

COVER NOTE

from :	Praesidium
to :	Convention
Subject :	Justice and Home Affairs – Progress report and general problems

Introduction

1. The areas or subjects that come under the heading of "Justice and Home Affairs" (JHA) are many and varied. They devolve essentially from three fundamental aspects articulated in the concept of the "area of freedom, security and justice" enshrined in the Amsterdam Treaty:
 - security, both internal and external aspects (terrorism, crime, drug trafficking, trade in human beings, illegal immigration),
 - justice, both civil and criminal,
 - and freedom, in the concrete form of measures on free movement of persons, asylum etc. Freedom is also a basic principle governing all JHA activities through the implementation of human rights reaffirmed by the Charter of Fundamental Rights.
2. Although the expression "European judicial area" dates from the end of the 1970s, its development dates back to the Maastricht Treaty and the creation of what was termed the third pillar, referring to a specific institutional function commonly assimilated to intergovernmental cooperation. The rules for the third pillar differ from those for the first pillar, on Community policies, and the second pillar, on the common foreign and security policy. For example, the European Parliament has a right of simple consultation only.

3. The Amsterdam Treaty marked a new stage with the transfer to the first pillar (communitarisation) of the fields of immigration and asylum, checks at the external and internal borders, visa policy and judicial cooperation in civil matters. New legal instruments, the decision and the framework decision, were also introduced under the third pillar. And, by means of an annexed Protocol, Amsterdam incorporated in the Treaty the *acquis* of the Schengen Convention, which had been developed from 1985 onwards and which enabled border controls between certain Member States to be lifted as from 1995, to be joined subsequently by other Member States. The United Kingdom and Ireland are able to opt in. There are special arrangements for Denmark.
4. The Tampere European Council of October 1999 adopted an ambitious programme of freedom, justice and security measures (almost 50 areas or recommendations for action were proposed). By so doing, the Heads of State or of Government intended to give a powerful political boost to this priority area.
5. JHA matters figure prominently in the Laeken declaration : "There have been frequent public calls for a greater EU role in justice and security, action against cross-border crime, control of migration flows and reception of asylum seekers and refugees from far-flung war zones" and "do we want to adopt a more integrated approach to police and criminal law cooperation?".
6. JHA matters were also frequently raised at the first meetings of the Convention ("What do you expect of the European Union?", 21–22 March and "What are Europe's tasks?", 15-16 April). In some cases it was the main theme of the initial contributions of certain members of the Convention, or was frequently raised by others in connection with Europe's tasks.
7. Lastly, the Eurobarometer statistics of April 2002 confirm and clarify European citizens' expectations in this area. The fight against organised crime and drugs trafficking ranks third (after peace and security and the reducing of unemployment) in priority and has the support of almost 9 out of 10 Europeans. Although a very large majority of those canvassed were in favour of decisions being taken within the EU on the fight against terrorism (85%), trafficking in human beings (80%), the fight against organised crime (72%) and the fight against drugs (71%), the findings vary when it comes to immigration and asylum policy. A minority of those surveyed were in favour of European-level decisions being taken on justice (58% against) and police matters (63% against).

8. The aim of this note is to catalogue the cooperation measures and action taken in the JHA field, to identify a number of problem areas which could be the subject of further discussion and to suggest, by way of example, some questions that could be used to guide future discussions.

I. Description

9. JHA matters are currently subject to two types of procedure:

(a) the Community field (Title IV of the Treaty establishing the European Communities, TEC Articles 61 to 69) for matters relating to visas, asylum, immigration and the other policies related to free movement of persons, in particular judicial cooperation in civil law matters. The aim is to establish progressively an area of freedom, security and justice (Article 61). To that end, the Council adopts measures on:

- controls at the internal and external borders, the list of third countries subject to a visa requirement, procedures and conditions for the issue of visas and the conditions under which third-country nationals may travel during a period of no more than three months (Article 62),
- asylum, in particular the criteria and mechanisms for determining asylum, the minimum standards on the reception of asylum seekers and the minimum conditions for qualification of nationals of third countries as refugees, as well as immigration policy and the fight against illegal immigration (Article 63 and the Protocol to the EC Treaty on asylum for nationals of the Member States of the European Union),
- judicial cooperation in civil matters having cross-border implications, including the simplification of cross-border service of documents, cooperation in the taking of evidence, the elimination of obstacles to the good functioning of civil proceedings (Article 65),
- strengthening administrative cooperation between the Member States and between their departments and those of the Commission (Article 66).

