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POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

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Harmonization of criminal law in the EU

STUDY



DIRECTORATE GENERAL FOR INTERNAL POLICIES

**POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS

Harmonization of criminal law in the EU:

A special focus on the US judicial system

STUDY

Abstract

The Lisbon Treaty does not revolutionize the possibilities given to harmonize criminal law. The actual process of harmonization could however accelerate the adoption of new instruments in the field of criminal law. The question of common criminal rules and a common judicial process exists in both in the European Union and in the United States. Although the federal system and the States' system do not officially interact, certain processes have been built up to divide jurisdiction between State and federal power or to make them co-exist.

Chapter I will provide the reader with an overview of the pre-Lisbon period and also the new provisions of the Lisbon Treaty. Chapter II will then discuss the statute of federal law v. State law in the United States. Chapter III will finally draw some points of discussion resulting from the development of the two first chapters.

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CONTENTS

- CONTENTS** **3**
- LIST OF ABBREVIATIONS** **4**
- EXECUTIVE SUMMARY** **5**
- ACKNOWLEDGMENT** **6**
- INTRODUCTION** **7**
- CHAPTER I. OVERVIEW OF THE PRE-LISBON PERIOD AND THE NEW
POSSIBILITIES FOR HARMONIZATION** **11**
 - 1.1. The pre-Lisbon situation 11
 - 1.2 The Lisbon Treaty and harmonization of substantive and procedural criminal law 13
- CHAPTER II. THE UNITED STATES FEDERAL SYSTEM AND CRIMINAL
LAW** **15**
 - 2.1 The US Federal judicial system 15
 - 2.2 The bases for federal criminal jurisdiction 18
- CHAPTER III. COULD THE US FEDERAL SYSTEM INSPIRE THE EU?** **24**
 - 3.1. Where should the line be between State and centralized powers? 24
 - 3.2. Conflicts of jurisdiction 25
 - 3.3. The organization of an EU judiciary 26
- ANNEX. ROUGH OUTLINE OF THE ORGANIZATION OF FEDERAL LAW
ENFORCEMENT AND FEDERAL JUDICIARY IN THE UNITED STATES
(SPECIAL FOCUS ON CRIMINAL LAW JURISDICTION)** **28**

LIST OF ABBREVIATIONS

AO	Administrative Office of the United States Courts
ATF	Bureau of Alcohol, Tobacco, Firearms and Explosives
CJEU	Court of Justice of the European Union
DEA	Drug Enforcement Administration
DHS	Department of Homeland Security
EU	European Union
EAW	European Arrest Warrant
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
ICE	US Immigration and Customs Enforcement
MS	Member States
TFEU	Treaty on the Functioning of the European Union
US	United States

EXECUTIVE SUMMARY

The question of harmonization of criminal law, similarly to harmonization in other policy areas, is not new at the EU level. Nevertheless, it is a “special” area, immersed in national sovereignty, where approximation/harmonization is not self-evident.

Approximation of legislations is, in fact, a form of harmonization of national pieces of legislations. Therefore, the word harmonization will mostly be used throughout this paper. In practical terms, the development of such an area means that EU citizens and third country citizens living in this area should feel safe and that they should have access to justice even if the criminal case they are involved in is a cross-border case, touching potentially upon the judicial system of other Member States.

Harmonization of criminal law can also be used as means of facilitating cooperation between practitioners (between law enforcement forces, between judicial authorities and between law enforcement and judicial authorities).

The Lisbon Treaty does not revolutionize the possibilities given to Member States and EU institutions to harmonize criminal law. The actual process of harmonization is however different than what was planned by previous treaties and could accelerate the adoption of new instruments in the field of criminal law.

The nature of a union of States has a major impact on the line being drawn between States and the central power. If States in the US have ceded more powers to the federal government than Member States have to the European Union, the first are paradoxically, on the one hand, keeping their own criminal law powers intact, and on the other agreeing to have a second legal system operating on their territory and controlling some of their judicial powers.

Federal criminal jurisdiction has nevertheless shown a tendency to increase these last years. Additionally, although both legal systems do not officially interact, in a number of situations, the federal legal and judicial system is acting as a “model” for US States.

The principles of harmonization and mutual recognition are not principles subject to discussion in the United States. Other processes have been built up to divide jurisdiction between State and federal power or to make them co-exist.

Setting aside the fundamental difference in political nature of the USA and the EU, the question of common criminal rules and a common judicial process exists in both Unions.

Some criteria could be proposed at an EU level to determine the moment when harmonization could occur. The question of a definition of *serious crime* might be difficult to solve but should not, in any case, be limited to the list proposed by Article 83 of the Lisbon Treaty.

Under certain conditions, some criteria could also be set to limit the increasing number of conflicts of jurisdiction.

In order to enhance implementation of EU criminal law, first instance courts and appellate national jurisdictions should be evaluated and strengthened. Another possibility could be to create European Regional Courts of Appeal.

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In order to meet the request of the European Parliament, I have interviewed justice professionals from the United States. They have all graciously and patiently answered my questions, I am therefore particularly grateful to all of them. My warmest thanks go to Judge Russell, Peggy Irving, Peter McCabe, Wanda Rubianes and Debbie Galloway, and of course to Jeffrey Apperson, without whom the interviews, fundamental to this research, would not have been possible. Finally, I would like to thank the staff of the Administration Office, the Department of Justice and the Federal Judicial Centre in Washington; and the staff of the State Court and of the Western District of Kentucky, Louisville who have been so helpful.

INTRODUCTION

The question of harmonization of criminal law, similarly to harmonization in other policy areas, is not new at the EU level. Nevertheless, it is a “special” area, immersed in national sovereignty, where approximation/harmonization is not self-evident. Since the Treaty of Maastricht, the development of an EU criminal justice area has been one of the targets of the Union. The introduction will first be used to clarify some terminology issues, before trying to identify the reasons why harmonization might be needed in the field of criminal law.

Terminology

The purpose of this paper is to discuss the subject of *harmonization* of criminal law in the EU while using the example of the United States to discuss the scope of future harmonization in the EU. The words *approximation* and establishment of *common rules* are often preferred to the word *harmonization* in EU texts, although most authors consider *approximation* to be equivalent to *harmonization*.

In fact, the *perception* given by the words *approximation* and *harmonization* is probably different, approximation being somehow considered a softer version of a harmonization process. The Treaties and case law of the European Court of Justice do not clearly present the differences existing between both words. It is our view that approximation is in fact a form of harmonization of national pieces of legislations. Therefore, the word harmonization will mostly be used throughout this paper.

In the criminal law field, harmonization can cover either substantive or procedural rules, specific pieces of the criminal law process, or an entire range of legal elements; therefore leaving more or less leeway to the implementation of national criminal laws.

Harmonization should nevertheless be distinguished from *unification* which would, on the other hand, leave no space to national action, due to national judges in the latter situation all acting under the same unified rule. The question discussed in this paper is harmonization, not unification.

Why harmonize?

The overall objective of the EU area of freedom security and justice is fundamental. In practical terms, the development of such an area means that EU citizens and third country citizens living in this area should feel safe and they should have access to justice even if the criminal case they are involved in is a cross-border case, touching potentially upon the judicial system of other Member States.

Harmonization can also be used as means of facilitating cooperation between practitioners (between law enforcement forces, between judicial authorities and between law enforcement and judicial authorities). A few sub-reasons can be distinguished here:

- National criminal legislations and, more precisely, the definition of offences as well as penalties associated with those offences still differ widely from one Member State to the other. Additionally, judicial procedures needed to settle a case or to deal with a judicial order from another Member State vary from one country to the other. Enhancing judicial and law

enforcement cooperation in cross-border cases is necessary to gain some “fluidity” in the handling of those cases. Harmonization of part of those rules could enhance the handling of cross-border cases.

