

CONV 346/02

WG X 8

NOTE

from :	Secretariat
to :	Working Group X "Freedom, Security and Justice"
Subject :	Summary of the meeting held on 8 October 2002

The Group held its third meeting on 8 October 2002 (morning and afternoon). In line with its agenda, the meeting dealt with instruments and procedures in the field of judicial cooperation in criminal matters. Three experts were invited: Mr Labayle (Professor at the University of Bayonne), Mrs van den Wyngaert (Professor at the University of Antwerp) and Mr de Kerchove, Director at the General Secretariat of the Council. An exchange of views took place after each exposé and the meeting ended with a general discussion of the subject.

Exposé by Mr Henri LABAYLE¹

In his exposé, Professor Labayle began by pointing out that, unlike other EU policies, the distinguishing marks of the area of freedom, security and justice (hereinafter AFSJ) were, on the one hand, an imperative need for efficiency and pragmatism (no room for error in matters of security and immigration) and, on the other hand, a very high degree of subsidiarity (necessary in order to take account of the national traditions and the particular features of those involved, i.e. magistrates and police).

¹ Full text distributed to members (WD 3).

In relation to AFSJ instruments and procedures, he listed three major deficiencies:

1. The lack of consistency in the system resulting in particular from four factors:

- (i) The pillar construction (which poses practical problems as to the choice of the appropriate legal basis for an act, particularly in "criminal" matters, PFI , combating illegal immigration, protecting the environment and customs cooperation; it also leads to pointless segmenting of certain topics);
- (ii) Variable legal obligations:
 - as a result of variable accession by States to agreements, the lack of uniform transposition of framework decisions and opt-ins and opt-outs by three Member States within the Union;
 - the problem of conventions entering into force after 8 ratifications;
 - the unequal situation of citizens of the Union depending on the behaviour of the State they live in;
 - the risk that such problems would increase with future enhanced cooperation and the difficulties relating to enlargement.
- (iii) The refusal to operate cross-sectoral links between pillars;
- (iv) Institutional shortcomings:
 - the EP was not considered to be an interlocutor nor were national parliaments (although the latter are interlocutors for matters having an impact on public freedoms, the definition of criminal law policies, the principle of legality);
 - the Commission was experiencing difficulties with regard to initiating and controlling the application of the law (national judges and police were not like other civil servants);
 - the role of the Council and Member States was particularly complex: decision-making processes split between technicians (home affairs, justice) and politicians (diplomats) offered no guarantee of simplicity and efficiency.

2. The lack of political vision: difficulties relating to lack of precision on certain points in the Treaties (Article 62 TEC refers to "measures"; great complexity of Community action in external matters; the legal arsenal of instruments for the third pillar set out in Article 34 TEU lacked any overall act setting out a general view; no clear, comprehensible policy approach (the instruments used did not clearly express policy choices and priorities); the need to use a

method making the nature of Community intervention clearer and establishing a link with the "open coordination" method (particularly in matters of immigration).

3. Lack of efficiency owing mainly to the following factors:
- (i) the nature of the instruments used (conventions not ratified by Member States, framework decisions not having direct effect, decisions used more to create structures or procedures without laying any stress on the underlying legal substance, the complexity of the Schengen heritage, the abuse of non-standard acts) reflects the refusal by the Member States to take on binding legal commitments;
 - (ii) procedural adoption blockage: problem of the right of joint Commission/Member States initiative and particularly the unanimity rule in the Council for the third pillar (except for the implementing measures referred to in Article 32(2)(c) and (d)) and for the first pillar (until 1 May 2004 except for certain aspects of visa policy); fears of paralysis relating to enlargement;
 - (iii) blockage of entry into force for acts adopted: average of 8 years for the entry into force of conventions: technical problem relating to the imprecise nature of the obligations described (for example Framework Decision on the European arrest warrant, which provides for minimal mutual recognition of other Member States' judicial decisions, although that still caused problems); problems relating to the implementation of implementing measures (role of the Commission in management of programmes not provided for in the third pillar).
 - (iv) control of the application of acts was weak because the Commission had no guardian role.
 - (v) judicial control was insufficient, particularly because the preliminary ruling referral procedure could be used only by last instance courts, control of legality was *ratione personae* and there was no provision for proceedings for failure to fulfil an obligation;

In the light of the situation as described above, Professor Labayle proposed modifications relating to actors, procedures and controls:

- (a) For actors the proposals were as follows:
- (i) the European Council should work out an overall vision of AFSJ that should extend to defining common standards for security or transmission of data;