On all these matters, the TEC makes provision for shared competence. The Member States continue to have competence insofar as the Community has not exercised its competence. Apart from that, in certain fields, the Member States retain the option of maintaining or introducing additional measures, provided that they are compatible with the Treaty (Article 63). Similarly, it is stated that the Treaty shall not affect the exercise of the Member States' law and order and internal security responsibilities (Article 64).

Under Title IV, in a departure from the usual rules, the right of initiative is currently shared between the Commission and the Member States. The European Parliament is consulted. The legislative procedure is complex. Unanimity remains the rule, except for certain legislation on visas. From 1 May 2004, the Commission will regain exclusive right of initiative. The transition to qualified majority decision-taking (and application of the European Parliament's codecision procedures) is also a possibility as from that date subject, however, to the prior unanimous agreement of the Member States. To complicate matters further, the United Kingdom and Ireland have the right to "opt in" and there are special arrangements for Denmark.

The Treaty of Nice, the ratification of which has not yet been completed, provides for a transition to qualified-majority decision-taking in the fields of civil cooperation (except for the aspects relating to family law) and asylum. However, in the case of the latter, the common rules and basic principles must be defined unanimously in advance.

(b) the so-called third pillar area of the Treaty on European Union, TEU (Title VI of the TEU, Articles 29 to 45), for police and judicial cooperation in criminal matters, insofar as it is not covered by the Community field. The Union's objective is to provide a "high level of safety" by developing common action among the Member States in the fields of police and judicial cooperation and by preventing racism and xenophobia. That aim is to be achieved by preventing and combating crime, organised or otherwise, in particular terrorism, trade in human beings and offences against children, illicit arms trafficking, corruption and fraud.

To that end, the Treaty provides for closer cooperation between police forces and other authorities, both directly and through Europol (Articles 30, 31 and 32), between the judicial authorities, for instance by providing for the adoption of minimum rules relating to the constituent elements of criminal acts and to penalties (Articles 31 and 32). The Member States inform and consult one another within the Council (Article 34).

In this field, the right of initiative is shared between the Commission and the Member States. The legal instruments available are those of the:

- common position, which defines the Union's approach to a particular matter, often relating to relations with external partners,
- framework decision and the decision, which are binding on Member States but have no direct effect,
- convention, which is then adopted in accordance with the constitutional requirements of each Member State.

Unanimity is the rule for the adoption of the above instruments except for measures implementing decisions and procedural questions. Judicial review by the Court of Justice is limited (see below). A "bridge" makes it possible for action taken in this field to be "communitarised" and for the transition to be made to qualified majority voting (Article 42). As in the first pillar, the Treaty does not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and safeguarding of internal security (Article 33).

Consultation of the European Parliament is mandatory (Article 39). Lastly, the Protocol annexed to the Treaties on the role of national parliaments by derogation from the common rules, gives the parliaments six weeks between submission of a Commission proposal and its examination by the Council, in order to enable them to state their positions should they wish. This provision also concerns legislative proposals in the field of JHA falling under the first pillar.

The Treaty of Nice establishes the European Judicial Cooperation Unit ("Eurojust") and lays down its tasks.

II. Progress report

10. At its meeting in Laeken in December 2001, the European Council's verdict on the progress made since Tampere was mixed. It noted that "while some progress has been made, there is a need for new impetus and guidelines to make good delays in some areas".
11. Although it is doubtless over-simplistic to do so, it is possible to categorise subjects under three headings, in descending order of achievement:

(a) Judicial field

In this field there has been genuine progress in recent years, in particular in the mutual recognition of civil judgments (Brussels I and II Regulations), paving the way for the free movement of judgments and judicial decisions.

