

Working Group X

Working document 17

Working group X « Freedom, Security and Justice »

Subject : Summary of the Paper submitted by M. Antonio VITORINO, Commissioner,
Member of the Convention (WG X - WD 14)

CONTRIBUTION OF MR VITORINO TO WORKING GROUP X (“FREEDOM, SECURITY AND JUSTICE”) OF THE CONVENTION ON THE FUTURE OF EUROPE

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

The development and maintenance of the area of freedom, security and justice is undoubtedly one of the **essential missions of the present and future Union**. A general consensus has emerged amongst citizens and governments alike that this is an area in which **“more Europe” is needed**.

The **challenges** posed to our societies in areas such as asylum, immigration, and the fight against crime and terrorism can no longer be adequately met by national measures alone. Our citizens expect an **effective response** to these questions, and that means **coordinated action both at national level and by the European Union**. At the same time, there is a feeling that the desired degree of action at European level could, for reasons of transparency and clarity, be **better defined**.

Where there is an identified need for the European Union to act, there is a strong consensus, reflected in the discussions of the Working Group, that it needs to do so with far more **efficiency, transparency, coherence and judicial oversight** than at present. In this context, all aspects of the area of freedom, security and justice should be brought together within **one institutional framework under the new Treaty**, as has already been proposed in the Convention. But, as the Commission has already noted¹, the abolition of the Pillar structure does not necessarily mean that the traditional Community procedures are appropriate in all areas: in each case, the procedures applicable should correspond to the objectives set and the degree of intensity of action needed at European level.

The Union is on the brink of an **enlargement** which is unprecedented in scale. The challenge for the Convention is to ensure that the area of freedom, security and justice, based on the principles of democracy, respect for fundamental rights and freedoms, and the rule of law, is a **reality** in a Union of 27 or more Member States.

¹ COM(2002) 247 final of 22 May 2002

That means addressing **two fundamental questions**:

- What does the area of freedom, security and justice mean in an enlarged Union, and how can this be reflected in a set of **sustainable objectives** in the new Treaty which demonstrate more clearly the **respective roles** of Member States and the European Union?
- Within a **single institutional framework**, what are the **procedures and instruments** needed to ensure that the enlarged Union can act coherently, effectively and efficiently to fulfil these objectives?

1 The objectives of an area of freedom, security and justice in an enlarged Union and the degree of action needed at European level

Visas, asylum, immigration and other policies related to free movement of persons (Title IV TEC)

It is essential to revisit the objectives set out in the present Title IV TEC and to adapt them to the needs of an enlarged Union. In a number of cases, it has already been recognised at the highest political level that more ambitious action is needed at European level if the enlarged Union is to meet the shared challenges it faces.

- *A common policy on asylum, refugees and displaced persons*

As the Tampere European Council recognised, the challenge posed to our societies in the area of **asylum, refugees and displaced persons** can only be managed by concerted action at European level. It requires a genuine **common asylum system**, with a common procedure and a uniform status, not just minimum standards.

A **new Treaty provision** should allow the adoption of all measures needed to put in place a common asylum system and a common policy on refugees and displaced persons. This implies harmonisation of national legislation, but also other forms of action, such as the introduction of the open method of coordination.

- *A European immigration policy*

The development of a **common immigration policy**, including measures to combat illegal immigration and residence, should be recognised as an **autonomous objective** in the new Treaty. This common policy does require some harmonisation of national legislation, but this should be complemented by other forms of action such as the open method of coordination.

Greater attention must be paid to the **rights of legally resident third country nationals**, as recognised by the Tampere European Council. The new Treaty should allow for third country nationals to be granted rights and obligations comparable to those of citizens of the Union, particularly as concerns the right to participate in political life at local level.

Finally, the new Treaty should allow the Union to adopt support and incentive measures to complement and add value to the policies for the **integration of third country nationals** developed at national, regional and local levels.

- *Free movement of persons and integrated management of external borders*

In an area without internal border controls, the effective management of our **external borders** is a matter of shared interest and responsibility. Enlargement will bring new frontiers, with particular geographical challenges. The Seville European Council therefore welcomed the objective of the gradual development of an integrated system of external border management. **The new Treaty should recognise this objective and provide a legal base for all the necessary measures to be taken.**

In the interests of simplification, measures on **visas** should be incorporated into a single Treaty provision on the development of a common visa policy. In this and other aspects of the management of external borders, the **harmonised rules first set out in the context of Schengen will need to be developed further**. But measures to build mutual confidence, including increased transparency and peer monitoring will also remain vital. Mechanisms for financial solidarity can also be envisaged, and in the longer term it may be necessary to put in place a common European border guard.

Finally, the new Treaty should reflect more clearly the shared European interest in questions concerning temporary reinstatement of **internal border checks** in the interests of security and public order. Decisions to reinstate such checks should be subject to political and judicial control at European level. A **mechanism for the coordinated reinstatement of internal border checks** in the event of a major security threat to a number of Member States should be considered. This would contribute to the emergence of a sense of a European public order.

