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TOWARDS A SINGLE TREATY FOR THE DELIVERY OF THE AREA OF FREEDOM, SECURITY AND JUSTICE?

1. Introduction

Creating and maintaining the Union as an area of freedom, security and justice

The development and maintenance of the Union as an area of freedom, security and justice, based on the principles of democracy, respect for fundamental rights and freedoms, and the rule of law, is undoubtedly one of the essential missions of the present and future Union. Since the entry into force of the Amsterdam Treaty, the establishment of this area has formed one of the objectives of the European Union. A general consensus has emerged at the level of Governments, Parliaments and public opinion, reflected in the ongoing debate in the Convention on the future of the European Union, that this is an area in which "more Europe" is needed. This growing consensus can also be seen in the constant and substantial evolution of the relevant Treaty provisions from the Maastricht Treaty through Amsterdam to Nice.

There is a clear recognition that the challenges posed to our societies in areas such as asylum, immigration, and the fight against crime and terrorism can no longer be met adequately by measures taken at the national level alone. A high level of security inside the Union implies effective management of our external borders. The fight against drugs requires a global and coordinated response at all levels. The public rightly expects a proper response to these challenges. They can only be properly tackled through a combination of action taken both by the Member States and by the European Union as a whole. As the Commission has already noted in its Communication entitled "A project for the European Union"[1], the common objective of the creation of an area of freedom, security and justice, a corollary to the establishment of an integrated, frontier-free economic area, is therefore one of the essential missions of the Union now and for the foreseeable future.

Six months after the entry into force of the Amsterdam Treaty, the European Council meeting at Tampere set out a vision for the area of freedom, security and justice, and approved a detailed action plan of measures needed for the first five years of its development. The decisions taken at Tampere were bold, and the aims expressed – the development of common European asylum and immigration policies, the establishment of a genuine European area of justice, the reinforcement of

[1] COM (2002) 247 final of 22 May 2002

the Union-wide fight against crime and stronger external action – were both far-sighted and ambitious.

The experience under Amsterdam

Experience in implementing the Tampere programme over the past three years has demonstrated two important challenges:

- Firstly, it has become increasingly clear that in a number of key areas, such as asylum policy, and despite the considerable improvements brought by the Amsterdam Treaty, the detailed objectives set out in the current Treaties do not match up to the political objectives clearly expressed by the European Council at Tampere. Unless the objectives set out at Amsterdam are aligned to match what was later decided at Tampere, there is a real risk that the full development of the area of freedom, security and justice will be hampered. In addition, this is an area in which, unfortunately, new challenges requiring a response at both national and Union levels will continue to arise. At Seville, Heads of State and Government agreed that the Union needs to focus on the gradual development of an integrated system of border management in a way that could not be foreseen even at Tampere. External events and demographic change within the Union will continue to present specific challenges in the areas of asylum and immigration;

- Secondly, although real progress has been made in some areas, in others progress has been slow. It has to be recognised that this is in no small part due to the specific institutional and decision-making framework attributed to justice and home affairs issues in the current Treaties. For all the advances made at Amsterdam, the separation of issues into two Pillars, decision-making by unanimity, a shared and sometimes competing right of initiative for the Member States and the Commission, and the complexity of variable geometry have proved serious brakes on the efficient delivery of the outcomes Heads of State and Government want to see. It is hard to explain to citizens why their democratically elected representatives in national parliaments and the European Parliament do not have more say in areas that touch their interests so directly. And as measures are gradually put in place, the limited role of the European Court of Justice and the absence of proper mechanisms for the control of the application of legislation in many

areas will increasingly pose problems for the coherence of the area of freedom, security and justice.

Simplifying and rationalising by moving to a single Treaty

One of the overall issues that the Convention was asked to address by the European Council at Laeken was the question of simplifying and rationalising the Treaties to improve transparency and develop the basis for the adoption of a constitutional text for the Union. In the context of this wider objective, the Commission and a broad majority of voices in the Convention have already pointed to the complexity created by splitting justice and home affairs issues between the Community area (Title IV TEC) and the Third Pillar (Title VI TEU).

Aside from the overall objective of simplification, there are strong substantive arguments against the retention of the Pillar structure in this area. The objective of creating an area of freedom, security and justice is a single one, and needs to be addressed in a balanced and coherent way. It should also be delivered as effectively and efficiently as possible.

This has so far not been possible given that visas, asylum, immigration and other policies related to free movement of persons are covered by Title IV TEC (the First Pillar) and police and judicial cooperation in criminal matters by Title VI TEU (the Third Pillar). The fact that a single measure cannot have a legal base in both Pillars has meant that in some cases the achievement of one single objective, such as combating trafficking in human beings, has required the adoption of separate legal instruments based in the First and Third Pillars respectively. It is difficult to ensure the necessary global and coordinated approach, eg in relation to the fight against drugs, where this requires action within both Pillars. Furthermore, coherent external representation of the Union in this area is difficult given the different responsibilities of the Presidency, the Commission and the Member States according to whether a matter falls in the First or Third Pillar. The situation is particularly unsustainable in relation to the growing number of external negotiations that involve both First and Third Pillar aspects.

In terms of efficiency, the very existence of the two Pillars has meant lengthy negotiations about the legal base for a specific measure, even before the negotiations on substance have begun. Some matters genuinely require legal bases in both the First and Third Pillars, but finding agreement on this solution has proved impossible, eg in relation to the Schengen Information System.

Finally, as well as proving counter-productive to the efficiency of decision-making at Union level, the present Pillar structure is difficult, if not impossible, to explain to the citizen.

The institutional complexity of the Pillar structure is further compounded by the variable geometry which governs justice and home affairs and is set out in a series of protocols. The United Kingdom and the Republic of Ireland do not in principle participate in Title IV TEC, but have a right to opt-in to measures on a case-by-case basis. They have so far exercised this right in a coherent manner in relation to all measures on asylum and civil judicial cooperation. In addition, these Member States have chosen to participate in many, but not all, aspects of the Schengen acquis, following the incorporation of Schengen in the Amsterdam Treaty. Denmark does not participate in Title IV TEC, and has no right to opt-in, but it does automatically participate in all measures under this chapter which build on the Schengen acquis. In a balanced area of freedom, security and justice, the aim should be that the common measures put in place, based on respect for rights and fundamental freedoms, should apply equally across the Union.

The present distinction between the First and Third Pillars is counter-productive, opaque and can no longer be justified. As the Commission noted in its Communication on "A project for the European Union"[2], if the institutional architecture is to be simplified and rationalised it will be necessary to drop this distinction, which is important in law but very much obsolete in political terms. A new Treaty should bring together all aspects of the area of freedom, security and justice under a single institutional framework.

But moving to a single institutional framework would not mean that Community procedures would necessarily need to be applied in an identical way to areas currently falling within the Third Pillar: the instruments and procedures applicable could vary as a function of the type of action envisaged at Union level.

A new Treaty should bring together all aspects of the area of freedom, security and justice under a single institutional framework, in the interests of rationalisation, simplification, coherence and efficiency. But this does not mean that traditional Community procedures are necessarily appropriate in all areas. Instead, in each case the instruments and procedures applicable should correspond to the objectives set and the degree of intensity of the action which should be undertaken at Union level.