Under the third pillar, the attacks of 11 September had the direct effect of accelerating the adoption of a number of basic measures, such as the European arrest warrant and the Framework Decision on combating terrorism. This important stage was reached following intense political pressure by the European Council on the JHA bodies, in particular through the setting of a deadline. Some have made the observation that these measures are gradually introducing a concept of internal European security, complementary to that of individual Member States.

All these newly-adopted or pending texts use the innovative legal instruments of the decision and the framework decision. They do not have direct legal effect but are binding on the Member States. It has been pointed out that the courses of action available in cases where a Member State fails to fulfil its obligations are fairly limited (see below).

Lastly, a new institution, Eurojust, was set up on 6 March 2002 without waiting for the Nice Treaty, which provided for its creation, to enter into force. It is a flexible instrument for coordination between magistrates currently seconded (one per Member State) to Brussels. Eurojust can request a Member State to institute criminal proceedings. The Member State will not be obliged to comply with such requests but will have to justify any refusal to do so.

The Commission forwarded proposals contained in a Green Paper ¹ proposing the institution of a European Public Prosecutor while taking account of the diversity of legal systems and traditions. At Laeken, the Heads of State or of Government called on the Council "swiftly to examine" those proposals and called for "a European network to encourage the training of magistrates to be set up swiftly".

While some progress has been made, many consider that cooperation in the judicial field lacks overall coherence: measures are adopted randomly with no reference to an overall plan; the split between the first and third pillars adds to the confusion. Some have observed that the progress that has been made is not immediately obvious to the general public.

At Laeken, the Heads of State or of Government called for efforts to be made "to surmount the problems arising from differences between legal systems", particularly by "encouragement of recognition of judicial decisions, both civil and criminal".

¹ COM(2001) 715

For the record: Green Papers are communications published by the Commission dealing with a specific policy area. They are primarily intended for the parties concerned – organisations and individuals – who are invited to take part in the consultation and discussion process. In some cases, they lead to subsequent legislative developments.

(b) Police cooperation

A promising start was made in the field of police cooperation following the adoption of the Maastricht Treaty. The subsequent incorporation of the Schengen Convention into the Treaties represented an important step forward. However, numerous experts give a qualified verdict on its success.

The same applies to Europol: with its own annual budget of 30 million euro paid for by the Member States, its 300 officials in The Hague are unable to conduct direct investigations or take part in joint investigations. The information supplied by the national authorities is apparently scarce or inadequate, and it is difficult for them to carry out the analyses they are asked for, which results in them being under-used.

At the JHA Council on 25 April 2002, the Home Affairs Ministers reached political agreement on Europol's participation in joint investigation teams and on the possibility of requesting Member States to lead such investigations. However, in the absence of agreement on a simplified procedure for amending the Europol Convention, the entry into force of that agreement in the form of a protocol for ratification by the national parliaments could take several years.

Direct cooperation between the police of all the Member States or between some only seems to be operating satisfactorily. Note should also be taken of the existence, within the Commission, of the European Anti-Fraud Office (OLAF), comprising around 250 employees, which intervenes against malpractices in the Community's financial interests.

(c) Asylum and immigration

Once these matters were incorporated into the first pillar, in accordance with Article 63 TEC and the the conclusions of the Tampere European Council, the Commission forwarded to the Council numerous proposals for Directives, on refugee status, conditions of residence and so on. Most of them have yet to be adopted even if some headway has been made on temporary protection and the setting up of a European Fund for Refugees. The Laeken European Council was unhappy with this situation, recognising that "progress has been slower and less substantial than expected" and it said that "a new approach was needed so that a common policy on asylum and immigration could be adopted as soon as possible".

Many observers attribute these delays to the unanimity rule or believe that most Member States favour first and foremost harmonisation on the basis of established law, which would make it difficult to arrive at compromises acceptable to all. Some feel that the possible cost to the Community or national budgets of these new instruments is also a reason for the Member States' lack of enthusiasm.

The Home Affairs Council, at its meeting on 25 April 2002, did however reach political agreement on the proposal for a Directive on minimum standards for the reception of asylum applicants. After its final adoption, the Member States will have two years in which to implement it. Despite its general nature and the numerous possibilities for exceptions or adaptation which it contains, it nevertheless represents a significant step forward. The Directive is among those which the European Council wanted to be adopted without delay.

