

Working Group X

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Working group X "Freedom, Security and Justice"

Subject : Comments to WD 05 by Mr Ben Fayot, Member of the Convention

Comments to WD 05

on

Police and judicial co-operation in criminal matters, asylum and immigration, judicial co-operation in civil matters: instruments, procedures and other institutional issues

by Ben Fayot

Ad Introduction

Since the new Treaty will be "single", without pillars, it has to be decided first what to deal with in the 1st part (Constitutional Treaty) and what to put in the 2nd part concerning the different policies and actions.

Concerning the third pillar matters transferred into the single Treaty, it will indeed be necessary to create a "mix" combining the Community method and inter-governmental collaboration as well as defining specific methods for the different fields of co-operation.

Concerning a multi-annual strategic programme set up by the European Council, it must be stressed that the new rules of procedure of the Council already contain the possibility of a three years strategic programme completed by annual operational programmes. Given the experiences of the past (f.i. Tampere), it is not certain that the impulsions given by the European Council would be sufficient to bring more action in this field. It will be far better to have clear structures and decision-making processes.

Concerning the involvement of national parliaments, it is of course their responsibility to intervene very early in such sensitive areas for national sovereignty and to collaborate closely with their governments especially at the beginning of a legislative process as well as during all the co-operation processes where parliaments normally are involved in national politics.

Ad A. LEGISLATIVE PROCEDURES

I. Areas related to TEC (current "First Pillar")

a. Asylum, refugees and displaced persons

Given the failure of the Amsterdam Treaty in this field, it will be appropriate to use co-decision with QMV in the Council and to enshrine in the Constitutional Treaty the principle of solidarity, aiming at promoting the **solidarity sharing** instead of burden sharing.

b. Common policy of immigration

Immigration policies and policies of asylum, refugees and displaced persons are often very close one to another. Moreover, each country has its own immigration "policy" due to historic, economic, cultural or political reasons. It will be very difficult to find a common ground in this respect. It will be necessary to find this common ground first before speaking of QMV and co-decision in this area. As experts from the Commission have stressed, agreements about quotas are impossible to reach, but it should be possible to design a common legal frame for immigration policy.

Concerning the integration of legal residents of third country nationals, here too each member state has its own strategy in the different areas of integration. An extension of parts of European citizenship to such legal residents could be a first step to a common policy in this area.

c. Judicial co-operation in civil and commercial matters

The reference to the internal market was introduced by article 65 TEC in Amsterdam. This reference is indeed no more relevant and could well be replaced by the principle of subsidiarity which will be developed and structured in a new Treaty.

It would be interesting to have a specific legal base for judicial co-operation in this area.

The limitations to judicial control by the ECJ should be abolished.

II. Areas related to TUE (current Third Pillar)

a. Reform of Legal Instruments

It will be highly useful to replace conventions by regulations and directives. The Council is currently discussing and should make progress about replacing the Europol Convention by a "decision" to align Europol to Eurojust as an instrument and to reach a greater adaptability of those instruments.

b. Clearer identification of the scope of Union legislation

1. Preliminary remark

It will be necessary to make use of approximation as well as of mutual recognition in this field. Mutual recognition can not replace progress in approximation.

2. Minimum rules / Approximation of substantive criminal law (constituent elements and penalties)

"Minimal rules" are not enough for an efficient criminal policy! We should speak of "common standards" in this respect.

An approximation of criminal law could be developed in three areas:

- a) for crimes of a clearly transnational dimension
- b) for crimes which attack the European social model and values and common interests
- c) for crimes for which a transnational criminal co-operation is necessary.

Instead of a precise list to put in the Treaty, it will be more useful to keep in the Treaty a "generic" list. The Council would have the role to define a European criminal policy through a multi-annual strategic programme decided by unanimity. Inside this

programme, priorities could be fixed in annual operational programmes by QMV and co-decision, with the (exclusive?) right of initiative of the Commission.

3. The principle of mutual recognition and approximation of elements of criminal procedure

If the principle of mutual recognition is enshrined in the Treaty, there should be control mechanisms on a European level, for instance by the ECJ in criminal matters.

Concerning the approximation of certain elements of the repressive side of criminal procedure, one should not exclude for the future a global European view of criminal law and a European criminal procedure in certain well-defined areas.

c. Reform of Legislative Procedures

1. Is unanimity unavoidable?

Unanimity is probably unavoidable at the present stage in criminal matters. This should not be an unsurmountable difficulty since it is also highly improbable that a member state of the EU could refuse to agree in such important areas like for instance the fight against money laundering out of national interests.

