

# Internal Security Cooperation under Functional Expectations: Initial Law Enforcement Europeanization - Case of Finland and Estonia

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**Abstract:** Law enforcement cooperation as a central part of the EU internal security policy to combat cross-border organised crime and terrorism needs to be more effective by adopting specific provisions and tools. This paper argues that functional expectations require removal of barriers and construction of a common security area, but sometimes better cooperation in practice does not fit, as Europeanization of law enforcement still lacks understanding of objectives, values and principles for improving international trust, consensus, sincere cooperation and effective national coordination. The level of Europeanization of law enforcement could be evaluated as based on the level of implementation of the EU provisions on police cooperation related to practical enforcement, factors promoting or hindering law enforcement and changes in discursive practices due to EU provisions and professional socialisation processes. Some aspects of observed inertia characterizes the slow process of transition or tendencies for absorption in which resilience meets the necessary degree of flexibility allowing for some mutual learning and cooperation, but the result is expectedly a form of accommodation of needful policy requirements in the lack of substantial change perspective.

**Keywords:** Law enforcement, EU Justice and Home Affairs (JHA), Area of Freedom, Security and Justice (AFSJ), Europeanization.

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## Introduction

The European Union (EU) has been in a permanent transition and probably never more than during the first turbulent decade of the 21<sup>st</sup> century with its challenging enlargements, deepening of the monetary and economic integration, the widening of the Schengen area and struggling with new immigration flows. Currently, the EU is facing the greatest contemporary migration crisis that will likely change the internal security system of the Union. The problem of illegal immigration, including that of cross-border organized human trafficking, is far from being new to the EU, but the increasingly forming pressure is becoming a source of more opinionated positions and thereby nurturing potential radicalism.

Effective management of transition requires both a high degree of cooperation based on mutual trust to shape collective action at the EU level, based on appropriate resources, including common value resources, political will and institutional capabilities. Contemporary security challenges are mostly cross-border and cross-sectorial. Thus, the future of the Union's internal security domain is mainly a matter of effective cooperation in preventing and fighting serious organised crime, terrorism and cybercrime, strengthening the integrated management of the external border and protection of critical infrastructure.<sup>2</sup> The ongoing crisis has highlighted the need for more active cooperation of the EU internal security and law enforcement bodies and competent national authorities to prevent, detect and stop transnational illegal networks. Operational cooperation should also be targeted even more towards the external dimension, in order to break the networks of cross-border smuggling. Increasing security challenges give some extra functional pressures to national governments for more effective transnational and supranational cooperation. The EU's efforts on matters of internal security have recently been focused more on operationalizing the existing instruments and intensifying the use of cooperation tools. The main innovation since the start of the ambitious Stockholm Program (2010) is the EU policy cycle on serious and organised crime, developed through the Standing Committee on Operational Cooperation on Internal Security (COSI). At the same time, some critical debates on state sovereignty and EU internal security integration have also been raised (see Bigo, 2008a, 2008b; Burgess, 2009) since policing and law enforcement have been carefully guarded features of traditional sovereignty. So, the constructivist approach to re-define the common security space needs to be re-vitalized to meet the functional expectations and find some further appropriate governance tools.

The adoption of the Lisbon Treaty (TFEU) opened a challenging chapter for the promotion of more supranational actions in EU law enforcement cooperation. The policy context of so-called *Lisbonization* highlights the call for the *European model* for Justice and Home Affairs (JHA) and Area of Freedom, Security and Justice (AFSJ) with appropriate operationalization of cooperation tools. Thus, the Stockholm Programme (2010) turns

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<sup>2</sup> Studies of transnational law enforcement cooperation and *Europeanization* have started to collect some interrelated academic research traditions during the past decade (see, among others, Anderson, *et. al.*, 1995; King and Ray, 2000; Sheptycki, 2000; Börzel and Risse, 2003; Mitsilegas, *et. al.*, 2003; Deflem, 2004; Walker, 2004; Marenin, 2005; Savage, 2007; Bigo, 2008a; 2008b; Burgess, 2009; Mabee, 2009; Kaunert, 2010; Merlingen, 2012; Kaunert and Léonard, 2013; Bergström and Cornell, 2014; Loik and Smith, 2015).

a lot of attention to the development of trust and common culture, stating that mutual trust is essential to make some 'real progress' in the EU, JHA/AFSJ, that also requires the establishment of minimum standards and understanding of the different judicial traditions and methods of the EU Member States (also MS).<sup>3</sup> Thus, the governments' activities should be examined from the point of view of national implementation of the EU cooperation principles and law as aspects of *Europeanization*.

There are some important aspects in characterizing to what extent law enforcement has been transformed in line with EU legislation and principles when analysed to the deepened understanding of whether the respective discursive practices under transitional adaptation pressure have become more *European*. From that position the study addresses the following questions: (i) how the implementation of the EU provisions on police cooperation manifests into guidance within respective authorities, and (ii) how the implementation of the EU provisions on internal security reflects on the operational level.<sup>4</sup> The hypotheses propose that the main direction of Europeanization has been *top-down* more than expected in case of Finland. Estonia as former soviet country in transition has been treated even in a more conditional way, since it was obliged to implement all the JHA/AFSJ provisions of the Amsterdam Treaty already prior to the EU accession on the 1 May 2004 (see also Veebel and Loik, 2012). The study refers to general understanding on how Finnish and Estonian law enforcement in combating organised crime has been challenged to transform in initial respect, and what measures should be taken under more close attention to promote further implementation of EU police cooperation instruments in Schengen area.

