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Working Group X

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# Working group X "Freedom, Security and Justice"

Subject : Comments to WD 05 by Mrs Marie Nagy, Alternate Member of the Convention

**Working document 05**
**Possible ways forward for the working group**
**Comments of Marie Nagy**

In preamble, I must say that the working document submitted to us is excellent. I wish to thank all those who have been working on it.

The proposed structure is clear and efficient and it will undoubtedly contribute to the quality of the coming debates and, ultimately, to the impact our final report once transmitted to the plenary assembly of Convention.

I am therefore very much in favor of keeping the same structure for the drafting of our final report. Nevertheless, for reasons of wording and clarification, I would propose the following minor changes :

- **the « golden rules » (I would rather say « the Principles ») ;**
- **the « implementation on policies on the EU level », respectively :**
    1. **the « legislative procedures » (I would rather say : the « development of the normative framework ») ;**
    2. **the « strengthening of operational collaboration » ;**
- **the « horizontal questions ».**

Following now the initial structure of the working document, which is basically the same as the one outlined here before, I wish to make the following comments.

MARIE NAGY

## INTRODUCTION : BASIC ASSUMPTIONS AND GOLDEN RULES

See my comments at the beginning of this note for the wording of the idea.

## I. General legal framework recognizing the particularities of JHA

Putting an end to the Pillar structure is a necessary and unavoidable step.

« Communautarisation » of the present Third pillar is not achievable in the short and medium term in all maters : there is indeed a need for a mix of Community method and a number of special rules.

Mentioned examples : I strongly stand behind the first ones (EU strategic programmes and normal procedures before the Court of Justice) but not behind the third one (involvement of national parliaments – also see : « horizontal questions - Involvement of national parliaments »).

## II. Separation between « legislative » and « operational » tasks

I would rather say « distinction » instead of « separation » (also see : « Operational collaboration within the Council »).

This idea is of crucial importance, as several speakers who are familiar with the functioning of the present Third pillar have underlined it. The JHA structure does not have at its disposal any tools for operational co-operation besides the « normative » working groups of the Council. This situation (that applies to matters in which national sovereignety will remain very important) has very negative effects in terms of efficiency, follow-up of the decisions, developpement of common approaches, credibility of the EU structures (a.o. Europol) for the people « on the ground », etc.

This idea should therefore be strongly emphasized (see also : « Strengthening operational collaboration »).

## III. Subsidiarity

When dealing with that sensitive question – especially in JHA matters - , the Treaty must clearly raise it as a matter of principle : what common approach is relevant at EU level, what approach is relevant at the national level, what approach is relevant at both levels ? The only criterion to answer it is the « added value » criterion, on a case by case basis.

No list is required in the Treaty itself : it would not fit to the necessary evolutions required by the legislative process of the EU and the nature of criminal activities. I am therefore in favor of « giving to the Council the role of defining a multi-annual strategic programme of priorities » (with qualified majority voting and co-decision).

In the field of Justice, the issue is to know in what domains harmonization and mutual recognition must respectively apply (also see : « Clearer identification of the scope of EU legislation »). In the field of police co-operation, the issue is to determine Europol and MS police authorities working priorities, both leading together to a consistent « European Security Plan ».

In this regard, a strong political debate and agreement is a necessary condition to move forward and develop efficient and coordinated co-operation.

## A. LEGISLATIVE PROCEDURES

See my comments at the beginning of this note for the wording of the idea.

## I. Areas related to TEC

### a. Asylum, refugees and displaced persons

This step towards a global « communautarisation » of those matters has not been made yet although the idea has been « in the air » for years. The Convention would miss a unique opportunity if, in this regard, it did not go beyond the current Treaty limits.

I therefore clearly stand behind two proposals of the working document :

- use of co-decision with qualified majority in the Council ;
- enshrining the principle of solidarity in the future Treaty.

### b. Common policy of immigration

Although very sensitive, this question should be developed more extensively and not simply touched upon (although mainly remaining within the competencies of the MS). In this sense, the proposals made in the document are inappropriate.

The Treaty should keep opened the possibility for one or several MS to open their frontiers in the framework of an active immigration policy (studies, labor, family regrouping, etc). Of course, given the unique market and the liberty of movement within the EU, such a possibility requires a consultation and coordination mechanism at EU level.

The principle of solidarity towards development countries should also be enshrined in the Treaty in view of not ruining the development policies of the EU towards those same countries.

### c. Judicial co-operation in civil and commercial matters

No comments.

### d. Management of external borders

This item should be developed under this title (« Areas related to TEC ») since the current border co-operation in the present Treaty takes place within the First pillar (for all aspects but the ones strictly relating to police co-operation, many country having their border gard unit separated from

their police structure). Developing it only under title B (« Areas under TUE ») would consequently be a step backward.

The development of a European Border Guard is a logical, necessary and emblematic goal for the EU, although in the long term. This would suppose the attribution of exclusive competences to the EU (*via* a unique and integrated European Border Guard). In the mid-term, besides the slowly developing co-operation, this would also suppose the creation of a « European support unit » that would complement the MS forces, when and where needed.

## II. Areas related to TUE (Third pillar)

### a. Reform of Legal Instruments

I strongly support the proposals of the working document :

- the replacement of the Framework decision and Decisions with Regulations or Directives (i.e. « communautarisation ») ;
- the abolition of Conventions, the existing ones being converted into regulations and directives (or integrated in the Treaty as it was done for the « Schengen acquis »).

There might also be a need for creating a new instrument that would enable a principle decision to be taken at EU level while requiring the *creation* of a *new body* at the *national level* (example : Eurojust).