- If Member States were to implement a stronger role for relevant EU agencies, such as Eurojust and Europol, harmonization would certainly facilitate their actions. Indeed, one of the major difficulties experienced today by Europol and Eurojust is that Member States have such different approaches to cooperation and to “what is possible” and “what is not possible” under their own national laws. It is very difficult for those agencies to obtain consensus from Member States (and sometimes even to obtain an agreement from a majority of Member States) on the opening of an investigation, on the participation in an Analysis Work File, on sharing information, on solving conflicts of jurisdiction etc.
- More and more conflicts of jurisdiction are being raised between the EU Member States. If harmonization of criminal laws was developed, it would probably also facilitate compromises between Member States, who would not systematically feel that their legal principles might not be respected if the case is tried in front of another Member State’s court.

Some stakeholders would mention the principle of mutual recognition to demonstrate that harmonization is not needed. Under the principle of mutual recognition, a national judge should recognize and execute a judgment issued by another judge from other Member States with a minimum of formalities and with limited grounds for refusal. Mutual recognition is indeed a concept that is efficient in specific circumstances. For instance, the European arrest warrant was adopted in 2002 after the 2001 attacks in the USA. Nevertheless, and although mutual recognition is the official “cornerstone” of judicial cooperation, does it create in itself mutual trust? Does it cover both the judicial work and the law enforcement activities which should go hand in hand when criminal cases are concerned – and even more so in cross-border cases? Does the principle of mutual recognition bridge all major gaps existing between the different national legal systems? It seems to us that the answer to those questions is merely negative¹.

Indeed, the decision of a judge in one Member State comes with a system of values: the country’s specific criminal law, criminal procedure, and its general criminal law. To recognize it, and therefore to accept to enforce it, implies acceptance of these values. This is why the principle of mutual recognition has prerequisites such as the knowledge of foreign national laws, the development of cooperation, evaluation of national policies and also, potentially, minimum common criminal rules.

The European Union has to this day tried creative solutions to suggest that mutual recognition would be the supreme concept inducing *per se* mutual trust. By doing so, the European Union has also avoided opening too broadly the debate on harmonization of criminal law systems more than absolutely possible. When circumstance have been favourable (i.e. when common political will has been present), harmonization has occurred; the more successful example being again the European arrest warrant,

¹ Nadja Long, *Development of an EU criminal justice area*, July 2009.

replacing the classical extradition system between Member States². Otherwise, negotiations or implementation of instruments – although often placed under the seal of mutual recognition - have continued to drag on. Good examples in those areas include the European Evidence Warrant adopted in December 2008 after more than four years of negotiation and which does not (already!) fulfil expectations of practitioners, and the 2003 Framework Decision on recognition of freezing orders³, which all Member States had not yet implemented in their national laws by the end of 2008⁴. Additionally, many mutual recognition instruments include multiple grounds to justify non-execution⁵.

It is often forgotten that the Tampere European Council of 1999, in addition to mutual recognition, also mentioned the fact that “better compatibility and more convergence between the legal systems of Member States must be achieved”. Trust can indeed be more easily achieved between similar (not necessarily identical) legal systems; Nordic countries or Benelux countries being an example of high level and successful cooperation.

Harmonization is, however, not always the unique solution. Mutual recognition can indeed facilitate cooperation between such different countries as civil law and common law Member States⁶. It is therefore no coincidence that common law countries introduced the concept of mutual recognition to mutual assistance in criminal matters during the preparations for the Tampere summit. The same countries made a proposal to introduce, under Article 83 of the TFEU (Lisbon Treaty), the “brake-accelerator” clause⁷. It is noteworthy though that common law countries have been able to implement very strong instruments such as the EAW. Even if the UK and Ireland would decide to opt out from cooperation in criminal matters⁸, the subject of this paper is a global question that will have to be raised. Should mutual recognition go hand in hand with an accelerated

² The European Arrest Warrant, although operating under the principle of mutual recognition, goes quite far into the harmonization of transfer procedures between Member States.

³ Council framework decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

⁴ Council of the European Union 8417/2/08 REV2, Implementation of the Framework Decision of the Council of the European Union of 22 July 2003 (2003/577/JHA) on the execution in the European Union of orders freezing property or evidence – Information provided to the General Secretariat, 23 October 2008.

⁵ The European Evidence Warrant adopted on 18 December 2008, for instance.

⁶ An example of important difference between common law countries and civil law Member States is the area of asset forfeiture where the common law countries are able to implement civil confiscation for instance.

⁷ According to Article 82.3 and 83.3 of the TFEU, when a Member State believes that the “fundamental aspects of its criminal justice system” might be affected by the directives proposing harmonization in procedural or substantive criminal law provisions, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. (...) in case of disagreement, and if at least nine Member States wish to establish enhanced cooperation on the basis of the draft directive concerned, they shall notify the European Parliament, the Council and the Commission accordingly”.

⁸ When agreeing to adopt the Lisbon Treaty, the UK and Ireland have indicated that they might opt out completely from judicial cooperation in criminal matters and law enforcement cooperation in the future.

level of harmonization in the criminal law field in the EU? If so, what could be the scope, limits and criteria of this process?

Chapter I will provide the reader with an overview of the pre-Lisbon period and also the new provisions of the Lisbon Treaty. Chapter II will then discuss the statute of federal law v. State law in the United States. Chapter III will finally draw some points of discussion resulting from the development of the two first chapters.

CHAPTER I. OVERVIEW OF THE PRE-LISBON PERIOD AND THE NEW POSSIBILITIES FOR HARMONIZATION

KEY FINDINGS

- The Lisbon Treaty does not revolutionize the possibilities given to Member States and EU institutions to harmonize criminal law.
- The actual process of harmonization is however different and could accelerate the adoption of new instruments in the field of criminal law.

1.1. The pre-Lisbon situation

Possibilities to harmonize substantive criminal law already existed in the Treaty on the EU before the adoption of the Lisbon Treaty.

1.1.1. The pre-Lisbon legal base for harmonization of criminal law

Harmonization of criminal law was possible according to Article 31 of VI (Provisions on police and judicial cooperation in criminal matters) of the Treaty on the European Union.

Article 31 (1) stated that

Common action on judicial cooperation in criminal matters should include:

- (c) *ensuring compatibility of the rules applicable in the Member States, as may be necessary to improve such cooperation;*
- (e) *progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organized crime, terrorism and illicit drug trafficking.*

From these two paragraphs, two clearly different actions were envisaged.

Article 31(1)(c) provided a legal basis to render national legislations “compatible”, meaning that legal differences still existed but that cooperation could be enhanced by, for instance, modifying some legal obstacles. Article 31(1)(c) did not ensure that legal obstacles could not be raised again in the future or that difficulties in cooperation did not exist.

Article 31(1)(e) on the other hand provided for a possibility to “establish common minimum rules” relating to definition of criminal offences and to penalties in three particular fields: organized crime, terrorism and illicit drug trafficking. While the number of criminal fields being subject to harmonization seemed quite small, this field was potentially quite broad, for two reasons. Firstly, the definition of “organized crime” in

itself is quite broad, most *serious crimes* being potentially organized type crimes⁹. Secondly, at the Tampere summit, a unanimous decision was taken not to limit itself to terrorism, organized crime and illicit drug trafficking. Consequently, quite a large number of them were harmonized.

Article 31(1)(e) covered both, definitions (“constituent elements”) and penalties, but not officially procedural rules¹⁰.

1.1.2. The “harmonization” instruments adopted before the Lisbon Treaty

After the Amsterdam Treaty, framework decisions were the main tool used by Member States to harmonize criminal law. It seems to us that three main directions have been followed by Member States in their attempt to harmonize pieces of this area.

For cooperation purposes

The idea was to enhance cooperation between Member States through the adoption of some common legal grounds. In essence, those areas of cooperation are cross-border areas. Whenever a crime has strong probabilities of leading to cross-border components, a common EU approach has – sometimes – been chosen (trafficking in human beings, for example¹¹).

To supplement the mutual recognition principle

The European arrest warrant has, for instance, harmonized a list of offences (list of 32 offences)¹² to address the abolition of dual criminality and has contributed towards replacing the classical system of extradition between Member States with a simplified procedure.

