



MAPPING POLICE COOPERATION STRATEGIES IN THE EU AND AUSTRALIA: IMPROVING INTER-AGENCY UNDERSTANDING



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Abstract: This contribution presents both the EU and the Australian system of police cooperation in comparative socio-legal perspective and highlights some of the reasons why law-enforcement cooperation in the EU might, to some extent, be considered more advanced. The article also aims at answering the question whether EU police cooperation is today comparable to strategies employed in a federal system, such as Australia, or whether it is still closer to international cooperation.

To find out about the structure of police cooperation in the EU this study employed a comparative socio-legal approach and juxtaposed both legal texts and practitioner attitudes in the area of law enforcement cooperation in the two systems. Interviews with practitioners were conducted with a view to investigating the extent of implementation of laws fostering police cooperation in the EU and Australia. It could be concluded that EU law-enforcement cooperation is distinctly different from both federal and international cooperation strategies. EU strategies are more formalised than Australian strategies as both bilateral and multilateral strategies between EU Member States have often been regulated at the supranational level. Compared to international cooperation, EU strategies are more far-reaching and go beyond international sovereignty concerns. What is most striking to learn in the comparative context is that the level of enthusiasm for cooperation (as measured by interview response rates) is much higher in the EU than in Australia. It follows that regulation of police cooperation, rather than having a strong legal effect, could be a major sociological factor impacting on practitioner enthusiasm.

I. INTRODUCTION

This article gives a brief summary of the author's recently published comparative socio-legal study titled *Policing Cooperation Across Borders — Comparative Perspectives on Law Enforcement within the EU and Australia* (Hufnagel, 2013). It outlines the main new insights into police cooperation that can be gained from this analysis. Drawing on interviews with practitioners, a number of areas where the EU can be compared to a federal system are highlighted and the advantages and disadvantages of being a Union or a federation of states with a view to police cooperation practice are addressed. Particular topics that will be given attention are the evolution of legal frameworks regulating police cooperation, Joint Investigation Teams, Europol and regional cooperation.

An important question to be asked in relation to EU police cooperation is whether it is today comparable to strategies employed in a federal state, such as Australia, or whether it is still closer to international cooperation. The short answer to this question is that EU law-enforcement cooperation is distinctly different from both federal and international cooperation strategies. With regard to federal, and specifically Australian, police cooperation, EU strategies are more formalised as both bilateral and multilateral strategies between EU



Member States have often been regulated at the supranational level. Compared to international cooperation, EU strategies are more far-reaching and go beyond international sovereignty concerns. This contribution presents both the EU and the Australian system of police cooperation in comparative socio-legal perspective and highlights some of the reasons why law-enforcement cooperation in the EU might, to some extent, be considered more advanced.

II. COOPERATION STRATEGIES IN THE EU

The development of police cooperation in the EU in the last 20 years is impressive, not only considering that many of its current members were in a state of war less than 70 years ago (Dedman, 1996, pp. 10-11; Pinder & Usherwood, 2007, pp. 1-3), but also in comparison to cooperation within federal systems, such as Australia. The study this article is based upon has concluded that many cooperation strategies, like access to data such as criminal records, has in some federal systems not been developed much earlier than in the EU between sovereign nation states. This is particularly remarkable considering that police and criminal justice cooperation and a common security policy were not even envisaged when the European Economic Community (EEC) was established in 1957 (Preamble to *Treaty Establishing the European Economic Community*; Pinder & Usherwood, 2007, pp. 3-6). The EU was formed mainly to prevent future wars among the Member States by including them in one entity with common interests and goals (Ibid; Craig & de Búrca, 2011, p. 7). Economic cooperation aimed at establishing an internal market within the EEC then culminated in the Single European Act in 1986, with Article 8A providing for the abolition of border-controls between Member States (*Single European Act*). The *Treaty on European Union*, which was signed in 1992, was the first to integrate law enforcement between the Member States (*Treaty on European Union*). In its Title VI on Co-operation in the Field of Justice and Home Affairs, which was a significant step towards a harmonised EU framework on police cooperation, it provides for this integration (Den Boer, 1996, p. 247; Fijnaut, 2004, pp. 241-242). Article 29 of the TEU prescribed that citizens should be provided with a high level of safety within an area of freedom, security and justice by

preventing and combating crime through closer cooperation between police forces, customs authorities and other competent authorities in the Member States.

