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Subject : Comments of Mrs Ana Palacio, Member of the Convention, Representative of the Spanish Government, on the WD 05

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JUSTICE AND HOME AFFAIRS IN THE EUROPEAN CONVENTION

On 8 November 2002 the Chairman of Working Group X (Justice and Home Affairs) of the European Convention presented an initial reflection paper containing the principal ideas expressed during the course of previous meetings of the group. This document (WD5) shall serve as the basis for discussion in defining the position that the Group will present at the European Convention Plenary session.

Subsequent to careful study of the document, the position taken on the principal issues identified is presented herein:

A. INTRODUCTION. "GOLDEN RULES".

The creation of the European Area of Freedom, Security and Justice figures as one of the maximum accomplishments of the Treaty of Amsterdam. However, the imperative of initiating the process from a pre-existing structure of strictly inter-governmental cooperation as was stipulated in the Treaty of Maastricht, forced Amsterdam to uphold a structure half-way between inter-governmental and Community. To a large degree, the difficulties that have arisen over the last several years in the development of Justice and Home Affairs in the European Union are due to this complex legal structure.

Although the programmed objectives of this European Area remain valid, their fulfilment requires new approaches and to this end full use should be made of the opportunity presented by the treaty modification process initiated at the Convention.

The objectives outlined in Article 61 of the EC Treaty and in Article 29 of the TEU are, in fact, the basis for the European Area of Freedom, Security and Justice and should continue to be so. Although it is quite possible, and this would be the first of the Convention's contributions, *that a clearer and more concrete expression of those objectives could be advisable, making them more comprehensible for Union citizens.*

The European Council, in its pluri-annual strategic programmes, should establish periodically the main areas of work and lines of action for the different fields covered by JHA matters. The Council, together with the Commission and in close consultation with the European Parliament, would agree annual programmes of work. National parliaments would have to be associated to this exercise.

In general terms, the two "golden rules" on which the Convention Working Group's analysis is based are right: the need to overcome the "two-pillar" structure without prejudice to the peculiarities that would have to be upheld in certain areas and the opportunity to draw a distinction between legislative issues and merely operational ones.

Prior to this and from a systematic perspective, it would help to propose, *under one single Title in the Treaty, an integrated structure including all Justice and Home Affairs issues; this title being precisely the "European Area of Freedom, Security and Justice"*.

The Title should deal first with matters of a horizontal character: objectives, methods and instruments (harmonisation of legislation, mutual recognition, other means of co-operation), monitoring and evaluation. A second part of the Title will refer to the different areas of action: asylum and immigration, co-operation in civil and criminal law matters, police co-operation.

B. LEGISLATIVE PROCEDURES

Principles for Union legislation

The suppression of the "two-pillar" arrangement calls for a compulsory redefinition of procedural rules based on the following principles:

1. Full intervention of the European Parliament in the legislative procedure, reinforcing the principle of Parliamentary intervention in the taking of decisions affecting issues within the scope of JHA.

2. Application, as a general rule, of the qualified majority rule to all aspects regarding which there is a need for harmonisation of administrative procedure and procedural law (including mutual recognition mechanisms).

3. Preservation of a restricted use of the unanimity rule, reserving it for the regulation of the coercive aspects of public security, the definition of material criminal law or of family law and, in general, for those areas in which the meddling of the public authorities in citizens' rights is more pronounced or where the different legal and social traditions of the Member States should have a certain margin for action.

   Even in these restricted cases, the application of the unanimity rule should be counterbalanced by mechanisms that prevent situations of deadlock. To this end, closer co-operation and "constructive abstention" mechanisms should be facilitated and applied.

   After a transitional period, to be determined, the application of the unanimity rule would be reviewed. During this transitional period, efforts would be undertaken in order to define by unanimity a "European concept of law and order" ("*ordre public européen*") in accordance with criteria incorporated into the future Treaty. Once agreed, that concept (always evolutionary; i.e., through the pluri-annual strategic programme of the European Council) would be the basis on which to take decisions by qualified or super-qualified majority.

4. Preservation of the shared right of initiative between the Commission and the Member States.

   The criticisms levelled at the preservation of the right of initiative by the Member States focus either on the fact that it often implies a lack of coherence in the Union action or on the "pressure" that its very existence exerts on the States holding the rotating presidency to use such initiative.

   These disadvantages could be avoided while at the same time strengthening the trust level of those that favour a more gradual integration if a "take into consideration" procedure were established (which is in fact part of some of our national parliamentary procedures) thus making Member States' initiatives subject to –in contrast with those of the Commission- a procedure by

which the Council, before initiating the processing and discussion of the proposal, would have to decide, by means of a simple majority, whether the initiative coincides with Union objectives and merits discussion at that point in time.

