

Working Group X

Working document 05

**POLICE AND JUDICIAL CO-OPERATION IN CRIMINAL MATTERS,  
ASYLUM AND IMMIGRATION, JUDICIAL CO-OPERATION IN CIVIL MATTERS :  
INSTRUMENTS, PROCEDURES AND OTHER INSTITUTIONAL ISSUES**

**POSSIBLE WAYS FORWARD FOR THE WORKING GROUP**

***INTRODUCTION: SOME BASIC ASSUMPTIONS OR "GOLDEN RULES"***

The present paper has been drafted in the light of the evidence gathered and the deliberations that took place within the Working Group. Its purpose is merely to facilitate the discussion foreseen for the next meeting of 8 November 2002. Following the debate held at this meeting, the Chairman will then produce a first draft of the final report of the Group at the meeting of 22 November 2002.

Hereafter will be proposed two "golden rules" to build up final and comprehensive proposals from the group:

- *A common general legal framework recognising the particularities of this area*

Following the draft frame Treaty submitted by the Presidium at the last session of 28 and 29 October 2002, the current "Third pillar" provisions should be brought under a common general legal framework, in a "single Treaty". This would overcome the pillar structure and its well-known adverse effects (uncertainty about legal bases; necessity of two instruments or separate international agreements for a series of initiatives).

But the question is not whether or not to "simple communitarize" the present Third pillar. Instead, one would create a "mix", combining elements of the Community method with a number of special rules allowing in some cases for strengthened inter-governmental collaboration and involvement of national parliaments, thus taking into account the specific features of the area of police and criminal law.

In this context, the following examples could be mentioned:

- a multi-annual strategic programme set by the European Council, defining an overall framework for legislation and operational collaboration.
  - application of the normal procedures before the Court of Justice; in particular the infringement procedure, could be complemented by recognising the intergovernmental "peer evaluation" method (foreseen in the Treaty?);
  - the involvement of national parliaments could be envisaged both before and after adoption of legislative acts (implementation).
- *Introduce, as much as possible, a separation between "legislative" and "operational" tasks*

A clearer and stricter separation between legislation (legal instruments; legislative procedures; implementation; in large part to be aligned with the general procedures of Community law) and a reinforced operational collaboration within the Council, as set out below. This could be an improvement compared with the present confusing situation.

## **A. LEGISLATIVE PROCEDURES**

### **I. Areas related to TEC (current "First Pillar")**

#### *a. Asylum, refugees and displaced persons*

The objectives detailed in Tampere are manifestly not met. Moreover, in this area new challenges (eg external events, demographic changes) require response. The European Council made it clear that a common asylum policy requires a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union, not just common minimum standards as

foreseen in Article 63 TEC. The Treaty of Nice foresees co-decision for measures related to asylum and displaced persons *"provided that the Council has previously adopted (...) Community legislation defining the common rules and basic principles governing these issues"*.

Three basis questions could be addressed:

- *Would it not be more appropriate to redraft Article 63 TEC in a more general way in order to enable the adoption of all measures needed to put in place a common policy on asylum and on refugees and displaced people, as indicated in Tampere?*
- *Should it not be appropriate to use co-decision with qualified majority in the Council, going beyond what is indicated in the Treaty of Nice?*
- *It is suggested to enshrine in the Constitutional Treaty the principle of solidarity between Member States implying in particular a fair balance of the burden sharing; Should this principle be drafted as a general principle applying to asylum, immigration and border control policies?*

*b. Common policy of immigration*

- *Would it be appropriate to limit the scope of this policy with a view to facilitating the acceptance of codecision with qualified majority?*
- *How could the integration of third country nationals who are legally resident (long term residence) in the Union be improved?*

*c. Judicial co-operation in civil and commercial matters*

Article 65 TEC limits the action of the Union to "civil matters having cross-border implications" and "insofar as necessary for the proper functioning of the internal market". The reference to the "internal market" has been seen by some as no longer relevant. It could be envisaged to maintain in the new Treaty, following the suppression of the pillar structure, a specific legal base for judicial co-operation in civil and commercial matters, but dissociated from matters of asylum and immigration. It could also be considered to abolish the current limited judicial control foreseen in Article 68 TEC (see below). No other changes or improvements have been suggested.