- (ii) the European Parliament should play its part under the codecision procedures, be involved in external issues relating to AFSJ and be consulted in the case of non-binding acts;
 - (iii) the Commission should play its part as guardian of the treaties;
 - (iv) a "Mr AFSJ" could be appointed, to be attached to the Commission and be responsible for coordinating the institutional labyrinth generated since Amsterdam.
- (b) For procedures, it was argued that a single treaty in which different procedures coexisted would raise the issue of the unity of instruments. However, although there was no question of recasting instruments and procedures, rationalising them seemed indispensable. The attraction of the Community pillar was of interest but need not necessarily result in "orthodox alignment". In that context, two specific problems were raised:
- (i) the need to clarify the place of "common positions" in the hierarchy of acts;
 - (ii) the external section of AFSJ and the fact that international agreements could cover both the first pillar and the third pillar, thus raising the question of the negotiating brief and procedure.
- It was also proposed that "framework decisions" and "decisions" under the third pillar have direct effect and that in that connection Court of Justice case-law apply regarding the circumstances in which a Directive may be relied on in the event of States defaulting.
- (c) Modifications relating to controls concerned three types: political, administrative and judicial.
- (i) As regards political control, it was proposed that national parliaments be more closely associated on grounds of transparency and legitimacy.
 - (ii) As regards administrative control, it was suggested that institutional coordination be introduced to avoid autonomous unmethodical development of the various bodies set up. A mutual assessment policy, which would make Member States responsible, and the use of the scoreboard technique were proposed.
 - (iii) As regards judicial control, it was suggested that the overall arrangements for the first pillar be copied.

Exposé by Mrs Christine van den Wyngaert

Mrs van den Wyngaert dealt with four points in her presentation: how to clarify and structure the *acquis communautaire* in criminal law matters, how to simplify the legislative procedure, how to establish a "vertical" system of applying the law and whether it was necessary to create a criminal chamber for "procedure prior to legal proceedings".

As regards the *acquis communautaire*, the current system was not very satisfactory insofar as acts were often adopted on a one-off basis, as for instance in the wake of the 11 September attack or in response to the political impetus resulting from the six-monthly Council presidency rota.

Mrs van den Wyngaert stressed that the variety of structures in existence (OLAF, Europol, Eurojust, European Judicial Network, liaison magistrates) which dealt with criminal law at European level created overlaps and duplication. Moreover, each structure had its own database system.

She advocated codification of crimes coming under the EC Treaty and the EU Treaty: to do that it would be advisable to define such crimes and the concepts specific to criminal law (attempted crime, participation, penalties, extra-territorial jurisdiction, etc.). For certain crimes, the Community already had competence to legislate (crimes affecting the financial interests of the Community (Article 280 TEC)), crimes resulting in environmental damage or relating to counterfeiting of the euro. Other crimes came under the EU Treaty and were referred to in Article 31 TEU. Mention could also be made of "mandate crimes" (for which Europol and Eurojust are competent) and crimes for which mutual recognition applied (for instance the list of 32 crimes in the Framework Decision on the European arrest warrant).

As regards the simplification of the legislative procedure, Mrs van den Wyngaert made some criticisms of the instruments referred to in Article 34 TEU and of the difficulties in implementing them (conventions not ratified, framework decisions and decisions without direct effect). She advocated including the third pillar *de lege ferenda* in the Community's field of competence, arguing that that would result in greater democratic legitimacy (codecision procedure, CJEC control). She also proposed that regulations and directives be used in future, particularly in order to

harmonise the definitions of crimes and penalties in the long term, in certain areas, or indeed to adopt a European criminal code.

As regards establishing a "vertical" system of applying the law, one proposal was the introduction of a European public prosecutor. The advantages would be: direct application of criminal law (without the need for letters rogatory), unification of provisions on evidence within the European area (rules on legality of evidence and exclusion of evidence obtained illegally), transparency and visibility and possibly the development of a common criminal law policy. Mrs van den Wyngaert was nevertheless aware of the difficulties and obstacles relating to the introduction of a European public prosecutor, particularly on the following points: what type of political control would he be subject to? And what type of judicial control?

She suggested that in the future the European public prosecutor be provided by Eurojust. He could be the President of Eurojust. She was, however, aware that at the moment it seemed that the time had not yet come for a European public prosecutor but the idea should not be ruled out.

Finally, she suggested a "pretrial chamber" at European level whose task would be to undertake judicial monitoring of inquiry procedures at national level and to prevent police or prosecutor "forum shopping".

