CENTRE FOR EUROPEAN REFORM
policy brief

Let justice be done: Punishing crime in the EU

By Hugo Brady and Mónica Roma

★ EU co-operation in justice and home affairs (JHA) is helping the member-states to fight cross-border crime. However, having agreed ambitious innovations like the European arrest warrant in 2001, the governments have become less enthusiastic about working together at EU level.

★ The way the EU takes decisions on criminal justice issues holds back progress. Governments agreed to fix this decision-making machinery in the EU constitutional treaty, but its rejection in 2005 has prevented the planned reforms from entering into force.

★ Another major problem is that governments cannot agree on how best to protect their citizens' rights if they are arrested or imprisoned in another EU country.

★ Finland will review the Union's JHA policies when it takes up the EU presidency in the second half of 2006. The Finns should devote a European Council solely to JHA, to come up with some practical solutions to the current problems, such as inadequate rules for decision-making.

Cross-border crime is on the rise in the European Union. Criminals, especially organised gangs, are exploiting the lowering of national barriers to EU trade and travel to commit crimes, increase their illegitimate profits and escape punishment. As the EU has expanded, criminals across the Union have moved quickly to take advantage of new markets for people, drugs and stolen property. Each year over 100,000 women and children are trafficked across EU borders. Counterfeiting of the euro is also increasing. In 2004, nearly a million counterfeit euro banknotes were seized, with a value of over €45 million, a rise of nearly 30 per cent compared with the previous year.

As cross-border crime has increased, the EU has become more active in criminal justice co-operation, a key element of the Union's JHA agenda. Most member-states have 'double criminality' requirements, whereby an offence must be the same in each country for a court to comply, say, with a request for suspects or evidence from abroad. But EU countries define many crimes differently, thus hampering closer co-operation. The governments have tried to tackle this problem in two ways. First, the member-states drew up a list of crimes that have a cross-border impact, such as drug trafficking or money laundering. They then agreed to 'approximate' or align the legal definitions of these crimes throughout the EU. Alignment allows the member-states to recognise each others' courts when dealing with serious cross-border crimes. This is known as 'mutual recognition', a principle which proved hugely effective in building the EU single market. Rather than trying to harmonise criminal law across the whole Union, the member-states accept each others' rules and standards. In November 2004, they agreed the 'Hague programme', a five-year plan to close the gaps between a range of national policies from immigration to policing. By implementing it, the governments will extend mutual recognition to most kinds of legal decision involving cross-border crime.

These are the first steps towards ensuring that criminals cannot use the diversity of law enforcement systems to their advantage. But although all EU governments support this goal in

Centre for European Reform
29 Tufton Street
London SW1P 3QL UK

T: 00 44 20 7233 1199
F: 00 44 20 7233 1117
info@cer.org.uk / www.cer.org.uk

theory, they cannot agree what it means in practice. Some member-states would like to see greater harmonisation of laws and procedures, culminating, eventually, in a single EU criminal justice system. Others, such as the UK and Ireland, see mutual recognition as a way of avoiding harmonisation altogether. As a result, JHA policies are often messy compromises, riddled with contradictions between national and supranational; liberty and control; and openness and exclusion.

These underlying tensions have resulted in two practical problems. First, all decisions must be unanimous and it is up to the governments whether they implement agreements correctly and on time. Second, mutual recognition works in the single market because the EU has the competence to lay down minimum standards through legally binding regulation. In criminal justice, the EU has no equivalent power to set minimum judicial standards. Instead the process relies on the member-states trusting each other to maintain high judicial standards. Unfortunately, such trust is often lacking between Europe's law-makers and judges.

Crime and national sovereignty

Differences between national legal traditions can prevent EU member-states from working together effectively to tackle crime. Under the traditional system of European judicial co-operation, still mostly in place, sovereign states simply decide whether or not their courts will comply with foreign requests for suspects and evidence. In the past, if Britain asked Spain to extradite a suspect or deliver a piece of evidence, it was up to the Spanish justice ministry or courts to decide whether to comply. The rules governing this kind of interaction were either drawn up bilaterally between countries, or multilaterally through the UN or the Council of Europe (a non-EU body that promotes democracy and human rights). However, these rules allow for too much political interference from justice ministries which can prevent cases going to trial in other countries. And international conventions tend to be too complex and inflexible to provide a basis for fighting modern crime, especially in the EU where criminals can move from one country to another unimpeded.