The paper discusses particularly the main shifts of competencies in EU internal security domain as policy context, the European Police Office (Europol) and the related exchange of information, liaison officers system and use of Analysis Work Files (AWF). Regarding the Schengen Convention, the mutual assistance and information exchange under the Convention and the use of the Schengen Information System (SIS) are additionally examined (see also Jaani-Vihalem and Loik, 2013). The Convention on Mutual Assistance in Criminal Matters between the MS (MLA Convention) is mainly examined in terms of the Joint Investigation Teams (JIT), and exchange of police information. The voluntary disclosure of information to other EU Member States is also discussed (see Hämäläinen, 2009). The implementation of the Europol (Serious) Organised Crime Threat Assessment (S)OCTA, as well as some related EU Council priorities are given as an example of translating policy goals into operational cooperation.

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<sup>3</sup> The adoption of legislative action programmes creates some new and amends the existing secondary regulation deriving from the Treaties and initiates the efforts to improve police and judicial cooperation in a more specific manner. This paper aims to examine how the actors in the field of criminal justice applying the legal instruments, e.g., pre-trial investigation authorities and other relevant national bodies closely associated with the implementation are pressured to follow the EU provisions in combating organised crime.

<sup>4</sup> The questions are mainly approached from the practical perspective. The implementation of the EU instruments takes more time, as well as it takes a while before there is such information available to enable appropriate evaluation of whether the implementation has been influential. Hence, this paper covers the implementation of the main EU instruments started in or after 1999 but not later than 2004.

## 1. Aspects of EU Competency Shifts in Common Internal Security Area

### 1.1. Development of legal bases

Internal security and law enforcement issues in the EU achieved a prominent place after acceptance of the Stockholm Program for the period 2010–2014, the EU Internal Security Strategy (ISS) from 2010, and adoption of the Lisbon Treaty (TFEU)<sup>5</sup> with its principal reforms on the EU JHA/AFSJ.<sup>6</sup> Before the TFEU came into force on the 1 December 2009, the EU's legislative powers over the 3<sup>rd</sup> Pillar (TEU, Articles 29–45 previously) were quite limited and intergovernmental competences dominated in police and judicial cooperation in criminal matters.<sup>7</sup>

The legal basis for the JHA/AFSJ integration is mainly provided by Title V of the TFEU (formerly as article 61 of the Treaty establishing the EC and Article 29 of the TEU) providing that an AFSJ shall be constituted in the EU with respect for fundamental rights, the different legal systems and traditions of the Member States, ensure the absence of the internal border controls and shall frame a common policy on asylum, immigration and external border control, based on solidarity, which should be fair towards third-country nationals. The high level of security through measures to prevent and combat crime, to avoid racism and xenophobia and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws with the transparent public access to justice shall be facilitated through the *principle of mutual recognition*.

### 1.2. Mutual recognition and deepening harmonisation

Article 83(1) of the TFEU states that the European Parliament and the Council may establish minimum rules regarding the definition of criminal offences and sanctions in the areas of serious crime with a 'cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis'. Article 83 also lists such areas of crime as terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. It is also important to note that on the basis of developments in crime, the Council may unanimously adopt a decision identifying also some other areas of crime

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<sup>5</sup> Treaty on the Functioning of the European Union (TFEU). Official Journal of the European Union, No. C 115/47.

<sup>6</sup> The EU Justice and Home Affairs (JHA) was the intergovernmental *Third Pillar* of the EU before the adoption of the Lisbon Treaty and covered police cooperation with judicial matters. At the Amsterdam Treaty, the pillar was renamed Police and Judicial Cooperation in Criminal Matters (PJCCM) after Schengen Agreement features were transferred to the *First Pillar* (Community law). According to the consolidated version of the TFEU, the JHA domain is integrated into Title V, *Area of Freedom, Security and Justice* (AFSJ): Chapter 4 – Judicial cooperation in criminal matters; Chapter 5 – Police cooperation.

<sup>7</sup> The AFSJ contains a large number of EU policies and instruments established to ensure (internal) security, rights and free movement within the EU. After internal borders removal with Schengen developments, cross-border judicial and police cooperation had to increase to counter cross-border crime with some common minimum judicial standards.

that meet the Article 83 criteria, after obtaining the consent of the European Parliament.<sup>8</sup> Effectiveness of implementation of these instruments is a priority to the EU and new areas should be also examined where necessary, including Euro counterfeiting, money laundering and drugs trafficking as the main areas for further construction of common internal security space within the advanced harmonization of criminal law and sanctions.

The judicial cooperation in criminal matters is based on the principle of mutual recognition of judgments and judicial decisions and will include the approximation of the laws and regulations of the EU Member States (incl. Article 70, TFEU). In criminal matters the European Parliament and the Council of the EU are able to adopt measures to lay down the rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions, prevent and settle conflicts of jurisdictions between the MS, as well as to support the training and common learning of the judiciary and law enforcement staff, as well as facilitate cooperation between internal security or equivalent competent authorities.

