

Working Group X

Working document 09

## **Working group X « Freedom, Security and Justice »**

**Subject : Paper by Mrs. E. Paciotti, Mrs. A. Van Lancker and Mr. Méndez de Vigo,  
Members of the Convention**

Members of Working Group X “Freedom, Security and Justice” will find attached a paper by the Mrs. E. Paciotti, Mrs. A. Van Lancker and Mr. Méndez de Vigo, Members of the Convention, representatives of the European Parliament.

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We, the undersigned, representatives of the European Parliament, hereby propose that the working group reply as follows to the questions set out in its constituent mandate:

**1. What improvements would have to be made to the treaties in order to promote the actual implementation of an area of freedom, security and justice (AFSJ) in all its elements?**

We are obliged to note that, as the treaties stand, it is very difficult for the Union to attain successfully the objective that it has set itself – in Article 2 of the Treaty on European Union – to develop the Union as an area of freedom, security and justice because of:

**(a) the complexity of the Union's current institutional framework** (separation into pillars) and the varying systems under which it operates (ordinary system and Schengen system) as well as the individual protocols applying to various Member States (United Kingdom, Ireland and Denmark). If we want to maintain the consistency of Union action in implementing the ASFJ under the current treaties, we should have to:

- abolish the current separation between pillars (as proposed by the Working Party on the Legal Personality) and
- **ask the Member States to which certain provisions do not apply to review their position**, where possible before enlargement so that the decision-making procedure<sup>1</sup> may be simplified;

**(b) a persistently varying level of protection of fundamental rights and of the principle of the rule of law.** In this connection, account should be taken of the proposals put forward by the Working Party on the Charter of Fundamental Rights and of the proposals for the recasting of the treaties currently being debated by the Praesidium and the plenary. These reforms are of the utmost importance for the implementation of the AFSJ, which would become a credible objective for European citizens if the following steps were taken:

- **establishment of a new constitutional treaty**
- **integration of the Charter of Fundamental Rights**
- **full jurisdictional control by the Court of Justice**
- **use of the codecision procedure and qualified majority voting for the adoption of legislative acts** (see answer 2);

**(c) the inefficiency and the haphazard nature of the measures taken at the level of the Union and of the specialised agencies and bodies that the Union has put in place.** The lessons learned during the three years since the entry into force of the Treaty of Amsterdam have shown that the inefficiency and haphazard nature of those measures stem largely from the disparity between the Union's general objectives and the individual measures taken to implement those objectives. In practice, the Union has

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<sup>1</sup> It should, for example, be noted that, at present, all the fifteen Member States participate in full or in part in the Schengen system which might then become the common base, with a few simple technical adjustments being made with respect to the checks on persons which concern the United Kingdom and Ireland.

tried to plug that gap by drawing up a plethora of plans and strategies, only some of which the Member States have followed<sup>2</sup>.

We must therefore make provision, as of now, at treaty level, for binding planning instruments to be drawn up on the basis of the requirements and weaknesses that have become apparent at Member State level and which would therefore justify Union intervention, **where appropriate under emergency procedures** (see answer to the next question).

## **2. In particular, what improvements would have to be made to instruments and procedures?**

**2.1 The inefficacy of the Convention as an instrument has become self-evident**, with non-transposition having become the rule and the coexistence of treaty provisions and of those of the conventions thus possibly leading to disputes as to interpretation<sup>3</sup>. Persisting with them might be justified solely in order to achieve enhanced cooperation which would commit only those Member States which signed and ratified the conventions.

**2.2** Several operators have called for **recourse to action plans** which would provide a framework for action by the Union institutions and its Member States. One significant example of the success of this type of planning is that relating to environmental protection<sup>4</sup>. Transposed into the AFSJ field, this method would facilitate the enhancement of national plans and the detection of possible weaknesses in the protection system for both European citizens and public institutions by giving greater responsibility to all public actors ranging from local level right up to the level of a Union with a population of 500 million.

The framework programmes in the AFSJ field should include the agencies and confer on them no more than a power of organisation (with substantive rules remaining the prerogative of the institutions).

Such framework programmes should define the scope and funding of the networks to be established with a view to ensuring cooperation between the Member States and the institutions (including the Schengen / Europol / customs / visa networks, etc.).

**2.3 Emphasis should be placed on the crucial role played by the principle of mutual recognition** over the last two years which has facilitated the adoption of some very important acts for the implementation of the AFSJ (in particular, the framework decision on the European arrest warrant). This principle deserves to be incorporated in the treaty, since it strengthens mutual confidence between Member States and, hence, the credibility of the AFSJ.