The establishment of a European border police force is frequently raised. The European Council asked the Council and the Commission to "work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created". The Commission produced guidelines and preliminary proposals on this subject in a communication adopted on 7 May 2002². In particular, it proposes initially the creation of a common basis for the training of border guards and a European college of border guards, leading in the medium term to a European corps of border guards. Italy is also due to publish a communication on this subject on 30 May this year.

III. The five challenges facing JHA

12. Given the above balance sheet, understanding the difficulties encountered in the JHA field might be made easier by identifying some overall problem issues. Those broached below may not always be specific to JHA. But they are often horizontal issues which are of particular importance or at least of a more acute nature.

² COM (2002) 233 final

(a) Consistent sharing of competence

Regarding criminal law, there is no clear distinction between matters to be dealt with at European level and those within the Member States' competence. The objectives in Article 29 of Title VI of the TEU are general and open to broad interpretation ("... the Union's objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice ..."). What follows is a non-exhaustive list by topic, including the prevention of organised crime, terrorism, trafficking in persons and offences against children, illicit drug trafficking, illicit arms trafficking, corruption and fraud. Nowhere is it stated that, to trigger common action or measures, those phenomena need to have a European or transnational complexion.

It should also be noted that the Community and the Union may legislate to penalise the infringement of their own rules (for instance, environmental or Community financial legislation can provide for the introduction of criminal penalties in the event of infringement).

In the absence of clarification in the Treaty of, and effective judicial control over, power-sharing between the European and national levels, in practice a European complexion is sometimes put on certain matters for which the transeuropean argument may be tenuous but which are a political priority to one or several Member States (e.g. the treatment of sexual or paedophile crime following various events in a given Member State or the request from certain countries to introduce the concept of environmental crime). Each Member State's right to make proposals, combined with the rotating presidency, also complicates the choice of priorities, with one replacing another.

There is broad support for a clear-cut division of power and a focusing of European action with, as principal criteria, the transnational dimension of the crime being prosecuted or of its consequences, or the need to prosecute certain types of crime at Union level and not only nationally.

(b) Efficient legal instruments

Experience has shown that the 3rd pillar legal instruments are not necessarily appropriate to pull off ambitious legislative projects along the lines of the Tampere conclusions. This shortcoming derives partly from those projects' very design. Because they draw quite heavily upon the legal tools adopted for the second pillar (CFSP) at the time of the Maastricht Treaty and despite the improvements introduced by the Amsterdam Treaty, this undoubtedly makes them little suited for sustained legislative use.

It should be noted that:

- the convention between Member States is no longer used as a legal instrument because of its inertia and the uncertainties involved in the ratification procedures (ratification alone takes 4 to 5 years). The unwieldiness of that instrument also raises questions regarding future developments – considered highly likely at political level – that will affect existing conventions, notably the Europol Convention; and
- while recent advances have systematically relied on the new instruments (framework decision and decision) introduced by the Amsterdam Treaty, these too have not always been free from criticism prompted by their lack of direct effect.

Thus the European arrest warrant, adopted in the form of a framework decision following the September 11 attacks, contains highly detailed procedural rules based on a system of instant mutual recognition of one Member State's judicial decisions in all other Member States, thereby replacing the unwieldy extradition procedures. The system is comparable to those providing for mutual recognition of judicial decisions in civil matters. The only way for such systems to operate efficiently is to ensure that all judicial authorities apply one and the same scheme. For this reason, the form of a regulation was chosen for civil matters. However, the European arrest warrant will not be truly operational until the Member States have transposed it, word for word, into domestic law. Any variations may give rise to refusal of mutual recognition. The scheme is further weakened by the absence of machinery to penalise a Member State that does not meet its obligations, particularly timely and faithful transposition. In fact, only a Member State can institute proceedings against another Member State before the Court of Justice, because the Commission has no means of instituting proceedings for failure to fulfil an obligation. However, experience has shown that Member States are reluctant to institute proceedings against any of their peers.

