EU Cross-Border Policing Provisions, the View from One of the Schengen Opt-out States

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1. Introduction

At first sight the developments of cross-border operational capabilities for policing are welcome improvements within the “post-national” setting of the EU”.1 Organised crime is no respecter of borders or of differing national legal jurisdictions. Attempts made by criminals to exploit the differences across the EU in combating crime must be addressed. The deeper, however, we delve into the issues which come with cross-border policing, the more complex the picture becomes. Still, the very nature of “policing” differs from one jurisdiction to another, with some of the policing role in one jurisdiction being allocated to non-police law enforcement officers in another. While the core policing role “is basically the same”, “historically, the role of the police force as part of society and its modes of action are quite varied”.2 Acting as agents for their states, the police reflect the differences in “the cultures of government” in each of their countries, which “probably vary quite a lot.”3 While domestic debates on “law and order are increasingly situated within a European context”,4 the “plethora of policy actors involved within the (European)
policing policy”\textsuperscript{5} has constructed a complex web of policy and legal documents, building on political compromise which resulted in the PJCCM pillar of the EU. They do not form part of a coherent whole. In fact the “European constitution,” or legal framework can be seen more as a “vector, rather than as a point”,\textsuperscript{6} given its constantly evolving status, and it is very much a framework “under construction.” Nevertheless the generally pragmatic approach of the EU’s policing professions has managed to make operable an unlikely legal framework.

The deep political concerns of EU governments in the policy area of PJCCM, which go to the core of state sovereignty, cannot be ignored. These concerns have resulted in academic and practitioner commentary on democratic accountability and issues of human rights, and concerns about state protection. At a practical level, the uneven implementation of the EU law enforcement provisions, in particular, due to the express “opt-out” stance of certain EU member states, in particular, the United Kingdom, also raises concerns. Further “variable geometry”\textsuperscript{7} is to be anticipated with respect to the forthcoming EU wide discussions on the Treaty of Prüm. Added to these difficulties in cross-border police enquiries and operations, the police role has been described as being “explicitly impartial owing to their express purpose of controlling adherence to jointly agreed norms”.\textsuperscript{8} These jointly agreed norms, while to a limited extent will be directed by an evolving EU legal framework, as in the case of the EU Framework Decisions on Terrorism\textsuperscript{9} or Drug Trafficking,\textsuperscript{10} for the most part will be set internally within each EU member state, and must therefore differ, to a greater or lesser extent, from one EU member state to another.

In this complex area of relations between states, within the context of the inter-governmental rather than the traditional international level, one element of International Relations theory becomes useful, that of Constructivism. Developed by Onuf, it “is applicable not simply to the level of states, but to humans in any dimension of their social activity, international relations being merely one, albeit

\textsuperscript{5} S. Cope and P. Starie, \textit{loc.cit.}, p. 350.
\textsuperscript{6} J. Shaw, \textit{loc.cit.}, p. 590.
\textsuperscript{8} J.T. Kääriäinen, \textit{loc.cit.}, p. 413.