## **II. Areas related to TUE (current Third Pillar)**

**a. Reform of Legal Instruments**

- *Replace Framework Decisions and Decisions (present Article 34 TUE) with Regulations and Directives (or their successors).*

- *Abolish Conventions: in the future, regulations and directives will suffice; presently existing Conventions can be "converted" into regulations or directives.*

This solution was recommended by expert evidence in the Group<sup>1</sup>. Combined with the introduction of an infringement procedure (see below), it would notably solve the problem of unratified Conventions in general, and that of cumbersome Europol decision-making in particular, since the Council could convert the Europol Convention into a regulation and define appropriate decision-making procedures for the management of Europol. But the contents of the Europol Convention, and thus the basic character of Europol, would not necessarily be affected by such a conversion.

## b. Clearer identification of the scope of Union legislation

### *1. Preliminary remark:*

*Need to distinguish between the various types of Union intervention in this area:*

- *Minimum rules / approximation of substantive criminal law (constituent elements and penalties)*
- *Minimum rules / approximation of elements of criminal procedure*
- *Rules organising police and judicial co-operation between Member States authorities (in particular: mutual legal assistance, arrest warrant, extradition).*

The need for clearer identification of Union competence seems to arise above all for the sectors of approximation of substantive and procedural criminal law.

At the same time, it would be necessary to find the right balance between approximation and the principle of mutual recognition.

## 2. Minimum rules / Approximation of substantive criminal law (constituent elements and penalties)

### *i. "Listing crimes"*

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<sup>1</sup> As well as by experts giving evidence to WG IX (namely, Mr. Piris and Judge Lenaerts).

The basic idea is that a certain approximation of substantive criminal law is needed to the extent that certain phenomena of crimes are of transnational dimension and cannot be addressed effectively by the Member States acting alone. This has been recognised both by the Treaty of Amsterdam and by the European Council of Tampere. The Treaty of Amsterdam mentions the establishment of "minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking" (Article 31 (e) TUE), but does not exclude approximation of laws as foreseen in Article 29 (preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug and arms trafficking, corruption and fraud). In Tampere, it was mentioned that "efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, euro counterfeiting), drug trafficking, trafficking in human beings particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime".

Given that the Union now wishes to intensify action against crime, the Working Group might wish to attempt to define as precisely as possible the areas where approximation of substantive criminal law is reckoned as necessary. It has been stressed that these areas should be limited and that the principle of mutual recognition will constitute the general basis for criminal co-operation. Would it be appropriate to draw up a precise list of crimes, for which easier decision-making is possible (QMV + codecision, *see below*)? Could this be combined with the possibility left to the Council to add further crimes to that list in the future, in case of need.

Two models would be possible:

- according to one model, this list should be in the Treaty itself, and the Council should be able [by unanimity] to add further crimes to it, on which then legislation could be passed by QMV + codecision;
- another model would be to keep in the Treaty the broader, non exhaustive list of crimes currently found in Articles 29 + 31 (e), but to give to the Council the role of defining a multi-annual strategic programme of priorities in EU fight against crime. The more precise list of crimes to be approximated with QMV + codecision would be included in that programme; other crimes could, in case of urgent need, be subject to legislation adopted by a heavier procedure (unanimity).

ii. Enshrining *criteria* in the Treaty to spell out subsidiarity in this area

*(This approach could be combined with listing crimes)*

Possible criteria include, e.g.:

- Cross border impact or dimension. In a broader sense, this could also include cases where there is a clear impact of disparities in national laws on crime developments, notably in organised crime (i.e.: eliminating "safe havens" for organised crime)
- Common interests [or: values] (including Union values: financial interests, euro, [environment?])
- need for approximation of a crime in order to facilitate mutual recognition (e.g., abolish the "double incrimination" requirement).
- Other criteria?

*Should these criteria be alternative, or some of them be required cumulatively?*

3. The principle of mutual recognition and approximation of elements of criminal procedure

Expert hearings have demonstrated that the need for approximation of certain elements of procedure is widely recognised by practitioners; perhaps more urgent than approximation of substantive criminal law which in the past often dominated the debate. Is procedural approximation needed both for more efficient collaboration between law-enforcement agencies, and as corollary of the principle of mutual recognition (which according to Tampere should become the cornerstone of judicial co-operation in criminal matters)? Does Article 31 EU Treaty reflect sufficiently this point?