[2] COM (2002) 247 final of 22 May 2002

The challenge for the Convention on the Future of Europe

The challenge that now faces the Convention on the Future of Europe is therefore two-fold:

- To set out objectives for a Union of 27 or more Member States which are sustainable in the longer-term and which will permit the full development of the area of freedom, security and justice based on respect for the rights laid down in the Charter of Fundamental Rights of the European Union and the rule of law. These objectives must both reflect in full the political ambitions already expressed and be sufficiently flexible to allow the Union to face the new challenges which will arise. They should also, of course, fully reflect the fact that the area of freedom, security and justice can only ever be the result of actions taken at both national and Union level, and must therefore clearly define the scope and intensity of action to be taken at Union level;

- To provide a single institutional framework which allows an enlarged Union to act coherently, effectively and efficiently to fulfil these objectives.

The overall result should be a set of Treaty provisions that are coherent, transparent and sustainable. It is understandable that in a rapidly developing area such as this, there has been the need to gradually build up the appropriate provisions through a series of recent Treaties. But the moment has now come where the direction and legitimacy of future action in this area are clear. It is time to give the area of freedom, security and justice its full status as a key objective of the future Union and to provide a stable and effective institutional base for its development.

The purpose and scope of this contribution

In this context the remainder of this contribution seeks:

- to review the objectives set out in the present Treaties for each of the policy areas covered by the current Title IV TEC and Title VI TEU, and to suggest how they might be developed for the future whilst paying due attention to the need to define more clearly the level of intensity of action to be undertaken at Union level in each case (part 2);

- to propose, on the basis of the proposed objectives and intensity of action, the instruments and procedures which should apply in each area in the context of a single Treaty (part 3).

Ensuring freedom, security and justice in full respect of democracy and fundamental rights would contribute to give its full meaning to citizenship of the Union and to the rights flowing from it. Those rights are nevertheless not discussed in this contribution, given that they are being addressed separately elsewhere in the work of the Convention. This contribution therefore takes as its starting point only questions which flow from the current Title IV TEC ("Visas, asylum, immigration and other policies related to the free movement of persons") and the current Title VI TEU ("Provisions on police and judicial cooperation in criminal matters").

2. The objectives and intensity of action needed at Union level to develop the area of freedom, security and justice must be better defined

Since the entry into force of the Amsterdam Treaty, the establishment of a coherent and balanced area of freedom, security and justice has formed one of the key objectives of the European Union. The three components – freedom, security and justice – are complementary and of equal importance. The exercise of fundamental freedoms and rights and the respect of democratic values cannot be guaranteed without security; internal and external measures designed to deliver a high level of security allow freedoms and rights to flourish in a genuine European area of justice for all. All three aspects must be developed in parallel and to the same degree of intensity, and the aim should be that all of their component parts should apply in full to all Member States present and future.

This general objective is already clearly stated in the Treaties. But the series of articles which translates it into specific objectives to be achieved at Union level are often inadequate to allow an enlarged Union play its part in the medium term. The following sections review the specific objectives set out in the present Treaties for each of the policy areas covered by the current Title IV TEC and Title VI TEU, and suggest how they might be developed for the future within the context

of the overall objective of the development and maintenance of the area of freedom, security and justice.

The different types of action that can be undertaken in common at the Union level in order to achieve these objectives are many and varied in nature:

- Measures aimed at full or partial harmonisation or approximation of national legislation;
- Measures to establish mechanisms or procedures for mutual recognition, with or without a minimum of harmonisation of national legislation;
- Measures to put in place mechanisms for the exchange of information, and mechanisms or bodies to promote cooperation, including various methods of coordinating national policies;
- Measures of a financial nature (burden sharing, funding of training and exchanges, development of pilot projects, support for NGOs etc).

In certain areas the achievement of the objectives of the area of freedom, security and justice requires the Union to have the full range of actions at its disposal. In other areas, only a low intensity of action is needed at Union level, with Member States retaining a high level of responsibility for the delivery of the common objectives. It is therefore important that in reviewing the objectives of the area of freedom, security and justice, due attention should be given to the need to define more clearly the degree of intensity of action to be undertaken at Union level.

2.1 Visas, asylum, immigration and other policies related to free movement of persons

A common policy on asylum, refugees and displaced persons

In the area of **asylum, refugees and displaced persons** (Article 63 (1) and (2) TEC), the European Council meeting at Tampere agreed on the development of a common European asylum system and Union-level action on displaced persons and refugees. This implies the use of the full range of possible actions available at Union level: harmonisation of national legislation is certainly needed, but so too are measures of a financial nature such as burden sharing, and measures to ensure the coordination of national policies such as establishment of an open method of coordination.

The current Treaty allows the Community to take all of the measures necessary in relation to mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States ('Dublin' and Eurodac), and to promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons. However, in other areas (such as reception conditions and procedures for granting and withdrawing refugee status) the Treaty only provides for harmonisation of legislation, and the scope of such harmonisation is limited to setting common minimum standards. Measures on administrative cooperation in the asylum field can, however, be adopted under Article 66 TEC.

The Commission has presented all of the legislative proposals needed to meet the requirements of Article 63 (1) and (2) TEC. But the scope of the provisions of the current Treaty are, unless they are to be interpreted very broadly, only adequate to put in place the instruments necessary for the first phase of the common asylum system, as described by the European Council at Tampere. The European Council made it clear that a truly common asylum system requires a common asylum procedure and a uniform status for those who are granted asylum valid throughout the Union, not just common minimum standards. This is compounded by the fact that for many aspects the current Treaty requires the establishment of common minimum standards, without providing a definition of the level at which these minimum standards should be set. Inevitably the degree of ambition expressed in the initial Commission proposals has been reduced in the process of negotiation.

Of course, special attention should also be paid to the external aspects of asylum policy, with due respect for developments in global protection regimes. Resettlement schemes and processing applications for asylum outside the Union are two examples of where effective external action is an essential part of a common asylum system.

Consideration should be given to replacing the current Article 63(1) and (2) with a general provision allowing the adoption of all measures needed to put in place a common asylum system and a common policy on refugees and displaced persons. Such an approach would be consistent with that adopted in relation to the development of the Single Market, and the degree of intensity of actions at Union level would be governed by the principles of subsidiarity and proportionality. It is clear that for some aspects of the common policy legislation

will not be needed: recourse will need to be made to the full range of actions available at Union level.

A European immigration policy

In relation to the Tampere goal of the development of a **common immigration policy**, competence is again shared between the Community and the Member States. The current Treaty permits action at Union level in relation to: conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion; illegal immigration and illegal residence, including repatriation of illegal residents; and measures defining the rights and conditions under which third country nationals who are legally resident in a Member State may reside in other Member States (Article 63(3) and (4) TEC). In effect the Treaty therefore covers the full breadth of the immigration domain. Unlike in the asylum field, the Treaty does not include any specific limitations in relation to the intensity of the activity permitted, recognising the fact that the objective of a common immigration policy requires the use of the full range of actions available at Union level. At the same time, there are some issues for which Member States alone should continue to remain competent. One example would be questions relating to any eventual transition from legal migrant status to citizenship (ie naturalisation).

