Cooperation between central authorities and police officials : the changing face of international legal assistance in criminal matters

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COOPERATION BETWEEN CENTRAL AUTHORITIES AND POLICE OFFICIALS: THE CHANGING FACE OF INTERNATIONAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

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Summary

This article addresses emerging methods of legal assistance in criminal matters and how such methods are encroaching on the scope and function of traditional treaty-based judicial cooperation.

More specifically, the author focuses on the phenomenon of financial investigation units (FIUs), which have been instituted to combat money laundering, organized crime, and the financing of terrorism, as well as on the trend toward police cooperation treaties and the use of liaison officers and joint investigation teams as a means of enhancing international police cooperation. He notes that "[b]oth trends are predicated on the perceived need for greater efficiency and expediency in securing not only intelligence on trans-border criminality but also evidence capable of being introduced in pre-trial investigations or at the trial itself."

Yet, the author cautions that because these alternatives take place outside the general pattern of judicial cooperation, there is a potential for a violation of human rights, which must be respected. This is particularly problematic with respect to the manner in which evidence has been obtained abroad, especially in the absence of rules obligating States to inform defendants about such collection of evidence and the investigation techniques used.

Finally, restrictions on the use of information obtained by FIUs and cross-border police cooperation are discussed, as well as the limiting principles of legality, proportionality, and subsidiarity.

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Sommaire

Cet article a trait aux méthodes novatrices d'entraide judiciaire en matière pénale et à la façon dont ces méthodes empiètent sur la portée et la fonction des traités basés sur la coopération judiciaire traditionnelle.

Plus spécifiquement, l'auteur s'intéresse au phénomène des unités financières de recherche (FIU), qui ont été instituées pour lutter contre le blanchiment d'argent, le crime organisé et le financement du terrorisme. De plus, l'auteur s'interroge sur la tendance à conclure des traités de coopération policière et celle qui consiste à utiliser des officiers de liaison et des équipes conjointes d'enquête comme permettant d'augmenter la coopération policière internationale. Il note que « les deux tendances confirment le besoin d'une plus grande efficacité et d'une plus grande opportunité en fixant non seulement le renseignement sur la criminalité transfrontière mais également sur l'utilité de la recherche de la preuve dans les investigations précédentes le procès pénal ou le procès lui-même."

Cependant, l'auteur avertit que, parce que ces solutions alternatives ont lieu en dehors du modèle général de la coopération juridique, il existe un potentiel risque de violation des droits de l'homme, droits qui doivent être respectés. C'est particulièrement problématique s'agissant du mode selon lequel la preuve a été obtenue à l'étranger, en particulier en l'absence des règles obligeant les états à respecter les droits de la défense en informant la partie défenderesse sur la collecte des preuves et les techniques de recherche utilisées.

En conclusion, des restrictions à l'utilisation d'informations obtenues par les FIU et la coopération policière transfrontalière sont discutées, aussi bien que la compatibilité de ces méthodes avec les principes de la légalité, de la proportionnalité, et de la subsidiarité.

Resumen

Este artículo examina los métodos emergentes de asistencia jurídica recíproca en asuntos penales y cómo tales métodos están sustituyendo en cuanto a su alcance y función a la cooperación judicial tradicional basada en tratados internacionales.

Más específicamente, el autor se centra en el fenómeno de las unidades de investigación financiera (UIF), creadas para combatir el blanqueo o lavado de dinero, el crimen organizado y la financiación del terrorismo, así como en la tendencia hacia la elaboración de tratados de cooperación policial y el uso de oficiales de enlace y de equipos conjuntos de investigación como medios para realzar la cooperación policial internacional. Señala que "ambas tendencias se basan en la necesidad percibida de una mayor eficacia y en la conveniencia de asegurar no solamente inteligencia sobre la criminalidad transfronteriza sino también

pruebas susceptibles de ser incorporadas a las investigaciones previas al juicio o en el propio juicio".
El autor advierte que dado que estas alternativas se llevan a cabo fuera del ámbito general de la cooperación judicial, existe un riesgo potencial de violación de los derechos humanos, que deben ser respetados. Esto es particularmente problemático en relación con la forma en la que se obtienen pruebas en el extranjero, especialmente a falta de reglas que obliguen a los Estados a informar a los acusados sobre tal recopilación de pruebas y sobre las técnicas de investigación utilizadas.
Finalmente, se estudian las restricciones al uso de la información obtenida por las UIF y a través de la cooperación policial transfronteriza, así como los principios limitadores de legalidad, proporcionalidad y subsidiariedad.

1. Introduction

International treaty-based cooperation between judicial authorities is the traditional mode of gathering evidence abroad when such evidence is required for the conduct of criminal proceedings. From a strictly international law perspective, transnational cooperation is governed by the concept of State sovereignty, which limits powers of the State to take investigatory, provisional and enforcement measures to its own territory.[1] International judicial assistance is the traditional response and remedy to the requesting State's lack of enforcement jurisdiction.

Treaty-based cooperation has grown out of a need to gather information which can be introduced as evidence in the requesting State, in the numerous instances where the alleged criminal conduct involves transnational aspects. Over the past 15 years, judicial cooperation has been frequently extended to the tracing of criminally derived proceeds for the purpose of their seizure and confiscation[2] particularly to combat money laundering and organized crime. Proceeds-oriented international cooperation is required at every stage of the domestic proceedings, i.e., tracing of assets and investigatory measures, seizure and confiscation (or restitution) of the proceeds. Other forms of cooperation in criminal matters include the assumption of a State's jurisdiction by another, thereby requiring one State to take over all or part of foreign criminal proceedings either by instituting its own domestic proceedings or by enforcing criminal sanctions in another State.