There are 27 legal systems in the EU (Scotland and Northern Ireland have distinct systems), each one with its own rules for starting investigations and gathering evidence. More importantly, each country has its own definition of the same crime. Under the double criminality principle, national authorities will only react to a request from another country if the offence in question is also defined as a crime in their own country. The member-states have used mutual recognition to get around this, allowing governments to get suspects, evidence or stolen goods from other EU countries without many formalities. The first and best-known application of mutual recognition is the 'European arrest warrant'.

The European arrest warrant

The warrant establishes a new system of extradition between EU countries, making it easier and quicker to extradite suspects from one member-state to another. In force since 2004, it excludes justice ministries and puts all decisions in the hands of law enforcement bodies. The arrest warrant sets strict deadlines, and leaves national courts with only limited reasons for refusing an extradition request. EU countries can no longer refuse to extradite their own nationals on principle. Most importantly, the requirement of double criminality has been abolished for extraditions involving 32 types of crime, including terrorism, organised crime, human trafficking, child pornography, and money laundering. This has enabled the warrant to reduce average extradition times in the EU from nine months to 43 days.

EU countries have built on the achievement of the arrest warrant by reforming other areas of criminal justice co-operation. In particular, they have passed laws allowing courts to secure evidence, confiscate criminal property and apply fines for criminal acts across the Union. In the course of 2006, member-states plan to reach agreement on a 'European evidence warrant' which – though not as ambitious in scope as the arrest warrant – would allow courts to obtain evidence from authorities, individuals or businesses in any EU jurisdiction. By 2008 the EU intends to apply mutual recognition to many other types of legal decision including, for example, bans on child sex offenders from working with minors.

However, mutual recognition is not enough on its own to ensure the smooth administration of justice across borders. By treating the same crimes differently, countries can create legal loopholes, which allow offenders to escape justice. Criminals can target countries that impose lighter sentences and hope to rely on technicalities to prevent their extradition. So, as well as aligning definitions of crimes, the member-states have also aligned punishments for those crimes by setting minimum sentences. The EU now has common minimum sentences for serious crimes relating to terrorism, the sexual exploitation of children, people trafficking, fraud, corruption, money laundering and drug trafficking. For example, before 2001 many EU countries did not have a legal definition of terrorism as a punishable crime. Now, the crime of directing terrorist activities carries a prison sentence of at least 15 years in every EU country, and individual member-states are free to impose longer sentences.

Decision-making and implementation

The EU has managed to overcome many of the failings of the old system of international legal co-operation. However, governments still face significant obstacles to better co-operation. The main problem is a lack of trust: both at the political level, where governments struggle to agree and implement new

measures; and on the ground, where judges, prosecutors and defence lawyers resist EU initiatives for fear that these may expose citizens to lower standards elsewhere in the Union.

EU co-operation is divided into three main 'pillars' or areas of activity, each with its own rules: the single market, foreign and security policy, and crime and policing. As criminal justice is so linked to the sovereignty of the state, the rules for 'third pillar' decision-making are very cumbersome. In most other areas of EU policy, only the European Commission can make proposals, and the governments decide on them by qualified majority voting (QMV). Under the third pillar, decisions about criminal justice are taken unanimously, and each member-state can make proposals as well as the Commission. National governments often put forward initiatives that matter for them domestically, but are of secondary importance for EU criminal co-operation. This kind of decision-making has several drawbacks.