In practice, progress to put measures in place at Community level in relation to legal immigration has been slow since this area was communautarised at Amsterdam. The Treaty requires the adoption of common measures to harmonise national legislation without providing a definition of the level at which standards should be set. This has in general meant, once discussion begins in the Council, a lowering of the degree of ambition by comparison to the Commission's proposals. With the delivery of the draft Directive on the conditions for entry and residence of third country nationals for the purposes of studies, vocational training or voluntary service, the Commission has now presented proposals in all of the areas covered by Article 63(3)(a) TEC.

In parallel, in an area of freedom, security and justice for all, it is important to continue to pursue the objective of ensuring fair treatment of third country nationals who reside legally on the territory of the Member States, as set down by the European Council at Tampere. The European Council

considered that a more vigorous integration policy should aim at granting third country nationals rights and obligations comparable to those of EU citizens. But the current Treaty provides for Union level action only in relation to the free movement and residence within the Union of legally resident third country nationals. It is important to consider supplementing the existing provision to allow the adoption of measures covering a wider range of rights for third country nationals. Particular priority should be given to the right to fully participate in political life at local level. As regards promoting the integration of third country nationals who are legally resident in the Union, in many cases the most effective policy responses can be found at local, regional or national level. At the same time, there is a strong case for providing a specific Treaty base allowing Union level action where this can genuinely add value: measures to coordinate exchange of information and best practice, to support benchmarking exercises, and to support coordination in relation to integration policy.

As regards illegal immigration, Member States have shown a greater degree of willingness to cooperate at Union level given the demonstrable ineffectiveness of purely national policies in the face of this phenomenon. A comprehensive action plan to combat illegal immigration and trafficking in human beings in the European Union has been adopted. This will give rise to various proposals for legislative and non-legislative actions over the next year. In addition, it remains particularly important that criminal law measures remain part of the tool-kit for fighting illegal immigration and the associated trafficking in human beings.

The scope of the present Treaty provisions effectively covers the full breadth of the immigration domain. But, as is the case for asylum policy, the present Treaty text does not fully acknowledge the notion of a common European immigration policy as an autonomous objective that justifies the taking of measures towards its construction. Consideration should be given to providing in the Treaty a general provision allowing the adoption of all measures needed to put in place a common immigration policy, including measures on illegal immigration and illegal residence. Such a provision would not be open-ended: the limitations on the intensity of Community action provided for under the principles of subsidiarity and proportionality would continue to apply here, and it is clear that recourse will need to be made to less-intensive actions such as the open method of coordination. At the same time, greater attention should be paid

to the rights of legally resident third country nationals. A specific Treaty provision should be introduced in this regard, particularly as concerns participation in political life at local level. Finally, there is scope to recognise in the Treaty the value which incentive and support measures at Union level would add to the integration policies developed at local, regional and national levels.

Free movement of persons and integrated management of external borders

In the area of **free movement of persons, internal and external frontiers and visa policy**, Article 62 TEC covers action on the absence of controls on persons at internal borders, control and surveillance of external borders, visa policy, and free movement of third country nationals for a short stay. These provisions reflect in a large part the scope of the Schengen acquis in these areas at the moment of its integration into the framework of the Union by the Treaty of Amsterdam.

A fair amount of progress has been made since Amsterdam, mostly related to the implementation and updating of the Schengen acquis (eg the application of the full Schengen acquis in Greece and the Nordic countries, and measures to update the common visa list, the Common Consular Instructions and the Common Manual on external frontiers). New legislation has been put in place in relation to visa security and on free movement of third country nationals with a long-stay visa. Following the European Council's decision at Seville to pursue the gradual development of an integrated system for border management, measures which are likely to be under discussion in the coming months include the creation of a visa identification system, and action to update the Common Manual on external frontiers based on experience and best practice.

The very nature of these subjects requires a coherent and uniform application of rules at Union level. In an area without internal border controls, the decisions made on admissions by one Member State have implications for all Member States which have lifted their internal border controls with that Member State: a degree of mutual confidence is required which can only come through the consistent application of common procedures and rules at all external border crossing points. The current Treaty therefore provides the potential for full harmonisation of both substantive and procedural law at Union level in all of the areas set out in Article 62 TEC. In addition to this harmonisation, it is clear that building mutual confidence also requires actions to promote cooperation, information exchange and training. Mechanisms for financial solidarity, eg in

relation to the control of the common external border, could also be envisaged. In the longer term, it may be necessary to consider the development of a common European border guard. The decision to develop a genuinely integrated system of border management – and the growing recognition that this is an area in which national responsibility for security and public order needs to be complemented by shared responsibility and action at Union level – should be reflected in the new Treaty through a provision allowing the adoption of the full range of measures needed to meet the political objective of a common system of external border management.

As regards internal borders, whilst Member States could retain the possibility of unilaterally reinstating temporary checks in the face of a specific security threat to their national public order, in the future such decisions should be subject to proper control, including judicial control, at Union level. As a complement to this possibility, it could be desirable to provide a mechanism for a coordinated reinstatement of internal border checks in the event of a major security threat potentially affecting the public order of a number of Member States, reflecting the shared sense of European responsibility based on common values and respect for fundamental rights. This would contribute to the emergence of a sense of a European public order.

Finally, the political objective of a common visa policy should be clearly written into the new Treaty. The current provisions – which cover very nearly all aspects of visas – are split into four specific parts reflecting procedural differences which should, as explained in part 3, no longer be retained in a single Treaty. In a single Treaty, the provisions on visa policy should be simplified into a single provision providing for the adoption of all measures needed for the common visa policy. This should of course include measures for mutual confidence building, in particular through increased transparency and peer monitoring.

The Seville European Council has welcomed the objective of the gradual development of an integrated system of external border management. The present Treaty text is inadequate for the achievement of this ambitious long-term goal. There is a strong case for developing a new provision allowing the adoption of all measures needed for the common system of external border management. In the interests of simplification, the new Treaty could provide for the adoption of all measures needed for the common visa policy. Further consideration should be given to the potential advantages of a better reflection of shared

European interest in questions concerning temporary reinstatement of internal border checks in the interests of security and public order.

A genuine area of justice in civil and commercial matters

The need for action at Union level in the field of **judicial cooperation in civil and commercial matters** stems from the reality of the internal market. This has given rise to an increase in the frequency at which European citizens establish themselves, perform economic activities or buy goods and services in Member States other than that of their origin, sometimes through the use of new technologies. More and more frequently personal and family situations present cross-border aspects (eg marriages of two people of different nationality, persons owning houses in a different State to that in which they are habitually resident). Action is required at Union level to ensure that individuals as well as commercial and non-commercial actors can have uncomplicated access to justice in such cases.

As with other areas of justice and home affairs cooperation, judicial cooperation in civil and commercial matters is an area in which competence is shared between the Community and the Member States. Article 65 TEC provides that action at Union level in relation to judicial cooperation in civil law matters is limited to questions which have cross-border implications insofar as necessary for the proper functioning of the internal market. Since Amsterdam, the Community has adopted five landmark Regulations covering insolvency proceedings, parental responsibility, service of documents, jurisdiction and recognition and enforcement of judgements, and taking of evidence. A European Judicial Network on civil and commercial matters and a general Community framework programme have been established. Three further draft instruments are currently under discussion in the Council (on legal aid, a European Enforcement Order for uncontested claims, and parental responsibility).