- *A genuine area of justice in civil and commercial matters*

The reality of free movement in the internal market means that citizens and businesses are increasingly pursuing their private and commercial interests across internal borders. It is essential that they can have **proper, uncomplicated access to justice** where these interests are challenged.

Citizens' concerns are growing in areas such as personal status or the patrimonial consequences of the break-up of married and unmarried couples. Failure to deal with these questions presents a potential constraint on free movement of persons and would therefore undermine the proper functioning of the internal market. Further harmonisation to deliver a **genuine area of justice in civil and commercial matters** must be set in this context. It should also take full account of the need to avoid duplication of regimes (one for cases with proven cross-border aspects, another for internal cases).

Police and judicial cooperation in criminal law matters (Title VI TEU)

The primary objective of the present Title VI TEU is to provide citizens with a **high level of safety in which they can enjoy in full the benefits of free movement**. In an area without internal border controls, action at European level is needed to ensure that the benefits of free movement cannot be exploited by criminals and terrorists. At the same time, questions of policing and criminal law remain very sensitive matters. It is therefore important to revisit the objectives set out in Title VI TEU and seek to clarify the respective responsibilities of national and European levels.

- *A high level of safety through common action in the field of law enforcement cooperation*

Effective action to prevent and fight serious crime and terrorism requires action at both national and European levels. The current balance of responsibilities between these two levels is the right one. National law enforcement authorities should remain responsible for decisions on specific operational deployment.

But there is a need for action at European level to provide an **effective common framework** to facilitate effective cooperation between authorities. The new Treaty should provide for the adoption of the legislative and non-legislative measures needed to further develop this framework and to ensure that it **easily adaptable** to the changing reality of criminal activity. There is, for example, a clear need to replace the Europol Convention with a **more flexible instrument** and provide enhanced **judicial and democratic control** at European level. Fully effective cooperation may also imply the need to find common procedural solutions, for example to overcome difficulties created by diverging national rules on investigations techniques or evidence gathering.

Finally, a **mutual commitment** by the Member States to the full use of the common framework for cooperation could be considered. This would be another expression of a shared European responsibility for security and public order which complements the ongoing responsibilities of Member States for these issues;

- *A genuine area of justice in criminal law matters*

The principle of **mutual recognition** as a cornerstone of judicial cooperation in criminal matters should be written clearly into the new Treaty. This principle seeks to maintain national criminal law regimes whilst allowing the recognition and enforcement of national decisions by other Member States. It does however require the adoption at European level of a series of **accompanying harmonisation measures** to provide a high standard of protection of individual rights, to find solutions to procedural differences which hinder cooperation, and to facilitate mutual understanding and confidence.

But in relation to some types of crime it is necessary to put in place **harmonised rules on the definition of infractions and applicable penalties**. The new Treaty should set out more clearly where this harmonisation of substantive criminal law is necessary, building on the current *acquis*. The new Treaty should therefore provide for harmonisation in relation to:

- **a set of “European crimes” which would be defined in a list in the Treaty itself.** The list would cover crimes which are transnational in nature and cannot be addressed effectively by one Member State acting alone (eg facilitation of illegal entry and residence);
- **crimes which threaten a shared European interest in an existing common policy** (eg counterfeiting of the euro, environmental crime). In such cases harmonisation of substantive criminal law must be an integral part of the toolkit of measures available to allow the Union to deliver the objectives of the common policy;
- **crimes for which experience clearly shows that full application of mutual recognition and effective law enforcement cooperation cannot take place without substantive harmonisation.** This category provides a supplementary possibility of action at Union level where this is proven necessary in practice (as has already been the case in relation to the sexual exploitation of children).

2. **The institutional framework needed for an enlarged Union to deliver these objectives**

A better definition of the objectives to be pursued and the intensity of action needed at Union level, although essential, will not alone allow the area of freedom, security and justice to become a reality in the enlarged Union. The procedures and instruments applicable to justice and home affairs issues should be revisited in the context of a single Treaty, to ensure that the Union can act coherently, effectively and efficiently to deliver the objectives set in this area.

- *An exclusive right of initiative for the Commission*

The right of initiative currently shared by the Member States is problematic. Proposals from the Member States may not represent the **common European interest** or take into account the **specific**

position of all Member States. Experience suggests that **Member States' proposals can be detrimental to the achievement of common objectives** because Council time is diverted to them at the expense of agreed priorities. These two factors have a negative effect both **substantively** (on the quality and ambition of the measures adopted) and in terms of **efficiency and coherence**.

To ensure coherence and efficiency in the delivery of the area of freedom, security and justice, the Commission should be accorded **an exclusive 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 other areas, this right would be applied with full respect for the principles of **subsidiarity and proportionality**.

Given that expertise on how and when to use police and other law enforcement authorities lies with national authorities, it is appropriate and justified that Member States should retain responsibility for proposing and defining **non-legislative operational planning and activities** in this area.

