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COVER NOTE

from :	Secretariat
to :	Convention
Subject :	Contribution from Mr Filadelfio Basile, alternate member of the Convention: Justice and Home Affairs

The Secretary-General of the Convention has received the contribution annexed hereto from Mr Filadelfio Basile, alternate member of the Convention.

Contribution from Senator Filadelfio Basile
(Alternate member)

Justice and Home Affairs

Cooperation among the Member States in the field of justice and home affairs began to expand rapidly in 1999 in relation to the programme to establish an area of freedom, security and justice in the European Union. judicial and police cooperation is considered to be a key element of this effort. The events of September 2001 lent further impulse to cooperation in this area, leading to additional framework decisions under the third pillar aimed at harmonising criminal law and criminal procedure in the Member States and strengthening operational cooperation mechanisms between judicial and law enforcement authorities.

An examination of the legislation approved so far and the measures under discussion highlights the main lines that European institutions are pursuing:

- modification of the traditional extradition system, aiming to replace the classic political-diplomatic relationship between states with a new dynamic of direct relations between judicial authorities mediated by common rules and bodies;
- facilitation of direct contacts between judicial and police authorities at both the investigative stage and in the enforcement of precautionary measures and final sentences;
- harmonisation of the definition of certain criminal offences closely linked with organised crime and international terrorism, with a specific focus on the definition of criminal conspiracy, trafficking in human beings, cybercrime and terrorism;
- development of operational mechanisms to enhance joint crime-fighting, meant not solely as cooperation among different national systems but also as cooperation using shared tools, namely: the development of a system of compulsory rules for the collection and storage of user data for mobile telephony operators and on-line service providers and the provision of such data to law enforcement authorities in the Member States; a requirement for judicial authorities in a Member State to seize and confiscate the illegal proceeds of offences which come under the categories of organised crime or terrorism under a court order from the judicial authorities of another Member State.
- strengthening of border controls, the fight against illegal immigration and checks of non-EU citizens entering EU territory: creation of a European border guard, establishment of Eurodac, a finger-print based system for identifying persons applying for asylum in a Member State.

An examination of European institutions' action framework in the area of justice and home affairs - in consideration of the fact that international cooperation in combating all forms of transnational crime has now become a priority for the international community - casts light on an issue that appears central to planning justice and home affairs policy in the coming years: the need to identify institutional reforms that will facilitate the expansion of European cooperation in this field in order to increase its efficiency and effectiveness and, at the same time, raise the level of democratic control over that policy.

The reinforcement of cooperation in the field of justice and home affairs must necessarily proceed in parallel with the democratisation of policy. The need to increase the efficiency of cooperation in the fight against all forms of international criminal activity is an internal security requirement of the European Union. As it continues to develop as a system of governance, the Union must have its own means to ensure that EU citizens and territory enjoy equal standards of security and guarantees throughout the Union. The strengthening of that policy must envisage an

increase in the powers of Community institutions in relation to national governments and in the force of Community law vis-à-vis national law. At the same time, however, increasing the power of common legislation and institutions also means reducing the democratic control exerted by national parliaments in domestic political systems. This is an especially important aspect in an area such as justice and home affairs, which is directly concerned with the management of personal liberty and the security of citizens and safeguarding human rights. It is an area of great political significance, in the sense that it regards the need to make choices about the values we wish to protect at a given moment in time.

INCREASING DEMOCRATIC CONTROL OVER JUSTICE AND HOME AFFAIRS POLICY

The issue of democratic control can be addressed on two separate analytical and institutional levels:

- democratic control over the formulation and approval of policy. This level can be defined as the **democracy of the decision-making process**;
- democratic control over the operational stage of policy. This can be defined as the **democracy of implementation**.

Democracy of the decision-making process

As things stand now, the decision-making process described in Title VI of the Treaty on European Union is characterised by its intergovernmental nature: the Council acts unanimously (Article 34); the Commission shares the power of initiative with the Member States; the powers of the European Parliament are limited to consultation in the cases of conventions, framework decisions and decisions (consultation is not envisaged for common positions), the right to be informed by the Presidency and the Commission in the areas covered by the Title and the right to ask questions of or make recommendations to the Council. Real democratic control of the decision-making process is in fact close to nil. The European Parliament's scope for shaping the content of policy is extremely limited and depends on the willingness of the Council to consider its opinions, which, though obligatory, are not binding. The Court of Justice has jurisdiction to give preliminary rulings on the validity and interpretation of framework decisions and decisions, and on the interpretation of conventions, but these powers are subject to the express acceptance of that jurisdiction on the part of the Member States.

The need to inject greater democracy into this process is clear. We can delineate two strategies for achieving this goal.