The approach adopted in this area since Tampere has been governed by the principle of mutual recognition and better access to justice. Mutual recognition is a concept that has been effectively applied in areas of the Single Market. If it implies the subsistence of national regimes, it is also true that its application may imply full harmonisation of rules on international jurisdiction of courts and of procedures for recognition and exequatur of foreign decisions, as has already been achieved

through Regulation (EC) No 44/2001 ("Brussels I"). Moreover, a degree of approximation of procedural national law may be needed in order to create new means for cooperation based on mutual recognition, such as the European Enforcement Order for uncontested claims currently under discussion.

The current Treaty is clear that the scope of any such approximation of national legislation should be limited to "civil matters having cross-border implications", and "insofar as necessary for the proper functioning of the internal market". These principles must be applied in the context of the gradual development of the area of justice in civil and commercial matters. Over time, and as the area develops, the need for action at Union level will intensify. The Mutual Recognition Programme adopted by the Council sets out the lines along which work towards the achievement of a genuine area of justice will deepen. This programme includes eg work in the area of patrimonial consequences of the break-up of married and unmarried couples, as well as successions and wills. It can also be anticipated that citizens' concerns will extend beyond these questions to issues related to the status of unmarried couples, questions concerning the patrimonial regimes of married and unmarried couples (and not only concerning the break-up of such relationships), issues concerning personal status (names), adoption etc.. Providing an effective response to citizens' concerns in this area implies an evolving application of the principles set out in the current Treaty article, as well as the need for increased Union level action in relation to recognition and enforcement of administrative documents and decisions.

At the current stage of development of the area of justice in civil matters, it is necessary to deal with these questions. Increasing numbers of people are choosing to use their right to reside in another Member State, which de facto means that questions of their personal, marital and patrimonial status has clear cross-border implications. Failure to deal with these issues would present a potential constraint on the freedom for individuals to reside in another Member State, and would therefore undermine the proper functioning of the internal market. This potential constraint is of course valid even for individuals who have not yet exercised their free movement rights. There is therefore a certain incoherence in the apparent current trend towards establishing a separate Union level regime for cases where a trans-border element is presented in practice in addition to a set of national rules which remain applicable for all cases where there is de facto no specific trans-border element. An evolutionary application of the principles should be set in the context of the objective of a single and coherent area of justice for all, and should therefore take full account of the need to avoid this potential duplication of regimes.

The reality of free movement in the internal market means that citizens and businesses are increasingly pursuing their private or commercial interests across borders. It is essential that a European area of justice in civil and commercial matters be created to allow citizens and businesses to have proper access to justice in cases where these interests are challenged. The current text of the Treaty sets out principles governing the need for harmonisation of national legislation in this area. These principles must be applied in the context of the gradual development of the area of freedom, security and justice and developing demands from citizens, and in so doing avoid the creation of two different regimes (one for cases with proven cross-border aspects, another for internal cases).

2.2 Police and judicial cooperation in criminal law matters

Providing a high level of safety through common action in the field of police cooperation

The essence of operational law enforcement and the prevention of crime falls within the national competence of the Member States. Decisions on how, and when, to implement preventive policies and deploy police and other law enforcement agencies in specific cases are national decisions. However, the trans-border nature of serious and organised crime increasingly means that in more and more cases European coordination, cooperation and information exchange is needed to ensure that crime prevention is successful and that criminals can be brought to justice. Action at Union level in relation to **police cooperation** is therefore focused on providing a framework promoting closer cooperation between police forces, customs authorities and other competent authorities in the Member States (Article 29 TEU), both in relation to operational cooperation and other forms of cooperation. This cooperation may be direct or facilitated by the European Police Office (Europol). In addition, Article 32 TEU provides that the conditions and limitations under which Member States' competent authorities may operate in the territory of another Member State, in liaison and in agreement with the authorities of that State, should be laid down at Union level.

An evaluation of the progress made under the present Treaty suggests that this is one of the areas where the **current balance of intensity of action at the national and Union levels is the right**

one. The basic framework for cooperation at Union level is in place. The challenge is to ensure that the instruments and bodies that have been established are used as effectively as possible.

The added value of action at Union level comes through the setting of common priorities and the coordination of national approaches, through the exchange of information and expertise, and through facilitating the preparation and coordination of specific actions in the prevention, detection and investigation of criminal offences. It requires the involvement of a several actors – Member States' representatives in the Council to define priorities, national law enforcement chiefs acting together to translate these priorities into specific operational plans based on best practice, Europol to facilitate the exchange of information and to support the competent national authorities in the preparation, coordination and conduct of specific investigations. There is a clear need to strengthen cooperation between these actors in the common framework and with Eurojust and the Commission. Furthermore, permanent agencies may be needed, but only in cases where there is proven added value, and where certain tasks cannot be undertaken by the existing institutions. In other cases instruments such as financing programmes play a continuing role eg in providing assistance to external bodies and NGOs in the field of crime prevention, and in encouraging training and exchange of good practice amongst the Member States' law enforcement authorities. Finally, effective law enforcement cooperation also requires the adoption of certain legislative measures at Union level to set up the framework for effective cooperation, such as measures on the establishment and role of Europol, and to find procedural solutions in cases where cooperation is hindered by diverging national rules such as those governing investigations and evidence-gathering (eg measures on common definitions of the information and intelligence to be exchanged and measures to ensure that evidence is admissible in other Member States).

The mechanisms for putting in place essential measures establishing and maintaining the framework for law enforcement cooperation need to be as efficient as possible if this cooperation is to be effective. This suggests in particular the need to provide Europol with a new legal base, replacing the existing Convention with an instrument which can be adapted more efficiently to changing needs (eg to extend the mandate of Europol to include new emerging forms of crime). This legal base should also provide for funding for Europol from the Community budget and enhanced judicial and democratic control at European level, to complement the control already exercised nationally. Finally, the more technical issues such as the Europol staff regulation and the applicable financial rules should also be subject to more efficient and effective instruments and procedures.

The international nature of serious criminal activity justifies cooperation at Union level, although operational decisions on using these frameworks should remain matters for national decisions alone. In an area of freedom, security and justice based on fundamental rights and common values, the public order of one Member State is equally assured by other Member States. Consideration should therefore be given to how to reflect, in the new Treaty, a sense of ongoing mutual responsibility, translated in practice through a common commitment to the effective use of the common framework for cooperation. An effective response to major incidents such as a terrorist attack on one Member State will require the rapid and effective cooperation of other Member States, eg in the tracing and prosecution of the perpetrators. A pledge of solidarity between Member States in the event of such an incident would provide a strong message not only to deter potential perpetrators but also to reassure the general public that the Union-wide destabilising effects of such an incident would be guaranteed a strong European response.