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[1] Guy Stessens, MONEY LAUNDERING: A NEW INTERNATIONAL LAW ENFORCEMENT MODEL 251(Cambridge studies in international and comparative law 2000).

[2] Ethan A. Nadelmann, COPS ACROSS BORDERS: THE INTERNATIONALIZATION OF U.S. CRIMINAL LAW ENFORCEMENT 4-5, 315 (The Pennsylvania State University 1993).

Since it was created more than 50 years ago, the Council of Europe has actively promoted judicial cooperation and has greatly contributed to shaping international standards through a network of mutual assistance conventions.[3] The combined effect of these conventions has been to create sophisticated legal machinery designed to enhance both evidence-gathering and proceeds-oriented cooperation. The last initiative of the Council of Europe is its approval on 19 February 2005 of a new revised Convention on Laundering, the Financing of Terrorism, Search, Seizure and Confiscation of the Proceeds from Crime, updating the Council's 1990 Anti-Money Laundering Convention.

In the context of international initiatives to combat money laundering, organized crime and, more recently, the financing of terrorism, new modes of international evidence-gathering have become increasingly significant.[4] Administrative and police cooperation are expanding and are definitely encroaching on the scope and functions of traditional treaty-based judicial cooperation. To comply with international instruments on the fight against money laundering, a large number of States have set up financial investigation units (FIUs) to process information received from banks and other financial institutions. Like police authorities, FIUs of different States exchange information on suspicious financial transactions, and this has now become one of the prominent features of international assistance.

Another noteworthy trend of international assistance in Europe is the transformation of police cooperation. Whereas police cooperation used to function informally, a number of treaties have now been concluded that regulate police cooperation in great detail.[5]
A historical precedent was set by the 1990 Schengen Implementation Agreement (originally signed by Belgium, the Netherlands, Luxemburg, France and Germany to implement the Schengen Agreement signed in 1985 by those countries); the primary objectives of the Convention were to create an internal market free of

[3] The most prominent being the European Convention on Extradition, Doc. No. 024 (1957); the European Convention on Mutual Assistance in Criminal Matters, Doc. No. 030 (1959); the European Convention on the Transfer of Proceedings in Criminal Matters, Doc. No. 073 (1972); the Convention on Mutual Administrative Assistance in Tax Matters, Doc. No. 127 (1988); the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Doc. No. 141 (1990); and the Convention on Cybercrime, Doc. No. 185 (2001).

[4] Stessens, *supra* note 1, at 258.

[5] Christine Van den Wyngaert, *General Report*, 70 INTERNATIONAL REVIEW OF PENAL LAW 178 (1999); Chantal Joubert & Hans Bevers, SCHENGEN INVESTIGATED: A COMPARATIVE INTERPRETATION OF THE SCHENGEN PROVISIONS ON INTERNATIONAL POLICE COOPERATION IN THE LIGHT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Kluwer Law International 1996).

border controls and to set up an elaborate set of rules to limit the consequences of the abolition of border controls. The Schengen Convention established transnational police cooperation, including cross-border observation, controlled deliveries, hot-pursuit, rules on the use of coercive measures out of the jurisdiction and the creation of a computerized data bank, the Schengen Information System (SIS), directly accessible to police services in the contracting parties. Other European initiatives followed, such as the establishment of Europol[6] and the 1997 Convention on Mutual Assistance and Cooperation between Customs Administrations of Member States.[7] The EU is developing a customs information system to allow national customs services to share information on movements across borders. In addition, a customs files identification data base will enable the national authorities responsible for customs investigations to identify competent authorities of other Member States investigating the same persons or businesses.

Interpol itself has fostered cooperation agreements with other international organizations and has developed a model bilateral police cooperation agreement. Many European States have expressed a wish to intensify multilateral and bilateral police cooperation within the next few years. Apart from providing a legal basis for the exchange of information on persons and data, an important feature of police cooperation is the deployment abroad of police attachés to assist in transnational investigations and to increase cooperation with the law enforcement authorities of the host country.

Adding to this state of flux in the area of transnational evidence gathering, proactive policing techniques have been developed for the purpose of dealing with the challenges of organized crime and more recently of terrorism. New modes of investigation include more sophisticated devices for recording conversations, images and movements of persons and objects, computer analysis and data mining.

Whilst alternative evidence-gathering methods are gaining momentum, the distinction between FIU and police cooperation on the one hand and cooperation between judicial authorities on the other is not always easily drawn. Recourse to cooperation between police officials and central authorities is, in general and

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[6] Ministerial Agreement signed in Copenhagen on 2 June 1993 and confirmed in a Common Action of January 24, 1995, followed by the Council Act of 26 July 1995 drawing up the Convention on the establishment of a European Police Office (Europol Convention), O.J. (C 316).

[7] Council Act 98/C 24/01 of 18 December 1997 drawing up the Convention on mutual assistance and cooperation between customs administrations, O.J. (C 24).

practical terms, more flexible than cooperation between judicial authorities, where more conditions and obstacles apply. Therefore, as matters now stand, these new forms of international assistance have the potential of being used at least partly as a substitute for cooperation between judicial authorities, in the interest of expediency and efficiency of transnational investigations. This evolution calls for a closer scrutiny of FIU and police cooperation not only from the perspective of human rights but also to take into account general ethics in law enforcement, as well as a number of requirements that should govern the conduct of criminal proceedings, such as the tests of legality, proportionality, subsidiarity, international standards of data protection and speciality.[8]

This article will briefly discuss current trends of cooperation between central authorities and police officials, as well as their impact on the international framework of mutual legal assistance in criminal matters.