The first consists in fully communitarising the third pillar. The Treaty of Amsterdam extended the Community framework only to those aspects associated with immigration, visas and asylum policy. The full communitarisation of the third pillar (and hence the replacement of the pillar with a specific Title of the Treaty of the European Community) should lead to the adoption of the co-decision procedure, qualified majority voting in the Council of Ministers for Justice and Home Affairs, the attribution of powers to the Court of Justice equivalent to those held for other Community policies and independent of the control of the individual Member States, and the granting of a monopoly on legislative initiative to the Commission. The latter measure is a key element, since the activities of the Commission linked to its powers of legislative initiative are characterised by constant contact between the Commission itself and political and social actors that would not otherwise be involved in policy formation. The sweeping function of development and aggregation of interests performed by the Commission enables many segments of civil society to influence the content of proposed legislation, as in the case of the Forum on Preventing Organised Crime launched by the Commission in 2001, which seeks to create a partnership linking all the parties involved – institutions, law enforcement authorities, non-governmental organisations,

volunteer associations, academics and professionals – in order to develop proposals to prevent organised crime. This strategy essentially democratises the development stage of the decision-making process of the European Union, an element that is missing in cases where the power of initiative lies with the Member States or the Council.

The second democratisation strategy, to be adopted in the event that consensus cannot be reached on the first proposal, envisages introducing democracy into the third pillar. In this case, we would maintain a specific pillar for justice and home affairs, separated from the Community pillar but at the same time increase the level of democracy in decision-making by making a number of changes to existing plans. More specifically, this would involve: granting the Commission a monopoly on legislative initiative; establishing compulsory consultation of the European Parliament for all legislative measures envisaged under the Title; making EP opinions not just obligatory but also binding for the purposes of determining the text and content of legislative measures; introducing qualified majority voting for the Council of Ministers for Justice and Home Affairs while maintaining the principle of the dual numerical and geographical majority envisaged under Article 34.3; and freeing the jurisdiction of the Court of Justice to give preliminary rulings on the validity and interpretation of conventions in this area from the influence of the Member States.

Democracy of implementation

This level of democratisation concerns the scope available to a democratically elected institution to control the operational aspects of implementing cooperation between police and, possibly, judicial authorities.

The European Parliament currently has virtually no role in the activities carried out by the institutions and bodies charged with implementing law enforcement cooperation. Europol has no obligation vis-à-vis the European Parliament, which is informed of its activity through an annual report drafted by the Presidency, taking account of any confidentiality requirements that may apply. Europol's activities do not comprise direct investigative work but rather primarily consist in gathering information and maintaining its database (the Europol information system), which brings together information on persons suspected of having committed an offence that falls under Europol jurisdiction. A first, essential step towards the democratisation of the operational side of justice and home affairs policy would be to require the independent Joint Supervisory Body - established pursuant to the provisions of the Europol Convention and charged with monitoring Europol's activities to ensure that the storage, processing and use of the data it holds does not infringe the rights of individuals - to submit periodic reports on its activities not only to the Council, as is currently the case, but also to the European Parliament, and in particular its Committee on Citizen's Freedoms and Rights. With the same goal of improving transparency, the European Parliament should also receive periodic reports from the Europol Management Board and should be given an active role in appointing the Director of Europol, who is currently appointed by unanimous vote of the Council. It would be advisable to establish an oversight committee on Europol at the European Parliament or to assign this function to the Committee on Citizen's Freedoms and Rights. It would also be advisable, within the framework of communitarising the sector, that this area should be explicitly included in the responsibilities of the European Ombudsman for justice and home affairs and that the Europol budget should be integrated in the Community budget.

INCREASING EFFICIENCY AND EFFECTIVENESS

Democratising justice and home affairs policy would make it possible to strengthen cooperation. A policy decided and implemented through sufficiently democratic processes would enable a smooth transfer of decision-making sovereignty from the individual national governments to the European Union. Any deepening of cooperation without the parallel democratisation of such processes would lack social legitimacy.

The measures that would lead to closer integration in this field are first and foremost the production of normative acts that have direct legal effect in the national legal systems of the Member States. Currently, both framework decisions and decisions are binding for Member States only as regards the objectives they set, but they must be transposed into national legislation. The slowness with which the Member States are harmonising legislation and ratifying conventions has produced such a lag in implementation that the effectiveness of cooperation is being undermined. Legislation having direct effects in the national legal systems of Member States and the approval of such legislation with the participation and oversight of the European Parliament would enhance the effectiveness of justice and home affairs policy.

Charging the European Parliament with overseeing the activity of Europol would also expand the role of this organisation, increasing the number of offences that fall under its remit and giving it an operational role.

To conclude, it is also necessary to increase judicial cooperation. Eurojust, while certainly an important element of judicial cooperation, should evolve and take on the role of European Public Prosecutor. From a narrow perspective, its authority should cover at least all offences related to the violation of the financial interests of the Union or, more broadly, all the offences envisaged in the framework decision on the European arrest warrant, or those that fall under the sphere of responsibility of Europol. It would therefore be necessary to clarify relations between Eurojust and Europol. The proposal to give Europol an operational role is complemented here with the proposal to give Eurojust a role as a judicial authority with the power to authorise, for example, police action (investigations, warrants, etc.).