- *Should the principle of mutual recognition of judicial decisions be enshrined in the Treaty?*
- *Should a legal basis permitting common minimum standards on the rights of individuals in criminal procedure be foreseen (building on, but going beyond where necessary, the standards of the European Convention on Human Rights and the Charter) in order to facilitate mutual recognition (right to be defended in another Member State effectively, right to have an interpreted appointed, minimum standards of legal aid, etc.)?*
- *Should a legal basis permitting approximation of certain elements of criminal procedure be included to the extent necessary for efficient co-operation: in particular taking and admissibility of evidence (common standards in regard to the disclosure of material to the*

*defence, common standards for the retention of evidence - eg. DNA material)? Other elements of procedure?*

4. Rules on police and judicial co-operation between Member States authorities (examples: the present Convention on Mutual Legal Assistance; the European Arrest Warrant)

No change in the Treaty. Even in case the Treaty were to list specific types of crime for possible substantive approximation, the Treaty should - in accordance with the present situation - not restrict the scope of application of rules on police and judicial co-operation to these types of crime; otherwise, that would be a *step back* (e.g.; the Council Framework Decision on European arrest warrant covers a long list of crimes, not all of which should be harmonised). Such rules are justified already by the fact that criminals exploit freedom of movement of persons and capital.

As already indicated, it could be envisaged to provide Europol with a new legal base replacing the existing Convention by a Regulation, which would enable the extension of the mandate of Europol to new forms of crime.

c. Reform of Legislative Procedures

1. Is unanimity unavoidable?

Would sticking to unanimity mean practically the end of any dynamic policy in this area, after enlargement? Is there a serious risk that even an individual state could refuse any negotiation on issues as important as money laundering, in order to protect their own national interests?

i. Qualified majority voting + codecision

An extension might be possible as regards:

- Certain matters of substantive and procedural criminal law (i.e. criminal sanctions relating existing common policies where QMV already applies, list of crimes and elements of procedure mentioned either in the Treaty (+ matters added on later by the Council), or contained in the multiannual strategic programme);

- Rules organising police and judicial co-operation (e.g., mutual legal assistance, arrest warrant, extradition).

ii. other areas:

In particularly sensitive areas, it might be considered inopportune to pass over to QMV + codecision. Possible examples:

- Substantive criminal law "outside the lists of crimes"?
- Creating new Union bodies with operational powers?
- Operational powers of joint police teams on territory of another Member State?

The Group might consider necessary to identify these areas where after enlargement it is still justified to vote unanimously in the Council. The question is whether with 25 States this rule would not lead to deadlock, since a single State is in a position to even refuse any negotiation on issues conflicting with its specific interests. How could such a situation of deadlock be overcome? Through which decision arrangements? (a concrete definition of such arrangements go beyond the remit of the Group, but the latter could stress the need to envisage such arrangements in the JHA area).

2. Right of initiative

Currently Member States share the right of initiative with the Commission in relation to measures under Title IV TEC and Title VI TEU. After 1 May 2004, Member States will keep this right of initiative within TEU only. Some have pointed out that the initiatives submitted by Member States tend to focus mainly on existing difficulties within that State without taking into account the general perspective of the Union's interests. In addition, some States, when they are chairing the Union, feel politically obliged to propose initiatives to respond to an actual concern of their population. This can imply the discussion of subjects within the Council for which there is actually limited interest.

Is it not from a legal and institutional point of view, opening the possibility for Member States to launch a legislative initiative within QMV+ codecision incompatible with the very nature of this procedure as described in Article 251 TEC and with the existing institutional balanced?



Against this background, the Group needs to consider the following options:

- a) maintaining the right of initiative for each member state;
- b) recognise the right of initiative to the Commission alone or with exceptions in specific areas such as police co-operation, development of law-enforcement agencies. The European Parliament, the Council and (a group of) Member States formally request the Commission to submit a proposal; if the Commission could not do it, it should give reasons).
- c) giving a concurrent right of initiative only to a group of Member States.
- d) adoption by normal qualified majority + codecision only possible upon Commission initiative; Member States initiatives would require unanimity / superqualified majority. [This would follow the general logic that QMV is more acceptable for "outvoted" Member States, and conciliation between the Council and the EP in codecision is better manageable and more balanced, if the Commission acts as a neutral mediator and guardian of the general interest].
- e) The Presidency of the Union? The High Representative (if the post was created)?