Effective action to prevent and fight serious crime and terrorism requires action at both national and Union levels. Whilst national competent authorities should remain responsible for decisions on specific operational deployment, action at Union level should focus on further developing the common framework to make cooperation between the law enforcement authorities of the Member States more effective. Both legislative and non-legislative measures are needed to further develop this framework and to ensure that it is used to its full. In particular, there is a clear need to replace the Europol Convention with an instrument which is more easily adaptable and which would provide proper judicial and democratic control at European level. A mutual commitment to the effective use of the framework could be considered as the expression of a shared European responsibility for public order and security based on common values and fundamental rights, which complements and adds value to Member States' own responsibility for national security and public order.

A genuine area of justice in criminal law matters

The Treaty requires that measures be taken in the field of **judicial cooperation in criminal law matters** aimed at achieving a high level of security. Article 31(1) TEU sets out examples of areas

for common action including proceedings and the enforcement of decisions, extradition, compatibility of rules, preventing conflicts of jurisdiction, and minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking. In addition to direct cooperation between national competent authorities, the Nice Treaty (new Article 31(2) TEU) provides for judicial cooperation in criminal matters to take place through Eurojust.

Two main developments since Amsterdam are worthy of note. The first has been the successful establishment of Eurojust. Eurojust has a broad field of competence, but no binding power: its role is one of coordination. Consideration could be given to the possible role of Eurojust in preventing conflicts of jurisdiction, but this is hampered by the fact that as yet no clear rules can be established to give exclusive or priority competence to a particular Member State's jurisdiction in complex cases. That is one of the reasons why a European Public Prosecutor for the protection of the financial interests of the European Community should be established.

The second development has been the growing reality of the principle of mutual recognition as one of the cornerstones of the construction of a European area of justice in criminal matters. The approach is grounded in the principles of subsidiarity and proportionality: it seeks to maintain national regimes whilst providing means for the decisions of these regimes to be recognised and given effect in other Member States. In other words, it is a concept which has at its heart an acknowledgement that full harmonisation – a single European criminal code or a unique criminal procedure - is neither appropriate nor proportionate in this area.

Mutual recognition does however require a common base of shared principles and minimum standards, such as harmonised minimum procedural guarantees for the protection of individuals' rights, and therefore involves accompanying measures to facilitate mutual understanding and confidence. It also requires national law to recognise new means for cooperation, such as the European Arrest Warrant, and to allow these to be applied by national authorities. These two supporting elements – the creation of a base of common principles and the need to ensure that the new means for mutual recognition can be applied – require a degree of approximation of national procedural law and criminal investigation standards. Consideration should be given to including in the new Treaty a general provision enabling the Council to take the necessary measures for the mutual recognition of judicial requests, orders, fines, disqualification decisions, and all other forms of judicial decisions. This should be accompanied by a provision allowing the Council to adopt

measures to put in place an accompanying set of common principles needed to ensure a high degree of protection for the fundamental rights of individuals and to build confidence between Member States' competent authorities.

But in some areas it is necessary to approximate substantive criminal law. The Union has already begun to approximate national rules on the definition of infractions and applicable penalties. The Treaty of Amsterdam cites three particular areas – organised crime, terrorism and drugs trafficking - where this harmonisation constitutes a specific objective in the context of the overall establishment of the area of freedom, security and justice. In reality, the creation of this area implies providing citizens with a high level of security and taking common action both to prevent and fight crime, which requires action beyond the three specific areas cited. This is why the Treaty also provides for common action against trafficking of human beings, offences against children, illicit arms trafficking, corruption, fraud, and racism and xenophobia, whether or not organised crime is involved.

The Council and the Commission have responded to this by adopting action plans and by seeking to respond to the Tampere European Council conclusions which identify a series of criminal phenomena which should be harmonised as a matter of priority. All of the areas in which action has been requested are either already the subject of measures or are currently being addressed. The degree of harmonisation is, however, not total, partly because the exercise must respect the principle of proportionality, and partly because the approach adopted is deliberately progressive. Of course the proportionality criteria must be viewed in the light of the current state of development of the area of freedom, security and justice and it may be that action in relation to harmonisation will need to intensify over time in accordance with this progressive development. In the same spirit, it should not be excluded that in time the need for action at Union level may become clear in relation to other forms of criminality.

The Commission's proposals and the Member States' initiatives in relation to the harmonisation of substantive criminal law submitted to date are fully in the spirit of Protocol 30 on the application of the principles of subsidiarity and proportionality which is annexed to the Treaty of Amsterdam. For the future, each action should be justified in relation to at least one of the following criteria:

- the criminal phenomenon is included in a list of "European crimes" set out in the Treaty. The list would cover crimes which are of transnational nature and cannot be addressed effectively by the Member States acting alone (eg facilitation of illegal entry and residence);

- the absence of action at Union level would threaten a shared European interest which is itself already the subject of a common policy (eg counterfeiting the euro, the fight against environmental crime), in which case substantive harmonisation of criminal law should be seen as an integral part of the toolbox of measures to deliver the objectives of that policy. The scope of this category would match the scope of the common policies set out elsewhere in the Treaty;

- the action at Union level is taken in the light of a demonstrable need to ensure the full application of mutual recognition of judicial decisions and to guarantee the effectiveness of common tools for police and judicial cooperation designed to deliver the area of justice in criminal matters. This principle provides a supplementary possibility of action at Union level where this is deemed necessary for the proper working of judicial and law enforcement activity within the context of the development of the area of freedom, security and justice; this possibility has been used (eg sexual exploitation of children).

The question of the approximation of substantive criminal law is sensitive. It should therefore only be used where necessary as set out above: the aim cannot be to establish a single and comprehensive European criminal law. The decision-making procedures applicable should vary according to the category of crime concerned, as suggested in part 3, section 2 of this contribution.

The development of a genuine area of justice in criminal law matters based on the principle of mutual recognition and the necessary accompanying measures needed to provide a high standard of protection for individual rights and to facilitate mutual understanding and confidence should be included as an explicit objective in the new Treaty. Eurojust's role in preventing conflicts of jurisdiction could be examined. For the protection of the financial interests of the European Community, a European Public Prosecutor should be established. The new Treaty should also set out more clearly the principles which should govern the further approximation of national substantive criminal law, building

on the existing acquis. Harmonisation is justified where the criminal phenomenon in question is included in the list of "European crimes" and/or where the absence of action at Union level would threaten a shared European interest which is itself already the subject of a common policy. To supplement this, harmonisation is also justified where the action at Union level is considered necessary to ensure the full application of mutual recognition of judicial decisions and to guarantee the effectiveness of common tools for police and judicial cooperation designed to deliver the area of justice in criminal matters.

3. Providing the Union with the means to deliver these objectives

Although, as has been noted above, real progress has been made in some areas, overall progress towards establishing the area of freedom, security and justice has been slow. It has to be recognised that this is in no small part due to the specific institutional and decision-making framework attributed to justice and home affairs issues in the current Treaties and their various forebears. In other words, a better definition of the objectives to be pursued and the intensity of action these objectives require, although essential, will not alone deliver the desired improvements in this area. If the aim is to provide the enlarged Union with a basis on which it can act coherently, effectively and efficiently in response to the challenges facing it in this area in the medium term, then serious consideration has to be given to improving the arrangements for initiating, agreeing and controlling the application of the measures needed. In the context of a single Treaty, the instruments and procedures applicable should be defined as a function of the type of action envisaged.