2. New modes of evidence-gathering

2.1 Financial intelligence units

FIUs are specialized law enforcement agencies designed to receive and process financial information from banks and other financial intermediaries. Most international instruments are silent on the nature and role of FIUs.[9] The FATF recommendations refer only to the "*competent authorities*" to which financial institutions should make their reports.[10] The first and second European Money Laundering Directives likewise refer to "*authorities responsible for combating money laundering*"[11] and oblige Member States to ensure that these authorities

[8] Joubert & Bevers, *supra* note 5, at 5.

[9] Stessens, *supra* note 1, at 183. An exception can be found in the Recommendation 1 of the Caribbean Drug Money Laundering Conference, which states the following: "*Adequate resources need to be dedicated to fighting money laundering and other drug related financial crimes. In countries where experience in combating money laundering and other drug related financial crimes is limited, there need to be competent authorities that specialise in money laundering investigations and prosecutions and related forfeiture actions, advise financial institutions and regulatory authorities on anti-money laundering measures, and receive and evaluate suspicious transaction information from financial institutions and regulators and currency reports, if required, to be filed by individuals or institutions.*"

[10] Recommendation 26: *Countries should establish a FIU that serves as a national centre for the receiving (and, as permitted, requesting), analysis and dissemination of STR and other information regarding potential money laundering or terrorist financing* (…).

[11] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering, O.J. (L 166); Directive 2001/97/EC of the

are able to request information from the relevant financial institutions.

The nature of the authorities exercising the functions of FIU, their operational modes and the conditions in which suspicious transactions can be reported and/or suspended, as well as the procedures to be applied for the processing of information received from financial institutions, are matters that vary considerably from State to State. No international harmonization has yet taken place with respect to these issues.[12]

Recognizing that FIUs "*offer law-enforcement agencies around the world an important avenue for information exchange,*" a group of FIUs decided to develop a FIU network in 1995 at the Egmont Arenberg Palace in Brussels. The so-called Egmont Group[13] has met regularly to find ways to cooperate, especially in the areas of information exchange, training and the sharing of expertise, and, at the end of 2004, there were currently 94 countries with recognized operational FIUs, with others in various stages of development. Countries must go through a formal procedure established by the Egmont Group in order to be recognized as meeting the Egmont definition of a FIU. Currently, the Egmont Group is a loosely defined organization without a permanent secretariat, and administrative functions are shared on a rotating basis.

Although every FIU operates under different domestic guidelines, most FIUs, under certain provisions, can exchange information with foreign counterpart FIUs. In addition, many FIUs provide other government administrative data and public record information to their counterparts. Thus, one of the main goals of the Egmont Group is to create a global network by promoting international cooperation between FIUs.

The current definition of a FIU is the following[14]:

"*A central national agency responsible for receiving (and as permitted, requesting), analysing and disseminating to the competent authorities, disclosures of financial information:*

European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, O.J. (L 344/76).

[12] Stessens, *supra* note 1, at 183-184.

[13] See <www.egmontgroup.org>.

[14] As amended at the Egmont Plenary Meeting in Guernsey on 23 June 2004.

(i) Concerning suspected proceeds of crime and potential financing of terrorism, or

(ii) (ii) Required by national legislation or regulation, in order to combat money laundering and terrorism financing."

The Egmont Group has also attempted to establish principles including legal safeguards for the exchange of information.[15] The main principle is that international cooperation between FIUs should be encouraged and based upon the foundation of mutual trust and consistent with procedures understood by the requested and requesting party. The scope of information to be provided is wide, i.e., "*any available information that may be relevant to an analysis or investigation of financial transactions."*

2.2 New forms of police cooperation

Police cooperation treaties are a relatively recent phenomenon that is gaining ground. Interpol has developed a model police cooperation agreement (hereafter "the model agreement") within the framework of the cooperation system set up by the ICPO – Interpol. The aims of the model agreement are to: (1) create a privileged police cooperation space between the parties; and (2) set up machinery to facilitate cooperation and to create specific operational structures for that purpose.

Under the model agreement, parties undertake to ensure that information is exchanged, in compliance with national legislation "*for preventing ordinary law crime, locating offenders and bringing them to justice."*[16] Significantly, this undertaking does not apply where the domestic law of the requested parties stipulates that the request has to be made to the judicial authorities.

The Model Agreement provides for the protection of personal data.[17]

The Model Agreement also makes provision for joint missions, participation in trans-border investigations and special investigative techniques.[18]

For the purpose of improving the exchange of information between police authorities, modern instruments increasingly use "*central authorities*", responsible in each contracting State for international police cooperation. Various conventions refer to this practice, including the Council of Europe Convention on Laundering,

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[15] These principles were agreed by the Egmont Group in the Hague on 13 June 2001.

[16] Interpol Model Police Cooperation Agreement, art. 4.

[17] *Id.*, art. 7.

[18] *Id.*, arts. 13-15.

the Financing of Terrorism, Search, Seizure and Confiscation of the Proceeds from Crime[19] and the Schengen Convention[20]. In the case of Schengen, a computerized system of information exchange (SIS) has been established that is administered, in each Member State, by the Central Authority (SIRENE).[21]

The SIS has been in operation since 1995. It is a computer network system containing information on wanted persons and stolen objects and vehicles.