5. Harmonisation of the types of norms adopted within the scope of JHA by means of the solution agreed to regarding the simplification of the Union's legal instruments. At any rate, this would imply abandoning the instruments of a strictly inter-governmental nature such as international conventions that have not proven to be very effective.

   Simplification and harmonisation of the instruments should not be incompatible with the preservation of duly justified peculiarities. From this perspective it is considered relevant in the approximation of material criminal law –common definition for constituent elements of criminal acts- that the principle of the lack of direct effect be preserved. Two reasons justify this exception. On the one hand it should be pointed out that the creation of material criminal law, the identification of punishable behaviours, is closely linked in our societies to parliamentary intervention and this calls for preservation of greater powers of intervention for the national parliaments. On the other hand, it should not be forgotten that there is a need to make the common definition of the constituent elements of crimes in the Union compatible with the different legal traditions of the Member States.

C. CONCRETE POLICIES

1. Visas, frontiers, immigration, asylum.

This area has received quite a bit of political and social notoriety over the last several years due to the increase in migratory flows towards the European Union.

All of the different aspects of policies related to third-country nationals form part of the same structure and therefore harmonisation in the different spheres should progress in a uniform and balanced fashion.

Visas.

Progress should be made on the drafting of a common visa policy, simplifying the wording of Article 62.2 of the EC Treaty in such a way that it includes, in a general sense, the adoption of common criteria on matters of short-term visas especially when it comes to technical issues involving forms, procedures, etc.

Turning to long-term visas, currently exclusively under national jurisdiction, these should be subject to certain common criteria once the entry and residency policies applicable to third-country nationals are harmonised.

Frontiers.

In practice, external frontiers are no longer the exclusive interest of the State in question but have now become the common Union frontiers of the internal area of free movement. This means that management must be as harmonised as possible. The objective of putting together a European corps of border guards could be advantageous over the long term. The technical and political complexity that the creation of this corps entails, however, indicates that an all-out effort should not be

expended trying to achieve this objective but rather, coordination among the border forces of the different Member States through the establishment of joint teams, standardised operational regulations, common formation, etc. should be promoted.

When external frontiers are controlled for the benefit of all, provisions should also be made for common material and financial resources.

The importance of the progressive harmonisation of external frontier management makes it advisable to use the co-decision procedure in these matters as well, although prior agreement should be reached on the scope of application of the measures relating to the crossing of external frontiers as is set out in the Declaration annexed to the Final Act of the Nice Treaty with regard to Article 67 of the EC Treaty.

Immigration.

There is an urgent need for defining a comprehensive common policy in this field. It is important for a common immigration policy to cover those aspects relating to legal immigration as well as the fight against illegal immigration and trafficking in human beings. Political choices will have to be made.

This implies that limits pertaining to the harmonisation of national policies should not be established *a priori* but rather a certain margin of manoeuvrability should be provided for thus allowing Member States to keep special policies rooted in the historical and cultural links that they may share with some of the immigration countries of origin.

The integration of legal residents can be improved through the application of specific policies that entail not only the concession of social assistance and the recognition and protection of their civil rights but also education regarding the values of our societies.

The co-decision procedure must be used in the application of immigration policies with the same intensity as in asylum policies because that will be the only way of forging ahead in a Europe with twenty-five Member States.

Asylum.

One of the principal problems with Member States' asylum systems is the fraudulent use made of them by individuals who are not really seeking protection: these persons are actually "economic" immigrants often arriving under irregular conditions who then apply for asylum in an attempt to normalise their situation or attain the social and economic benefits associated with asylum status.

This is why harmonisation in the area of asylum should go hand-in-hand with that of immigration because we will not be able to remedy the dysfunctions of the asylum system if immigration polices remain substantially different.

Article 63 of the EC Treaty foresees the adoption of common minimum rules on asylum matters; this provision should be reformed and advances should be made towards genuinely common rules, without foreclosing the possibility of a common European asylum. With regard to the administrative and judicial procedures applicable in each Member State, priority should be given to the guarantees of the asylum seeker while leaving specific enforcement up to the discretion of each

Member State. The Community regulation should not be burdened with detail that could clash with very diverse administrative traditions.

The legislative procedure should be that of co-decision.

With regard to the question of the reception of refugees and displaced persons, the principle of "double acceptance" (by the individual and by the Member State concerned) should be kept. Appropriate financial assistance to receiving States shall be provided in accordance with already existing legislation.

2. Co-operation in civil and criminal law matters.

Co-operation in civil law matters

EC Treaty Article 65 in restricts the scope of judicial co-operation in civil matters to issues that have cross-border repercussions and to the degree necessary to allow for proper internal market operation. This very limited margin of manoeuvrability has been criticised for its restrictive effect on European Community work.