### 1.3. Major institutional developments

As further important cooperation steps, a standing committee (COSI)<sup>9</sup> is set up within the Council of the EU in order to ensure that operational cooperation on internal security and law enforcement that contributes to the coordination between the MS is promoted and strengthened within the EU. Also, it will be open to the EU MS to organise enhanced cooperation between themselves under their departments of their administrations responsible for safeguarding national security (see Article 73, TFEU). The Lisbon Treaty also establishes that as for preventing and combating terrorism and related activities, the European Parliament and the Council will define to the MS a framework for direct effective administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or some non-State entities (see Article 75, TFEU).

Revisions enforced by the Lisbon Treaty also strengthen the competence and positions of Eurojust agency (see Article 86, TFEU) that, namely in order to combat serious crimes against financial interests of the EU, may be developed into European Public Prosecutor's Office by the Council, in order to exercise the functions of prosecutor in the competent courts of the Member States. Furthermore, the Council may adopt unanimously, after obtaining the consent of the European Parliament and after consulting the European Commission, a decision in order to extend the powers of the Public Prosecutor's Office to

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<sup>8</sup> Here the European Parliament and the Council have worked closely in recent years with a view to strengthen, especially the fight against trafficking of human beings, sexual exploitation of children, cyber criminality and protection of women and victims of other crime.

<sup>9</sup> COSI (In French: *Comité permanent de sécurité intérieure*) – Standing Committee on Internal Security, established by Article 71 of TFEU. The COSI is composed of members of the competent ministries, assisted by the permanent representatives of the EU MS and by the Secretariat of the Council. The objective of the COSI is to promote and strengthen the coordination of operational actions of the MS in the field of internal security (see OJ L52) The COSI, as well as the Political and Security Committee (PSC) must also assist the Council with regard to the *solidarity clause* – Article 222, TFEU. The COSI is successor to the Article 36 Committee.

include serious crime having a cross-border dimension and accomplices in serious crimes affecting more than one EU Member State.

## 2. Conceptualization of Law Enforcement *Europeanization*

### 2.1. Organizing approach from constructivist perspective

Presumably one of the most influential definitions of *Europeanization* is proposed by Claudio M. Radaelli (2003, p. 30), formulating that ‘Europeanization refers to: Processes of (a) construction, (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, *ways of doing things*, shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies’. Hence, the concept of Europeanization could be defined as a theoretical approach of describing change or transition in terms of a dynamic and reciprocal process, which captures circular and nonlinear, multilevel interaction between the EU and its Member States, and understood as continual counteraction with on-going processes of negotiations, evaluations, learning and persuasion between multiple actors with their preferences and interests involved and changed.

According to Johan P. Olsen’s well-referenced understanding (2002) *Europeanization* needs, as a first step, to separate the different phenomena referred to by the term, what is changing. He distinguishes between five possible uses of this sense: (i) Changes in external boundaries;<sup>10</sup> (ii) Developing institutions at the European level;<sup>11</sup> (iii) Central penetration of national systems of governance;<sup>12</sup> (iv) Exporting forms of political organization;<sup>13</sup> (v) and a political unification project<sup>14</sup> (Olsen 2002, p. 923–924). He claims that the developing institutions at the European level ‘signify centre-building with a collective action capacity, providing some degree of co-ordination and coherence. Formal-legal institutions of governance and a normative order based on overarching constitutive principles, structures and practices both facilitate and constrain the ability to make and

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<sup>10</sup> Olsen (2002, p. 923) explains in a more specific way that ‘this involves the territorial reach of a system of governance and the degree to which Europe as a continent becomes a single political space. /.../ Europeanization is taking place as the European Union expands through enlargement’.

<sup>11</sup> This means ‘centre-building with a collective action capacity, providing some degree of co-ordination and coherence. Formal-legal institutions of governance and a normative order based on overarching constitutive principles, structures and practices both facilitate and constrain the ability to make and enforce binding decisions and to sanction non-compliance’. (*Op.Cit.*)

<sup>12</sup> Olsen (2002, p. 923–924) explains that ‘Europeanization here involves the division of responsibilities and powers between different levels of governance. /.../ Europeanization, then, implies adapting national and sub-national systems of governance to a European political centre and European-wide norms’.

<sup>13</sup> This means the ‘Europeanization as exporting forms of political organization and governance that are typical and distinct for Europe beyond the European territory /.../ Europeanization signifies a more positive export/import balance as non-European countries import more from Europe than *vice versa* and European solutions exert more influence in international flora’ (Olsen 2002, p. 924).

<sup>14</sup> Olsen (*Op. Cit.*) states ‘the degree to which Europe is becoming a more unified and a stronger political entity is related both to territorial space, centre-building, domestic adaptation and how European developments impact and are impacted by systems of governance and events outside the European continent’.

enforce binding decisions and to sanction non-compliance'. (*Op. Cit.*) It also means that the institutions can take more roles in the functioning of the EU with supranational powers and thus advance the integration.