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<sup>2</sup> That was the case of the plan to combat organised crime adopted by the Council in 1997, the plan adopted by the Vienna European Council in December 1998 and the Tampere plan in 1999. Those plans were followed by specific programmes devoted to the implementation of the principle of the mutual recognition of judicial decisions, the action plan against terrorism adopted by the Gent European Council of 21 September 2001, and the 'road map' for measures to combat illegal immigration and control European frontiers submitted to the Seville European Council in June 2002.

<sup>3</sup> This applies in particular to the provisions relating to the information of Parliament laid down in the Europol Convention which are not in line with the provisions of Title VI of the Treaty on European Union.

<sup>4</sup> This planning is based on widespread monitoring of the territory, on jointly defined indicators, on quantifiable objectives over a given period, on a European instrument (the European Environment Agency) assisting the Member States and on resources and mutual aid systems in the event of serious breakdowns. Last but not least, planning and Union interventions are triggered only in cases where national intervention would prove inadequate.

**2.4 The framework decisions and the decisions currently provided for in the third pillar** should be converted into ‘framework laws - directives’ and ‘Community laws - regulations’ and should become legislative norms within the formal meaning of the term, i.e. adopted under the codecision procedure and by a qualified majority (see the contribution from the working party dealing with the hierarchy of norms). As already provided for by Community law, they should have direct effect in such a way that they may be tested before the courts by individuals as well (particularly in the event of non-transposition).

In particular, framework decisions should codify everything that is required for the implementation of the principle of mutual recognition with regard to:

- **the essential elements of crimes and penalties,**
- **the minimum guarantees to be provided during trials,**
- **the essential elements for the acquisition of evidence and for its recognition by courts other than those of the State of origin,**
- **police measures connected with transfrontier initiatives**
- **standards to be respected for the processing of data, particularly in the networks provided for in the framework programmes.**

Recourse to a framework decision should also apply for the recasting of the relevant provisions with regard to police and judicial cooperation in the Schengen, Europol and Customs Conventions and, most recently, in the Convention on judicial cooperation in criminal matters which, at present, largely overlap and which might constitute the general reference framework for cooperation between judicial and law enforcement services in the Member States and in the Union’s institutions and agencies (see next paragraph)<sup>5</sup>.

One matter which merits consideration at treaty level is that concerning **emergency measures which might be triggered at Union level in the event** of serious threats affecting the internal security of several Member States<sup>6</sup>. Similar measures would be admissible only if ratified by the European Parliament in accordance with appropriate procedures.

**2.5** It should be possible for **implementing measures at Union level** to be adopted under simplified procedures (and, where appropriate, by majorities smaller than those currently provided for in the third pillar). It should be noted that the Treaty on European Union provides for the consultation of Parliament with regard to implementing measures as well. It would be paradoxical if that innovation were to disappear when third-pillar matters were being transferred to the first pillar. That provision must, therefore, be retained when Article 211 of the EC Treaty is being revised.

**2.6 With regard to the legislative procedure to be followed for the adoption of measures** falling under the AFSJ, the same approach should be adopted as that for Community legislation, with a few additional concerns. While acknowledging that the Commission has the sole right to propose legislation, the provisions should be strengthened which enable Parliament, the Council or, where appropriate, a group of Member States to ask the Commission to propose legislation. Should the Commission refuse to present the proposal requested, it should be obliged to submit its reasons for not doing so to the European Parliament and the Council. As a corollary to this principle of loyal cooperation, the Member

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<sup>5</sup> The termination of these conventions in the new treaty might be accompanied, where appropriate, by transitional provisions.

<sup>6</sup> This was debated after the terrorist attacks of 9 September 2001; the possibility of controls at all internal frontiers being restored was mooted.

States would have to provide the Commission with all the prior information it required for the drawing up of legislative initiatives in this area so that the initiatives submitted might comply with the criteria of subsidiarity and proportionality laid down by the treaties.

**2.7 In principle, the problems of implementing legislation** in this field are not substantially different from those which concern other Community legislation, except that emergency measures must be envisaged to cover a situation where the failure of one Member State to act might seriously jeopardise the security of the other Member States (cf. problems relating to border control, the fight against terrorism, cyber-crime at Union level, etc.).

**2.8 One instrument that has frequently been used is the common position** which lays down the strategy to be followed by the Member States in international negotiations. Should the pillars be merged, that instrument would have to be abolished and replaced by a negotiating mandate which, in the current Community structure, is conferred on the Commission when it is conducting international negotiations.

