

**CONV 258/02**

**WG X 3**

**NOTE**

---

from           Secretariat

to             The Convention

---

Subject :     **Mandate of Working Group X "Freedom, Security and Justice"**

---

Members will find attached an annotated mandate, which further elaborates the questions circulated in CONV 206/02 and aims at facilitating the discussion of the Working group on Freedom, Security and Justice.

## **Working Group X "Freedom, Security and Justice"**

**Chair: M. John Bruton, member of the Presidium**

### **Annotated Mandate**

#### **I. Introduction**

1. The Convention's plenary debate on security and justice (6-7 June) stated that freedom, security and justice are areas in which citizens broadly accept a greater European dimension. It was also recalled that Member states on their own, lack sufficient resources to combat crime, particularly when it comes to cross border crime such as drug trafficking, organised crime, trade in human beings etc. The institutional framework of the Union, especially the division into pillars and the complexity of legal instruments was raised on several occasions in the debate. In his conclusion, the President of the Convention proposed a more in-depth examination of certain questions and, in particular the constitution of a Working Group.
2. The present paper aims at briefly explaining the background of these questions <sup>1</sup>.

#### **II. Questions to be considered**

##### 1. What improvements would have to be made to the Treaties in order to promote genuine, full and comprehensive implementation or an area of freedom, security and justice?

There is a widespread acknowledgement amongst members of the Convention that the current situation is not satisfactory both in terms of practical efficiency and of legal organisation of the Treaties. The Working group should tackle a wide range of issues or items. Some may be approached in concrete terms, whereas others are closely linked to more general issues such as the general architecture of the

---

<sup>1</sup> Members of the group are reminded of document CONV 69/02 that explains the various issues in more details and contains several avenues to be explored. A reference must also be made to document CONV 97/02 containing a summary of the plenary meeting of 6-7 June on the area of freedom, security and justice. Documents CONV 69/02 and CONV 97/02 constitute a useful background to discussions to be held.

Union (for instance: division between pillars). Some of these items are mentioned in questions 2, 3 and 4 of the present annotated mandate (see below).

Some practical improvements could be explored by members of the working group like for example the following:

- questions related to Police co-operation and Europol. It is generally accepted that transborder crime constitutes a common threat that must be tackled jointly. Presently, Europol does not have the legal or material means to carry out its task, namely it is not empowered to request national police forces to launch inquiries. It should be noted that a strengthening of Europol should go hand in hand, for many members of the Convention, with reinforced parliamentary and judicial control over it; more generally, some have argued for a complete integration of Europol (including budget) into the institutional EU framework.
- judicial co-operation, both in civil and in criminal matters, and Eurojust's development is of crucial importance. Ways of reinforcing Eurojust should be explored in the light of experience gained during its first weeks of operation. Improving co-operation between Eurojust and the Public Prosecutors of Member States and closer co-operation between national prosecutors are also avenues to be explored. According to some, Eurojust could in the longer term prefigure the appointment of an European Public Prosecutor. If this was to be accepted by the group, it could then inquire as to the categories of crime for which such a Prosecutor should have jurisdiction and whether he / she should be allowed to bring proceedings before court's at national or only at European level;
- improving control of external land and sea borders of the EU is seen by a large number of members of the Convention as a valuable new field for enhanced cooperation. There is a general agreement within the Convention that progress could be made in that respect. Different proposals, going from a closer co-operation between Members States' services to a common border guard unit, had been put forward. The Working group could examine them, from both a legal and logistical point of view.

Concerning broader issues and items related to the general organisation of the Union, the following matters are worth mentioning:

- European policy on matters related to asylum and immigration has been described by many members of the Convention as too limited. The current situation and the treatment in Europe of asylum seekers and illegal immigrants are often regarded as a source of concern. The ambitious conclusions of Tampere European Council have not yet been fully implemented and progress has been slower and less substantial than expected. Means to reverse this situation should be examined both on legal and on practical grounds. In this respect, the questions on "burden sharing" and adequate mechanisms for achieving solidarity among Member States should be considered by the working group. The perspective of a genuine common policy could be explored.
- The need for a balance between security requirements and respect for fundamental values deserves particular attention. The group could examine ways and means to maintain an appropriate balance, bearing in mind the work currently in progress in the working group considering the integration of the Charter of fundamental rights.
- In the course of the plenary session several members stressed the external dimension of the justice and home affairs policy and called for renewed co-operation, notably with neighbouring countries, on these matters.

