparation of any compendium of such rules. In the time elapsing between the completion of this work and the publication of the final text, new instruments will undoubtedly have been approved, and others will be in preparation. The preparatory work for this publication was closed at 31 December 2003. It includes the instruments adopted in the areas of Civil and Criminal Justice up to that date, along with other texts that we have considered to be of unquestionable interest, for example the Draft Treaty establishing a Constitution for Europe.

One final comment to be made also relates to rules which have been systematized based on the specific forms of criminal activity to which they refer. In relation to organized crime and to the fight against cybercrime, the European Union has followed closely and adopted positions similar to those adopted in the work carried out by the United Nations and the Council of Europe. We therefore include both of these texts.

It was explained at the beginning of this introduction that the European Judicial Area has come about through a long process of evolution which has not yet reached its conclusion. Evidence of this are the debates that took place within the context of the Convention for the future of the European Union, which was being presided over, incidentally, by one of the main promoters of the European Judicial Area. The final report prepared by the X Working Group, on Freedom, Security and Justice, mentioned the need to establish «a general common legal framework», which brings together the third-pillar provisions. «This would make it possible», explains the report, «to move beyond the pillars structure and overcome its acknowledged adverse affects (uncertainty with respect to legal bases; need for two institutional or separate international agreements for a series of initiatives intended to combat the same problem)», in such a way that «all provisions relating to the European area of freedom, security and justice could be brought together in a single title of the Treaty». These comments by the Group of Experts are a further testimony to the difficulties to which we have referred in this Introduction. We hope that the reader will find this Code helpful when consulting the broad series of rules established to date in the field of Civil and Criminal Justice in the European Union.

I TREATIES