The SIS can be consulted by police, border police, customs and partially by authorities responsible for delivering visas and residence permits. It enables its users to check persons and objects both at external borders and within the territory of the Schengen States.

Another feature of modern police cooperation is the use of liaison officers, which was pioneered by the United States. Police attachés have the task of identifying and explaining cultural and legal obstacles to international enforcement efforts, to explain to the police in their home country how to improve cooperation and to organize training programs. However, problems have arisen where these officers have failed to abide by the legislation or practices of enforcement in the host country.[22]

The practice of exchanging liaison officers has been clarified in various international instruments. The Schengen Convention provides that contracting parties may conclude bilateral agreements for the assignment, for a specified or unspecified period of time, of liaison officers, whose task shall be to promote and accelerate cooperation by giving advice and assistance.[23] The Europol Convention stipulates that States shall assign at least one liaison officer to Europol.[24] The EU Council Decision of 27 February 2003[25] provides for the common use of liaison officers posted abroad by the law enforcement agencies of Member States; this framework draws upon the similar provisions contained in the

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[19] Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Doc. No. 141 (1990), art. 23.

[20] Convention implementing the Schengen Agreement of 14 June 1985, O.J. L 239 (1990), art. 39 (3).

[21] Van den Wyngaert, *supra* note 5, at 182.

[22] *See* Bruce Zagaris, *National Report for the USA*, 70 INTERNATIONAL REVIEW OF PENAL LAW 497 (1999).

[23] Convention implementing the Schengen Agreement, *supra* note 20, art 47.

[24] Europol Convention, *supra* note 6, art. 5.

[25] Council Decision 2003/170/JHA, 2003 O.J. (L 67/27).

Convention implementing the Schengen Agreement of 14 June 1985. Art. 5 of the Council Decision provides for cooperation between Member States regarding the exchange of information through liaison officers in third countries. Information may be exchanged even with other Member States not represented by their own liaison officers in the third country provided the information relates to serious criminal threats and is given in accordance with national law, relevant international instruments and subject to compliance with applicable provisions governing the protection of personal data.

For practical reasons, it is difficult to prevent liaison officers from exchanging information that should be made subject to authorization by judicial authorities. In an effort to curtail the abusive recourse to police cooperation as a substitute for judicial cooperation, Art. 39 § 2 of the Schengen Agreement provides that written information given by the requested party may not be used by the requesting party as evidence of the criminal offence other than with the agreement of the relevant legal authorities of the requested Party.

Joint investigation teams is another method of enhancing international police cooperation. The legal foundation for joint investigative action may be found in certain mutual legal assistance treaties[26] or in multilateral treaties such as the 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[27] and the 1997 EU Convention on Customs Cooperation.[28] The EU Member States meeting in Tampere in 1999 called for joint investigation teams to be set up in order to combat trafficking in drugs and human beings, as well as terrorism[29]. Furthermore, the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000 provides for the setting-up of joint investigation teams.[30]
The EU Council Framework Decision of 13 June 2002[31] regulates joint investigative action in some detail. In particular, the team shall carry out its operations in accordance with the law of the Member State in which it operates. Information lawfully obtained by a member of a joint investigative team which is

[26] For instance, the U.S. - Italy Mutual Legal Assistance in Criminal Matters Treaty, entered into force November 13, 1985, 24 ILM 1539.

[27] United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, A/RES/43/120 (December 20, 1988).

[28] Convention on Customs Cooperation, *supra* note 7.

[29] The European Council held a special meeting on 15 and 16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the European Union.

[30] Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, art. 13, 2000 O.J. (C 197).

[31] Council Framework Decision on Joint Investigation Teams, 2002 O.J. (L 162/1).

not otherwise available to the competent authorities of the Member States concerned may be used for the following purposes[32]:

(a)For the purposes for which the team has been set up;
(b)Subject to the prior consent of the Member State where the information became available, for detecting, investigating and prosecuting other criminal offences; it is also provided that consent may be withheld in respect of information for which that Member State could refuse mutual assistance;
(c)For preventing an immediate and serious threat to public security;
(d)For other purposes to the extent that this is agreed between Member States setting up the team.

It is not always clear which law applies to the admissibility of the information collected by such a team when it is later used as evidence in Court proceedings, i.e. the law of the State where the evidence was gathered or the State where the evidence will be used.

2.3 Unilateral police action on the territories of other States

Another function of police cooperation treaties is to strictly regulate unilateral police action on the territory of another State. Under the Schengen Agreement, such action is, in principle, subject to prior authorization, except in cases of urgency, and within strict boundaries (regarding the type of offence, the duration, the authorized police officers, etc.). If these conditions are disregarded, unilateral action will therefore be unlawful in the Schengen territory.

However, even if cross-border policing has been regulated in Europe, a number of issues remain unresolved, for instance, cross-border satellite observations of the territory of another State, monitoring telephone conversations in real time by satellite or downloading the internet software of a multinational company, thereby accessing sources of information out of the jurisdiction of the investigating officials.

3. The implications of growing FIU and police cooperation

International cooperation was traditionally the province of judicial authorities.[33] It is subject to a number of formal requirements (for instance, in respect of the formal contents of a letter of request or the channels of communication between States) and substantive rules (for instance the principle of dual criminality, the

[32] *See id.*, art. 10.

[33] Stessens, *supra* note 1, at 259.

political offence exception, the rule of proportionality, *locus regit actum*).

The borderlines between exchange of information by FIUs and police officials on the one hand and international judicial assistance on the other are not always clear. The traditional approach is that the use of coercive measures involving restrictions on personal rights and freedoms requires cooperation between judicial authorities.