To follow international developments

As explained by Valsamis Mitsilegas¹³, a number of initiatives at EU level are following international developments such as the FATF money laundering and/or financing of terrorism standards, the UN Convention against transnational organized crime and its Protocols in the field of organized crime, human trafficking etc. The 2008 EU instrument

⁹ The definition of organized crime is not always clear: the most internationally recognized definition is that of the United Nations Convention against Transnational Organized Crime. A common European definition has also been given by the framework decision adopted on 24 October 2008 on the fight against organized crime (2008/841/JHA).

¹⁰ Although, in 2001 the Council adopted the framework decision on the standing of victims in criminal proceedings, 2001/220/JHA.

¹¹ Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JAI).

¹² Although no harmonized definition of each of those offences was provided in the 13 June 2002 Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA).

¹³ Valsamis Mitsilegas, *EU criminal law*, 2009, page 87.

on combating terrorism (2008/919/JHA) has for instance introduced provisions similar to the 2005 Council of Europe Convention of the Prevention of Terrorism.

Nevertheless, it seems that in the pre-Lisbon period of time no systematic harmonization criteria were used, leading to a point where a “patchwork” of legal instruments has been adopted, according to the needs of the moment and to the political support of such instruments.

1.2 The Lisbon Treaty and harmonization of substantive and procedural criminal law

What new elements does the Lisbon Treaty bring to the topic of harmonization of criminal law?

Articles 82 and 83 of the Treaty on the Functioning of the European Union give the possibility to Member States and EU institutions to harmonize procedural and substantive criminal law. However, this “green light” is not given for any type of procedural nor any substantive criminal law.

Article 82 lists four procedural topics: mutual admissibility of evidence, the rights of individuals in criminal proceedings, the rights of victims of crime and “any other specific aspect of criminal procedure which the Council has identified in advance by a decision”¹⁴. Those minimum rules can only be adopted if they serve two broad concurrent purposes: “facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension”. In this article, mutual recognition is mentioned unconditionally and becomes the pre-condition to use article 82. Harmonization is not viewed here as an autonomous objective, but rather as a tool facilitating the development of the mutual recognition principle. This concept could indeed limit the scope of the harmonization of procedural criminal law.

Article 83 allows the European Parliament and the Council – following the ordinary legislative procedure – to adopt directives to harmonize the definition of criminal offences and sanctions in ten *particularly* serious crime areas with a cross-border dimension. Those areas are **some** of Europol’s and Eurojust’s core business areas and have been the subject of particular attention in the EU for already a number of years: terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting means of payment, computer crime and organized crime. Similarly to article 82, this list can be extended – after consent obtained from the European Parliament – by the Council acting

¹⁴ Unlike the actual adoption of minimum procedural rules in the areas listed – which can be done through the normal legislative procedures, the qualified majority voting and the co-decision procedure– the extension of the list to “any other specific aspect of criminal procedure” has to be adopted unanimously by all Member States with the consent of the European Parliament. This of course reduces the actual possibility of extensions to other topics.

unanimously. This article triggers in particular the question of what is a “serious crime” (see Chapter III).

Additionally, the purposes for which this harmonization can take place are limited but not clearly defined:

- *“particularly serious crimes 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 83.1)
- When approximation *“proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonization measures”* (article 83.2)

Article 83.2 could indeed serve to coordinate former first pillar policies and judicial cooperation in criminal matters¹⁵. The purpose stated in article 83.1 is, on the other hand, quite vague. Because of its ambiguity, article 83.1 does, however, give some leeway to the European Parliament and the Council to justify new harmonization instruments.

It seems to us though that the novelty of the Lisbon Treaty does not rest so much in the new scope of harmonization than it does in the decision-making procedures which will be followed to reach that objective. Cooperation in criminal matters (judicial cooperation and law enforcement cooperation) becomes an area of shared competences between the Member States and the European Union. Qualified majority voting (instead of unanimity) and co-decision with the European Parliament become the ordinary legislative procedure. It seems reasonable to believe that because of qualified majority voting, instruments would not be submitted to endless discussions between Member States. On the other hand, the fact that a new institution, the European Parliament, also has a decisive role to play might prolong the discussions; but this should in any case give the negotiation process another angle, since interests of the Council and the European Parliament are often quite different.

All in all, it also seems reasonable to believe that the path of harmonization in criminal law will become faster and that the number of common legal instruments will increase¹⁶.

What criteria do Member States and European institutions want to apply to this area of shared competencies?

¹⁵ One can recall here the problems of coordination between the first and third pillar in the field of criminal environmental law, before the Lisbon Treaty entered into force. In this particular area, see Case C-176/03 of the European Court of Justice, *Commission v. Council*.

¹⁶ Many authors share this point of view. See for instance Valsamis Mitsilegas, *EU criminal law*, 2009, page 112: “On the one hand, the move to “Community method” of decision-making may lead to increased quantity (if not quality) of harmonization measures. On the other, the expansion of EU action in criminal matters into criminal procedure and the increased production of substantive criminal law may necessitate increased interpretative intervention by the Court of Justice”.

The European Parliament asked EIPA to study a federal law system and to try to understand where the line could be drawn between State jurisdiction and centralized jurisdiction. During the course of January 2010 I was able to meet with Federal and State authorities in the USA.

CHAPTER II. THE UNITED STATES FEDERAL SYSTEM AND CRIMINAL LAW

KEY FINDINGS

- The nature of a union of States has a major impact on the line being drawn between States and the central power. If States in the US have ceded more powers to the federal government than Member States have to the European Union, the first are paradoxically, on the one hand, keeping their own criminal law powers intact, and on the other agreeing to have a second legal system operating on their territory and controlling some of their judicial powers.
- Federal criminal jurisdiction has nevertheless shown a tendency to increase these last years. Additionally, although both legal systems do not officially interact, in a number of situations, the federal legal and judicial system is acting as a “model” for US States.
- The principles of harmonization and mutual recognition are not principles subject to discussion in the United States. Other processes have been built up to divide jurisdiction between State and federal power or to make them co-exist.

2.1 The US Federal judicial system

2.1.1 The US political system¹⁷

The US Constitution has created three separate branches: the legislative branch (Article I) consisting of the Congress (the Senate and the House of Representatives), the executive power, i.e. the President of the USA (Article II), and the judicial branch through the Supreme Court and inferior courts established by Congress (Article III).

“Article III judges” are appointed for life (see Annex). This ensures that judges will not be impeached for political reasons by other members of government. Judges’ salaries cannot be reduced during term in office. As a result, the entire budget of the judiciary cannot be reduced by Congress. Those elements and the centralization of procedural issues in the Judicial Conference (see Annex) lead to the independence of the Judiciary and common rules for Federal courts in all different States of the US. Those measures aim at ensuring independence of the judiciary.

¹⁷ For more information on the Federal judicial and a few comparative analysis with the States system: <http://www.uscourts.gov/about.html>

Federal power lies in the text of the Constitution¹⁸, which is interpreted by the Supreme Court of the United States and which is used by Congress to adopt new federal laws. Law enforcement, prosecution and federal judicial powers therefore lie in those fundamental documents and institutions. In addition, although the United States is still following a typical common law system where case law is fundamental, the US has moved towards a code system. Title 18 of the US federal "Code" is the criminal code (although more criminal law provisions can also be found in other titles of the code; such as drug crimes in the general title on drugs).

The federal criminal law and the federal criminal procedural law are uniform throughout the country. On the contrary, State laws are different and accepted as such. There is no principle of uniformity or even desire for harmonization between US States, each State being fundamentally sovereign¹⁹.

2.1.2 The federal justice system in the US v. EU

The federal government is a government of limited powers, but the States in the US have ceded more powers to the central government than the Member States of the EU have. Additionally, Congress can create new federal jurisdiction by enacting new rules. To criminalize a particular act, Congress has to establish a link between that act and some federal power. The EU, on the other hand has no *competenz-competenz*; it only has the powers that have been delegated by the Member States and cannot alone decide to increase those powers.

Congress has indeed created new federal criminal rules in the past and all stakeholders agree on the observation that there is a global tendency to increase the number of federal legal instruments. If the debate has not been too tensed in the area of criminal law, some other areas such as education, healthcare or family law, which typically fall into the States' remit, have recently led to questions relating to the "optimum level of federal involvement"²⁰. How broadly should federal powers be defined?