First, there is a surfeit of proposals that enjoy little support. For example, in 2003 Greece tabled a proposal dealing with the trafficking of human organs within the EU. The initiative was withdrawn after lengthy deliberations when it became clear the other member-states doubted its utility and would not back it. Second, negotiations on laws that require unanimity tend to be long and cumbersome, reducing proposals to the lowest common denominator. The European arrest warrant was only agreed after the shock of September 11th, when justice ministers came under intense pressure from European leaders. Yet despite subsequent attacks on Madrid and London, negotiations on the European evidence warrant have dragged on. According to one senior EU official, the "9/11 effect no longer exists". Third, even when EU countries do reach agreement on a criminal justice measure, their implementation is often woeful. Badly implemented agreements can be worse than no agreement at all. For example, in July 2005, the German constitutional court blocked the operation of the arrest warrant in Germany on the grounds that it had been incorrectly implemented there. As a result, the German authorities were unable to extradite Mamoun Darkazanli, a suspect wanted in connection with the March 2004 Madrid bombings, to Spain. Since Germany had no legal basis for keeping him in jail, he had to be released. In retaliation, the Spanish authorities threatened to release 50-odd suspects wanted for questioning by the German authorities.

Some member-states – notably the UK and Ireland – do not see decisions on criminal justice as more than loose inter-governmental agreements. In contrast to single market legislation, the European Commission lacks enforcement powers in this area. As many governments do not want the European Court of Justice (ECJ) to have a say over how they write EU criminal justice agreements into national law, they have severely curtailed its usual role. In policing and criminal justice matters, the ECJ only has jurisdiction where a member-state agrees. The only leverage that the Commission can apply is to carry out 'naming and shaming' exercises, singling out member-states which fail to implement agreements properly.

Co-operation on the ground

The member-states stick with the third pillar procedures because they are cautious about aligning national rules on crimes and sentencing. And they have been even more reluctant to harmonise criminal procedures. These are the rules that spell out how national courts should conduct cases, and what rights an individual should enjoy before the law. Legal procedures differ widely among EU countries, with the biggest gaps found between countries with common law systems, such as the UK and Ireland, and those with civil law systems, like Germany and France. All countries have their own, long-established ways of doing things. For instance, criminal investigations in the UK are led by the police; in France by an investigating judge; and in Portugal by prosecutors. Each country defends the benefits of its own system. The proponents of common law systems believe that the civil law emphasis on written evidence does not give defendants adequate rights and protections. Conversely, civil law advocates feel that the adversarial nature of common law unduly favours rich defendants who can afford expensive lawyers to act for them. Governments know that the harmonisation of such different approaches would take decades. In any case no EU treaty allows for such full-scale harmonisation.

Instead of harmonising their laws, member-states are trying to develop practical tools for judicial co-operation. One of the most important is Eurojust, an institution that has been in operation since 2002. Eurojust's main role is to help national authorities to work together on investigations and prosecutions of serious crimes. It consists of a network of 25 senior prosecutors, judges and police officers who have been seconded from the member-states. They work together in The Hague, but remain members of their national organisations. As national prosecutors they enjoy the confidence of colleagues in their own countries, which is an essential requirement for rapid, cross-border co-operation. Eurojust prosecutors can recommend which of the countries involved is best placed to deal with a particular case, and they can request the national authorities to start an investigation or prosecution.

Although Eurojust is a young organisation, its caseload is growing rapidly. In 2004, cases involving four or more countries doubled, and it helped in the prosecution of 381 cases. These mostly involved drug trafficking, fraud and terrorism. Eurojust shares its resources with the European Judicial Network (EJN). The EJN is a diffuse, Union-wide network of over 200 ordinary judges, prosecutors and police officers. These people act as contact points, directing cross-border requests for suspects, key witnesses or

evidence to the right national official in their own country. The EJN meets as a body three times a year to exchange information on the different legal systems throughout the EU.