Existing police cooperation strategies between EU Member States today go far beyond the founding aims of creating peace, economic prosperity and stability in the EEC. Advanced bilateral and multilateral cooperation initiatives have developed and require the partial surrender of sovereignty rights in order to facilitate the exercise of powers of law enforcement on foreign territory (See, in relation to the Belgium, German, Dutch Cooperation in the common border region: Spapens, 2008, pp. 225-226; and more generally: Sheptycki, 1996, p. 10). This development is particularly remarkable as policing is one of the most 'sovereignty sensitive' functions of a nation state (Wallace, 1999, pp. 509-510). Furthermore, cooperation strategies were developed despite the existence of divergent cultures, structures, languages and histories of police organisations in the Member States (Hebenton and Thomas, 1995, pp. 24-37).

Police cooperation has increasingly become a focus of European attention since the 1970s and the onset of the threat of terrorism in Europe (Busch, 1995, pp. 285-292). This led to the development of a number of intergovernmental initiatives (which are comparable to Australian cooperative federalism). Three ways of promoting police cooperation developed in the EU and are therefore the focus of this comparison. The first are 'legal' strategies, such as supranational legal frameworks and the harmonisation of criminal law and procedure. The second are 'compensatory' strategies, created to counteract or compensate for the current lack of legal regulation and harmonisation in this field and to overcome cultural and structural differences of the organisations involved. 'Compensatory' strategies in this context are common education and training, common forums and common institutions or agencies. The third are advanced 'regional' cooperation strategies, encompassing the previous two strategies but developing them further in the regional context.

What can already be stated with a view to Australian strategies is that legal strategies are nearly non-existent. Australia relies on the existence of its federal police more than on legal frameworks and harmonisation facilitating cooperation between its states and territories. However, Australia also



has a number of 'regional' frameworks, which exist bilaterally and multilaterally between some of the states and territories. The difference between these and EU regional strategies is that they have not been formalised through treaties and agreements and therefore have no power to influence federal law. Australia and the EU show most similarities with regard to 'compensatory' strategies. Both employ liaison officers in the other jurisdictions and offer common education and training, as well as other practitioner forums to overcome the lack of legal frameworks and harmonisation. On the sociological rather than the legal level, many similarities do therefore exist.

With regard to the EU, one of the most important developments in the area of police cooperation was the establishment of a common legal framework under the Schengen Agreement (*Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders 1985*), which had the effect of relaxing common border controls. The Schengen Agreement, together with all the decisions of the Executive Committee, was supplemented by the 1990 Convention Implementing the Schengen Agreement (Schengen Convention or Schengen Acquis, D'Oliveira, 1996, pp. 268-269). The Schengen Convention provided for the gradual abolition of borders between the EU Member States signatories, with the view to creating an internal market without frontiers, enabling the free movement of goods and persons (*Europa, Summaries of Legislation, 2014*). While it is a harmonised EU legal framework today, the Schengen Convention commenced as a regional initiative and borrowed from other regional frameworks, such as the Benelux and Nordic countries cooperation and the informal Dutch, Belgium and German cooperation network 'NebedeagPol', which highlights the importance of regional frameworks to stimulate innovation and enhanced police cooperation in the EU.