2.1.3 Federal law does not, in principle, result in harmonization of the different State laws.

Harmonization is not a word that is used in the US in the context of having a common legal rule between all States. The States have kept their sovereignty as far as substantive and procedural criminal laws are concerned and as far as the judicial process in this area is concerned.

In fact though, there is seldom a fundamental substantive difference in criminal law between States²¹. The differences are more visible for penalties. The most extreme

¹⁸ Federal judges and State judges have in common the right to declare laws invalid if they violate the Constitution. This is called the judicial review.

¹⁹ Although States do take judicial notice of judgments of other States.

²⁰ Professor Russell Weaver, University of Louisville, Interview 21 January 2010, Louisville.

²¹ In addition, while state procedure is different from one State to the other, the States attempt to adopt similar rules, especially rules similar to federal rules.

example is probably the death penalty being applicable in more than half of the 50 States, for offences which might simply be subject to imprisonment in other States.

One difficult situation can occur when substantive difference exists between federal laws and State laws. The decriminalization of possession of small amounts of marijuana for medical use in some States has recently triggered the US Attorney General (see Annex) to issue a directive to federal prosecutors not to prosecute certain possession of marijuana cases when the persons in question are operating in accordance with State law. The situation had become difficult between some State laws and federal law, since federal law had not been following the same medical "decriminalization" path²². This example shows that federal law/regulations do not always follow the general consensus among States and that they sometimes adapt to particular State situations.

What does "federal law" therefore represent in comparison to State laws?

The two different legal systems – State and federal – co-exist and do not necessarily interact. States have their own legal system and the federal power has another one. Nevertheless,

- o Federal law pre-empts State law in certain areas. This is rare but it is expressly foreseen by the Constitution. Congress, subject to judicial interpretation decides in which areas this pre-emption is possible. Certain labour federal regulations could for instance pre-empt State law²³.
- o The Supreme court, a federal institution (see Annex), also has jurisdiction in some areas over States law or regulations. The area of civil rights is particularly subject to control by the federal power. The role of the US Supreme Court in defining the scope of civil rights in criminal procedures is fundamental, both for State and Federal courts. Initially, the first ten amendments of the US Constitution, known as the "Bill of rights" applied only to the federal government. The Supreme Court, however, ruled in the middle of the twentieth century that many of those provisions applied to State governments²⁴. The Due Process Clause of the Fourteenth Amendment applies most of the Bill of Rights to the States. Sometimes though, the scope is different for procedural rights between a federal jurisdiction and a State court: for instance, according to the Court, "the Sixth Amendment guarantees trial counsel for indigent federal defendants in all criminal prosecutions, but guarantees trial counsel for an indigent State defendant only when she will receive a jail sentence"²⁵. Additionally, in certain cases, the Supreme Court will look at the "management" of due process by State courts. In *Brown v.*

²² For more information on the Attorney General's new Medical Marijuana Guidelines: <http://www.justice.gov/opa/pr/2009/October/09-ag-1119.html>.

²³ Judge Russell, Court of the Western District of Kentucky, in Louisville, Interview 21 January 2010.

²⁴ Nicholas S. Acker, *Prosecutorial and law enforcement cooperation between the US and Italy*, 2004, p. 560.

²⁵ Russell L. Weaver, Leslie W. Abramson, John M. Burkoff and Catherine Hancock, *Principles of Criminal Procedure*, p. 5.

*Mississippi*²⁶ the Supreme Court decided that evidence obtained under violent conditions/ interrogations was not to be declared admissible by a State court because it violated due process.

In criminal proceedings, someone imprisoned in a State court may also file a petition on federal court for a “writ of habeas corpus” seeking to have the federal court review whether the State has violated his or her rights under the United States Constitution²⁷.

Sometimes, the action of the Supreme Court imposing new rules to States and federal authorities can create frustration amongst States. In the *Miranda v. Arizona* case²⁸ the Supreme Court found that an interrogated person in custody “must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. (...) If the individual indicates in any manner at any time prior or during questioning, that he wishes to remain silent, the interrogation must cease (...)”. This decision was much criticized by many States, but also by the four Justices dissenting.

2.1.4. There is no need to further develop mutual recognition between the US States.

The legal differences between State and federal laws are accepted if they fall into the division of tasks as defined by Congress and the Supreme Court. For instance, the fact that a simplified extradition system exists between States is not subject to any particular control of the State judges other than the control of the identity of the person and the validity of the existence of the charge even if the extradited person could face death penalty in the requesting State.

De facto, “mutual recognition” is largely implemented between the different US States.

2.2 The bases for federal criminal jurisdiction

2.2.1. Criteria?

Federal criminal cases cover only around 10% of the cases at the nation-wide level; the 90% remaining are dealt with at State level. States retain a general police power under which a majority of offences would fall. The public would therefore mostly be familiarized with State courts, rather than with federal courts, a case being brought in front of a

²⁶ 297 U.S. 278 (1936).

²⁷ Article III Judges Division *The Federal Court System in the United States, An introduction for Judges and Judicial Administrators in Other Countries*, page 52.

²⁸ 384 U.S. 436, 479 (1966).

federal court is therefore sometimes considered more solemn by the public²⁹. Nevertheless, since 2000, the number of federal criminal filings has steadily increased. Since 2000 criminal cases filed in US District Courts have increased by 21.7%. In district courts for instance, felony cases rose by 7% between 2007 and 2008 (in particular in illegal immigration cases, sex offenses and fraud) and criminal appeals climbed by 4%³⁰. Since 2008, criminal cases filed in District courts increased by 7.9%. The growth has stemmed primarily from filings relating to immigration crimes and filings addressing fraud, sex crimes and traffic offences³¹.

States have broad authority to prosecute many types of crime, such as crimes against the person (murders, assaults, theft, burglary etc.) and many crimes against property; however, States can only investigate and prosecute crimes committed within their geographic territory.

There are no systematic criteria to define which situation should be governed by federal law and which should be governed by State criminal law. Federal power and jurisdiction is based on the Constitution of the US, on decisions of Congress and on the case law of the Supreme Court and federal courts. Federal criminal law and procedure can be found in Title 18 of the "US Code"³².

One criterion – considered by the EU to be essential for harmonizing legal instruments – i.e. the "seriousness" of the crimes (see Chapter III below), is not, *per se*, a criterion for federal power/jurisdiction. However, in fact, many of the most serious crimes such as terrorism, drug trafficking and money laundering, are dealt with by federal courts. Federal offences as defined by Congress can be divided into three main levels: felony offences – the most serious crimes – may be punished by more than one year prison; misdemeanour offences may be punished by up to one year in prison; and petty offences may be punished by up to six months imprisonment. The latter are often addressed though through fines rather than prison sentences³³. In determining the sentence, the federal judge would have, in particular, to follow the United States Sentencing Commission's special federal sentencing guidelines. Those guidelines take into account "the seriousness of the criminal conduct and the defendant's criminal record"³⁴.

²⁹ Discussion on perception by the public of federal court's work. Interview of District court Judge Russell, 21 January 2010, Louisville, Kentucky.

³⁰ Administrative Office of the United States *2008 Federal Court Management Statistics*, page iii.

³¹ Administrative Office of the United States Courts, *Federal Judicial Caseload Statistics*, 31 March 2009.

³² The US Code can be found on the House of Representatives website <http://uscode.house.gov/download/download.shtml> or on the following website <http://www.law.cornell.edu.uscode>

³³ Article III Judges Division *The Federal Court System in the United States. An Introduction for Judges and Judicial Administrators in Other Countries*, 2001, page 27.

³⁴ *Ibid*, page 28.

Murder, which can be considered as a serious crime in the EU is not *per se* considered to fall within the federal jurisdiction in the US. In fact, murder is typically a crime which should be prosecuted at State level. Nevertheless, there are more than 50 federal criminal statutes that deal with murder. Why? Those latter would be specific types of murder, having a link with federal powers: the murder of a federal official³⁵, the murder while crossing a State line, murder where telephone facilities have been used from one State to another to plan the murder etc.