Under the Schengen Convention,[34] police authorities shall assist each other for the purposes of preventing and detecting criminal activities, insofar as national law does not stipulate that the request is to be made to legal authorities and provided that the request of the implementation thereof does not involve the application of coercive measures.[35] The notion of coercive measures certainly includes physical coercion but it is not clear that all infringements of general human rights, especially of the right to privacy (e.g., telephone taps, covert surveillance, etc.) also qualify as coercive measures. Coercive measures are defined differently from one State to another[36] and from one Convention to another. Under the Schengen Convention, controlled deliveries are dealt with as a form of police cooperation, whereas under the EU Convention on Mutual Assistance in Criminal Matters, it is considered as a form of judicial cooperation.[37]

The lifting of banking secrecy usually qualifies as a coercive measure that requires the intervention of a judicial authority and is therefore normally granted only in the course of a judicial cooperation. However, many FIUs also have the power to lift banking secrecy and can consequently exchange information covered by banking secrecy laws. Such information will normally be exchanged only for intelligence purposes.

In addition to information exchanged by FIUs, there are instances where evidence may be volunteered by one State to another, in the absence of any formal request for judicial cooperation. Art. 10 of the European Convention on Laundering, the Financing of Terrorism, Search, Seizure and Confiscation of the Proceeds from Crime provides for spontaneous information given by one State to another for the purpose of provoking or facilitating criminal proceedings within the territory of the recipient State.

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[34] Convention implementing the Schengen Agreement, *supra* note 20, art. 39 *et seq*. and 47 *et seq*.

[35] Van den Wyngaert, *supra* note 5, at 179; Convention implementing the Schengen Agreement, *supra* note 20, art. 39.

[36] Joubert & Bevers, *supra* note 5.

[37] Van den Wyngaert, *supra* note 5, at 179.

Switzerland's domestic law[38] also provides that a judicial authority may spontaneously transmit to foreign judicial authorities evidence that has been gathered in the course of domestic proceedings when that transmission is of a nature that might permit the initiation of criminal proceedings or facilitate their conduct. The law contains a restriction on the transmission of evidence that affects the right to privacy; such evidence may be transmitted only if it is of a nature that will enable the recipient State to submit a formal request for judicial cooperation to Switzerland. The purpose of this restriction is to ensure that the transmission of evidence that can be used against a defendant in foreign criminal proceedings will be made subject to the formal and substantive requirements of judicial cooperation (such as the rule of dual criminality and the political offence exception). To that extent, the Swiss lawmaker has attempted to draw a distinction between the transmission of evidence and of information. In addition, the spontaneous transmission of information must always give rise to a written communication to the authorities of the recipient State.[39]

It has been suggested that a distinction between various forms of international cooperation should be based on the purpose of the cooperation rather than on the nature of the authorities that initiate or respond to requests for cooperation.[40] For instance, the role of FIUs is to clarify the background of suspicious transactions and to fulfil that role, FIUs mutually exchange information. To a large extent, this exchange of information takes place outside the general pattern of judicial cooperation in criminal matters and, although its role and importance have been recognized, there is as yet no multilateral treaty regulating this form of international assistance.

Exchange of information between FIUs together with the development and refinement of international police cooperation (whether based on treaty or on proactive trans-border policing techniques) raises a number of issues involving human rights and the legal protection of the persons concerned (not only suspects but also third parties such as stakeholders in frozen assets). Another issue worthy of consideration is the lack of judicial enforceability of restrictions imposed on alternative evidence-gathering methods. The lawfulness and reliability of the relevant information will only be judicially reviewed in the Court proceedings where such information is tendered as incriminating evidence.

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[38] SR 351.1, Federal Act on International Mutual Assistance in Criminal Matters (IMAC), art. 67a.

[39] Official Reporter of Decisions of the Swiss Federal Tribunal, ATF 125 II 238 *et seq.*, particularly at 247-248.

[40] Stessens, *supra* note 1, at 259-260.

4.Compliance with Human Rights

Legal scholars agree that the pursuit of objectives of international cooperation (whether in the form of mutual legal assistance or of cooperation between police officials or central authorities) should not take place at the expense of the human rights of the persons involved. International cooperation in criminal matters should never result in an infringement of human rights.[41]

In practical terms, there is no guarantee that international cooperation procedures will have no impact on the human rights of the persons concerned. New forms of evidence gathering in criminal matters often rely on the secrecy of the trans-border investigation activities. In a number of circumstances, the defendant will have extreme difficulties in determining how the information was obtained and in assessing the regularity of the investigative techniques that have been used. Problems will increase if there are no rules obliging States to inform the defendant about the way in that evidence has been obtained abroad. The fair trial rights contained in Art. 6 of the European Convention of Human Rights ("ECHR") are designed to deal with domestic proceedings and are not tailor-made for international cooperation. Mutual assistance proceedings, i.e., proceedings in which decisions are made by the authorities of the requested State with respect to the admissibility of requests for cooperation, do not fall within the fair trial requirements of Art. 6 ECHR, since the purpose of these proceedings is not to decide on a criminal charge.[42] Nevertheless, under the case law of the European Court of Human Rights, a State is responsible for violations of human rights, also when acting to comply with international obligations, for instance, by granting a request for assistance or when acting outside its national territory.[43]

It has been suggested that the protection of human rights in the context of international cooperation should remain the same, regardless of the nature of that cooperation and of the channels used for the purpose of gathering evidence or exchanging information (judicial, administrative or police channels).