The limits of trust: Latvian jails and the Dutch police

Mutual recognition will remain tricky as long as EU governments fear that their citizens may be locked up in another European country on specious charges or for an unacceptable length of time. With no single EU criminal procedure, the member-states simply trust that the standards and conditions in each others' countries are sufficient to support mutual recognition. This confidence is nominally based on the fact that every EU member is also party to the European Convention on Human Rights (ECHR). The convention lays down standards for democratic practices, human rights and the rule of law across the EU, including the basic rights of defendants. But the Council of Europe, which monitors compliance with the ECHR, reports that there are wide variations in standards of justice in EU countries. In 2004, its human rights commissioner, Alvaro Giles-Robles, chastised Hungary and Latvia for their over-crowded prisons and unacceptable conditions for detained suspects. He also found the rules and conditions for holding suspects lacking in Portugal, Denmark and Sweden. And he criticised Estonia for not providing free legal aid.[1]

[1] *Office of the Commissioner for Human Rights, 'Country reports 2003-2004', http://www.coe.int.*

No EU country has escaped criticism for one aspect or another of its criminal procedures. The Dutch, for example, do not allow a lawyer to be present during police questioning; the integrity of the Dutch police is considered enough to ensure that a person's rights are protected. In many cases, foreigners charged with a crime in another EU country have no guaranteed access to legal aid or interpreters, which they need in order to properly understand the charges and the legal proceedings.

The problem of different standards in the EU has worsened with enlargement. For example, the former communist countries of Eastern Europe have new legal systems that are relatively untested. Many judges there have spent much of their professional lives applying Communist law. Fearing that the newcomers may not adequately implement JHA agreements, the 'old' member-states have retained the right to suspend justice co-operation with them until 2007. These concerns matter. The number of foreigners charged in a country that is not their own is not trivial. Nearly 1,000 British citizens are currently detained in other EU countries, for example. And according to Fair Trials Abroad, a British NGO, foreign nationals in some member-states are roughly twice as likely to be arrested as native citizens. Moreover, the option of release on bail is usually unavailable for these people: authorities across the EU fear that released defendants will flee the country and never return. In such cases, judges often find it impossible to assess a defendant's 'community ties' (job, family circumstances and community status), which are among the criteria taken into account when judging suitability for bail.

Fair Trials Abroad and other NGOs complain that EU co-operation in criminal justice is too focused on security at the expense of citizens' rights. They say this unsettles the subtle balance between internal security and civil liberties that exists in each country. For example, the member-states are happy to use the EU for fast-track extradition, but they have yet to consider setting up a Union-wide bail system. Moreover, the EU has no express power to protect human rights, including the rights of defendants. In the Hague programme, EU leaders promised to ensure that a high quality of justice exists throughout the Union by using 'mutual evaluation'. Such 'naming and shaming' is unlikely to have much impact. Member-states already use a similar method to evaluate their efforts in fighting terrorism. But the process is confidential and the evaluation conducted by the member-states themselves. In the area of criminal justice, the EU has not yet devised what will be evaluated, by whom, or how potential recommendations could be strong enough to inspire confidence, yet weak enough not to interfere with judicial independence.

Let the courts decide?

The EU constitutional treaty would have taken important steps to improve decision-making in criminal justice policy, and strengthen trust between member-states' legal systems. It would have switched most criminal justice issues to qualified majority voting, and given the Commission and the ECJ the same role in enforcing EU law that they have in other areas of EU policy. National proposals on criminal justice policy would have needed the support of at least four countries to get on the EU agenda. And it would have increased democratic oversight in this sensitive field, by requiring the European Parliament to approve new laws, and providing national parliaments with opportunities to scrutinise the EU's work. It would also have allowed the European Court of Human Rights to hear cases against EU legislation, which it currently cannot do. This court was established by the European Convention on Human Rights, under the Council of Europe framework and has no formal links to the EU. Importantly, the constitution spelled out that EU justice agreements should be binding on the member-states.

However, the constitutional treaty is unlikely to be revived after its rejection in the French and Dutch referendums in mid-2005. The Hague programme was agreed in 2004 with the assumption that the treaty's reforms would be in force by late 2006. With the EU's decision-making machinery in legal

limbo, the 2010 deadline for completion of the programme is likely to be missed. For example, the member-states agreed to give defendants across the EU a basic level of rights protection by the end of 2005, by agreeing on some specific 'safeguards' or rules for criminal proceedings. But negotiations to date have come to nothing. Without the constitutional treaty, it is unclear whether the EU has the legal right to set such standards. Reluctant governments also fear such minimum rules could lead to the harmonisation of criminal procedures by the back door. Legal and political disputes like this show that, treaty or no treaty, EU governments and institutions still need to find a way of making criminal justice co-operation run more smoothly.