For instance, fraud would generally be a State crime, whilst fraud using inter-State telephone facilities would be a federal crime³⁶. More generally, the fact that a crime has involved the use of the mail, telephone or wire communications, or travel or transportation between the States, is required for certain crimes before they may be prosecuted in federal court³⁷.

The idea is not to “harmonize” State criminal laws into one federal law, but rather to cover different types of offences. Therefore, prosecution of the same facts can be carried out at State level and/or at federal level based on different legal qualifications (see 2.2.2 below). The fact that federal jurisdiction might have increased in recent years in the US is not necessarily perceived as a threat by the US States, at least not on criminal law issues. Federal healthcare reforms or federal education reforms might raise much more opposition from States than increased federal criminal powers. Some States would not even want to have a case brought in front of their own courts if they did not have the means to handle it properly. For instance, terrorism cases are extremely sensitive, requiring huge financial resources for the investigation and strict security measures during the trial process. Terrorism is, however, a non-exclusive jurisdiction of the Federal courts when national security is an exclusive federal competence.

In conclusion, although formal criteria do not officially exist, federal jurisdiction would be recognized in the following situations:

- in cross-border cases (e.g. a State line has been crossed),
- national security/armed forces,
- inter-State commerce³⁸,

³⁵ For instance, before JF Kennedy was assassinated, the murder of the President of the United States of America was not considered a federal offence. It became a federal offence shortly afterwards when Congress enacted a new law. Therefore, if Lee Harvey Oswald had not been killed a few days after JF Kennedy, the murder of the President would have been tried in a State court in Texas.

³⁶ Nicholas S. Acker *Prosecutorial and law enforcement cooperation between the U.S. and Italy*, 2004, p. 553. This situation results from one of the most important criteria for federal jurisdiction: the *inter-State commerce*. The Supreme Court has interpreted this principle broadly and has therefore given federal jurisdiction a base for wide jurisdiction.

³⁷ Department of Justice *Criminal prosecutions in the United States*.

³⁸ In *Perez v. United States* (1971), the Supreme Court states that some crimes can have an impact on inter-State commerce.

- anything involving federal government i.e.: crime committed against a federal official or agency, crime involving the mail (federal power) etc,
- copyrights,
- bankruptcy,
- securities, stock exchanges and the banking system,
- *serious crimes* (to certain extent): drug wars, organized crime, financial market crimes etc. Complicated cases can be easier to handle at a federal level. For instance, a federal court can issue a subpoena to a witness to appear in court from anywhere in the United States.

Only a couple of those areas would be exclusive areas of jurisdiction; the vast majority are concurrently State and federal crimes.

2.2.2. Double jurisdiction: federal and State interest to prosecute

State courts do not feel deprived of their own jurisdiction because in most cases, they retain their own jurisdiction in addition to the federal one. Sequential trials can therefore take place at a State level and then at a federal level or vice versa. The *ne bis in idem* principle (or double jeopardy principle) is not considered to be violated here since, although covering the same course of conduct, a case would be brought to federal and State courts under two different legal qualifications. Therefore, the same facts can be tried twice because the offence will not be considered the same. Although options are open as far as jurisdiction is concerned, this whole system of overlapping jurisdiction does have in it a certain amount of tension³⁹.

Usually, though *informally*, prosecutors at federal and State level will work out at which level the prosecution should be made. The criteria for choosing one or the other may be very pragmatic: does the State system have resources to prosecute the case? Is prosecution in one jurisdiction advantageous because of the penalty applied, in comparison with the second jurisdiction?

A famous example of double prosecution is the *Rodney King* case where the police officers prosecuted in front of a State court in California were acquitted for the charges of assault and later on were found guilty on the charges of violation of civil rights in a federal court⁴⁰.

Often the case would go to whichever prosecuting authority did the investigation first or which happened to arrest the person first. If the amount of drugs, the complexity of the

³⁹ For instance, although cooperation is also clearly taking place, there could be some competition on organized crime cases in certain places in the US, such as New York.

⁴⁰ On 3 March 1991 officers from the Los Angeles Police Department (LAPD) stopped motorist Rodney King for a traffic violation. During the arrest proceedings, King was struck violently by the police after initially resisting their orders. The arrest was videotaped by a witness and was broadcasted on television. Four LAPD officers were initially acquitted of the charges of assault brought against them in the State court. Riots broke out in Los Angeles. Charges were brought at a federal level against the same officers for the same conduct, but on the basis of violation of Rodney King's civil rights two of the four officers were found guilty.

case, the number of persons involved (for instance) seem to the local police to be somewhat more important than the cases they are used to handling, the FBI (general jurisdiction), the DEA (for drugs) or the ATF (arms) etc. will be called. Those federal forces will then contact the federal prosecutor in order to get (or not) an agreement on the continuation of the investigation at federal level. If the prosecutor declines, the State could decide to go forward.

Apart from a tactical decision (is the federal prosecution likely to win the case?), federal guidelines exist for prosecution services to assist in determining when a prosecution could be left to another jurisdiction⁴¹ and when dual prosecution cases are possible⁴². In determining when a prosecution could be left to another jurisdiction, the US Attorney should weigh three important considerations: “1. The strength of the other jurisdiction’s interest in prosecution; the other jurisdiction ability and willingness to prosecute effectively; and 3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.” All three elements are then detailed in order to give the US Attorney some indication of the components of each consideration. On the other hand, federal prosecution could take place after a State prosecution if three prerequisites are satisfied: “1. the matter must involve a substantial federal interest⁴³, 2. the prior prosecution must have left that interest demonstrably unvindicated and 3. the government must believe that the defendant’s conduct constitutes a federal offense and that the admissible evidence probably will be sufficient to obtain and sustain a conviction by an unbiased trier of fact”.

Definition of offences as well as penalties can be quite different between the two legal systems. The extreme example which shows that one cannot look at the US federal legal system in terms of “harmonization” of State laws is the example of the death penalty. Federal courts can apply the death penalty in a number of limited circumstances (in particular in around 60 different types of murder), whilst some States have banned the death penalty entirely.

Although no harmonization *per se* occurs between States, when “state legislatures and courts consider the need to define or interpret statutory codes governing criminal procedure, they are often influenced by the Federal Rules of Criminal Procedure and other federal statutes, and by the American Bar Association Standards for Criminal Justice”⁴⁴. Nevertheless, it is not compulsory for States to use federal texts.

The decision not to prosecute is taken by a prosecutor and not a judge. One of the criteria which might convince a federal prosecutor to prosecute a case or not can be the

⁴¹ US Attorneys, *Criminal Resource Manual*, 9-27.240 Initiating and Declining Charges – Prosecution in another Jurisdiction.

⁴² US Attorneys, *Criminal Resource Manual*, 9-2.031 Dual and Successive Prosecution Policy (“Petite Policy”).

⁴³ A “substantial federal interest” is not easy to define. Then again, the criteria could cover many different types of situation: a pure investigation interest for a major drug trafficking network, as well as interest in investigating a crime involving the national currency (for example). This wording is subject to some kind of subjective assessment.

⁴⁴ Op. cit. footnote 23, p. 3.

potential penalties applied to a particular course of action. There are for instance federal guidelines on the key penalties applicable to a certain quantity of cocaine or heroin. If the quantities are below the minimum listed in those guidelines, a federal prosecutor would probably not prosecute. The final decision to prosecute, on the other hand, is taken by a judge. It is the responsibility of the plaintiff to “assert the legal basis for the court’s jurisdiction over the case and the court makes an independent determination that it has jurisdiction to address the case. (...) Under certain circumstances, a case that was improperly filed in federal court may be *remanded* to a State court that has jurisdiction to hear the case. Conversely, a case that was filed in a State court may, if certain conditions are met, be *removed* to a federal court”⁴⁵.

⁴⁵ Article III Judges Division *The Federal Court System in the United States. An Introduction for Judges and Judicial Administrators in Other Countries*, 2001.