QMV and co-decision could be possible in certain areas where European legislation is created. Mutual recognition should remain in unanimity.

2. Right of initiative

If multi-annual strategic plans and annual operational plans are elaborated, each Member State could bring in its input and its interests in the making of this work. But concerning the execution of operational plans, it may be thought of giving only the Commission the right of initiative.

AD B. STRENGTHENING OPERATIONAL COLLABORATION

I. Operational collaboration within the Council

There exist permanent operational coordination structures for matters of external security and police missions outside the EU. Such structures do not exist in matters of security in home affairs.

The EU should have a permanent police structure for operational coordination with a committee for security and justice, assisted by a committee of the heads of police. This structure could be used for coordination in transnational police cooperation missions, in crises management inside the EU, in regional police operations (see for instance the new center for regional police cooperation between L, D, B and F to be active on January 1 2003) or in the operational management of the exterior borders of the EU.

In this context, Europol which is specialized in criminal investigation, would become one of the actors of European police cooperation.

II. Is there a need to create a new structure within the Council with a new responsible (High Representative/high official) to enhance the operational collaboration?

This proposal stems probably from the need of more efficiency in JHA to respond more quickly to actual problems and situations. Still, the real problem is political. Without a consensus on procedures and objectives a new responsible official will be of no use.

It has been demonstrated during the past years that the intergovernmental procedure is very time and effort taking. One main political objective must be to define clearly the areas for community method.

On the other hand, it could be interesting to define clearly in this field the legislative and the executive tasks. In the prospect of developing the Council into a second legislative Chamber co-deciding with the EP, there would remain quite a number of executive and operational tasks for which it would be interesting to have somebody more permanent than the rotating Chair.

For such tasks, instead of creating a new function, it would be more useful to put in charge the JHA Commissioner and to make him work closely with the Council which could be held under the chairmanship of the said Commissioner.

III. Management of external borders

As already stated before, the new Treaty should not separate the police operations on the external borders and the police cooperation on the whole. Integrated and coherent structures could cope with those problems on the whole.

IV. Development of Union bodies (Europol, Eurojust)

It will not be necessary to describe those bodies in detail in a future Treaty.

Concerning Eurojust, it could lead in a long term perspective to a European Prosecutor who should not be limited to the protection of the financial interests of the Union, but could intervene - within clearly defined areas - in a number of criminal matters related to the EU such as organized crime, terrorism, human trafficking, Euro counterfeiting.

AD C. HORIZONTAL QUESTIONS

II. Involvement of national parliaments

Mainly, national parliaments have to deal with national governments. Political control by the EP and national parliaments could be established, each in its own sphere of competence. There should be, as far as possible, no parliamentary control mechanisms other than the normal ones for this area.

IV. Judicial Control

As WD 5 rightly states, the limited jurisdiction of the Court is no longer acceptable concerning acts in areas (police co-operation, judicial co-operation in criminal matters) which directly affect fundamental rights of the individuals. As Advocate

General F.G.Jacobs writes in a contribution to the Convention ¹ : " Under the current system the Community Courts' jurisdiction is severely limited or even excluded as regards the Union's activities in certain fields, as a result of the three-pillar structure introduced by the Maastricht Treaty and refined - but made far more complex - by the Treaty of Amsterdam. In consequence the jurisdiction of the Community Courts has become a complex patchwork, (...). Legal certainty is threatened in an area where it is of paramount importance, and the availability of judicial review seems at some points almost random. It is difficult to reconcile the current scope of judicial review with Article 6(2) of the TUE, which requires the Union to respect fundamental rights without any distinction based on the pillar under which it is acting."

The general system of jurisdiction of the Court of Justice should be applicable, with three reforms to be undertaken:

- a less restrictive standing of individuals to challenge general measures (art. TCE 230.4)
- the extension of scope of judicial review to measures taken by all institution and bodies of the Union
- the extension of the scope of judicial review to measures across the whole range of Union activities.

For criminal matters, a criminal Chamber in the ECJ will be necessary.

¹ The EU Charter of Fundamental Rights and the system of judicial remedies in a European Constitution, by F.G. Jacobs, Advocate General, Court of Justice of the European Communities, November 2002.