A *political unification project* by Olsen (2002, p. 924) describes the process to which EU is becoming a more integrated and unified political entity, related both to territorial space, centre-building, domestic adaptation, as well as how the European developments impact and are impacted by the events and systems of governance. Sharing the competencies show that if the MS are ready to delegate some of their powers up to the EU's level then they follow a political unification project, as well as strengthening the EU institutions. The TFEU initiates some new bases, which can be seen as important steps for deeper political integration and further unification in the EU internal security domain, and also as strengthening the powers of the EU JHA agencies. One of the indicators about deeper integration in the TFEU is the *mutual defence clause* (Article 222), which extends the EU's competencies, potential and powers in the fight against terrorism and conflict prevention missions.<sup>15</sup>

Asking about how to reflect Europeanization and the layout of its dynamics, the degree and logic of *adaptation pressure* for change also needs to be specified. Radaelli (2003, p. 37) distinguishes four different aspects of such adaptation pressures:

(i) *Retrenchment* in which domestic actors oppose reforms and thus national policies become somewhat less in line with European templates. In other words, national policies can transform in response to the EU level (a) towards more harmonization and convergence or (b) towards increased divergence;

(ii) *Inertia* characterizes a lack of change, where national and EU policies are too dissimilar or if there appears an overlarge misfit. Inertia is expectedly followed by (a) an implementation delay, (b) increasing resistance to change or (c) conservation of *status quo*;

(iii) *Absorption* is understood as change through adaptation in which resilience meets a necessary degree of flexibility which allows for some learning. Thus the result is expectedly a non-fundamental change in which a 'core' of national policies or traditions remains. The absorption is hence a form of accommodation of 'needful' policy requirements without substantial change of structural logic;

(iv) *Complete transformation* is labelled on paradigmatic change in which some new opportunity structures are also created in terms of a deeper and systematic change. Transformation thus means change of substantial logics of processes and behaviour as a result of adaptation pressures towards Europeanization.

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<sup>15</sup> In the context of the EU JHA the first part that probably has the most significance, given that the EU Member States are compelled to bring domestic arrangements into line with specific EU conditions and criteria set at the European level of convergence, is the part of *Acquis Communautaire* – the Copenhagen Criteria for EU candidate countries. This form of adaptation pressure is potentially the most influential and is closely associated with the 'coercion' or conditionality. This influence also creates an important link between the *bottom-up* and *top-down* conceptualizations as MS may be able to 'condition' adaptation pressures from the EU level at the policy development stage in order to absorb its impacts.

Consequently, the adaptation of the Europeanization pressures reflects variations of domestic responses with different motivations, as well as abilities, to adapt the aspects of change and these are not universal or constant. To generalize, the level of Europeanization advancement of law enforcement can be perceived on the bases of the following criteria: (i) the level of implementation of the EU provisions on cooperation related to practical law enforcement; (ii) factors promoting or hindering the Europeanization of law enforcement, and (iii) changes in law enforcement discursive practices due to the EU provisions or the constructive socialisation process.

## 2.2. Levels and sources of law enforcement performance analyses

The main characteristics of the EU internal security domain during the recent years have been developments towards deeper harmonisation of criminal justice aspects for a more coherent fight against organised crime (Loik and Smith 2015, p. 105). Hence, the establishment of minimum rules at the EU level regarding necessary elements of a criminal offence and punishments for some serious organized cross-border crimes according to the TFEU (Article 83)<sup>16</sup> has become the central issue of concern. Recent EU proposals for directives on trafficking in human beings, sexual exploitation of children and cybercrime represent some further steps towards deepening harmonisation. Examinations of law enforcement and police cooperation from a larger perspective, where the interrelated levels for performance analyses can be distinguished (see Heberton 1995, p. 39) are as follows:

- (i) *macro* level – constitutional and international legal agreements, harmonisation of national laws and regulations;
- (ii) *meso* level – operational structures, practices, procedures, technology, etc.;
- (iii) *micro* level – the prevention and detection of specific offences and organized crime problems.

Macro-level implementation should be examined by analysing strategic- and international documents compiled by the government and ministries, as well as the corresponding steering of law enforcement performance. Meso-level implementation results come by evaluating mechanisms for international and transnational cooperation with exchange of information between the key law enforcement agencies combating organised- and the most serious crimes.<sup>17</sup> To assess micro-level implementation, the focus on the experiences of individual actors in the application of the EU instruments and the improvement of cooperation with other MS should be evaluated. The referenced levels of analyses should be reflected by the corresponding strategic documents and administrative implementation plans.

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<sup>16</sup> Article 83(1); see also ex-Article 31 of the TEU.

<sup>17</sup> In case of Finland, namely the National Bureau of Investigation (in Finnish: *Keskusrikospoliisi*), Helsinki Police Department (*Helsingin poliisilaitos*) and National Board of Customs (*Tullihallitus*).

The Ministry of the Interior prepares annually both a strategic and financial plans for four or five years, including a detailed performance plan for the following year both in Finland and in Estonia.<sup>18</sup> There are discussions in progress in the Estonian Ministry of the Interior if it's more useful to develop and implement a ten-year strategic planning circle as the Ministry of Defence already does. In addition to the administrative plans drawn up by the Ministry, the *Police Department* in Finland and merged *Police and Border Guard Board* in Estonia prepares annual long-term operating and financial plans for policing, as well as correspondent annual performance plans.<sup>19</sup> These documents form the basis for annual performance plans between the Police Department and the police units under the Ministry, such as the National Bureau of Investigation, Helsinki Police Department and Provincial Police Commands in Finland<sup>20</sup> and for such law enforcement bodies as Police Districts (Prefectures), and specialized units as Central Criminal Police in Estonia are the main sources of analyses.