CHAPTER III. COULD THE US FEDERAL SYSTEM INSPIRE THE EU?

KEY FINDINGS

- Setting aside the fundamental difference in political nature of the USA and the EU, the question of common criminal rules and a common judicial process exists in both Unions.
- Some criteria could be proposed at an EU level to determine the moment when harmonization could occur. The question of a definition of *serious crime* might be difficult to solve but should not, in any case, be limited to the list proposed by Article 83 of the Lisbon Treaty.
- Under certain conditions, some criteria could also be set to limit the increasing number of conflicts of jurisdiction.
- In order to enhance implementation of EU criminal law, first instance and appellate national jurisdiction should be evaluated and strengthened. Another possibility could be to create European Regional Courts of Appeal.

3.1. Where should the line be between State and centralized powers?

Where should harmonization stop and State jurisdiction (only) prevail? Isn't the question wider than mere harmonization and should we go as far as talking about an EU jurisdiction?

Rather than a patchwork of harmonizing instruments depending mainly upon certain crime areas, couldn't the Member States and the EU institutions agree on a clear set of criteria determining the moment when harmonization could occur? Our suggestion would be to simply refer to

- *Serious crimes (see below)*;
- Cross-border dimensions;
- The involvement for one reason or another of EU institutions, agencies or bodies in criminal cases;
- And leave the door open to further additions/amendments of those criteria according to the common needs of Member States and the EU interest. The EU interest in the criminal cooperation area, in our view, still has to be defined in order to get away from the "patchwork syndrome".

The definition of serious crimes is a fluctuant question. The UN Convention against transnational organized crime defines serious crimes as a "conduct constituting an

offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty". This is not a definition recognized officially at European Union level. The 2008 Framework Decision (2008/841/JHA) on the fight against organized crime does not propose a definition of *serious crime* but rather includes the four years' imprisonment criteria in its definition of "criminal organization". The 32 serious offences listed in the European arrest warrant are not subject to double criminality control if they are punishable by a "custodial sentence or a detention order for a maximum period of at least three years" and are nevertheless considered as *serious crimes*⁴⁶.

The areas of *particularly serious crimes* subject to future harmonization, listed in article 83 of the TFEU, although pertinent, are in our view incomplete. In fact they do not mirror the list of serious offences included in the EAW nor do they cover the mandate of Europol and Eurojust⁴⁷. Of course, again, many crimes could be included under the terms "organized crime", but organized crime has a definition of its own (see explanation above) which does not always match the needs of practitioners. The question of what is a serious crime might not be answered in a mathematic way, since national criminal law systems are so different. However, since a political agreement has been found in the past, it is our view that existing EU instruments listing serious crimes, which have been accepted as such by all Member States (and this is the case for the EAW and for the jurisdiction of Europol and Eurojust), should constitute the basis of this discussion. Anything below would clearly diminish cooperation that is already taking place on the basis of those documents. And it hardly seems conceivable – from a citizen's and practitioners' point of view – that cooperation should not encompass all criminal fields which have been recognised as *serious crimes* before the Lisbon Treaty and the Stockholm Programme⁴⁸, the idea being to continue to add "bricks" to the development of an area of freedom, security and justice.

3.2. Conflicts of jurisdiction

The Member States of the EU are experiencing more and more conflicts of jurisdiction between different Member States. In the absence of European compulsory criteria to prevent or solve conflicts of jurisdiction between different Member States⁴⁹, the criteria proposed by the US Attorneys Criminal Resource Manual (although applying initially to potential conflicts between States and the federal level) could be used by the Member States of the EU:

1. The strength of the other jurisdiction's interest in prosecution; 2. The other jurisdiction ability and willingness to prosecute effectively; and 3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.

⁴⁶ Article 2.2 of the Council Framework Decision (2002/584/JHA) of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States.

⁴⁷ See Article 4 and Annex to the Council Decision of 6 April 2009 establishing the European Police Office (Europol) (2009/371/JHA).

⁴⁸ Council of the European Union, *The Stockholm Programme – An open and secure Europe serving and protecting the citizens*, 17024/09, 2 December 2009.

⁴⁹ Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of jurisdiction in criminal proceedings.

One major difficulty remains though: it is impossible today for all Member States' judges and prosecutors to know exactly how a case would be treated in another Member State, both from a procedural and substantial point of view. The reason for this situation is multifaceted: absence of knowledge of other national criminal laws, but also absence of centralized evaluation mechanisms and information about the different national legal systems. Some informal mechanisms have been put in place to try to deal with the most complex cases. Eurojust, for instance, has been tasked with assisting Member States in dealing with complex jurisdictional issues. Nevertheless, this is not a compulsory and systematic system⁵⁰ and much still needs to be done. An EU centralized assessment of the implementation of EU criminal law in the different Member States is in our view badly needed.

3.3. The organization of an EU judiciary

Unlike in the US⁵¹, the EU countries do not have, for the time being, two layers of courts. The first "European judges" are the national judges. The only exception is the Court of Justice of the European Union, which should see its powers considerably increased in the field of criminal law with the Lisbon Treaty. The CJEU plays, similarly to the US Supreme Court, the role of a supreme court but is not the top of a chain of EU courts. Another potential EU judicial body could become the Public Prosecutor, if his office is created according to the provisions set out in the Lisbon treaty.

Practitioners are facing more and more cross-border cases. Certain countries have already created specific jurisdictions to deal with complex cases (organized crime cases for instance), which often include a cross-border element⁵². We believe that Member States will, in the future, at a minimum, have to strengthen their first instance and appellate capacity to deal with cross-border cases, and might even have to develop new judicial structures. In any case, national jurisdictions should be given resources. Two ideas can be developed:

- o In order to secure a similar or "harmonized" treatment of cases complying with the criteria set out in 3.1 above, national first instance courts should be dealing with those cases in an equivalent way through a set of harmonized procedural and substantive European rules, but also through the development of common frames (in particular a judicial organization based on common grounds; common legal educational programmes in EU law for judges, prosecutors and judicial staff) and through availability of similar resources from one country to the other in the Union.

It is in our view indispensable not to separate substantive and procedural law from the possibilities given to national judges to implement these

⁵⁰ Ibid.

⁵¹ For a short and rough explanation of the US federal court system, see Annex.

⁵² In France, JIRS – *jurisdiction inter-régionales spécialisées* – have been created.

common European texts. The evaluation of implementation by the judiciary of EU instruments can only be made on the basis of recognition of the caseload of those courts and of the financial, staffing, logistical means of those courts throughout the different MS. One of the main forces of the US judiciary is in our view its strong and flexible organization. This question, although not covered as such by the Lisbon Treaty, cannot in our view be considered as a minor issue in the European Union and should be particularly looked at in the years to come by Member States and EU institutions, in particular by the EU Parliament.

- o Appellate courts are currently also national courts. Either, that level could be strengthened similarly to first instance courts (see paragraph above), or, another option could be – since our proposal is to have set criteria involving *serious crimes* – a European handling of the most important (or the biggest) criminal cases. Those cases could then be handled at a regional appellate level with the creation of Regional Appellate European Courts, which would not only review the case on a legal basis but could also review the facts.

If French, German and Belgian authorities are working on a case involving a criminal network operating in the three Member States, they could all theoretically have jurisdiction to hear the case. If France and Belgium agree on letting Germany handle the case under German law, they could do so on the condition that the nearest geographically regional appellate court would hear the case if an appeal was made. In addition to enhancing efficiency for complex cross-border cases and ensuring efficient and “standardized” implementation of EU criminal law, we also believe that the creation of such courts could proportionally reduce the workload of the European Court of Justice in the field of preliminary requests, which should mathematically increase in the years to come.

ANNEX. ROUGH OUTLINE OF THE ORGANIZATION OF FEDERAL LAW ENFORCEMENT AND FEDERAL JUDICIARY IN THE UNITED STATES (SPECIAL FOCUS ON CRIMINAL LAW JURISDICTION)

Each State has its own system of criminal law rules, its own judiciary and police agencies. The federal level has, on the other hand, a unique system of criminal rules, a unique judiciary and its own police.