**2.9 The problem area of instruments also includes the proliferation of agencies which the Union has established in recent years**, with varying legal bases, frequently overlapping tasks and vague remits (Europol – Eurojust – OLAF – European Judicial Network, etc.; see attached table), in order to strengthen its own actions and cooperation among Member States.

The reform of the treaties might provide a good opportunity for:

- providing these bodies with a uniform legal basis (that would constitute an innovation for the Europol Convention) which would lay down the remit of each one and the procedures for scrutiny by the Council, Court of Justice and the European Parliament (with regard to the tasks of interest to the Union as a whole) and by the national parliaments (for tasks which concern the Member States);
- bringing the new legal bases into line with the protection procedures and standards which apply to the Member States and the Union institutions (see previous paragraphs);
- excluding any regulatory powers for these agencies. They would simply be required to attain the objectives and comply with the rules laid down by the Union institutions.

**2.10 The role of the European Public Prosecutor:** for several years now, the European Parliament has noted that fraud perpetrated to the detriment of the Community's financial interests is a scourge acknowledged and denounced by all the Member States of the Union. The annual amount involved is currently around EUR 1 billion and constantly increasing. Current legal instruments are inadequate for the pursuit of an effective campaign against fraud, largely because of the disparities between the legal systems of the Member States, the cumbersome nature of mutual judicial assistance in criminal matters and the constraints connected with the administrative nature of OLAF inquiries.

The most effective remedy envisaged is the creation of an independent European Public Prosecutor whose task would be to represent the public interest before the competent courts of the Member States in matters relating to the protection of the Union's financial interests.

**3. How might we, for example, better identify the issues in the criminal field which call for action at Union level? What procedures would be needed to increase judicial cooperation in criminal matters?**

**3.1** Over the last three years, there has been a proliferation of measures taken both to confirm the principle of confidence and of **mutual recognition**<sup>7</sup> and for the **harmonisation of criminal law**<sup>8</sup> covered by Article 31(e) of the Treaty on European Union which provides for the adoption of ‘... *measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.*’ That demonstrates that the two approaches are not incompatible but that, on the contrary, they respond to a need felt by the Member States<sup>9</sup>.

One very significant step was taken with the adoption of the framework decision establishing the European arrest warrant, since it had the practical effect of replacing extradition procedures by the handing over of suspects between Member States and laid down a list of 32 crimes in respect of which no checks would be made to establish the existence of dual criminal liability.

In the medium term, one objective of the Union must be to guarantee the free movement of court rulings throughout the Union. Such free movement would apply to rulings in criminal as well as in civil cases.

**3.2** How may we support future harmonisation in this field? The incorporation of a list of crimes in the treaties might well prove to be so inflexible that it would soon be out-of-date<sup>10</sup>. It would be more sensible to set out a series of criteria to be verified in advance<sup>11</sup>, such as:

- the jeopardising of a crucial interest of the Union or of several Member States (protection of financial interests, international terrorism, defence of external frontiers, the euro, protection of IT networks, environmental protection, etc.);
- the existence of excessive disparities in the laws of the Member States which might give rise to ‘crime shopping’ or to ‘virtually safe havens’ for criminals (in particular, money laundering, etc.).

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<sup>7</sup> For example, the Convention on judicial cooperation in criminal matters adopted in 2000, the framework decision on the European arrest warrant and proposals for the mutual recognition of measures relating to the freezing of assets, confiscation measures and financial penalties.

<sup>8</sup> For example, framework decisions adopted in relation to counterfeiting of the euro, trafficking in human beings, and terrorism and those to be adopted to tackle illegal immigration, computer hacking, child pornography, racism and xenophobia, environmental crimes, illicit drug trafficking and corruption.

<sup>9</sup> What is more, several of these initiatives stem from proposals put forward by various Council Presidencies.

<sup>10</sup> That has been the experience of Europol which has been gradually obliged to expand its areas of activity in order to combat new forms of crime – which, according to a statement made by the Director of Europol to the Committee on Citizens’ Freedoms and Rights, does not give a fig for the limits of Europol’s remit as set out in the treaties.

<sup>11</sup> See the statement made by Commissioner Vitorino at the meeting of Working Group X of 8 October 2002.

**3.3** According to the European Parliament<sup>12</sup>, the principle of mutual recognition also requires legislative harmonisation providing:

- a minimum base of procedural guarantees to be granted to individuals during police prosecution and an inquiry and/or criminal proceedings (establishment of the principle of habeas corpus? legal aid?),
- minimum standards for the recognition of evidence collected during inquiries and the earlier stages of the proceedings.