(c) Tighter political and judicial control

Police and justice have always been areas where it is necessary to identify individual and/or collective liability clearly and it must be possible to invoke such liability quickly and efficiently. When something untoward happens to them, citizens want to know immediately whom to hold responsible and whom to punish.

To some, the present European institutional system fulfils this political accountability requirement only partly, in particular because Europol's activities are not subject to control by the European Parliament. Moreover, adoption of a common position by the Council does not require consultation of the European Parliament.

Political accountability would become more of an issue if a commitment – albeit limited and progressive – were made to putting in place a European criminal-law system, a European prosecutor, a truly common European asylum scheme or a European police force.

The same reasoning applies to the legislative process. With practice seeming to depart increasingly from the traditional system of negotiating conventions, transparency and legitimacy of the legislative process are becoming key factors in the smooth functioning and acceptance of that system. Can the Council afford to discuss politically sensitive issues such as common arrangements regarding the right to asylum, and the powers and structures of a European police force, away from the public eye? What about the European Parliament's role – presently confined to consultation – in all these areas? Where do the national parliaments fit in?

The Court of Justice currently has limited control over JHA matters. The Treaties discount any competence for the Court of Justice in 3rd pillar matters as well as in the "communitarised" area, in the event that checks on persons are reinstated at internal borders i.e., generally, to control any national measures to do with police or public policy. In the case of preliminary proceedings concerning 3rd pillar matters, the TEU provisions have led to an extremely complex "variable geometry" arrangement which, in addition, operates alongside the different procedures introduced by "pre-Amsterdam" conventions (notably the Europol Convention).

At Union level, there is no judicial protection against Europol's activities. National court action is an option, but continues to be controversial and, in any event, not very clear. Criticism is also occasionally levelled at the fact that the right to make preliminary referrals is being limited to courts of last instance for asylum and immigration matters and civil law.

According to one school of thought, this situation complicates uniform interpretation and implementation of the relevant Union law to the detriment of the efficiency of a system founded upon mutual trust between the Member States.

(d) The simplification challenge: the question of opting out and division between pillars

At present, JHA constitutes one of the most complex areas in various respects.

First, it is marked by a sharing of competence between the first and third pillars, involving different legal instruments, procedural rules and institutional roles. This state of affairs frequently triggers

legal debate on the demarcation of the said two pillars. The legislator frequently has to work around a single political challenge using two legal instruments, at the risk of reduced efficiency and consistency. Some recent examples are the introduction of criminal penalties in areas such as illegal immigration, protection of financial interests or of the environment, development of the Schengen Information System (SIS), customs cooperation and the question of mutual recognition of financial penalties. The dual regimes for international agreements on Community matters (Article 300 TEC) and 3rd pillar matters (Article 38 TEU) are also causing similar problems.

In addition, JHA has generated multiple different and highly complex opt-in arrangements for the United Kingdom and Ireland, as well as Denmark, with regard to Title IV of the TEC (immigration and asylum, civil cooperation) and the Schengen area. It should be noted however that, in practice, these three countries have usually shown their willingness to get involved in European initiatives and policies.

Besides this complex situation, there is also the participation by certain non-member States, namely Norway and Iceland – and maybe, some day, Switzerland – in the Schengen area for free movement of persons.

Institutional complexity is not specific to JHA, but the gap between the level it reaches there and the ease of understanding and transparency expected by citizens is definitely fairly wide.

(e) The mutual trust challenge

Trust is the determining factor for the quality of cooperation between Member States on JHA. However, it may sometimes be difficult to consolidate where many partners come into play, as for instance in the case of police cooperation, and notably Europol. For this reason, preference is sometimes given to cooperation formulae involving only some of the Member States, or to bilateral cooperation.

Such trust is equally necessary in the case of other Member States' judicial systems, including the penal component thereof. It is difficult to devise quantifiable criteria for judicial matters: how is the efficiency of a judicial system to be assessed? Yet a common judicial area needs to build on shared trust. This applies equally to the penal component, since Member States could be obliged to extradite their own nationals to fellow Member States to serve all or part of their sentences there.

At present, conditions vary from State to State; Member States may therefore be reluctant to cooperate more closely.