- *The decision-making process*

The present Treaty provides for the vast majority of decisions needed for the creation of the area of freedom, security and justice to be taken by the Council acting by **unanimity** after **consulting** the European Parliament.

The unanimity requirement has led to **significant delays** in decision-making. Even in cases where the political will to act has been 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** to the detriment of the coherence and ambition of the measures concerned. In the context of a Union of 27 or more Member States, **this situation is untenable**. The very limited changes introduced by the Nice Treaty do little to mitigate the position. In the interests of efficiency, it is essential to make a substantive move in favour of **greater use of qualified majority voting** in this area.

The fact that the **European Parliament** is only consulted on legislation in this area is difficult to justify given that these issues touch so directly on the daily life and rights of citizens. In the

interests of democratic legitimacy, the new Treaty **should extend the codecision procedure to all legislative measures needed for the area of freedom, security and justice.**

In the new Treaty, legislative measures should be adopted in accordance with the **codecision procedure** with the Council acting by **qualified majority** in relation to:

- 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 management and crossing of **external and internal borders** and the **common 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 law enforcement 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**;
- measures to **harmonise substantive criminal law** where the criminal phenomenon in question is **included in the list of “European crimes”** and/or where the type of crime concerned threatens a **common European policy** on which the Council acts by qualified majority.

However, in a single Treaty and in line with the principle that the abolition of the Pillar structure does not necessarily mean that the traditional Community procedures are appropriate in all areas, it could be considered opportune to retain **unanimity**, with **codecision for legislative measures**, in relation to a limited number of specific areas. One such area could be decisions on the **creation, scope and powers of common bodies which would take the place of national competent authorities for the exercise of certain responsibilities**. One option would be to set this out in the Treaty itself, as the Commission has proposed in relation to a **European Public Prosecutor for the protection of the financial interests of the Community**. However, in other cases, to achieve a sustainable Treaty text for the medium term, it could be considered preferable to allow the Council to take such decisions by unanimity eg in relation to the possible establishment of a **common**

border guard. Similarly, it could be considered appropriate to retain the unanimity requirement for the **planning, modalities and scope of operational law enforcement activities**, 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. Finally, similar considerations could apply to measures for the **approximation of substantive criminal law where the crime is not included in the list of "European crimes"** but where experience shows that full application of mutual recognition and effective law enforcement cooperation cannot take place without substantive harmonisation.

In parallel to this, more should be done to involve **national parliaments** in policy-making this area, for example, through encouraging their active participation in consultation exercises launched by the Commission prior to the presentation of legislative proposals, and through ensuring that justice and home affairs issues are subject to any mechanism allowing national parliaments to convey their views on compliance with the principle of subsidiarity.

- *Choice of instruments*

With the exception of the convention, the specific legislative instruments provided for in Title VI TEU all find their **direct equivalent** in the current Community pillar. The **convention** is an instrument which has shown its limitations, carries the risk of delays in ratification by national parliaments, is rarely used, and **should not be retained for the future**. In the interests of simplicity and transparency in a single Treaty, there is no reason why the **general conclusions** of the Convention in relation to the future instruments should not be applied equally to all areas of justice and home affairs policy.

- *Implementing and controlling the application of adopted legislation*

In many areas of justice and home affairs it is vital that Member States have a sense of **mutual confidence** that common rules are being properly applied on the ground. There is scope for **enhancing peer-review, evaluation and monitoring mechanisms** to check the real application of Union legislation at operational level. A role for national parliaments could be foreseen in this respect.

This should be a complement to the **extension of the formal infringement procedures** to all aspects of justice and home affairs. As the body of Union law grows and increasingly affects the interests of citizens, it becomes increasingly difficult to explain why in relation to the present Title VI TEU there is no legal means to ensure that Member States fulfil their obligations to properly transpose and implement legislation in this area.

- *Ensuring proper judicial control*

Measures taken at European level to promote the area of freedom, security and justice have a direct effect on citizens' rights and freedoms. In a single Treaty, they should be subject to judicial control at European level in line with that applicable to other common policies.

In relation to the present Title IV TEC, the provision that only the **highest courts of appeal in the Member States may make references for preliminary rulings** to the European Court of Justice should no longer be needed if recourse is made to the possibility of setting up specialised judicial panels as agreed at Nice. The current exclusion of **measures to temporarily reinstate checks on persons at internal borders** from the jurisdiction of the Court is difficult to justify in the context of a balanced area of freedom, security and justice, and should be abolished.

In relation to police and judicial cooperation in criminal law matters, the Court should be granted competence in relation to the **proportionality and justification of law enforcement operations** where those operations implement European law.

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 effectively** and subject to proper **judicial and democratic control**.

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 the Convention, and therefore of the Working Group, must be to ensure that the Union of tomorrow can rise to this challenge and **deliver what its citizens expect**.