The gridlock at the political level has encouraged the ECJ to make rulings on questions of criminal justice policy that have caused unease among many of the member-states. In June 2005, the Court decided in the *Pupino* case that EU criminal justice agreements should be implemented by governments, even where they contradict established national procedures.[2] Some governments disagreed, however, insisting that these are non-binding, inter-governmental agreements. To common law countries like Britain and Ireland, this ruling takes a step towards harmonisation of national criminal laws, which they strongly oppose. Even more controversially, the ECJ ruled in October last year that the Commission has the right to ask the member-states to make an offence against EU law a criminal offence. The Court rejected the arguments of several governments that criminal law should be an exclusive national competence.

[2] *The ECJ ruled that a victim of non-sexual child abuse in Italy should be allowed to give evidence out of court, citing an EU criminal justice decision giving this right to "vulnerable victims". Under Italian law, this protection existed for sexual offences only.*

EU officials – both in the Commission and Council – defend the Court's rulings, saying that it has always stepped in to keep the EU going in times of political paralysis. During the 1960s, it clarified that binding decisions at EU level take precedence over conflicting national laws; and in the 1970s it helped to lay the foundations for the single market by designing the mutual recognition principle. Nevertheless, recent rulings may have stretched the EU treaties to their limits, increasing the Union's authority beyond what was foreseen by the treaty's drafters. As a result, governments are now more wary of involving EU institutions in criminal justice. Ireland and Slovakia, for instance, want the Court to strike down a controversial EU directive on the retention of telephone and internet data. While they do not oppose the principle of retaining the data, they are angry that the member-states, led by British Home Secretary Charles Clarke, bowed to pressure from MEPs to involve the European Parliament by treating the new law as a form of single market legislation. This technical – but vital – concession set aside the usual 'third pillar' rules; and for the first time, allowed the Parliament a say in a decision affecting domestic security. Ireland and Slovakia say that this oversteps the EU's lawful authority.

The inability of the EU to decide how it should protect defendants' rights in cross-border cases is also likely to invite further action from the courts, both European and national. In 2005 Belgium's constitutional court, the *Cour d'Arbitrage*, asked the ECJ to examine whether the arrest warrant and its use of mutual recognition breeches fundamental legal principles of non-discrimination and equality. This is a key test case for the future. If the ECJ finds that the whole concept of mutual recognition in the criminal sphere is legally problematic, then EU justice co-operation could be greatly undermined. This has already happened in Poland. In April 2005, the Polish constitutional tribunal suspended the arrest warrant, ruling that it contravened the constitutional right of Poles not to be extradited.

The effect of judgements like these is difficult to predict. The courts are less interested in questions of sovereignty than they are in legal certainty. The supremacy of EU law is now so widely accepted that any conflict with national law is more likely to result in the national law being changed. Although the Polish court ruled against the arrest warrant, it also hinted that it will delay the suspension while Poland's parliament revises the constitution. Similarly, other EU countries may have to amend their constitutions to make mutual recognition work.

What the EU should do now

The administration of criminal law is central both to the liberty of the individual and the sovereignty of the state. Hence criminal justice co-operation will remain one of the most difficult policy areas in which to reconcile national differences and to assuage anxieties about the abuse of state power. Teething problems – such as glitches in the implementation of the arrest warrant – are to be expected. They should not be interpreted as a sign that criminal justice co-operation in the EU has come to a dead end.