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

It is generally accepted that the existing instruments and procedures, in particular in the "third pillar", seem no longer appropriate in the light of the strong political ambitions developed since the Tampere European Council and the events of 11 September 2001. Likewise, there are strong calls for simplification of the particularly complex institutional and legal system in the areas of Justice and Home affairs.

Firstly, the deficiencies of the legal instruments in the "third pillar" are apparent: "conventions" are seldom used because of the cumbersome process for their entry into force, and "framework decisions" and "decisions" lack direct effect. The working group could consider the advantages of a possible use of some of the legal instruments developed in Community law. The group could also consider making the general regime of jurisdiction of the Court of Justice applicable to Justice and Home Affairs, given the problems inherent in the current arrangements (no efficient judicial procedure against Member States failing to fulfil their obligations, various other limits to judicial control and variable geometry

concerning the preliminary rulings procedure which gives rise to concern with regard to the rights of individuals).

Furthermore, the plenary debate showed a clear need both for greater efficiency and for stronger democratic legitimacy and democratic control over the decision-making process. Thus, the question could be addressed as to whether such sensitive issues as a common asylum system, an European police force or Prosecutor can be treated in a legislative process where parliamentary involvement is limited to a mere consultation of the European Parliament and where the Council deliberates in camera. At the same time, the right of initiative for every Member State, which has not always contributed to coherence and respect for subsidiarity, could be re-examined. Another important issue is that of parliamentary scrutiny of executive action by Europol; this sort of issue would become even more acute if true operational powers were to be given to organs such as a European police force, a common European border guard or a European Prosecutor; the group could consider possible models for such scrutiny.

The working group could also consider whether, both in the areas of the current "third pillar" and in asylum and immigration, unanimity in an enlarged Union is sustainable and whether it blocks efficient policymaking. In this context, techniques of constructive abstention and of reinforced cooperation might be explored, and which the group might revisit the existing, highly complex opt-in arrangements.

Finally, if the group's analysis of the above issues shows that it would be preferable to bring all matters of the area of freedom, security and justice under a common general legal framework, the group should then examine where there might still be a need for special procedural rules within such a framework, and for which aspects of it.

### 3. What can be done, to identify more clearly those criminal law issues, which require action at Union level ? How should judicial cooperation in criminal matters be stepped up?

The group should explore possibilities of devising simpler and more clearly understood definitions of EU competence in criminal law matters. The principal criteria for action on European level could be, for example, the transnational dimension of a crime or of its consequences, the effects of existing disparities in national laws on transnational or organised crime, or the need to prosecute certain types of crime through cooperation at Union level. Thought could be given to a possible distinction between

harmonisation of substantive criminal law (definition of offences, minimum and maximum penalties), which might be necessary only to a more limited extent, and other areas wherein the Union might promote instruments of judicial cooperation based on mutual recognition (such as the European arrest warrant). The issue of common rules or minimum standards of procedure should also be considered.

Amongst possible tools to enhance judicial cooperation in criminal matters, the group could discuss ways of developing Eurojust further (see above).

4. What adjustments could be made to the wording of the Treaty provisions defining Community competence, particularly in regard to immigration and asylum matters?

Some argued, in the plenary, that the provisions of Title IV of the TEC, laying down Community competencies in the area of freedom, security and justice, could be improved. This has been maintained in particular regarding Article 63 TEC on asylum and immigration matters. The group could, inter alia, inquire whether the "minimum standards", by which Article 63 paragraphs 1 and 2 regulates Community powers in the areas of asylum and temporary / subsidiary protection, could not be streamlined and strengthened, so as to be more in line with the ambitious political goal of a "common asylum system" agreed at Tampere. The risk of deadlock, resulting from the unanimity requirement in an enlarged Union, might lead the group to examine whether one must not go further in introducing QMV and/or in relation to the co-decision procedure, than was agreed at Nice, in the area of asylum, and in possibly more clearly defined, areas of immigration policy.