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[41] Stessens, *supra* note 1, at 254-255; Christine Van den Wyngaert, *The Criminal Justice Systems failing the Challenge of Organised Crime*, 67 INTERNATIONAL REVIEW OF PENAL LAW 634-635 (1996); Joubert & Bevers, *supra* note 5, at 135-136.

[42] See, for instance, Kirkwood v. United Kingdom, European Commission H.R. Decision of 12 March 1984, No. 10479/83, 37 DR 158, 190.

[43] Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989); Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) at § 61-2 (1995); see also André Klip, *The Decrease of Protection under Human Rights Treaties in International Criminal Law*, 67 INTERNATIONAL REVIEW OF PENAL LAW 291-310 (1996).

The Parliamentary Assembly of the Council of Europe has broken ground most recently in its report on the draft Convention on Laundering, the Financing of Terrorism, Search, Seizure and Confiscation of the Proceeds from Crime.[44] Whilst encouraging the intent and purpose of the draft Convention, the Parliamentary Assembly has determined that some of its provisions may be or result in measures that are inconsistent with fundamental rights, including the existing obligations of potential parties under the ECHR and its additional Protocols. In defining rights and remedies available under the Convention, language has been proposed to the effect that nothing in the draft Convention shall be construed in a manner that would violate or allow violations of the rights contained in the ECHR and those of its protocols by which a party is bound. In addition, the Parliamentary Assembly determined that cooperation shall be refused where execution of the request would result in the violation of the rights protected by the ECHR and those of its additional protocols by which the Requested Party may be bound, in particular, Art. 6 ECHR and Art. 1 of its Additional Protocol No. 1 (protecting the right of every natural or legal person to the peaceful enjoyment of his possessions).

One matter of particular concern is the exchange of information with FIUs, which are located in jurisdictions where there is a substantial risk that the person in respect of whom suspicious transactions are being investigated, could be the victim of violations of human rights and particularly of treatment breaching Art. 3 ECHR. In light of the rapidly expanding network of FIUs and the lack of any pre-emptive judicial intervention, this risk should not be minimized. The transmission of information on suspicious financial transactions must therefore be made subject to compliance with relevant international human rights instruments (such as the UN Covenant on Civil and Political rights and the ECHR).
In the interest of expediency and efficiency, FIUs have agreed on principles for the exchange of information that are predicated on their ability to freely exchange information on the basis of reciprocity or mutual agreement and consistent with procedures understood by both parties. Safeguards have been built into the principles to limit the permitted use of information to the specific purpose for which the information was sought or provided and to ensure compliance with domestic standards of confidentiality and protection of privacy. These safeguards may not be sufficient to prevent the infringement of basic human rights in countries that have a poor record of compliance with international human rights instruments.

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[44] Report of the Parliamentary Assembly on the Draft Convention on laundering, the financing of terrorism, search, seizure and confiscation of the proceeds from crime, Doc. No. 10392 (2005).

Alternative evidence-gathering techniques may also affect the right to respect for the private life guaranteed, in particular, by Art. 8 of the ECHR. This right relates to respect for a person's private and family life, his home and his correspondence; public authorities may not interfere with the exercise of this right except in accordance with the law and provided this is necessary in a democratic society.

The case law of the European Court of Human Rights has clearly established that "*there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by §1* (of Art. 8 ECHR)." The European Court added that where a power of the executive is exercised in secret, the risks of arbitrariness are evident and stated that a severe interference with private life must be based on a law that is particularly precise. It is essential to have clear, detailed rules on the subject, particularly in light of the increasing sophistication of technology.[45]

The European Court has clearly defined the formal requirements that a law has to meet in order to legitimately restrict one of the rights or freedoms guaranteed by the ECHR. The law itself must have a basis in domestic legislation, it should be accessible to the person concerned and this person must be able to foresee the consequences of the restriction for him.

In addition to these formal requirements, there are substantive ones. The fact that the restriction is enshrined in domestic legislation does not necessarily warrant a violation or restriction of one of the rights or freedoms guaranteed by the Convention. The restriction must pursue a legitimate aim and be necessary in a democratic society in order to meet the substantive requirements. The restriction itself must be compatible with the essence of the ECHR.

Thus, it is clear that powers given to the police to carry out international cooperation, as well as powers afforded to FIUs to engage in the exchange of information, must be enshrined in legislation that complies with these requirements.

5. Compliance with other fundamental principles

5.1 Restrictions on the use of information

FIUs are a central part of domestic and international anti-money laundering efforts. Their main function is to gather financial intelligence by providing an interface between financial institutions and the criminal justice system. Financial

[45] Joint cases of Kruslan v. France, 176 Eur. Ct. H.R. (ser. A) (1990), and Huvin v. France, 176 Eur. Ct. H.R. (ser. B) (1990).

intermediaries are viewed as the "*gate-keepers*" of the international financial system and to a certain extent they are deemed to be partners – rather than adversaries – of law enforcement agencies in the fight against money laundering. Cooperation of financial intermediaries is the main requirement for the effectiveness of FIUs. This cooperative approach is fostered as long as financial intermediaries are in a position to trust that the use of information provided to FIUs is subject to certain limitations. As implied in Art. 6 of the first EU Money Laundering Directive,[46] information supplied by financial intermediaries to the FIUs can be used only in connection with the combating of money laundering, thereby establishing a sort of speciality principle. However, this language was not taken up in the amendments made to Art. 6 in the second EU Money Laundering Directive.[47]

There is a risk that FIUs could go beyond their function of gathering and filtrating financial intelligence to determine what information should be passed on to the judicial authorities for legal action. For instance, the G7 Finance Ministers determined in May 1998[48] that "*money laundering authorities* (i.e., financial intelligence units) *should be permitted, to the greatest extent possible, to pass information to the tax authorities to support the investigation of tax related crimes, and such information should be communicated to other jurisdictions in ways which would allow its use by their tax authorities.*" Although it may be argued that this conclusion is limited to the investigation of tax related crimes, thereby excluding purely administrative use by tax authorities, it does generate legitimate concerns that some FIUs could be tapping financial intelligence provided by the private sector on behalf of other government agencies, particularly tax administrations.