After the presentations by the two university professors, there was an exchange of views on the following points: what would be the role of national parliaments and what coordination would there be between them and the EP? Should the Commission have sole right of initiative in the future in AFSJ matters? If Member States were to retain the legislative initiative, should the present system be modified, making a joint initiative by several Member States obligatory? What would be the advantages and disadvantages of introducing a European public prosecutor?

In the course of that exchange of views, some members were in favour of the Commission having the sole right of initiative while others preferred to retain Member State initiative (possibly involving several Member States). Other points raised were: the problem of difficulties in implementing acts under the third pillar (for example the European arrest warrant), the need to harmonise criminal procedure provisions (problem of free movement of evidence) before harmonising criminal law provisions, the arrangements for judicial control and the need to lay down sanctions for Member States which did not meet their obligations.

Preliminary remarks

Speaking in a personal capacity, Mr de Kerchove began by outlining the main stages in establishing the area of freedom, security and justice since the Dublin European Council, at which the Irish Presidency – following the murder of a journalist in Ireland – had for the first time placed crime issues on the agenda.

There had been considerable progress in quantitative and qualitative terms since the Maastricht Treaty (November 1993) and the Treaty of Amsterdam.

As regards the areas of work under the third pillar, he pointed out that in the Maastricht Treaty the main starting-point was the abolition of controls at internal borders (for example, extradition conventions, PFI, corruption, mutual assistance in criminal matters, European judicial network). There followed the Amsterdam Treaty, which brought a new approach in that now the Union had to act in criminal matters with the aim of achieving an area of freedom, security and justice. This was a conceptual leap. The concept of an "area" was constitutional as it had legal effects (area was to territory what nationality was to citizenship). There had to be a balance between freedom and security. Tampere had assigned four different strands of work to the Council of Justice and Home Affairs Ministers: the mutual recognition of legal judgments, harmonisation of criminal law, integrated cooperation (setting up of agencies) and the development of international relations. After 11 September 2001, the Belgian, Spanish and Danish Presidencies had carried forward these four strands at lightning speed. In the case of mutual recognition, agreement had been reached on a European arrest warrant; on harmonisation, the Council had reached a definition of the concept of terrorism; integrated cooperation had seen the creation of Eurojust and in international relations, the Council had given a mandate to the Presidency to negotiate an agreement between the EU and the United States on mutual assistance in criminal matters and on extradition.

Current difficulties in the functioning of the Third Pillar

There were **four types of difficulty** the problems of effectiveness, efficiency, complexity and accountability.

Effectiveness, since despite dozens of conventions, joint actions and framework decisions, in which the Council had created new concepts (e.g. mutual recognition, setting up of joint investigation

teams), there had been considerable delay in Member States' implementation of the adopted measures, even though they had been adopted unanimously (out of fourteen conventions adopted, only two had been ratified by the Member States; as regards joint actions and framework decisions, there were problems of non-transposition or incomplete or delayed transposition). This problem of effectiveness not only applied to instruments, but also to the implementation of cooperation mechanisms (e.g. agencies), as was the case with Europol, which did not receive enough information from Member States.

Also of note in this context was the absence of any proceedings for failure to fulfil obligations and the lack of direct effect of framework and other decisions.

Efficiency, since the unanimity rule slowed down negotiations to a considerable degree. Where the rule was QM, delegations to the Council negotiated at greater speed; unanimity furthermore impoverished the content of instruments (illusory harmonisation or harmonisation à droit constant – on the basis of established law).

As regards complexity, taking two pillars as a basis raised the question of borderline cases, particularly in the choice of appropriate legal basis (e.g. environmental protection by criminal law, combating illegal immigration, protection of the euro, PFI) ¹.

On accountability, admittedly the Amsterdam Treaty had provided for the EP to be involved and to have a degree of judicial control, but it had done so while creating procedures which were unsatisfactory. True, the EP had to give an opinion on conventions, framework decisions or other decisions, but did so when the Council had already reached unanimous agreement on a draft act. Member States therefore no longer wished to risk opening discussions. Furthermore, the EP was not consulted on work programmes, some of which were major ones (e.g. organised crime or anti-terrorism programmes), nor was it consulted on common positions which could have some bearing on the conduct of international negotiations, or on the international agreements provided for in Article 38 TEU (which could have considerable impact on the conduct of mutual assistance in criminal matters at international level). As for review by the Court of Justice, the system of "variable-geometry" references for preliminary rulings was more than questionable

¹ One of the reasons why the Council had been unable to agree on the creation of a magistrates' college was that it was a difficult matter setting up a college for both civil and criminal law magistrates, requiring as it did two separate instruments; there were similar difficulties with international agreements which covered both Community and third pillar areas.

when it came to protecting individual freedoms; in addition, the absence of proceedings in cases of failure to fulfil obligations was noteworthy. Consideration should be given in this context to strengthening Europol control as its operational powers were developed.