3.1 The right of initiative

At present Member States share a right of initiative with the Commission in relation to measures falling under Title IV TEC and Title VI TEU. From 1 May 2004 the Commission will hold an exclusive right of initiative as regards Title IV TEC. The shared right of initiative will continue to apply to Title VI TEU.

This shared right of initiative deviates from the proven Community method in which the Commission, as guarantor of the common European interest, has a monopoly on the right of

initiative. It is problematic for two reasons. Firstly, proposals from the Member States may not necessarily represent the common European interest nor take into account the specific position of all Member States. It is important to recall in this context that the Commission is uniquely placed to ensure the necessary contact with political and societal actors who would not otherwise be involved in the development of proposed legislation. Secondly, experience suggests that this concurrent right of initiative can be detrimental to the efficient achievement of the agreed political priorities of the area of freedom, security and justice, as it encourages Presidencies to make numerous proposals with narrowly targeted objectives which they hope can be agreed within their period of tenure, if necessary by diverting Council time to them at the expense of the agreed priorities. These two factors have a negative impact both substantively (on the quality and ambition of the measures adopted) and in terms of efficiency of planning and delivery of the common set of objectives set out in the Treaty and by the European Council. For these reasons it is therefore essential that the Commission should be granted a sole right of initiative in relation to legislative activities in all areas of justice and home affairs.

Given that the essence of operational law enforcement falls within the national competence of the Member States, expertise on how, and when, to use police and other law enforcement agencies is largely found at national level. It is therefore appropriate and justified that Member States should retain responsibility for proposing and defining non-legislative operational planning and activities in this area.

In order to ensure the coherency and efficiency of the decision-making process in the context of a single institutional framework, the Commission should be given sole right of initiative in relation to legislative activities in the areas covered by the existing Title VI TEU in addition to the sole right of initiative it will automatically gain in respect of the existing Title IV TEC. As in the case of other policy areas, this right of initiative would be used in the context of the full application of the principles of subsidiarity and proportionality.

3.2 The decision-making process

The limitations of unanimity and simple consultation

Under the current Treaties, a large majority of decisions in relation to the establishment of the area of freedom, security and justice are taken by unanimity in the Council following simple consultation of the European Parliament. Only in relation to two aspects of visa policy does the Council act by qualified majority, and although from 1 May 2004 all aspects of visa policy will be subject to this rule, some aspects of visa policy will continue to be subject only to consultation of the European Parliament. After 1 May 2004 the Council can take a unanimous decision to extend the co-decision procedure to all or some of the areas covered by Title IV TEC (Article 67 TEC). Title VI TEU will however remain subject to unanimity.

The Nice Treaty and its Protocols do, however, provide for some extension of co-decision and qualified majority voting in some limited areas of Title IV TEC. Of these areas, co-decision and qualified majority voting will apply automatically from 1 May 2004 in relation only to civil judicial cooperation (excluding family law). Qualified majority voting and simple consultation of the European Parliament will apply to cooperation between the administrations of the Member States (Article 66 TEC). In the area of asylum, a move to co-decision for determining responsibility for processing an asylum claim and for minimum standards for reception of asylum seekers will only take place on 1 May 2004 provided that the Community legislation defining the common rules and basic principles governing these issues has already been put in place. Finally, a political declaration states the intention of the Member States to apply Article 67 TEC to move to co-decision from 1 May 2004 for external borders (subject to agreement on the scope of measures to be adopted), free movement of third country nationals and illegal immigration.

Inevitably, the requirement for unanimity in the Council is one of the factors which has led to the greatest difficulties in the adoption of the measures needed for the establishment of the area of freedom, security and justice. Even in cases where the political will to act has been made clear at the highest levels, individual Member States have used their power to postpone and block the adoption of measures, forcing last minute compromises and derogations which have a detrimental effect on the ambition and coherence of the measures concerned. In the context of a Union of 27 or more Member States this situation will be untenable. The very limited changes agreed at Nice do little to mitigate the position. In the interest of efficiency, it is essential to make a substantive move in favour of greater use of qualified majority voting in this area.

Improved democratic legitimacy: co-decision for legislative acts and a greater role for national parliaments

To this must be added the question of the role of the European Parliament in decision-making on legislative proposals. At present the European Parliament is consulted on draft measures, and although such consultation is mandatory, there is no obligation on the Council to follow the views of the European Parliament when adopting legislation. As set out above, from 1 May 2004 the co-decision process will be introduced for some of the issues covered by Title IV TEC. But despite the possible implications of legislative measures to be taken in the field of police and judicial cooperation in criminal matters for citizens and their fundamental rights, a move to co-decision is not envisaged in relation to Title VI TEU. In a single Treaty, all legislative measures should be co-decided by the Council and the European Parliament to ensure the democratic legitimacy of the action taken.

Given that the issues raised by the creation of the area of freedom, security and justice touch so directly on the daily life and rights of individuals, it is difficult to justify the present limitations on the role of the European Parliament in decision-making in this area. A new single Treaty should envisage the extension of the co-decision procedure to the adoption of all legislative measures in all areas of justice and home affairs cooperation. Provision could be made for an annual debate on the development of the area of freedom, security and justice.

In parallel to involving the European Parliament more fully in justice and home affairs issues, it is important to involve national parliaments to a greater extent in this area which so directly concerns citizens. Many of the recommendations for enhancing the role of national parliaments already under consideration by the Convention are particularly pertinent for this policy area. More contact between national parliaments and the Commission, especially during the open consultation process on consultative documents such as green papers, white papers and communications, should be encouraged. A mechanism to allow national parliaments to convey their views on compliance of a particular proposal with the principle of subsidiarity would be of particular relevance in relation to the development of the area of freedom, security and justice. National parliaments should also continue to play their key role in ensuring proper democratic control of Europol, a role which should in the future be complemented by control at Union level exercised by the European

Parliament. Finally, consideration should be given to the possible involvement of national parliaments in monitoring and peer evaluation mechanisms aimed at ensuring that European legislation is applied effectively on the ground.

The extension of qualified majority voting

In a single Treaty, in which the objectives at Union level are defined and limited as set out above, and subject to the exceptions described below, decision-making should follow the usual co-decision procedure with the Council acting by qualified majority when adopting legislation. This would include:

- **all measures required to put in place the common asylum system and a common policy on refugees and displaced persons;**
- **all measures required to put in place the common immigration policy;**
- **all measures relating to the crossing of external and internal borders and visa policy;**
- **all measures needed for the creation of a genuine area of justice in civil and commercial matters, including family law;**
- **measures needed for the development of a common framework for cooperation between the police authorities of the Member States, including all decisions relating to Europol;**
- **measures to promote and support the mutual recognition of judicial decisions as the basis of a genuine area of justice in criminal law matters, including the necessary harmonisation of procedural law and all decisions relating to Eurojust;**
- **further measures to harmonise substantive criminal law, building on the existing acquis, where the criminal phenomenon in question is contained in the list of "European crimes" and/or where the absence of action at Union level would threaten a shared European interest in a common policy on which the Council acts by qualified majority voting.**

However, there may be cases in which it could be considered politically opportune to retain the unanimity requirement. Such exceptions could include the creation or the scope of competence of common bodies which would take the place of national competent authorities for the exercise of certain responsibilities. One option would be to set out provisions on the creation, scope and powers of such bodies in the Treaty itself. This has been proposed by the Commission in relation to a European Public Prosecutor. However, in other cases, to achieve a sustainable Treaty text for the medium term, it could be considered preferable to envisage a provision to allow the Council, acting by unanimity and in accordance with the co-decision procedure, to take the necessary decisions to establish such bodies or define their role and powers wherever these powers genuinely reflect a clear transfer of responsibilities from national to Union level. Such a provision could therefore apply to any decision to establish a common border guard.