Law enforcement

At a level unknown in European countries, federal law enforcement agencies in the USA are numerous. The Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA) and the Bureau of Alcohol, Tobacco, Firearms and Explosives (AFT) fall under the authority of the Department of Justice. The US Immigration and Customs Enforcement (ICE) and the United States Secret Service fall under the authority of the Homeland Security (DHS). In addition, many other federal law enforcement agencies exist: the Internal Revenue Service, the Army Criminal Investigative Division Command, the US Postal Inspection Services for instance. Each department of the federal government and many federal agencies also have their own service investigating crimes committed against that department. Law enforcement agents and prosecutors would often work together from the beginning of a case.

A special law enforcement force, the Marshall Service – a service of the Department of Justice – plays a crucial role in the federal judiciary. Located usually within the building of the federal court itself, the primary function of the Marshalls is the enforcement of court orders. They do also protect federal judges and the safety of courthouses and courtrooms. Finally, they are also responsible for keeping prisoners in custody and transporting them⁵³. Although federal, this service has recently developed in a number of States into common federal-State task forces, including local law enforcement officers, which are tasked with locating and arresting fugitives that should be brought to court to face charges or who should be kept in custody. For instance, the task force constituted by Marshall Officers and Kentucky law enforcement officers in the Western District court of Kentucky, Louisville handles fugitive cases where around 90% are State cases⁵⁴. Most of the cases handled by the Louisville task force are supervisory release violations and robbery cases.

⁵³ Convicted persons by a federal court are held in federal prisons. Therefore, each system also has its own imprisonment system. However, during pre-trial, federal authorities might sign special agreements with county prisons. Interview with District court Judge Russell, 21 January 2010, Louisville, Kentucky.

⁵⁴ Interview with Dawn Izgarjan, Marshall services, US federal district court of Western Kentucky Louisville, 20 January 2010. In larger cities, federal cases could, according to Dawn Izgarjan, amount to around 50% of the cases handled by the task forces. Although the Louisville taskforce is quite small according to Dawn Izgarjan, task forces have developed throughout the country in many States. There are also a few regional task forces, each covering many States (in Atlanta and Chicago for instance).

Prosecution services

Unlike many European countries, prosecutions services in the US are part of the executive branch of the government and not part of the judicial branch. Federal prosecutors can be found both at a Central federal level in the Department of Justice in Washington and in all United States Attorney's Offices throughout the United States. The Attorney General is the prosecutor general of the United States, but is also the equivalent of a minister of Justice (head of the Department of Justice) and the chief law enforcement officer of the United States⁵⁵.

Each district (see below) has a federal prosecutor's office headed by a US Attorney. He is nominated by the President of the United States (unlike State prosecutors who are either nominated by the Governor or elected). Within the Department of Justice in Washington, divisions specialize in certain types of crime. Those divisions coordinate some prosecution cases around the country when the important profile of those cases is recognized, for instance on terrorism cases. The criminal division has a large number of specialized sections (organized crime, fraud, asset forfeiture and money laundering etc.); these divisions provide guidance, expertise and sometimes even personnel to federal prosecutors throughout the country.

First instance and appellate courts

Each US State will host Federal courts and State Courts, with each type of court applying a different legal system; although, all have to obey the principles of the US Constitution. Usually States will have first instance courts and some will have appellate courts. Their last instance courts are often known as State supreme courts. Unlike federal judges (see below), State judges are selected differently from one State to the other. In Kentucky, for instance, judges are elected. State judges are "the final arbiters of their own laws and constitutions. Their interpretation of the federal law or the US Constitution may be appealed to the Supreme Court who may chose to hear, or not, the case"⁵⁶.

According to Article III of the US Constitution, Congress establishes lower courts⁵⁷:

- o Each State is divided into one to four districts. Each district has a District Court resulting in currently 94 District courts. All are composed of District judges (hereinafter "Article III judges")⁵⁸, "holding their offices during good Behavior"⁵⁹ – meaning that they hold lifetime tenure unless impeached – and sometimes of many Magistrate judges, appointed for a period of 8 years (Magistrate judges can also seek reappointment). Article III Judges are

⁵⁵ A number of specific law enforcement agencies report to the Attorney General, who also has a general coordination power amongst the numerous federal law enforcement forces.

⁵⁶ Administrative Office, *The path to the Supreme Court*.

⁵⁷ In addition to district courts and appellate courts, Congress also establishes the Court of International Trade.

⁵⁸ Article III of the US Constitution invests the judicial power of the United States in the federal court system.

⁵⁹ United States Constitution, Article III.

appointed by the President of the United States and confirmed by the Senate to serve in a specific District or Circuit Court. It is difficult to appoint additional Article III judges. Indeed the creation of new Article III judges has to be agreed by Congress and agreement has to be found on their appointment by the President and confirmed by the Senate. Magistrate judges are appointed by federal courts – after recommendation by a panel of private citizens – when additional manpower is needed in order to face a growing caseload⁶⁰. Federal judges are subject to the Code of Conduct for the United States Judges. In order to guarantee their independence, the US Constitution states that Article III judges' salaries cannot be reduced while they are in office.

- o Additionally, it is worth mentioning that, contrary to the situation prevailing in most European Union Member States, district judges take decisions alone in criminal *and* civil matters⁶¹. They are not specialized in one specific area. Magistrate judges also intervene in criminal and civil cases. Nevertheless, the jurisdiction of the latter is limited to the scope that has been decided by the local Article III judges. Generally, magistrate judges cannot try felony defendants, but they can try civil cases with the consent of the parties. In criminal matters they would typically handle pre-trial work for the district judge (issuance of arrest warrants, preliminary hearings, detention hearings, information of defendants on their constitutional rights, determination if a court counsel should be appointed etc.)⁶².
- o Circuit courts, i.e. appellate level, cover a number of District courts. There are 13 Circuit Courts of Appeals across the US; 12 of them hear appeals from criminal cases⁶³. At appellate level, a panel of

⁶⁰ One main legal basis in this field is the Federal Magistrate Act of 1968. It gave the Judicial Conference responsibility for administering the magistrates system, including determining the number of magistrates, as well as the type, location and salary of each magistrate position. Each district court determines the volume and type of duties to be assigned to a magistrate judge. A *Magistrate Committee* also set forth legislative recommendations to the Judicial Conference. Magistrate judges' positions have attracted lawyers, State judges or former police officers. Philip M. Pro and Thomas C. Hnatowski, *Measured Progress: The Evolution and Administration of the Federal Magistrate Judges System*, June 1995, page 1510, and interview with Thomas Hnatowski 19 January 2010, Washington and with Judge Whalin, Western District Court of Kentucky, Louisville.

⁶¹ For instance, Judge Russell, Western District Court of Kentucky, Louisville would have around 20% criminal cases and 80% civil cases. During the interview that took place on 21 January 2010, he explained that this situation would vary very much from one State to the other, in particular for judges exercising near the border, where immigration cases and drug cases would significantly increase the number of criminal cases.

⁶² Administrative Office of the U.S. Courts, Office of Judges Programs, Magistrate Judges Division, *The United States Magistrate Judges System, an introduction*, 2007.

⁶³ US Courts of Appeals from the First through Eleventh Circuits, the Courts of Appeals for the District of Columbia (Washington D.C.).

three judges sits on each case. At the appeal level, the court will not conduct a broad review of the evidence; it will focus mainly on law rather than on facts.

Apart from active judges, Article III judges are sometimes called “senior judges”. When active Article III judges meet the rule of 80 (minimum 65 years of age and have served at least 15 years in the federal judiciary), they can retire or continue to hear cases while choosing their workload⁶⁴. Another element permitting some resource flexibility is the possibility for Article III judges to work (at a distance) for other federal courts, where the workload is much higher. Therefore, Magistrate judges, Senior Article III judges and, Article III judges, moving around occasionally, allow the federal judicial system to adapt to increasing responsibilities.

Because of the strong separation of powers in the US (and independence of magistracy), the judiciary can check on both the legislative and executive branches and can declare laws and presidential orders to be unconstitutional.