Prospects for reform

The central proposal would be to distinguish more clearly in future between the legislative function and the governmental function. The first should be aligned on the Community method, while the second should maintain an intensified inter-governmental nature.

There were two aspects to the governmental function: first, the determination by the Council (and perhaps by the European Council) of the strategic groundlines and priorities of European criminal justice policy, and second, the coordination of the operational activity of the police forces and courts and prosecutors' offices in Europe. As to the legislative function, where a particular type of crime was identified unanimously by the Council (or by the European Council) and had to be incorporated into European legislation, the legislative process would become a Community process, i.e. qualified majority and codecision with the EP, without the Commission necessarily having sole right of initiative. This was no great problem in practice, since in the long run (and even at the present time) the Commission already had a *de facto* monopoly, simply because Member States did not have the resources to do what the Commission did (i.e. assigning two or three officials for one year to examine all the legislation of the Member States and sounding out the reactions of civil society to its proposal). But if Member States' right of initiative were maintained – as Mr de Kerchove proposed – it would have to be established (a) by requiring that it should be included among the priorities of criminal justice policy adopted unanimously by the Council and (b) by setting a threshold of 1/3 of the Member States for an initiative to be admissible. One idea might be to have a procedure for qualified-majority decision-making when the initiative came from the Commission.

Legislative function

On the question of establishing competence as between the Union and the Member States in criminal matters, especially in the interests of greater observance of the subsidiarity principle, Mr de Kerchove was against drawing up a list of offences that would become fixed in the Treaty. This was a complex matter and would lead to excessive rigidity. It would also be simplistic to confine the Union's action to cross-border issues (cross-border test).

The harmonisation of criminal law should have five objectives:

- (i) a "signalling" function (vis-à-vis the European citizen and rest of the world): regardless of whether a particular type of conduct was of a cross-border nature, the Union might wish to make a criminal offence of (internal) conduct that was contrary to the Union's fundamental values (such as racism or child pornography);
- (ii) avoiding a "sanctuary" effect, i.e. avoiding a situation whereby crime became concentrated in places where certain types of offences were less severely punished;
- (iii) giving the citizens of Europe a common sense of justice;
- (iv) the right of citizens to move freely and take up residence, which could be seriously affected by organised criminal activities;
- (v) a minimum of harmonisation was needed to implement mutual recognition and the integrated cooperation measure (as provided for at Tampere); mutual recognition presupposed Member States trusting in the quality of each other's substantive and procedural law (agreeing to execute judgments without control). To assist this mutual confidence, the Member States' provisions (especially on criminal procedure) should be harmonised (in this connection, see the Commission's Green Paper on the need to harmonise minimum procedural guarantees in the Union)¹. It was also important for integrated cooperation if Europol or Eurojust were to operate in a harmonised manner on the basis of harmonised charges.

Governmental function

It would first of all be useful for the Council (and perhaps the European Council) to establish unanimously the strategic priorities of the Union's criminal justice policy on the basis of, in particular, contributions from Europol and Eurojust in consultation with the EP. Operational activity, especially the coordination of police operations at Union level, was undoubtedly one of the aspects where the Union could do better. The Tampere Summit sought to improve this aspect by calling for the setting up of a Police Chiefs Task Force, but the results so far were not yet satisfactory. The Amsterdam Treaty (Article 30(2) TEU) gave Europol more operational competence (participation in joint investigation teams or the right to ask Member States' police forces to carry out investigations) but the Council had not yet adopted the requisite secondary legislation.

¹ Mr de Kerkhove mentioned here the case of Switzerland, which was in the process of harmonising the codes of criminal procedure of all the cantons with a view to establishing a federal code of procedure.

Specific responses to the four types of difficulties mentioned

On "effectiveness", Mr de Kerchove proposed providing for a right to bring proceedings for failure to fulfil an obligation on the basis of Article 226 TEC. As regards instruments, conventions could be done away with; framework decisions and decisions should have direct effect and, for the sake of clarity, it would be preferable to unify legal instruments and to replace them with regulations and directives. The appropriate instrument would be chosen according to the subject-matter: regulations would normally be used for the harmonisation of procedural law (e.g. European arrest warrant), but the harmonisation of substantive criminal law could be the subject of directives (leaving States a greater margin of discretion for transposition). Common positions could be retained, as they were useful, but could be adopted by a qualified majority. Lastly, the legal effects and the binding nature of the international agreements provided for in Article 38 TEU, as well as their effects on bilateral treaties, should be clarified.