It is debatable whether the abolition of internal borders in the EU genuinely heightened the risks of cross border crime, and therefore justified enhanced cooperation under the Schengen Convention, or whether the calls for greater cooperation were simply opportunistic political rhetoric (Busch, 1996, p. 319; Anderson, 1994, pp. 3, 9-11). It is reasonable to assume that suspected criminals entering neighbouring

countries, and thereby into another jurisdiction, pose difficulties for the police pursuing them, such as obtaining arrest warrants, permission to continue the pursuit or general assistance of the police from the country entered (Hertweck, 2005, p. 721; Schneider, 1998, p. 306; Storbeck, 1993, p. 175). A heightened significance of police cooperation in the EU in the last 20 years can probably be attributed to a number of factors, apart from the perceived increased risks of cross-border crime flowing from the abolition of border-controls. These include, for example, the effects of globalisation, terrorism, organised crime and, generally, the increased mobility of offenders (see inter alia, Bowling, 2009; Busch, 1996; and in relation to the impact of globalisation on policing, Reiner, 1992; Sheptycki 2009a and b). These factors have clearly affected the EU and Australia alike.

In addition to the Schengen regime, many regional cooperation frameworks have developed in the EU: for example, the Nordic Police and Customs Cooperation (in Norwegian: PTN) (Gammelgård, 2001, p. 232), the Benelux cooperation (*Treaty Concerning Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands*), the Cross Channel Intelligence Conference (CCIC) (Gallagher, 2002, p. 121), the Meuse-Rhine Euroregion cooperation (Spapens, 2008, 225-226) and numerous Police and Customs Cooperation Centres (PCCCs) (Mitteldeutsche Polizeiakademie, 2010; Overview of PCCCs, 2006).

While enhanced regional cooperation could be regarded as beneficial, it has been claimed to lead to the emergence of a so-called 'patchwork' system of cooperation (Benyon, 1994). This can also be observed in the Australian context. Being political entities consisting of multiple jurisdictions, some of those jurisdictions have developed stronger links with each other and hence engage in more cooperation, while others have remained excluded from more advanced practices. While in the EU many neighbouring states have developed bilateral and multilateral treaties and agreements to enhance cross-border cooperation, a multitude of EU initiatives have equally developed to improve cooperation and set minimum standards in certain areas (Böse, 2007, pp. 235-279). Due to the resulting diversity of bilateral, multilateral and EU strategies, the creation of an overarching legal framework



governing police cooperation has frequently been discussed (Mitsilegas, 2009, pp. 59-110; Klip, 2009; Klip & van der Wilt, 2002; Asp, 2001). Since the Treaty of Lisbon in 2007 (*Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*), these discussions have become even more vivid (Ladenburger, 2008).

Although common legal frameworks can be said to exist in the EU, such as the Schengen Convention, their implementation is far from uniform (Joubert & Bevers, 1996, p. 11 [in relation to languages], pp. 15-17 [in relation to different interpretations]). EU legal frameworks provide general strategies for police cooperation, which need to be translated into national legislation and bilateral or multilateral treaties and agreements to become operational at the national level (Article 39, para 5 of the Schengen Convention). The differences in the implementation processes and in legal systems in relation to criminal law, procedure, data protection and evidence laws therefore continue to hamper cooperation (Joubert & Bevers, 1996, pp. 538-542; Interview German-French Police and Customs Cooperation Centre). It became one of the major tasks of European integration to improve cooperation by creating harmonised legal regulation and 'compensatory' measures with a view to common standards, practices and institutions (see, for the distinction between the three legislative dimensions, Monar, 2006).

Problems in the area of information exchange have led to the recent establishment of another prominent legal framework, the Prüm Convention (*Convention Between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of The Netherlands and the Republic of Austria on the Stepping up of Cross-border Cooperation, Particularly Combating Terrorism, Cross-border Crime and Illegal Migration*), which implements a system of mutual recognition in the field of information exchange. Furthermore, the establishment of Europol in 1995 (*Council Act of 26 July 1995 Drawing up the Convention based on Article K.3 of the Treaty on European Union on the Establishment of a European Police Office*) was intended to improve the sharing of data between the Member States' law enforcement agencies. Europol can to a certain extent be compared to Australian federal agencies, as it provides for a law enforcement institution with overarching

responsibility for national jurisdictions within the EU and because it can participate, similar to the Australian Federal Police, in Joint Investigation Teams, despite its lack of law enforcement powers.