Domestic legislation may efficiently regulate the national use of financial intelligence gathered by a FIU. However, when it comes to vetting the international exchange of information by FIUs, there are too few legal safeguards ensuring compliance with the speciality principle. It is true that the FIU network is still in a proactive phase of expansion and that the current focus of the Egmont Group is quite understandably on how to enhance the effectiveness of the information exchange system, i.e., free exchange of information "*with other FIUs on the basis of reciprocity or mutual agreement….*"

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[46] Council Directive of 10 June 1991, *supra* note 11.

[47] Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering, O.J. (L 344/76).

[48] Conclusions of G7 Finance Ministers, London, 9 May 1998 available at <www.g8.utoronto.ca/finance/fm980509.htm>.

The Egmont Group has partly addressed these concerns in drawing up a document establishing "*Principles for Information Exchange between Financial Intelligence Units for Money Laundering and Terrorism Financing Cases.*"[49]

Under the heading "*permitted uses of information,"* the Egmont Group has set out the two following rules:

In order to achieve consistency with the domestic law of the FIU that will process the request, a FIU requesting information should disclose at least the reason for the request and the purpose for which the information will be used.

Information exchanged between FIUs may be used only for the specific purpose for which the information was sought or provided. The requesting FIU may not transfer information shared by the disclosing FIU to a third party, nor make use of the information in an administrative, investigative, prosecutorial, or judicial procedure without the prior consent of the disclosing FIU (rule of speciality).

All information exchanged by FIUs must be subjected to strict controls and safeguards to ensure domestic provisions on privacy and data protection. At a minimum, exchange of information must be treated as protected by the same confidentiality provisions as applied to similar information from domestic sources obtained by the receiving FIU.

These rules are obviously non-binding in their nature and their effectiveness depends very much on the goodwill of each party. Since the whole system of information exchanged is predicated on reciprocity, a proven record of breaches of this rule by a FIU could probably lead to limiting or even excluding cooperation in respect of future requests made by that FIU. Nevertheless, such breaches have the potential of violating the fundamental rights of the person involved in the investigations and of undermining the trust of financial institutions in FIUs.

One way of reducing the risks of improper use of information is to embody the speciality principle in the domestic legislation of the FIU transferring the information.

The concept of "*permitted use"* should gain wider international acceptance. A further means of striking a balance between the need for the exchange of information and individual rights would be to ensure that information that can be used as evidence in foreign proceedings – as opposed to financial intelligence – should only be granted in accordance with the formal and substantive

[49] Available at <www.egmontgroup.org/princ_info_exchange.pdf>.

requirements of judicial cooperation. As stated above, this distinction is already made in Swiss law in relation to so-called spontaneous transmission of information under Art. 67a IMAC.[50]

The situation is even less clear in the field of international proactive policing. To the best of our knowledge, there is no general principle that information obtained as a result of proactive investigation may only be used in support of a specific criminal charge and that such information could be disregarded when investigations do not lead to a criminal prosecution or to a trial. Whereas at the domestic level, police officials are accountable to prosecutorial authorities (and also sometimes to judicial authorities), the situation is more complicated on the international scene. Cooperation schemes may involve central authorities, liaison magistrates or police officials, as well as mixed investigation teams. As already observed,[51] there is no international supervisory judicial authority that could monitor the transnational activities of the police. These are matters to be regulated in bilateral (or multilateral) police cooperation agreements. Such agreements should regulate the permitted use of information collected by the police in trans-border operations.

As previously mentioned, Interpol has issued its own model (Bilateral Police Cooperation Agreement).[52] The Model Agreement appears to make a distinction between non-nominal information that should be exchanged as freely as possible (since the confidentiality of such information should be low) and "*personal data*" that should be subject to the national legislation of each party and to the relevant rules in force within Interpol.[53]

Personal data may be used by the recipient party solely for the purposes for which the agreement stipulates that such data may be transmitted; they may be used for other purposes only with the prior authorization of the Party that transmitted the data and in compliance with the laws of the recipient party. Further, data may only be used by judicial or police authorities or any other law enforcement agency designated by the party concerned, a list of which shall be communicated to the other party.[54]

Legal safeguards on the permitted use of information, as well as mechanisms

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[50] *See supra* note 38.

[51] *See id*. at 190.

[52] *See supra* note 16.

[53] Art. 7 § 1 of the Model Agreement.

[54] Art. 7 § 2 let. a and b of the Model Agreement.

designed to supervise and monitor those safeguards, should be built into the relevant police cooperation agreement.