For that reason, the Tampere European Council provided civil law co-operation with more political content alluding to a "genuine European Area of Justice" based on improved access to justice and greater convergence of civil law.

Moreover, it is forgotten that often the approximation of Member States' civil law, ridden with difficulties in the concrete development of judicial co-operation based on Title IV of the EC Treaty, develops without a hitch in other spheres that, due to their effect on other specific Community policies, are founded on other Treaty precepts (e.g.: consumer protection).

The above reflections lead to proposal for reform and improvement of the legal basis on which judicial cooperation in civil matters is based within the European Area of Freedom, Security and Justice.

As a programmed objective of law co-operation in civil matters, an allusion should first of all be made in the Treaty to an objective already expressed in the Conclusions of the Tampere European Council: "citizens should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal and administrative systems in the Member States". All of this rounded off with the necessary co-operation "for the development of the freedoms recognised in the framework of the Treaty and, when appropriate, the exercise of citizens' rights".

Based on these two objectives, the Treaty should outline the actions that the Union is responsible for:

- Foster compatibility of civil procedure rules applicable in the Member States.
- Mutual recognition of judicial decisions.

- Co-operation among judicial authorities throughout the different stages of the process including extra-judicial conflict resolution systems.
- Harmonisation of the rules applicable to conflicts of law and jurisdiction.

Co-operation in criminal law matters

The aim of this sector of the Area of Freedom, Security and Justice, together with that of police co-operation, should be to guarantee citizens a high degree of legal protection and security against crime by means of its prevention, persecution and punishment, including the protection of crime victims. This should be reflected in these terms in the Treaty.

When it comes to delimiting the Union's scope of action, the current Treaty employs diverse criteria that are not always congruent: the reference to crime "organised" or otherwise, the cross-border element or the list of a series of especially relevant crimes.

In enunciating the general objectives of police and law co-operation in criminal matters, however, it does not seem necessary to resort, as the Treaty does, to a general restriction or delimitation of the Union's scope of action. The most suitable solution would be to refer to the goal expressed in the first paragraph of this section as the general heading for this sector of the European Area. The setting of criteria to delimit Union's competencies would be called for however when concrete areas of action are examined (e.g.: the rapprochement of legislation on matters of material criminal law).

The main areas for action should be:

- Harmonisation of the general concepts of Member States' criminal systems (e.g.: the concept of perpetrator and ways of taking part in a crime), with a view to guaranteeing the compatibility of said systems with the successive approximations of laws relating to the constituent elements of criminal acts and to penalties.

- Approximation of laws relating to the constituent elements of criminal acts and to penalties in the case of certain crimes.

  The mere mention of the fight against crime to delimit the Union's scope of action is not compatible with the demands stemming from the principle of subsidiarity and thus the need to clearly define the field within which this approximation work is to be carried out. During the course of the Convention Working Group discussions, several different alternatives have been suggested that are not necessarily incompatible.

  The need to guarantee a certain margin of flexibility in the Union's response points to the usefulness of resorting to a mixed system in which we have, on the one hand, the general criteria used to define the spheres in which the legislative approximation should be applied and, on the other hand, a non-exhaustive list of the crimes and behaviours for which this approximation should be carried out.

  A common definition would thus be established relating to the constituent elements of criminal acts and to penalties with respect to trans-border crime or the protection of goods and values common to the Union and, at the same time, with respect to trafficking in human beings, terrorism, illegal drug trafficking, etc.

- The establishment of minimum guarantees for the accused throughout the trial proceedings thus raising the level of trust among Member States.

- Integrated protection of victims throughout the criminal trial.

- Mutual recognition of judicial decisions in criminal matters.

- Arrival at a degree of compatibility as concerns trial standards necessary to facilitate judicial co-operation among Member States.

- Prevention and solution of jurisdictional conflicts among Member States.

Besides, the Treaty should clearly state the capacity of the Union legislator to impose to Member States the establishment of penal sanctions when this is considered to be necessary for obligations provided for in Union law to be enforceable

The current Treaties allow the Union legislator just to impose to Member States the establishment of "appropriate sanctions" and there is no agreement on whether the Union legislator can precise the need for those sanctions to be of a penal character. The disappearance of the current division between "first" and "third pillar" would not solve the question unless a clear-cut answer is given by the future Treaty.

Considering that the definition of the penal character of sanctions is an essential element of any criminal policy, it seems logical that this capacity be recognised to the Union. This being a different case to that of the approximation of law, qualified majority should be the rule.

3. Police co-operation.

With the same objectives described for co-operation in criminal law matters, the lines of action should be as follows:

- Strengthening of operational cooperation among the competent authorities of the specialised Member State services with coercive functions, including through joint investigative teams, by means of the harmonisation of the action procedures employed by such services.

- Common processing and analysis of pertinent information.