### 2.3. Mutual EU evaluation mechanism

The Council of the EU has made efforts to improve the national implementation of some key EU instruments in the field of JHA, particularly those adopted for combating serious cross-border organised crime. The mutual evaluation system is an organised mechanism for peer-evaluation of the procedures followed in each MS to implement the commonly agreed provisions. The mutual evaluation mechanism enables Member States to evaluate on a basis of equality and mutual confidence the implementation by each MS of the cooperation instruments laid down to combat international organised crime. The aim is to evaluate the implementation and application at national level of the legal acts and instruments of the EU and other international acts and instruments in criminal matters. The specific subject of each evaluation is defined by MS at the Council, on a proposal from the EU Presidency.

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<sup>18</sup> The operating and financial plans studied for this paper cover the period 2004–2012. Such administrative plans are usually published at the end of the previous year or at the beginning of the first year of the planning period. The documents are mainly examined from the perspective of policing. Other strategic documents examined include – The vision, strategy and critical success factors of the police (2002); International cooperation strategy of the police (2004); Vision, strategy and critical success factors of the police (2004–2014); Drugs strategy of the police (2003–2006); Government resolution on the Internal Security Programme (2004) and Government resolutions on reducing financial crime and the *shadow economy* (2002–2005 and 2006–2009). Some working group reports of a strategy-like nature are also examined, concerning Legislation on combating financial crime (2004); Situations in the fight against financial crime (2004); Combating vehicle crime (2005); strengthening the fight against drug-related and organised crime (2007) and the Community policing strategy (2007). In addition, the long-term operating and financial plans for 2005–2008, 2007–2011, 2008–2011 and 2009–2012 of the Customs Administration and the annual performance plans between the Ministry of Finance and Customs (2003–2007), also Reports (2010, 2011 and 2012) on the implementation of the *Main Guidelines of Estonia's Security Policy Until 2015* by the Estonian Ministry of the Interior (2010, 2011, 2012) were examined as samples.

<sup>19</sup> The performance plans incorporate each unit's priorities and goals for policing, set in the administrative plans. The performance targets are then allocated inside the units, which takes place through performance plans between the management and the different performance units, e.g., supervision and criminal investigation units, as well as through staff development issues. The similar system of performance guidance both in Finland and Estonia is a major tool for turning the strategic goals of the entire police service into measures to be taken at the various units.

<sup>20</sup> The latter negotiate performance plans with the local police, except for the Helsinki Police Department, which comes directly under the Ministry of the Interior in Finland.

An evaluation team, set up separately and consisting of experts from the EU Member States and the General Secretariat of the Council, visits the MS being evaluated and prepares a report on the evaluation about mutual legal assistance, law enforcement and its role in fighting drug trafficking, implementation of a European Arrest Warrant (EAW),<sup>21</sup> exchange of information and intelligence with Europol and the other MS respectively, etc. Schengen capability evaluations under the Schengen Convention are also periodically carried out within the Member States. The country-specific reports are confidential until adoption, thus, the cooperation and mutual evaluation is based on mutual trust, confidentiality and loyalty as principle.

The evaluation reports are discussed by the relevant Council working group – earlier by the Multidisciplinary Group on Organised Crime (MDG) and from 2010 by the Working Party on General Matters including Evaluation (GENVAL). The working group adopts its conclusions on the reports by consensus. The Presidency then informs the Council annually about the evaluation results and the European Parliament about the implementation of the evaluation mechanism. The Commission then submits an annual report to the Council and the Parliament on the evaluation of the implementation of respective EU AFSJ/JHA programs. Hence, the development and implementation of law enforcement cooperation priorities' is observable by both the evaluation mechanism on EU level and policy reflections within national regulations.

### **3. Implementation of EU Policy to Fight Organised Crime**

#### **3.1. Law enforcement steering system**

The research interviews were conducted with the aim of gathering more detailed information on the implementation of the EU instruments from the actors on the ground.<sup>22</sup> The main finding pertains to the *de facto* implementation of the EU legal instruments in law enforcement activities. The insufficient implementation of the instruments during the observed period also means failing to fully achieve the goals for police cooperation stated by EU legislation and the objectives of the joint actions between the EU MS. Current challenges to guarantee the functioning of Schengen free movement area is partly reflection of problems to fully implement the EU level law enforcement cooperation mechanisms.

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<sup>21</sup> The European Arrest Warrant (EAW) is set up to address the issues of *dual criminality* for a list of categories of specified serious crimes, overcoming the obstacles of different criminal codes in the MS. The grounds for refusal are strictly limited by the correspondent framework decision and related regulations.