However, any further progress in criminal justice will be extremely difficult within the current decision-making rules. When EU countries first started working together on criminal justice, there were 15 member-states. Soon there will be 27, after Bulgaria and Romania have joined in 2007 or 2008. The unanimity requirement for each decision is thus a recipe for unsatisfactory compromises and gridlock. And decisions of poor quality are vulnerable to challenges before national and European courts. Finland takes up the presidency of the EU in the latter half of 2006 and also has the job of reviewing the implementation of the Hague programme. The Finns should devote a European Council meeting solely to deciding how JHA decision-making can be improved without the constitution. A successful summit should:

★ Reform criminal justice decision-making

Article 42 of the Treaty on European Union allows the EU to introduce qualified majority voting on questions of criminal justice and policing, provided every government agrees. Under this clause, the Commission and the ECJ could also acquire the powers that they have in other EU policy areas, and the European Parliament could have more of a say over JHA legislation. Governments could set the terms of such a transfer of powers, and provide safeguards to protect sensitive aspects of their legal systems, in a special agreement with the institutions. There is no doubt that some member-states will be reluctant to use Article 42. The clause has never been used before and EU countries are generally reluctant to give up their veto in areas that they consider politically sensitive. Some officials also fear that using Article 42 would require certain countries, like Ireland or Denmark, to hold referendums. However, this is by no means certain. Moreover, if the member-states are serious about the objectives they have set for freedom, security and justice, they must have the courage to develop more efficient decision-making procedures. In signing the constitutional treaty, all 25 governments have already accepted the principle of more majority voting in criminal justice.

★ Agree a code of conduct for criminal procedures

Mutual recognition is not a way of avoiding all harmonisation. For the concept to work, it will require some minimum procedural standards on the collection and admissibility of evidence, and on the rights of defendants. But negotiations on a binding list of such rights have broken down. Even if the governments use Article 42 to reform decision-making, this will not give the EU new legal powers to protect defendants' rights. For now the EU would be better off with a non-binding code of conduct for criminal procedures. The code should allow EU countries to move towards best practices while giving them enough leeway to recognise divergences between different national traditions.

The Commission could draw up the code, which would include a list of the rights each EU citizen is entitled to when on remand in another member-state. After adoption by the member-states, the code would then serve as a visible, public benchmark for justice in the EU. The governments should use the code of conduct as a checklist for evaluating each others' criminal systems and for pointing out problems wherever they exist. To make such criticism politically acceptable, the EU should offer funds to poorer member-states to help them upgrade, say, legal aid or translation services.

★ Make Eurojust stronger

Eurojust already makes an essential contribution to strengthening trust between practitioners. This is because of the double affiliation of its staff (being part of a centralised team of prosecutors and of their national public prosecutors' offices). Governments should expand this agency by establishing branches in each national capital. Eurojust prosecutors based in national capitals would be able to lead investigations, prosecute and try cases (something that the Eurojust central office cannot do). They would work in tandem with the existing office in The Hague, which would still have one national prosecutor from each member-state and co-ordinate cross-border criminal cases. This would be a bottom-up, decentralised way of tackling a growing problem of co-ordination. This change would not involve a transfer of powers, a loss of accountability or any infringement of sovereignty, because national prosecutors would staff each branch.

If EU governments could agree on these three measures, they would give a big push to criminal justice co-operation in the short term. But in the longer term, trust needs to be built from the ground up, over the course of several years, in day-to-day contacts between judges, policemen and prosecutors. The EU has already made some progress here, for example by establishing the European Judicial Network. But another key group seems to have been left out of the process – namely national parliamentarians, who must pass national criminal laws. EU governments should make greater efforts to liaise with their parliaments throughout the whole process of reaching agreements in JHA. This would help improve accountability and oversight, and speed up implementation of measures once they have been agreed. Denmark and the Netherlands already have a good track record of consultation between their legislative and executive branches, but other EU countries need to do more.

The limited proposals outlined in this paper are not a panacea for the challenges facing the EU in justice and home affairs. But they would help the member-states to achieve more efficient and accountable policy-making at EU-level. Such co-operation would re-assure European citizens that their governments can fight cross-border crime in Europe, without encroaching on their civil liberties.

Hugo Brady is a research fellow and Mónica Roma is a former senior research fellow at the Centre for European Reform.
April 2006