III. AUSTRALIAN POLICE COOPERATION STRATEGIES

Unlike the EU with its 28 Member States, Australia is only divided into nine different criminal jurisdictions (Bronitt, 2009, pp. 2, 4). However, similar to the EU, each of these is policed by its own police force and specialised law enforcement agencies (Finnane, 1994, pp. 14-23). Problems of border crossing, information exchange and joint investigations are therefore confronted due to differences between state and territory laws in the field of substantive and procedural criminal law and data protection laws (Bronitt, 2009, pp. 2, 4). Another factor that is less frequently considered, but no less important, is the difference in organisational culture and investigative techniques of the state and territory police forces. The difficulties of cross-border enforcement in Australia are particularly apparent in relation to calls for new laws to enable cross-border investigation in the last decade. These reform proposals deal primarily with mutual recognition of law governing controlled operations, assumed identities, electronic devices and witness anonymity (Standing Committee of Attorney General and Australasian Police Ministers Council Joint Working Group on National Investigations, 2003, i).

While similarities between the EU and Australia are apparent in relation to the situation of policing across borders, major constitutional differences exist that need to be considered when comparing both systems. Unlike the EU, Australia is one nation, established as a constitutional democracy (*Chapter I, Australian Constitution*). It therefore is governed by constitutionally established federal organs of government with clear federal competences (*Chapter II, Australian Constitution*). However, similarities are created by the subdivision of Australia into states and territories following the former system of colonies (Parkinson, 1994, p. 148). The power to enforce state and territory laws and the autonomy in making these laws stems from the *Australian Constitution*, which confers some degree of autonomy in relation to



legislative powers on the states. This has similar effects, in practice, as EU Member States' national sovereignty. By cooperating with other states and territories, for example, by exchanging information or allowing foreign police on one's territory, state sovereignty in relation to national jurisdiction and law enforcement is endangered. Only Australian states have sovereignty under Chapter V, s 108 of the *Australian Constitution*, while the two territories (Northern Territory and Australian Capital Territory) are more dependent on the federal state. However, the territories also have their separate jurisdiction, police and criminal legislation. This constitutional framework led to the need for states and territories to either trade powers on a bilateral and multilateral basis or give up competences to the federal government to enhance cross-border police cooperation.

Like EU Member States, Australian states and territories can enter into bilateral and multilateral relationships amongst themselves. On this basis, Australian states and territories have developed a number of initiatives to counter cross-border crime, mostly in the form of Memoranda of Understanding (MOUs), with other domestic jurisdictions. A recent multilateral cross-border initiative, called Ngaanyatjarra Pitjantjatjara Yankunytjatjara lands (NPY lands) cooperation, between the Northern Territory (NT), Western Australia (WA) and South Australia (SA), for example, led to the ceding of competences between a territory and two states (Standing Committee on Legal and Constitutional Affairs, 2009, Chapter 2).

The most prominent agencies in the areas of multijurisdictional policing and information exchange are the Australian Federal Police (AFP) and CrimTrac, an agency created under a multilateral MOU between all states and territories and the Commonwealth to facilitate information sharing (CrimTrac, 2009). Another initiative to harmonise cross-border policing standards and practices in Australia is the creation of model legislation (Standing Committee of Attorney General and Australasian Police Ministers Council Joint Working Group on National Investigations, 2003, i), though this is, similar to EU framework decisions and conventions, rarely implemented uniformly by states and territories. Despite Australia being a Federation, a uniform legal framework for police cooperation does not exist. This causes problems for police cooperation comparable to the 'patchwork' system in the EU.

Despite the similarities of the EU and Australia at the legislative level, the comparability at the executive level is more unbalanced. Both objects of the comparison differ considerably in relation to their population size and degree of historical, cultural and organisational diversity. Australia's population size is about 23.4 million (Australian Bureau of Statistics, 2014). This compares to 503 million inhabitants of the EU (Europa, 2014). Australia covers a total area of 7,692,024 sq kilometres (including islands) (Australian Government, 2009). This compares to the EU area, which covers about 4,300,000 sq kilometres (Europa, 2009). All police forces in Australian states and territories have developed according to the British model, and at about the same time, with some necessary adaptation to the colonial context (Finnane, 1994, pp. 14-23). The differences in history, structure and culture of Australian police forces are therefore much more subtle than those in EU countries. Policing structures in the EU differ significantly from Member State to Member State according to the particular state structure (whether centralised or decentralised), historical events (e.g. wars) and legal cultures (e.g. common law or civil law) (Fijnaut, 1994, pp. 600-603). However, both systems are today promoting 'compensatory' strategies, such as common education and training of police across different jurisdictions (Lafferty & Fleming, 2000; Pagon, 1996; and in relation to CEPOL, Occhipinti, 2003, pp. 126-129). This shows that similarities exist even at the executive level.