<sup>22</sup> The interviewees were mainly selected among representatives of law enforcement authorities whose rank in the organisation was that of a head of investigation or contact persons who had cooperated with law enforcement authorities with other EU MS in practice. The selection procedure was started with heads of investigation who were generally known to have investigated sophisticated international criminal cases. The interviewees comprised 24 experienced heads of investigation in total, representing the National Bureau of Investigation, Helsinki Police Department, Espoo District Police and the Southern and Western customs districts of the Customs Administration. Two of them had worked as police liaison officers seconded to Tallinn (Estonia) and Interpol.

The implementation of EU legislation at the macro-level demonstrates that political decision-makers have relatively clearly expressed willingness to improve and further deepen the internal security cooperation and strengthen the Schengen area both in Finland and Estonia (see also Security Policy 2010, 2011 and 2012). In this respect, the political and strategic level leaders seem to have adopted a policy that is in line with EU goals. Political will can be assumed to be reflected most directly by government officials responsible for preparing EU instruments of cooperation at the national level. The number of such officials were, however, too limited for deeper implementation both in Finland and Estonia up to the observed period.<sup>23</sup>

The administrative law enforcement steering system, which was mainly based on the operating and financial plans, performance plans and the performance guidance of offices and agencies on the bases of these plans, did not seem to contribute to transferring the goals of the governmental EU policy into the administrative sectors under the respective Ministries. Due to the steering system, law enforcement authorities only got a faint and diffuse message as to the EU's law enforcement objectives in the case of Finland. (Hämäläinen, 2009) In the case of Estonia, the academic community is quite poorly involved into the EU policy's evaluation process as potential valuable expertise providers. The steering system contributes poorly especially to the implementation of EU instruments, which call for more active measures by the administrations. Since the provision of information on the EU objectives through the steering system has been insufficient, it hence manifests lack of knowledge about EU-level obligations, well-coordinated implementation and complete evaluation.

### 3.2. Implementation of mutual assistance principle

The formal transposition of EU legislation, such as to enforce the national provisions implementing a certain convention or a framework decision, has been carried out within the given deadline when it comes to the instruments examined, i.e., the MLA Convention, Europol Convention, Schengen Convention and the framework decisions on JIT-s and the EAW. The respective administrative authorities, i.e., prosecutors and law enforcement agencies, have been provided with some training and instructions on the application of each instrument. Nevertheless, heads of investigation needs further detailed training in the instruments, as well as an update on the content. The findings of the study demonstrated that law enforcement authorities had not been provided with sufficient guidelines on processing information gathered during criminal intelligence and investigation processes, which could be useful for either Europol or law enforcement authorities of another MS (see Hämäläinen, 2009). The responsibility for taking action rested mainly with some individual law enforcement authorities.

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<sup>23</sup> In fact, the National Audit Office in Finland considers that it was even too limited and that the responsibility for representing rested too much with individual officials. As a result, the national preparation of the EU instruments was narrow; the remainder of the administration was not being able to take an active and creative part in the preparation or the formulation of the national positions. This lack of involvement also meant lack of the opportunity to make full use of the existing expertise and reinforce the larger-scale administrative commitment to implement the EU instruments both in Finland and in Estonia during the observed period.

The 'non specialized' authorities seemed to have relatively lack of knowledge about the obligations related to sharing information under the Europol Convention to promote law enforcement cooperation in accordance with trust and loyalty.<sup>24</sup> In some cases, the national implementation of the EU instruments has resulted in changes in the exercise of powers between the authorities. The transfer of competence for the EAW from police to mainly prosecutors, for example, to send the arrest warrant to the requested MS. This transfer of competencies seems to have taken place relatively smoothly in general.

In Finland, as well as in Estonia, the system of processing international requests for mutual assistance was centralised *via* corresponding contact points (or contact *units*). It has not been modified in spite of the trend in EU legislation, which would have given grounds for opportunities to further amend the procedure. Recent developments in EU law towards direct contacts between law enforcement authorities of the MS, the need for more person-to-person contacts for effective law enforcement activities, especially between the neighbouring countries, require further revising the national and regional cooperation provisions in this respect.

### 3.3. *De facto implementation*

To assess the *de facto* impact of the implementation of EU instruments, the effects on the operational micro-level needed to be examined. The heads of investigation selected as the interviewees were those who had the most experience in international cooperation, both within the police and customs. Therefore, the conclusions cannot be directly generalised to average senior investigators in the case of Finland.<sup>25</sup> It can be concluded that operational levels in both countries tend to approach the EU legislation from a task-oriented (narrow functional) perspective, focusing their interest directly on the task at hand. The need for the exchange of information, acquisition of evidence or operational cooperation at international level with another MS arises mainly from their own specific duties. Their cooperation at an international level could thus be mainly characterised as *need-oriented approach*.

There is also a finding that heads of investigations seemed to have minor knowledge about the Council priorities based on the (S)OCTA which do not influence with their concrete professional tasks. The situation can be explained by some defects in the administrative guidance on EU legislation and related supporting measures. However, the impact of the implementation of EU legislation manifests itself in gathering information for, or investigating individual criminal cases. Since the instrument applied is selected according to the needs of the case under investigation, the readiness to apply the different instruments is bound up with the experiences of each particular professional.

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<sup>24</sup> Finnish legislation, for example, did not clearly provide for an obligation to record information in the information systems or to communicate it further to central authorities. This would require making further relevant amendments to the existing legislation and improvements to the existing guidelines for law enforcement authorities, as well as ensuring sufficient training to enable the authorities to meet the obligations and challenges in practice.