Operational aspects of law enforcement cooperation, including measures to set out the conditions and limitations under which Member States' police forces, customs authorities and other competent authorities may operate in the territory of another Member State in liaison and in agreement with the authorities of that State (Article 32 TEU) could also be considered a specific case. Decisions on when and how law enforcement authorities should be deployed are the responsibility of Member States, and any measures relating to these decisions could therefore be subject to unanimity in the Council. Similarly, unanimity could apply to measures relating to the use of by one Member State on the territory of another of the powers traditionally exercised at national level.

A third example of an area in which co-decision with unanimity in the Council could be considered justified relates to some measures in relation to the approximation of substantive criminal law. Measures to approximate substantive criminal law in relation to protecting shared European interests in existing common policies should be subject to the same voting regime as the common policies themselves. Unanimity in the Council could be considered appropriate where supplementary action is needed, beyond the list of "European crimes" set out in the Treaty or the need to protect shared interests in existing common policies, to ensure the full application of mutual recognition of judicial decisions and to guarantee the effectiveness of common tools for police and judicial cooperation designed to deliver the area of justice in criminal matters. In such cases the Council could act by unanimity throughout the codecision procedure.

In a single Treaty, in which the objectives at Union level are defined and limited as set out above, it could be considered appropriate for the Council to act by unanimity, and, for legislative measures, within the co-decision procedure, in the following areas:

- **decisions on the creation and powers of common bodies which would take the place of national competent authorities for the exercise of certain responsibilities;**
- **the planning, modalities and scope of operational law enforcement, including measures to set out the conditions and limitations under which Member States' police forces, customs authorities and other competent authorities may operate in the territory of another Member State in liaison and in agreement with the authorities of that State;**
- **measures for the approximation of substantive criminal law where action at Union level is taken in order to ensure the full application of mutual recognition of judicial decisions and to guarantee the effectiveness of common tools for police and judicial cooperation designed to deliver the area of justice in criminal matters.**

Choice of instruments

As regards Title IV TEC, all Community instruments currently provided for in Article 249 TEC are at the disposition of the Community, and the choice of instrument in each specific case is made in accordance with the principles of subsidiarity and proportionality. Title VI TEU provides a specific set of instruments for the delivery of the objectives of that Title. Framework decisions are used for the approximation of the laws and regulations of the Member States and are binding as regards the result to be achieved but leave to the national authorities the choice of form and methods. In other words, this type of instrument is practically the same as the traditional Community directive. Similarly, the Title VI TEU decision closely resembles its equivalent Community instrument. The only instrument provided for in Title VI TEU which does not find a direct equivalent in the Community pillar is the convention, although the Community regulation does equally have direct effect. The convention is an instrument which has already shown its limitations, as was reflected in the changes brought by the Amsterdam Treaty (allowing conventions to enter into force among a limited number of Member States). Practical experience since Amsterdam shows a very strong tendency against using the convention, and to opt for framework decisions instead. This instrument

has proved itself ineffective for the realisation of the area of freedom, security and justice, and should no longer exist under a new Treaty.

The issue of the type of instruments the European Union should use in the context of the future Treaty is a wider matter already under discussion in the Convention. Whatever the Convention eventually decides in this regard, the assessment above strongly suggests that these results should apply equally to all areas of justice and home affairs as to other policy areas.

The legislative instruments needed to develop and maintain the area of freedom, security and justice are similar for those areas covered by the present Title VI TEU as for those covered by the present Title IV TEC. The convention is an instrument which has shown its limitations, is rarely used, and should not be retained for the future. In the interests of simplicity and transparency in a single institutional structure, the general conclusions of the Convention in relation to the future instruments of the Union should beapplied equally across the full justice and home affairs area.

3.3 Implementing and controlling the application of adopted legislation

As more legislation is put in place to establish and develop the area of freedom, security and justice, it is essential that efficient means are developed to allow that legislation to be implemented efficiently and its application to be controlled effectively.

Attributing executive powers

As in other areas, many measures adopted in the justice and home affairs area require the subsequent adoption of implementing rules. As noted in the White Paper on European Governance[3], responsibility for executing legislation by adopting implementing rules is generally conferred upon the Commission, subject to the conditions laid down by the legislation and under the control of the legislator. The present Article 202 TEC applies to Title IV TEC and sets the norm that the Council confers implementing powers on the Commission. There is no Article 202 TEC

[3] COM (2001) 428 final of 25 July 2001

type provision under Title VI TEU, but the Council has nevertheless decided to confer implementing powers on the Commission in relation, in particular, to funding programmes.

There is a strong case for formalising current practice by making clear that responsibility for implementing rules should lie with the Commission in relation to instruments adopted under the present Title VI TEU.

Controlling the application of European legislation at national level

Particularly in the justice and home affairs area, where competence will remain shared between the Member States and the Union level, it is important to underline the increasing need to ensure that legislation is applied properly on the ground by the Member States' competent authorities. European-level action in sensitive areas such as police cooperation and external border control requires a high level of mutual confidence that national practice at the operational level is fully in line with the common rules or practices agreed. An existing system of evaluation of Member States' proper application of the Schengen rules ensures through regular on-the-spot checks that the rules are being applied at operational level. This and other systems of monitoring and peer-review could well be useful in other areas too, eg a peer-review system could provide the transparency needed for the development of the mutual confidence that has to underlie an effective common visa policy.

In addition to monitoring practical application of Union rules, it is also essential that where instruments deliberately leave a wide margin of manoeuvre to the Member States as regards the means to achieve the common objectives set out, they are properly transposed into national legislation. This applies equally to legislation in areas currently falling within the First and Third Pillars. In relation to Title VI TEU, the need for monitoring of the application of legislation has been recognised, and many instruments provide for the Council, and increasingly the Commission, to monitor and produce regular reports on implementation. These reports serve as a means to put political pressure on Member States which are in breach of their obligations, but without any legal means of enforcement. As the body of Union law grows, and increasingly affects the interests of citizens, it becomes increasingly difficult to explain why in relation to Title VI TEU there is no legal means to ensure that Member States fulfil their obligations in this area, such as the formal

infringement procedures set out in Articles 226 and 227 TEC and which apply in full to the present Title IV TEC.

In the area of justice and home affairs a sense of mutual confidence between Member States in relation to the practical application of the Union's common rules is essential. There is scope for enhancing peer-review, evaluation and monitoring mechanisms which would focus on checking the real application of Union rules at operational level. This should complement an extension of the formal infringement procedures provided for in Articles 226 and 227 TEC to measures adopted under the present Title VI TEU (including the possibility of sanctions) to ensure proper transposition and implementation.