## **B. STRENGTHENING OPERATIONAL COLLABORATION**

### **I. Operational collaboration within the Council**

- Enshrine mission of Police Chiefs task force police in the Treaty; redefine mission and give Article 36 Committee jurisdiction for executive co-operation instead rather than for legislation;
- In this structure Member States could be represented on a permanent basis (ex. create a Police European Headquarter on the model of military structure in the present second pillar).

### **II. Is there a need to create a new structure within the Council with a new responsible (High Representative/ high official) to enhance the operational collaboration?**

To build up and enhance confidence as well as to improve efficiency, it could be questioned whether there is a need for a new structure within the Council. Would this create more visibility and accountability? Could this proposal furthermore introduce a clear distinction between the Council acting as a legislative body and the Council acting as an executive body responsible for operational

actions? In this respect, the Group may wish to consider proposals already made (see in particular the contributions made by Mr Haenel and Floch) favouring the creation of a new responsible to co-ordinate this area.

Such a post could be either of political nature (a High Representative chairing the JHA Council of Ministers) or rather of technical nature (a high official responsible for the co-ordination of technical and operational tasks). The Group may wish to consider first the opportunity of such a post and, possibly define its tasks. These are substantially different according to the profile chosen (political or technical).

The following tasks are indicated as examples where this new responsible could act:

- co-ordinate the entire spectrum of police and security matters: police co-operation, fact finding missions, peer review.
- chair or report to the Justice and Home Affairs Council and report regularly to the EP and, possibly, to the national parliaments. He would have direct authority vis-à-vis Europol (e. g. chairing the board) and would make sure that the co-operation between Europol and Eurojust is good.

Action taken within this structure of the Council should be subject to judicial control by the European Court of Justice.

### III. Management of external borders

The European Council of Seville mentioned the gradual development of an integrated system for border management as an objective of the Union. Should the Treaty contain a specific provision entailing a simplified provision on visas (currently, there are four paragraphs)? Should this provision serve as legal base for the adoption of other necessary measures (in particular, promoting co-operation , training, exchange of information and a mechanism for financial solidarity)?

It stems from the deliberations in the Working Group that the creation of a common European border guard is rather for the long term. Is it appropriate in this area to complement the Members

State's action needs by the Union? Is there a need to create joint teams composed by officials from different Member States in order to make more effective the control of the external borders?

#### IV. Development of Union bodies (Europol, Eurojust)

- more operational powers for Europol: a role of co-ordination of investigations; a power to make a (binding) request for the taking up of investigations; a leading role in joint investigative teams ? *Or*: simply replace the detailed statement of Europol's mission in Article 30 TEU by a short, general statement on Europol's role, indicating merely the direction of development and leaving to the Legislator a greater margin to define that role?
- more operational powers for Eurojust: a power to make a (binding) request for the taking up of criminal pursuits; a power to request referrals to itself of ongoing cases which need transnational coordination; a role over judicial supervision of investigations handled by Europol? *Or*: simply replace the detailed statement of Eurojust's mission in Article 31 TEU (Nice) by a short, general statement on Eurojust's role, indicating merely the direction of development and leaving for the Legislator a greater margin to define that role ?
- admit possible long-term perspective of envisaging a European Prosecutor, perhaps evolving from or combined with Eurojust, perhaps only for the protection of the financial interests of the Union or with a larger scope of action ?

### C. HORIZONTAL QUESTIONS

#### I. More efficient implementation

a. better monitoring of Member States' implementation through:

1. using the mechanisms of "mutual (peer) evaluation", as developed in the Council over the last years, for monitoring of efficient *practical* implementation by administrative and judicial bodies in order to facilitate mutual confidence. (Should that mechanism be mentioned in the Treaty ?).
2. giving the Commission the right to bring infringement procedures (as in Article 226 TEC).

b. more efficient implementation measures at Union level:

- giving the Commission power of implementation according to the usual patterns as in other areas (i.e. Article 211 TEC + Comitology, possibly as reformed by the Convention)

*(the Council increasingly granting the Commission implementing powers in 3rd pillar acts, anyway, although it is not foreseen in the EU Treaty)*

## II. Involvement of national parliaments

On the one hand, there is a need to take account of the fact that criminal law is a special area, especially sensitive to human rights and at the heart of subsidiarity, for which currently the national parliaments have responsibility (eg ratification of conventions). Reform of the legal instruments, the legislative procedures and operational co-operation is indispensable and will lead to an increased responsibility of the European Parliament, but national parliaments should continue to play an important role. On the other hand, the Group could try, as much as possible, to build on results found in the Convention generally on this issue, rather than to devise special mechanisms exclusively for the current 3rd pillar.