<sup>25</sup> If such interviews were conducted with investigators leading the investigation of serious crime cases in general, the findings would likely be equally different as they would probably indicate even a lower level of awareness and application of the EU instruments, with perhaps the SIS as an exception, which is also implemented on the operational street-level by the e-Police information system in Estonia.

The application of the SIS seems to have integrated into law enforcement authorities' daily routines by the technical integration of the system as part of the information systems of the Finnish and Estonian police and border guard. As a result, the alerts on persons, property, etc., recorded in the system are checked as part of the daily use of police e-information systems. The entries for Schengen alerts are checked centrally by the SIRENE Bureaus. Ensuring the EU law enforcement authorities' access to large-scale information systems, including VIS (Visa Information System), EURODAC (European *Dactyloscopie* – the fingerprint database for the Dublin Regulation to examine asylum applications), CIS (Customs Information System), FIDE (Customs File Identification Database), and other data exchanges, as well as the data protection activities is one of the central features of successful cross-border cooperation.<sup>26</sup> Heads of investigation had few experiences in the application of the framework decision on JIT and the national implementing act. Indeed, they were aware that the instrument exists, and its application tends to be considered in cases where cooperation in pre-trial investigations with another MS might be useful.<sup>27</sup>

### 3.4. Information exchange as an indicator of trust

The important finding of the study concerning international exchange of information is that exchange of information on crime or offences with Europol or another MS is needed for further improvement. In this particular context, information refers to knowledge gathered during the criminal intelligence or investigation processes which could be useful for Europol or the law enforcement authorities from another EU MS in the performance of their duties. Communicating information on the MS own initiative can be considered to significantly promote the joint action to combat organised crime referred by the Europol Convention.

Significant exchange of information with another MS or Europol means compliance with the principle of *sincere* cooperation. This can be considered binding under the Europol Convention. The Naples II Convention also includes a similar binding provision. Furthermore, the framework decision on simplifying the exchange of information and intelligence between law enforcement authorities clearly provides for an obligation to exchange information. Under the other EU instruments deriving from the Treaties, such as the MLA and Schengen Conventions and others, the exchange of information has

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<sup>26</sup> Data protection and security of ICT networks, also essential for a well-functioning information society, recently recognized by the *Digital Agenda for Europe* by DG INFSO (Information Society) addressing issues related to cybercrime, cyber security, safer internet and privacy. The High Tech Crime Centre at Europol already plays quite an important coordinating role. There are also the European Network and Information Security Agency (ENISA), European Information Sharing and Alert System (EISAS) and interface with a network of national/governmental Computer Emergency Response Teams (CERT-s) as the focal points of the EU fight against cybercrime in place. (see also EU Internal Security..., 2010)

<sup>27</sup> The most common EU agency for Finnish and Estonian law enforcement authorities is Europol; especially the liaison officers system is used. Since the police and border guard services are merged in Estonia, the Police and Border Guard Board is also responsible of the operational cooperation with European Agency for the Management of Operational Cooperation at the External Borders (Frontex).

been voluntary on the Member States.<sup>28</sup> The practice of direct contacts creates a tension, especially when it comes to the administrative guidance on the current practices of the EU police cooperation.

Apart from cooperation with the Nordic countries, the national legislation provides that international cooperation takes place through the central authorities. This means at the very least opening the contact with the law enforcement authorities of the other MS. Opinions on centralised or decentralised cooperation vary between the EU Member States. Recent trends in EU legislation and operational steps have been taken towards direct and expeditious exchange of information, as well as more direct cooperation between relevant judicial authorities (see also Kaunert and Léonard, 2013; Bergström and Cornell, 2014). This trend is also reflected by past amendments to the Europol Convention, implementing the principle of availability concerning the exchange of information between law enforcement authorities, the Prüm Treaty and the framework decisions on simplifying the exchange of information between the JIT-s. Functional expectations for advanced EU security require further barriers removal and construction of a common safety area both legally and socially, based on understanding of the objectives, values and principles for improving international trust and transnational cooperation within the European internal security and law enforcement community.

## Conclusions

The increase of various complex forms of cross-border organised crime is influenced by the trends of deepening globalisation and interdependence with regard to increasing functional pressures for the EU's internal security and regional stability. Complex and interconnected systems allow contemporary threats to emerge and escalate in quite unpredictable ways and national securities are closely framed by an international security turbulences. An appropriate and effective management of fast transitions and transformation processes requires a high degree of transnational cooperation skills and creative leadership with political will, sufficient normative resources, as well as institutional abilities to shape collective action.

The compatibility of the EU policy to fight against transnational organised crime and related legal instruments with national provisions and structures indicates the pressure for further Europeanization, especially after the TFEU came into force on 1 December 2009. Due to abandonment of former *Pillars*, the legal framework of the EU JHA/AFSJ has been transformed and forms of the cooperation have been further developed towards a supranational shift of competences. The EU legal instruments create framework and opportunities for the exchange of information, cooperation and joint operational actions between law enforcement authorities of the MS, however, the formal implementation of the instruments are not sufficient so far and national institutions are needed to act

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<sup>28</sup> The correspondent framework decision on simplifying the exchange of information and intelligence between the law enforcement authorities of the Member States of the EU notes that the competent law enforcement authority is obliged, subject to certain conditions, to communicate information and intelligence on a criminal investigation or intelligence operation to its counterpart in another EU MS.

as mediators, as well as context providers to ensure appropriate normative framework, effective implementation and evaluation.