On efficiency, the unanimity rule should be abandoned in favour of a qualified majority (or at the very least provision should be made for a system of quasi-unanimity: unanimity minus 1). Forms of enhanced cooperation should be allowed (e.g. 8 Member States could abolish double criminality among themselves and create a genuine integrated area among themselves). The Commission should also be able to execute acts of the Council where the latter require implementation at Union level (currently, Article 41(1) TEU does not refer to Article 202 TEC, and the Council needs to consider in each individual case whether or not to confer executive powers on the Commission).

On complexity, the question of merging the Treaties and doing away with the current pillar structure should be examined.

On responsibility, reference should be made to the points already made concerning the role of the EP. As regards review, and as and when the operational powers of Europol are developed, inspiration might usefully be drawn from the Belgian system of a committee specialising in the monitoring of police forces, which is accountable to Parliament. Judicial review has already been mentioned above. On the review of Eurojust, consideration should be given to the possibility of setting up a preliminary criminal chamber within the CJEC, before which Eurojust would have to bring cases in order to ensure that there was no temptation to "forum shop".

Other concrete proposals

- incorporate the principle of mutual recognition of judgments in criminal and civil matters (along the lines of the "full faith and credit clause" in the US Constitution). This clause would assist the work of the CJEC in its interpretation of acts adopted in the context of the AFSJ;
- word the articles on criminal justice of the treaty in such a way that it is not merely punitive, but rather preventive (by also providing for the rehabilitation of criminals);
- include cooperation with the secret services;
- consolidate the powers of the current players. Should Europol be brought further into line with the Community model ? What operational powers should it be given over and above those provided for in the Treaty of Amsterdam ? Gradual work could be carried out on Eurojust, and it could be given the role of European Public Prosecutor for the protection of the Community's financial interests (either exercised by the college of 15 members, or by appointing a 16th member who would be the European Public Prosecutor for the protection of financial interests). OLAF (once the pillars are done away with) should be merged with Europol, and there would then only be one anti-corruption unit internal to the five institutions. As regards the CJEC, it is proposed that a preliminary criminal chamber be created (important for the proper conduct of investigations at European level).

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Following Mr de Kerchove's presentation, members put questions to him, and a general exchange of views took place.

During the exchange of views, some members were open to the idea of bringing the third pillar further into line with the Community model.

The question of the harmonisation of criminal law and of the list of crimes was also raised: some considered that this list could be drawn up on the basis of two criteria: the need for a cross-border dimension and that there should be an interest (added value) in acting at European level; this list could be based on Article 29 of the current TEU and the Council could adopt it by a qualified majority; all other crimes to be added to that list on the basis of those two criteria should be decided on unanimously (some proposed that QM should be the rule). Others were sceptical about drawing up the list.

With regard to the Commission's monopoly on initiative, some considered that it should be introduced into the AFSJ sphere, but others felt that Member States' right of initiative should be preserved, while possibly providing for the need for a joint initiative by several States.

The idea was put forward that if the Council were to decide by a majority, the EP should be co-legislator. The question of the involvement of national parliaments was also raised in this context.

The lack of efficiency of the procedures in the AFSJ sphere was highlighted by several members. It was noted that States complied with their commitments only to a very limited extent, and that there were unacceptable delays in the ratification (conventions) and transposition of the acts adopted. Some members pointed out that the unanimity rule posed a serious problem as regards blocking, and others wanted to identify the areas in which it might still be justified.

Finally, it was proposed that Europol should become an institution following the Community model, and that it should have a branch office in each Member State to become more effective.

The idea of creating a European Public Prosecutor was raised by some members. One member wanted the new treaty to contain a legal basis for that purpose. It was proposed that the European Public Prosecutor should come from Eurojust.

**List of members of the Working Group who attended
the meeting on 8 October 2002**

Mr John BRUTON, Chairman, member of the Praesidium

BIRZNIECE Inese

de BRUIJN Thom

CAREY Pat

CHABERT Josef

COSTA Alberto

FLOCH Jacques

GLOTZ Peter (PLEUGER Gunter)

HEATHCOAT AMORY David

KUTZKOVA Neli

LEKBERG Sören

MENDEZ DE VIGO Iñigo

PELTOMAKI Antti

Baroness SCOTLAND of Asthal

VASSILIOU Androula

VITORINO Antonio