5.2 Legality, proportionality and subsidiarity

Undercover operations and other proactive policing techniques (such as controlled deliveries and wire-tapping) were traditionally viewed with suspicion in many European countries.[55] Since the 1980s, international efforts in drug enforcement, in combating money laundering and more recently in detecting financial transactions linked to terrorist organizations have bred a new legal culture that is more favourable to proactive trans-border cooperation. A number of European States have sought to reconcile the transformation of trans-border police investigation with the tests of legality, proportionality and subsidiarity. Within the EU, these requirements have been codified in the 1997 EU Convention on Customs Cooperation[56] with respect to cross-border undercover operations and in the EU Convention on Mutual Assistance in Criminal Matters.[57]

Legality requires the relevant investigative measures to be formalized. Proportionality limits their use to specified serious crimes. Subsidiarity implies that they be used "*where it would be extremely difficult to elucidate the facts without recourse… to the proposed investigative measures.*"[58]

The Schengen Convention[59] has regulated mutual legal aid by police officials in two provisions:

Art. 39 of the Convention deals with the exchange of information on request of a foreign police service, whereas Art. 46 focuses on the spontaneous transmission of information to a foreign police service.

Art. 39 provides that police officials must comply with the national legislation and the assistance must be requested for the purposes of preventing and detecting criminal offences, provided national law does not stipulate that the request is to be made to the legal authorities and provided also that no coercive measures are involved. As stated above, Art. 39 § 2 provides that written information may not be used as evidence other than with the agreement of the relevant legal authorities of the requested Party.

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[55] Nadelmann, *supra* note 2, at 225 *et seq*.

[56] *See supra* note 7.

[57] *See supra* note 30.

[58] Art. 23 of the 1997 EU Convention on Customs Cooperation; Van den Wyngaert, *supra* note 5, at 181.

[59] *See supra* note 20.

Art. 46 provides for the possibility (not the obligation) for a Contracting Party to spontaneously transmit information to another party that may be of interest in helping prevent future crime and to prevent offences against or threats to public order and security. Under Art. 46 § 2, information shall be exchanged through a central body, subject to more extensive arrangements between parties.

Other instruments enacted by the EU (for instance, Council Decision on 27 February 2003 on the common use of liaison officers[60] and Council Framework Decision of 13 June 2002 on joint investigation teams[61]) insist on compliance with domestic legislation and relevant international instruments, including provisions governing the protection of personal data. It is therefore clear that proactive policing techniques are moving out of the grey zone of informal cooperation and are being increasingly regulated in an effort to ensure compliance with principles of legality, proportionality and subsidiarity. In the absence of pre-emptive judicial review, the best way to secure compliance with these principles is to provide the judicial authorities with wide discretion to review the admissibility and reliability of evidence obtained by the means of international police cooperation.
The exchange and subsequent use of information by FIUs are not so clearly regulated in terms of securing compliance with these basic tests. Such information is not usually exchanged through the ordinary cooperation channels. Because of the confidential nature of the information on suspicious transactions, FIUs lay particular emphasis on the duty of secrecy. The whole system of exchange of information is predicated on the general assumption that FIUs will handle information on the basis of utmost confidentiality.

To a large extent, the whole scheme involving an international exchange of information between FIUs is predicated on a set of empirical practices and procedures that appear to be gaining wide recognition. The Egmont Group has agreed upon a definition of what a FIU should be;[62] it has completed a survey on the possibilities and modalities of information exchanged, prepared a model Memorandum of Understanding for the exchange of information, created a secure Internet website to permit and facilitate the exchange of information. It has also taken initiatives to develop the expertise of the FIUs' personnel and to contribute to the investigation of matters within the jurisdiction of FIUs. Nevertheless and inevitably, the FIU network includes government agencies all over the world with different legal cultures and diverging standards of legal protection and respect for the human rights of the persons concerned.

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[60] *See supra* note 25.

[61] *See supra* note 31.

[62] *See* <www.egmontgroup.org/egmont_final_interpretive.pdf>.

6. Conclusion

The European framework of international cooperation in criminal matters has undergone substantial changes over the past 15 years. Although mutual assistance through judicial channels remains the main pillar of trans-border cooperation, new modes of evidence gathering have gained momentum, as well as a wide measure of recognition. This evolution is two-fold. On the one hand, international police cooperation has been increasingly codified in the form of bilateral and multilateral instruments setting out new methods of proactive cross-border policing. On the other hand, Financial Intelligence Units have developed in a pragmatic way a broad network for the exchange of information on suspicious financial transactions.

Both trends are predicated on the perceived need for greater efficiency and expediency in securing not only intelligence on trans-border criminality but also evidence capable of being introduced in pre-trial investigations or at the trial itself. Although this process does not usually involve cooperation between judicial authorities, it remains governed by the rule of law and should not lead to a lowering of standards in the protection of human rights and of legal safeguards. Human rights instruments were designed to be enforced primarily in domestic law and have not been tailored for international mutual assistance proceedings. The emergence of a new and increasingly complex framework of international assistance and the development of non-judicial methods of gathering evidence call for a wider recognition of human rights in this area. Compliance with adequate legal standards must be a prerequisite for the admissibility of evidence obtained through non-judicial cooperation.

The Parliamentary Assembly of the Council of Europe has endorsed this approach. It has emphasized that in pursuing the public interest in fostering international cooperation, States should not lose sight of the rights of individuals.[63] The draft Convention of the Council of Europe on Laundering, the Financing of Terrorism, Search, Seizure and Confiscation of the Proceeds from Crime should propose definitions and procedures that are fully consistent with the principles of legal certainty and the right to fair trial in all its aspects. Investigative powers and techniques should be exercised in accordance with the principle of proportionality.

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[63] Report of the Parliamentary Assembly, Doc. No. 10392 (2005), *supra* note 44, at "Introduction", § 3.