Some aspects of law enforcement Europeanization have successfully taken place in Finland and Estonia, sharing the Schengen transit-corridor along the EU North–East external border, mainly in a practical level of cooperation, especially in use of the SIS, well-developed bilateral exchange of information and person-to-person contacts. The implementation of the EU instruments is important insofar as it gives more effective legal bases and technical tools for enhanced practical cooperation. The law enforcement authorities' direct contacts with their counterparts in other EU Member States have been increased due to either a criminal case under investigation or a mission, meeting or training abroad and this has diffused ideas, experiences and information between the judicial authorities. Anyway, the fragmentation and multiple speeds of transformations were also observed.

The example of successful implementation is the exchange of information under the Schengen Convention through the SIS, applicable throughout the EU. This demonstrates how the national needs could be similar to those at European level and how it makes it possible to introduce adequate structural solutions as development of large-scale information systems. The awareness of the specific EU instruments transposed into national legislation has also been increased. On the other hand, administrative guidance on the operational application of many instruments was observed to be poor and implemented with inertia. In some respect, the implementation in Finland could have been more vigorous than has actually been the case in terms of pursuing the political goals of the EU during the observed period.

The law enforcement in Finland has been gradually Europeanized as the EU instruments are increasingly applied, as well as in Estonia. EU institutions and cooperation tools have increased cross-border cooperation between judicial authorities and personal interaction between criminal investigators. The main direction of Europeanization has been 'top-down' more than expected in Finland. Estonia, as a former soviet country in transition, has been treated in an even more conditional way, since it was obliged to implement all the AFSJ/JHA provisions of the Amsterdam Treaty before the EU accession by 1 May 2004 and onwards. On the other hand, the adaptation can also be explained by the deepening integration trend, based on increased functional pressures by the cross-border operational needs. Thus, practical implementation of the instruments in international police cooperation is primarily need-oriented and narrow-scoped.

The impact of implementation of the EU regulations which direct law enforcement cooperation in practice becomes mainly visible by the implementation of some specific instruments. National legislation on each particular instrument, e.g., a convention, framework decision, related guidelines and training measures are the main channels for transactions and impact. The sample of administrative plans examined demonstrate that the EU objectives for the JHA/AFSJ have been entered into the documents mainly for a strategic level without being very much transferred into the performance plans at the *meso*-level. Hence, it can be concluded that information on the principles of the implementation of EU legislation has not reached significantly to the operational actors

on the ground during the observed period. Insufficient administrative guidance also undermines measures supporting implementation, as providing training and issuing guidelines for the implementing authorities.

Taking into account that the effective implementation of EU legislation needs to combine both 'top-down' and 'bottom-up' approaches, as well as the horizontal dimension, measures need to be taken to promote the implementation of the EU instruments, including the improvement of the administrative steering system. Increasing the awareness and ensuring the implementation of EU law requires that obligations arising from the EU legislation and national goals of integration were incorporated into the administrative steering system with appropriate administrative guidance and resources, involving balance between both the EU-acceptance and national preferences. The conclusion is supported by the aspects of *inertia* observed during the study that characterizes a slow process of transition or tendencies of *absorption* in which resilience meets a necessary degree of flexibility allowing for some learning and change, but the result is expectedly a form of accommodation of 'needful' policy requirements in lack of substantial transformations of structural logic during the observed period. For confirmation some further empirical research efforts would be needed.

The coordination of the objectives of the ministries and the administrative guidance of the authorities in their respective sectors would require that the government's EU objectives and development policies in police and judicial cooperation were precise. The effective implementation of the EU legislation also requires that the key elements of the EU policy to fight organised crime are communicated and the responsibility for their implementation allocated to the competent law enforcement authorities in annual performance agreements or in a discrete steering document. To allocate the responsibility for the implementation of the horizontal instruments, such as the (S)OCTA and related Council conclusions, steering and coordination mechanisms involving more than one authority need to be applied, as joint implementing actions and the division of labour could be agreed on in the framework of the decision-making and steering systems shared between the police, customs and border guard authorities.

Since the operational level tends to approach the EU measures from a very task-oriented perspective focusing on national law enforcement interests, the approach to further (re-)define the EU common security space needs to be re-vitalized to meet the new functional expectations and find some further appropriate tools for the EU internal security cooperation. As a general proposal, the interdisciplinary preparation and development of EU legislation at the national level is needed. An interdisciplinary formulation of national positions in connection with drafting the EU provisions would ensure that national views, values and the objectives of law enforcement cooperation are taken into account. Furthermore, it contributes to providing the bodies who will apply the provisions with more information on the preparation and content of the common instruments. The achievement of these goals could be also enhanced by introducing a drafting mechanism, which would enable integrating the key experiences of experts on practical law enforcement cooperation into the preparation of EU instruments in more diffused and integrative manner.

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