Ensuring proper judicial control

The need to improve judicial control over justice and home affairs to a level comparable with that applicable in relation to other common Union policies has already been noted several times during the work of the Convention. Under the present Treaties, the jurisdiction of the European Court of Justice in relation to Title IV TEC and Title VI TEU is subject to a series of specific rules. In the present Title IV TEC (Article 68 TEC):

- only the highest courts of appeal in the Member States may make references for preliminary rulings to the European Court of Justice. The aim of this measure is to avoid overburdening the European Court of Justice and causing serious delays in processing individual cases in relation to Community legislation on asylum and immigration. However, the Nice Treaty gives the Court the opportunity to establish judicial panels to deal at first instance with specific types of cases. The possibility of using this provision in relation to specific areas of justice and home affairs policy should be examined carefully. Although in a transitional period it may be necessary to retain the national filter, if such panels are created then this specific provision will no longer be needed;
- the Council, the Commission or a Member State may request the European Court of Justice to give a ruling on a question of interpretation of Title IV TEC or acts adopted pursuant to it. This

provision is unique in the Treaty and has never been used, which raises the question of whether it is really needed;

- the Court does not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) TEC (suppression of controls at internal borders) relating to the maintenance of law and order and the safeguarding of internal security. But when a Member State takes national measures to reintroduce temporary checks on persons at internal borders for reasons of maintaining law and order and the safeguarding of internal security, such measures have a direct impact on the exercise of free movement and should therefore be justified and proportionate. Yet in this case (unlike in the case of eg expulsion decisions affecting individuals' right of free movement) there is no means of control of the legality and proportionality of such measures, which is difficult to explain to the individuals whose rights are affected. Similarly, proper judicial control at Union level would be an essential aspect of any future mechanism for a coordinated reinstatement of internal border checks in the event of a major security threat potentially affecting the public order of a number of Member States.

It is important for the legitimacy and proper application of European legislation that the jurisdiction of the European Court of Justice in relation to the issues currently covered under Title IV TEC should identical to that applicable elsewhere. The filter mechanism provided for under Article 68(1) TEC should no longer be needed if recourse is made to the provisions of the Nice Treaty aimed at ensuring that the Court has the capacity to cope with an increasing workload, and in particular if specialised judicial panels are set up to deal with particular categories of justice and home affairs issues. The second of the specific provisions on the role of the European Court of Justice in relation to Title IV TEC has never been used and its value is questionable. The third specific provision excludes legal recourse as regards the justification for and proportionality of national measures to temporarily reinstate checks on persons at internal borders. This exception is difficult to justify in the context of the balanced development of an area of freedom, security and justice. .

Article 35 TEU establishes a specific regime of legal control for the areas covered by the present Title VI TEU. Measures adopted in the areas of police cooperation and judicial cooperation in criminal matters pursuant to Title VI TEU directly affect fundamental rights and liberties. A

specific regime of legal control for these areas cannot be justified in relation to preliminary references (where jurisdiction is currently subject to variable geometry), the legality of acts, and the settlement of disputes. In the context of a single institutional structure, these questions should be dealt with in a way comparable to the normal rules on the jurisdiction of the European Court of Justice applicable in the existing Community Pillar. As regards the validity or proportionality of operations carried out by law enforcement authorities, in an area of justice it is essential that these issues are also subject to proper judicial control. Of course, under the general rules on the competence of the European Court of Justice, this recourse could only ever be at Union level where the operations concerned constituted the implementation at national level of European law. In all other cases, the Court would continue to have no competence.

Measures taken at Union level in relation to police and judicial cooperation in criminal law matters have a direct effect on rights and freedoms. In a single Treaty they should be subject to judicial control in line with that applicable to other common policies. The Court should also competence in relation to the proportionality and justification of law enforcement operations where those operations implement European law. These questions are also under discussion by the Convention in the context of the future incorporation into the Treaty of the Charter of Fundamental Rights of the European Union.

4. Conclusions

The development and maintenance of the Union as an area of freedom, security and justice, based on the principles of democracy, respect for fundamental rights and freedoms, and the rule of law, is undoubtedly one of the key objectives for the present and future Union. The successful delivery of this objective is one of the main criteria by which our citizens will judge the value that the European Union brings. The expectations are very high – and the challenges too. Challenges such as asylum, immigration, and the fight against crime and terrorism require coherent and effective action at both national and Union levels. Making a reality of an area of freedom for all, in which a high level of safety is balanced by effective and fair systems of justice and full respect for fundamental rights, is no easy task – it requires ambition, commitment and a great deal of energy at all levels.

The Convention has an historic opportunity to design a Treaty which can ensure that an enlarged Union is able to play its full part in delivering this shared objective, and that it can do so efficiently, democratically and transparently. This means reviewing both the substance and intensity of the action needed at European level, as well as the procedures and instruments put at the Union's disposal.

In terms of the substance and intensity of action needed at Union level, the new Treaty should provide for:

- a common asylum system and a common policy on refugees and displaced persons;
- a common immigration policy, including measures on illegal immigration and illegal residence;
- measures on the rights of third country nationals, and for incentive and support measures in the field of integration;
- the development of a common system of external border management;
- a mutual commitment by Member States to the effective use of the Union framework for law enforcement cooperation as the expression of a shared European responsibility for public order and security based on common values and fundamental rights;
- mutual recognition of all forms of judicial decisions in criminal law matters, as well as measures to put in place the necessary set of common principles and standards to ensure mutual confidence;
- greater clarity in relation to the principles which should govern the further approximation of national substantive criminal law, building on the existing acquis.

In terms of instruments and procedures, the aim should be to bring together all aspects of justice and home affairs policy within one single institutional framework and one single Treaty. Within this single framework, the instruments and procedures applicable should be defined as a function of the action foreseen under the specific objectives as follows:

- a sole right of initiative for the Commission in relation to all legislative activities covered by the existing Title VI TEU as well as in relation to Title IV TEC;
- application of the co-decision procedure to all legislative acts, with qualified majority voting in the Council the general norm;
- abolition of the existing Third Pillar instruments in favour of the application of the new set of instruments to be decided by the Convention;

- implementation powers for the Commission in line with those applicable in other policy areas;
- development of peer-review, evaluation and monitoring mechanisms and application of the infringements procedures across all areas of justice and home affairs;
- rules on the jurisdiction of the European Court of Justice which are in line with those applying to other common policies.

Developing and maintaining a European area of freedom, security and justice represents a challenge comparable to that the Union has already faced in creating a genuine internal market. As was the case with the internal market, in this area an ambitious political idea now needs to be underpinned legally. The new Treaty will need to define and spell out clearly the Union's priority objectives, as well as the level of action needed at European level. It will need to set out procedures which guarantee the effectiveness and promptness of decision-making, as well as that the measures adopted are implemented properly. The forthcoming enlargement will mean that the number of Member States – and the number of citizens who rightly expect the advantages of living in an area of freedom, security and justice – will increase on an unprecedented scale. The goal of this process is to ensure that the Union of tomorrow can rise to this challenge and deliver what its citizens expect.