IV. EU SIMILARITIES WITH THE FEDERAL AUSTRALIAN SYSTEM

The existence of common 'compensatory' strategies in both systems indicates that police organisations share many sociological similarities with regards to police cooperation. A major difference and advantage of EU cooperation compared to Australian strategies is the existence of harmonised legal frameworks, such as the Schengen Convention and the 2000 Mutual Legal Assistance Convention, governing police cooperation in the EU. They could hence be a model that has the potential to improve police cooperation in Australia (as confirmed by the recent calls for legal frameworks by Australian practitioners).



Another advantage of EU police cooperation is that advanced regional cooperation initiatives have been developed and implemented in trans-national and supra-national legislation. The importance of this 'law generation' process at regional and EU levels is not so much the greater legal certainty and formal fostering of cooperation, but the recognition of practitioner efforts at the Member State and EU levels. It became apparent in interviews conducted in Australia that the lack of such 'law generation' was frustrating for practitioners developing sophisticated strategies in border regions. The establishment of such legal norms in Australia could therefore potentially enhance cooperation in the federal system by fostering practitioner enthusiasm.

Furthermore, Australia is, unlike the EU, policed by federal agencies and their impact on cross-border policing has been assessed with a view to informing the development of Europol. The existence of a federal police agency, while not possible in Europe in the near future, is also very problematic in Australia. Cooperation between states has been reported to work, at least at an informal level, very well, while cooperation with the Australian Federal Police is marked by resentment and prejudice as well as a fear of loss of competences. However, an area where the AFP has received high praise from states and territories is the Joint Investigation Teams (JITs). JITs in Australia are differently organised to those in the EU and often also include non-law enforcement agencies, such as social services. Throughout the interviews for this study, the AFP has been applauded for its leadership, knowledge about different legal systems within Australia and financial support, which significantly facilitate cross-jurisdictional cooperation. Here, the similarities of the EU with a federal system become particularly apparent. Europol, while unlike the AFP bare of enforcement powers, can already participate in JITs and provide its expertise and other support to them. In the light of the Australian experience,

it could be questioned whether Europol would be significantly improved by having enforcement powers or whether this would only lead to a future fight over competences and resentment of the Member State's police forces similar to many federal systems, such as Australia.

It can hence be concluded that Australian practitioners would welcome the creation of common legal frameworks, such as the Schengen Convention on police cooperation. The existence of such legal strategies in the EU can hence be viewed as a major advantage compared to a federal system. However, assessing the political and legal development in the Australian states and territories, a consensus on such measures will not be created in the near future. States are scared of giving up their limited powers (which in another publication by the author has been termed the 'fear of insignificance' — Hufnagel, 2010) and apply the adage 'if it ain't broke, don't fix it'. While regional strategies have developed in Australia to promote cross-border law enforcement, none of these have been formalised through legislation between participating states or taken up as a national strategy. This impacts on practitioner enthusiasm with a view to cooperation, as none of their efforts seem to be recognised at the state and national level. Compared to Australia, it can be noted that the practitioners interviewed for this study in the EU, while being critical of the legal provisions, showed a much higher level of enthusiasm towards cooperation than was apparent in Australia. This might point to another significant advantage of the EU: cooperation within it is still international as it involves sovereign nation states and therefore more exciting and marked by professional status than cooperation within a national system. A last recommendation to the EU could therefore be not to lose the individuality of the systems and not to harmonise too many rules, as the differences seem to keep practitioner creativity and enthusiasm alive.



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