The corollary of these measures should be the obligation for judges and lawyers to be trained in Union law.

#### **4. What adjustments might also be made to the text of the treaty provisions defining Community competence with particular regard to immigration and asylum?**

With regard to immigration and asylum policy (apart from the fact that Denmark is not a party to these provisions), the major problems might be summed up as follows:

- **the Treaty should provide for a legal basis for the devising of a genuine European immigration policy and of a policy for integrating immigrants** in order to resolve the issues of migrants seeking a better life (and who, consequently, have recourse to measures relating to asylum and/or subsidiary protection).

The absence of any Community framework and the disparities in the treatment of immigrants in the Member States objectively result in competition which significantly influences migratory flows<sup>13</sup>;

- the competences of the Union **as regards border control and the European visa policy** **should** be strengthened by making cooperation under the Schengen Agreement the general rule;

- **as regards asylum policy**, the Treaty is based on the **Geneva Convention** which has, to some extent, been overtaken by events since it does not take into account mass movements or the situation of persons fleeing persecution from non-State bodies. That led the Member States to advance the concept of safe third countries from which, in principle, no asylum requests would be accepted (which would breach the principle of non-refoulement laid down in the Geneva Convention). Since a solution has to be found before May 2004, it would seem sensible to retain the principles thereof at treaty level so that it might actually constitute part of the *acquis communautaire* for the applicant countries;

- the Treaty should also provide for the principle of **solidarity, including financial solidarity (burden-sharing) among the Member States** in order to cope with the expenditure involved in the policies connected with the control of common frontiers and support for refugees, asylum-seekers and persons requiring subsidiary protection.

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<sup>12</sup> In particular, during the debates on the framework decision on terrorism, the arrest warrant and regulations on the drawing up of lists of terrorist organisations.

<sup>13</sup> This is all the more evident between members of the Schengen Agreement and the United Kingdom and Ireland which are only associated therewith in part. It should be noted that all attempts to devise a policy in the field (in particular since 1998) have failed.





Annex  
Agencies and bodies connected with the European security area

	EJN	Eurojust	Europol	Schengen cooperation	customs cooperation	OLAF
Year	1998	2002	1995 entered into force 1998	1990 entered into force 1995	1995 (not in force)	1999
Began work	1998	2002	1999	progressive		1999
Participating states	15	15	15	13 (UK + IRE in part) + NOR and ISL	15	15
Founding act	Council Joint Action	Council Decision	Council Convention	International Convention	Council Convention	Commission Decision
Legal basis	Art K.3 EU Treaty (Maastricht)	Art 34 EU Treaty (Amsterdam)	Art K.3 EU Treaty (Maastricht)	between MS in 1990 – taken over by the EU (1 <sup>st</sup> -3 <sup>rd</sup> pillar) on 20.5.99 with Amsterdam	Art K.3 EU Treaty (Maastricht)	Art 280 EC Treaty (Amsterdam)
competence covers	all forms of transfrontier crime	list of offences included in the Europol list + other offences inserted by Council Decision	list of offences included in the Convention and involving organised crime	all forms of crime (apart from exceptions) but limited to transfrontier observation	customs offences	irregularities affecting the Community budget
Structure	decentralised	centralised	centralised	decentralised (Sirène unit)	decentralised	centralised
Composition	contact points	national members	National Europol Units (NEU)	not specified (decentralised access – data entry according to organisation within the MS)	n/a	n/a
tasks	1. facilitate judicial cooperation 2. legal and practical information 3. facilitate cooperation between courts	1. contribute to proper coordination of inquiries 2. improve judicial cooperation 3. support judicial authorities in inquiries and prosecutions	1. centre for the collection and exchange of information 2. analysis, reports and consultancy for inquiries 3. logistical support (training)	1. dismantling controls at internal borders 2. strengthening police cooperation 3. strengthening judicial cooperation	1. facilitating the transmission of customs information 2. harmonising certain inquiry techniques	1. carrying out administrative inquiries 2. helping in the devising of anti-fraud strategies 3. representing the Commission in the field of anti-fraud operations
Number of members	190 contact points, assisted by a secretariat	20 members assisted by a secretariat	350 persons	n/a	n/a	183 persons
information system	IT tools (judicial atlas, etc.)	n/a	EIS (Europol Information System)	SIS (Schengen Information System)	CIS (Customs Information System)	CMS (Case Management System)