In this context, the effects and repercussions of enlargement, with new States joining from 2004 onwards, could be considerable. For instance, it could alter the perception of how the external borders should be managed. Indeed, one of Schengen's founding principles is that each Member State is to retain responsibility for its part of the common external border. A joint assessment scheme is being operated. Such a scheme tends to be generally acceptable if its cost is shared more or less equally and development levels are close to each other. With a substantially enlarged area, the call for common management could become more pressing. Actually, some Convention Members from candidate countries have already made several suggestions along these lines on a number of occasions ³.

IV. Questions or avenues to be explored

On the basis of the above analysis, it would seem a number of questions, set out in the list below, which is of course not exhaustive, could usefully be considered further.

- Regarding asylum and immigration, should the qualified majority rule be envisaged in order to carry out the major projects already broached in Tampere, i.e. truly common asylum arrangements, solidarity in the event of a massive influx, and legal status and freedom of movement for third-country nationals residing on a long-term basis?
- Should the current opt-in and opt-out arrangements be kept in place? If so, should they be retained in full? Is it possible to envisage redefinition by topic, or should the existing possibility of unrestricted case-by-case redefinition be preserved?
- Should the unanimity rule be kept for the areas now covered by the third pillar in its current form?
- In criminal law matters, is it possible to devise a simpler, clearly discernible formulation of EU competence, assigning limited, but precisely defined, competence at European level? If so, how should this be done and what criteria should apply? What mechanism should be used for any changes in the apportionment of competence?

³ See for instance the statements calling for common management of borders made by Mr Martikonis and Ms Birzniece at the meeting on 15 and 16 April 2002.

- Should the arrangements in Articles 35 TEU and 68 TEC concerning the jurisdiction of the Court of Justice not be aligned on the general arrangements? Also, should the Commission, in its capacity as guardian of the Treaties, not be empowered in respect of all third-pillar matters, in order to ensure proper transposition by Member States of the measures adopted?
- How can the effectiveness of third-pillar legal instruments be improved? Should they be made more similar to, or even aligned on, those under the Community system?
- Should the division between two pillars be maintained ⁴? What are its advantages, set against the complexity it causes? Were matters covered by the third pillar to be brought under the first, would special procedural rules be required or could the ordinary arrangements apply in full?
- Regarding civil law, should priority be given to the settlement of family law disputes, even though the Treaty of Nice excludes that aspect from qualified-majority voting?
- How can mutual trust, notably regarding judicial matters, including the penal component, be bolstered? Should greater similarity in material conditions as between Member States be opted for? Should new schemes be introduced for monitoring/follow-up, for exchange of best practice or for approval of prison conditions?
- Should consideration be given to establishing a truly European police force empowered to deal with criminal or other offences to be prosecuted at European level? If not, is it necessary and possible to step up cooperation between Member States' police forces at European level and how should this be done?
- Can Eurojust prefigure a European prosecutor? What added value would such a prosecutor bring? Would that prosecutor be responsible for launching and conducting investigations entrusted to a European police force into offences coming within the European domain ⁵, or should cooperation between the European prosecutor and Member States' prosecutors be envisaged? If a European prosecutor were to be appointed, should his powers be confined to

⁴ See, for instance, Mr Teufel's contribution in CONV 24/02 and Mr Duff's statement calling for abolition of the division into pillars.

⁵ See, for instance, the contributions from Mr Barreau (CONV 30/02), Ms Lena Hjelm Wallén (CONV 29/02) and Ms Idrac (CONV 44/02).

protection of financial interests or counterfeiting of the euro, as envisaged by some? Or else, should provision be made for closer cooperation between national prosecutors? By developing Eurojust and/or how otherwise?

- Should consideration also be given to the introduction of a European criminal court or a criminal division at the Court of Justice? In that event, what should come within such a court's jurisdiction?
- Should the issue of control of common borders be broached and, if so, how? For instance, should a European external border control force be envisaged, or should closer cooperation be sought between Member States' existing forces?
- Were common operational units (police, European border guard and prosecutor) to be opted for, under what procedural rules should they operate? In the same eventuality, what political accountability in the JHA field should be envisaged? Should it be as under the Treaties generally, or should it be different?

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