- possible use of the "subsidiarity early warning mechanism" (devised by WG I) in criminal law matters, in particular where it is questionable that a crime has actually a "cross-border effect": e.g., a lower threshold of national parliaments entitled to early warning. In this respect, it could be considered to set up a "petition" mechanism triggered by a certain percentage of membership of the Parliaments of the European Union (this would encourage active co-operation on an inter-parliamentary basis between Parties in national parliaments);
- allowing such an early warning also where certain national parliaments consider that an initiative runs counter to basic features of national criminal law policy ?
- reserving a role for national legislation through exclusive use of directives (or successor) in harmonisation of substantive criminal law.
- involving national parliaments in the mutual evaluation mechanism (*see above*).
- establishing political control by the European Parliament? In association with the National Parliaments?

### III. International Agreements

In the final report of Working Group III it was proposed to merge the three current pillars and to foresee a single provision for the negotiation and conclusion of international agreements. The Treaty structure contains also a single specific provision on the conclusion of agreements. This new single provision would be based on the current Article 300 TEC and would foresee the application of Articles 24/38 as specific procedures derogating to the general Community mechanism. WG III did not propose any substantial change in the existing provisions on the negotiation and conclusion of international agreements. This means that if an international agreement refers exclusively to third pillar matters, article 24/38 applies (mandate of negotiation is decided by the Council and the Presidency of the Union negotiates, where necessary with the assistance of the Commission).

This is already the current procedure for international agreements concerning second and third pillar matters. WG III mentioned however that these procedures could be modified, if that was the will of the Convention. Agreements concerning second pillar matters can indeed be politically sensitive. As for agreements concerning Third Pillar matters they have a different nature, being linked with legislation, in particular of criminal law.

According to current Articles 24/38 the Presidency of the Union negotiates the agreements. The fact that the Presidency changes every six months has created difficulties. If a negotiation requires more time, it may become more complex with the periodical modification of the negotiator on behalf of the Union. The question is therefore whether a system could be proposed to enhance the protection of the Union's interests in the negotiation of agreements relating to current Third Pillar matters. This is presently under consideration by the WG "external action". It might though be appropriate to forward to them the reflections of this Group on this question.

### IV. Judicial Control

At present the jurisdiction of the Court of Justice regarding acts adopted under Title IV TEC and Title VI TEU is limited. According to Article 35, paragraph 1 TUE, the Court has jurisdiction to give preliminary rulings only if the Member States accept formally this jurisdiction (this has led to a complex "variable geography"); in addition the Court will have no jurisdiction at all to review acts

adopted by police forces or other law enforcement services (paragraph 5); the right to bring annulment proceedings is limited to the Member States and the Commission under the conditions set up in Article 35, paragraph 6 TUE.

The limited jurisdiction of the Court may no longer be acceptable concerning acts adopted in areas (eg police co-operation, judicial co-operation in criminal matters) which directly affect fundamental rights of the individuals.

The same question applies to the limited judicial control foreseen in Article 68 TCE. This provision (paragraph 1) limits the preliminary ruling procedure (Article 234 TCE) to requests made by the supreme or last instance courts, but it is well known that the difficulties of interpretation are raised mainly before first instance courts; this implies that the individual has to lodge appeals until the last instance in order to request that a question of interpretation (or validity) be put to the European Court (this is particularly problematic in cases like asylum, where speedy legal proceedings are crucial). In addition, the jurisdiction of the Court is excluded concerning measures related to the maintenance of law and order and the safeguarding of internal security (control of persons crossing internal borders). As stated before, the very nature of these measures is to affect individual rights. It seems difficult to justify a continuation of exemption of the jurisdiction of the Court for such measures especially taking into account that other measures relating equally to the maintenance of law and order (eg expulsion from one Member State to another of a EU citizens) have always been subject to judicial control by the ECJ.

*The Working Group may wish to consider whether the specific mechanisms foreseen in Articles 35 TUE and 68 TCE may be abolished and the general system of jurisdiction of the Court of Justice may be applicable.*

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