Federal courts generally have higher financial means than State courts. After preparation by the Administrative Office and approval by the Judicial Conference, the draft budget of the Federal judiciary is approved by Congress every year. In 2008, the Federal Justice budget stood for 1% of the total federal budget. The Administrative Office is then in charge of giving the budget allocated to each court. Courts are responsible for their own expenditure (process of “decentralization”), and are audited regularly by the Administrative Office. Unlike State judges who depend upon the educational system of each State, federal judges benefit from the educational programmes organized by the Federal Judicial Centre (see below) located in Washington.

Federal courts all apply the same substantive law and procedural law, with some local minor exceptions (e.g. number of copies to be filled).

In November 2009, there were 766 active Article III judges working around the United States including: 158 appellate judges, 599 district judges and 9 judges working in the Court of international trade. Additionally, 509 senior judges were still working for the federal judiciary (111 in appellate courts and 394 in district courts and 4 in the Court of international trade)⁶⁵.

The US Supreme Court

The US Supreme Court is the only federal court established by the US Constitution. It is composed of the Chief Justice of the United States and eight associate justices. Cases are heard “en banc” and decisions are taken together by the 9 justices. Roughly “a dozen precedents are produced every year by the US Supreme Court”⁶⁶. Generally, the Supreme Court will act as appellate court, reviewing, in criminal matters, the decisions of

⁶⁴ Peter Mc Cabe and Peggy Irving, Administrative Office, Interview 19 January 2010, Washington.

⁶⁵ Administrative Office of the United States, Peggy Irving, Interview 19 January 2010, Washington.

⁶⁶ Russell L. Weaver, Leslie W. Abramson, John M. Burkoff and Catherine Hancock, “Principles of criminal procedure” Third Ed., p. 1.

the United States Courts of Appeals, the United States Court of Appeal for Armed Forces, the Highest State Courts. In criminal cases, this second appeal process in front of the Supreme Court is generally not possible. Instead, the person needs to file an application explaining why the legal issue in this case is so important that the Court should consider the case (“writ of certiorari”). In the majority of cases, the Court does not accept to review those applications⁶⁷.

The US Supreme court, although of a federal nature, will issue decisions affecting both Federal courts and State courts. An example of “cross legal systems” is the constitutional rights of defendants charged with crimes. Defendants in a State case can invoke federal constitutional rights and State constitutional rights. The federal rights are the minimum standards that States have to observe. States can decide to grant more rights to defendants.

If the case is unclear as to the charge of a crime or only with a civil offence, the Supreme court “has ruled that it is theoretically possible for a defendant to persuade the court to treat a proceeding as criminal despite its legislation classification as civil”⁶⁸ and therefore to ask for Constitutional rights (see Bill of rights above) to apply.

The Judicial Conference

The Judicial Conference was created in 1922 by Congress. Since 1939 it administers the federal judicial branch. It is composed of 27 federal judges⁶⁹ and works in the form of committees. Because of the principle of independence of the US judiciary, the Judicial Conference has a broad scope of powers; it is the policy-making and administrative direction of the federal judiciary. For instance, the Judicial Conference is in charge of submitting to Congress the annual budget proposal, but also new legislation of interest to the judiciary, and is in charge of making recommendations to the Supreme Court for changes in federal rules to promote simplicity in the procedure or elimination of unjustifiable expenses and delay. The 24 committees, established by areas of responsibility, adopt reports and recommendations – often with the help of permanent or ad hoc sub-committees⁷⁰ - which are then examined by the 27 judges composing the Judicial Conference. For instance, the Committee on criminal law oversees the federal

⁶⁷ According to the Article III Judges Division and its 2001 *Introduction for Judges and Judicial Administrators in Other Countries*, page 35, upon 8000 petitions for certiorari, the Supreme Court will agree to hear only about 100 cases.

⁶⁸ Op. cit. footnote number 64 p. 3.

⁶⁹ The Chief Justice of the US (presiding officer), the chief justice of each of the 13 circuit courts of appeals, one district judge from each of the 12 circuits, the chief judge of the Court of International Trade, one bankruptcy judge and one magistrate judge as observers.

⁷⁰ There are, according to Peter Mc Cabe (Interview 19 January 2010), around 100 sub-committees. For instance, the criminal law committee has a permanent sentencing sub-committee, a probation office sub-committee etc. The average is 2 to 9 sub-committees per committee.

probation and pre-trial services system and review legislation and other issues relating to the administration of the criminal law⁷¹.

The Judicial Conference cannot propose to the Supreme Court any amendment to the rule which would be substantive in nature⁷². "The federal rules of practice and procedure regulate litigation in the federal courts and are designed to promote simplicity in procedure, fairness in administration, the just determination of litigation and the elimination of unjustifiable expense and delay"⁷³. Those rules can only cover procedural matters. Sometimes an amendment to a procedural rule can have some substantive consequences and so all the more when no clear definition of "procedural matters" exists. The Supreme Court decides on a case by case basis on this issue.

The Administrative Office of the United States Courts

The Administrative Office (hereafter "AO") was created by statute in 1939, is located in Washington and "is responsible for the day-to-day operations of all federal courts"⁷⁴ (payroll, equipment and supplies, information gathering, support to the Judicial Conference etc.). Nevertheless, each court has considerable latitude to manage their court operations (recruitment of staff, management of the budget) under a decentralization scheme developed since the 1980s. Locally, the chief judge⁷⁵ "has an important leadership role in court management" and is presumed, in his financial and administrative authority, to act in the name of all judges of the court⁷⁶ with the help in particular of the clerk of the court, the primary administrative officer of each court. In criminal cases, the clerk has also a role in executing judgments: if the court has ordered the payment of criminal fines, he is responsible for receiving money and distributing it as directed by the court.

The Administrative Office therefore performs four main functions⁷⁷:

⁷¹ Judicial Conference of the United States, *Jurisdiction of the Committees*, September 2009, page 6. Another important example, the Committee on International Judicial Relations, coordinates the federal judiciary's relationship with foreign judiciaries and with those agencies and organizations that are involved in international judicial relations, the expansion of the rule of law and the administration of justice.

⁷² "The procedure takes at least three years for an amendment to become a rule" according to John Rabiej from the Rules Committee Support Office. The amendment is proposed, submitted to comments of practitioners, discussed and then eventually submitted to the Judicial Conference. If agreed on by the Judicial Conference, it is then sent to the Supreme Court.

⁷³ Peter G. McCabe, *Renewal of the federal rulemaking process*, June 1995, page 1656.

⁷⁴ Honorable Lloyd D. George Chief United States District Judge, District of Nevada, *Administrative structure of federal courts in the United States*.

⁷⁵ Judge who has, at the time of appointment as Chief Judge, served at least one year and is under the age of 65.

⁷⁶ AO, Office of Judges Programs *Compendium of Chief Judge Authorities*, October 2002.

⁷⁷ Administrative Office, Interview with Peter Mc Cabe, 19 January 2010, Washington.

- Assisting the Judicial Conference as a permanent secretariat;
- Delivering information: publications, statistics (including a statistical evaluation of each federal court), intranet;
- Government functions: the AO used to be in charge of procurement for all federal courts. Since the beginning of the decentralization process, this function has changed into an assistance role (preparation of the budget, auditing, training in procurement issues, handling privacy and security issues etc.);
- Assistance to courts: strong interaction with courts (clerks, judges etc.) on a regular basis to try to resolve practitioners questions, build up new computer programmes, follow the appointment and terms of magistrate judges, evaluate the needs in additional resources etc. There is no supervisory role here but rather an exchange that results in a participative system where courts' views are part of the answer proposed by the AO to their difficulties.

The Federal Judicial Centre

Established in 1967 and also located in Washington, the Federal Judicial Centre is responsible for "training" judges and court personnel and conducting research. It also provides support to the Judicial Conference and its committees upon request. The educational programmes offered are diverse and use modern technologies (intranet, video, web-based resources, Judicial Television Network, face to face sessions etc.). In addition, the target groups of course include judges and judicial staff, but also US high schools and judicial representatives from foreign countries.

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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