- Co-operation in and development of joint initiatives for the training of members of the police services concerned.

- Joint assessment of special investigation techniques.

An annual programme should fix common objectives to be attained within concrete timetables.

D. OPERATIONAL BODIES OF THE UNION

The need for balance and institutional co-operation among Member States themselves, as well as between them and the Institutions, points to the need to choose a model that, stemming from the role that should be played by the States –as such or within the Council- and the Commission, is characterised by its simplicity and non-proliferation of new bodies or institutions.

Europol.

The pre-Maastricht origin of the European Police Office explains that its creation was based on an inter-governmental technique by means of an international agreement (the EUROPOL Convention). Today, subsequent to the development of new forms of co-operation and integration in the European Area of Freedom, Security and Justice, it appears necessary to adjust EUROPOL and its development to the principles that are common to the current degree of integration in JHA matters. To do this, the instrument used to create EUROPOL must be transformed into a Council decision – or the equivalent instrument provided for in the new Treaty.

The transformation of EUROPOL's legal base should also involve change in some of the contents of the current EUROPOL Convention with a view to making this European Office a body with operational faculties providing technical support for the work being done by the competent national authorities.

Increased parliamentary control should also be provided.

Eurojust.

From a criminal judicial perspective, EUROJUST's coordinating function and the support it lends to judicial co-operation in criminal matters among Member States should be ratified in the future Treaty.

The versatility of this recently created structure could give rise to its eventual transformation into a future coordinating body of national public prosecution services with possible powers of investigation (subject to national law and procedures) and powers to take action before national Courts with respect to all the crimes over which the European Area of Freedom, Security and Justice has recognised jurisdiction. This project is preferable to the mere creation of a Public Prosecution Service specialised in the protection of the Union's financial interests.

The functions of Eurojust, both under its current configuration and its possible future configuration, should be to supplement and support the action carried out by the national authorities in the enforcement of Union law and the attainment of the objectives of the European Area of Freedom, Security and Justice. Its functions should appear in these terms in the Treaty.

Other structures.

On the other hand, other operational co-operation structures or functional formulas, such as the "European networks" or the Task Force of Chiefs of Police, in light of their very nature, require a degree of flexibility and mode of action that do not merit "constitutional" treatment. Furthermore, the need for maintaining some of these structures should be reviewed.

Coordination and programming of work.

An essential functional element must be added to these organic ones: the Treaty should contain a mandate calling for coordination among the institutions and bodies responsible for achieving the common objectives of the European Area. A special Committee of the Council will be responsible for this operational coordination. This Committee will also be in charge, together with the Commission and in close consultation with the European Parliament, of work programming.

E. HORIZONTAL ISSUES

1. New instruments for the achievement of the objectives of the European Area of Freedom, Security and Justice.

   The Treaty, with all the guarantees inherent in the rule of law, should envision the possibility for limiting or regulating some freedoms set out in the Treaty itself for reasons of security or co-operation in the fight against crime. Thus, in the sphere of JHA, it should be possible to resort to special measures such as the ones currently provided for in Article 60 of the EC Treaty on matters of restricting the movement of capital and payments.

2. External relations.

   The European Area of Freedom, Security and Justice should be clearly projected in all of the European Union's external actions with the purpose of both assuring its effectiveness as well as of disseminating in third countries the democratic values on which the Union is founded. Thus, the following should be sought:

   - Integration of the external dimension of JHA matters in the European Union's international relations.

   - A clearer definition of the role of each one of the Union's Institutions, mindful of the fact that in this area a concerted effort must be made in the direction of institutional co-operation between the Member States and said Institutions. This definition should be founded, technically, on the solutions proposed in the Convention in relation to the Union's external action and its legal personality. Special attention should be devoted to the appropriateness of the stipulations of current Articles 24 and 38 TEU and 300 EC Treaty regarding the field of Justice and Home Affairs.

     The very important question of who negotiates international agreements on behalf of the Union requires further examination.

   - Recognition of the binding character of common positions and other instruments of coordination of the positions of Members States in negotiations on JHA agreements in international organisations (current Article 37 TEU).

3. Other issues: monitoring, evaluation and judicial control.

With regard to the monitoring, evaluation and judicial control of acts adopted within this framework, the trend should be towards homologation with the ordinary mechanisms envisioned in Community law.

The Commission would have to ensure Member States' compliance with the Treaty and the legislation based on it, in particular as regards transposition of norms. In this context, the Commission should be ready to bring action before the Court of Justice should a Member State fail to fulfil its obligations.

As far as operational action is concerned, the main responsibility to monitor Member States would lay on the Council, which should ensure proper control through a system of "peer evaluation".

Finally, the Court of Justice would have full powers under the new Treaty, corresponding to those it enjoys today for "first pillar" issues, to exercise judicial control in JHA matters.

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