### b. Clearer identification of the scope of EU legislation

Also see : « Golden rules – Principles : the principle of subsidiarity ».

#### 1. Harmonization (item 2 in the working document)

The following fields should be *compulsory* working priorities for the Council :

- Justice : elements of criminal procedures and serious crime of transnational dimension (terrorism, financial criminality, smuggling of human beings, drugs, etc) ;
- Police : working priorities for the police services at the EU level (Europol) and in the MS on serious crime of transnational dimension (terrorism, financial criminality, smuggling of human beings, drugs, etc).

This part of the report should clearly mention the need that exists for creating a so-called « European Prosecutor ». Although not created by the Treaty itself, the final report of the Convention should make a « break through » on that issue and leave to the Council the development of the specific provisions for its implementation in the medium term (also see : « Development of EU bodies »).

**2. Mutual recognition (item 3 in the working document)**

Its principle can be enshrined in the Treaty but only as a *general* principle. Given the highly complex work of harmonization (that *in se* is undoubtedly preferable to mutual recognition), the risk exists that, for facilitating its action, the Council eventually promotes mutual recognition to the detriment of harmonization and of basic individual rights (example : European arrest mandate). Mutual recognition should therefore take place in the following limits :

- not for the matters that are compulsory priority for harmonization (i.e. elements of criminal procedures and serious crime of transnational dimension) ;
- on a case by case basis, after decision of the Council ;
- once common minimum standards for the rights of individuals in criminal procedure have been achieved (building on, and going beyond where necessary, the standards of the European Convention on Human Rights and the EU Charter).

**3. Rules for (operational) co-operation between MS (item 4 in the working document)**

No change is needed in the Treaty (besides better structures for operational co-operation), as outlined in the working document.

The replacement of the Europol Convention by a regulation would formally enable the extension of the mandate of Europol to new forms of crime and working possibilities (i.e. operational competencies). Despite that, it appears that, in this regard, all remaining issues have already been settled both politically and legally within the current framework of the Europol Convention (« only » ratification is still awaited – which is a problem of a different nature).

**b. Reform of Legislative Procedures**

**1. Unanimity**

Unanimity should be abandoned, without any restriction, and replaced by qualified majority voting and co-decision : it is here a question of survival for the enlarged EU.

The only important restriction to the supposed « spill over » effect that QMV would probably generate is to be found in the MS exclusive competency for the rules organizing police and judicial (operational) co-operation. In other words : QMV for all normative aspects but maintained national sovereignty for all aspects of operational co-operation between MS authorities.

For the remaining remarks made under item « *ii* » : I stand as follows :

- substantive criminal law outside a list of crime : there should be no list in the Treaty itself (also see : « Golden rules – principles : subsidiarity ») ;
- new EU bodies with operational powers : what new body could it be besides Europol, Eurojust and/or the European Prosecutor, whose existence is to be enshrined in the future Treaty ;
- operational powers of joint police teams on the territory of another MS : all rules organizing police and judicial (operational) co-operation will remain at the national level and the

already agreed text on police joint team has already solved the problems in the same manner.

**2. Right of initiative**

Considering the arguments of both promoters and opponents to the exclusive right of initiative of the Commission, proposal « b » is the only valuable and practicable solution.

## B. STRENTHENING OPERATIONAL COLLABORATION

## I. Operational collaboration within the Council

Also see : « Separation between "legislative" and "operational" tasks ».

By introducing the current « Task Force of Chiefs of Police » within the EU structures, the Treaty would undoubtedly bring to the JHA policies of the EU the necessary dynamic that is lacking today. The institutionalization of the TFCP is – according to police practitioners – an absolute necessity.

Based on the model that already exists for the military aspects within the present Second Pillar, this new structure (TFCP) would be assisted by a « European Police Staff ». It would fulfill three different functions :

- it would be consulted, as an (experimented) advice body, by the normative working groups in their legislative work (i.e. Article 36 Committee),;
- it would be directly in charge of the execution (and of the follow up) of the normative measures elaborated by the normative working group of the Council ;
- it would, as a high level forum, promote co-operation between MS for all matters in which they remain competent and sovereign (rules organizing police co-operation).

## II. Need for a « JHA High Representative » ?

This proposal would create more problems that it would solve any. I am therefore clearly opposed to it.

### III. Management of external borders

See : « Areas related to TEC - Management of external borders »

## IV. Development of EU bodies (Europol, Eurojust)

### a. More operational powers for Europol

The Convention should remain cautious and not push a generic idea that almost no one in the JHA fields really wants : Europol should not become the « European FBI » but should keep a support function to MS authorities, although more operational.

The necessary texts for giving Europol the power to make (binding) requests and to assist joint investigative teams have *already* been adopted (recently), both politically and technically. Only ratification is still awaited and the Convention should concentrate its action on that more general problem.

### More operational powers for Eurojust

What applies to Europol also applies to Eurojust : basically, all provisions *already* exist to enable Eurojust to do its work correctly (only some national laws that must determining the powers of the national member of Eurojust are still awaited).

The real issue is whether or not Eurojust, by its nature itself, is sufficient a tool in order for the EU to develop a proper judicial activity since Eurojust can « only » develop and remain in charge of the « horizontal » (facilitation of) co-operation between MS. There is a consequently a real need for developing the « vertical » dimension of EU judicial activity through the creation of a European prosecutor.

Eurojust must develop the legal control of legality about the activity of Europol.

### Creation of a « European Prosecutor »

As stated above (see : « Clearer identification of the scope of EU legislation – Harmonization »), the final report of the Convention should make a « break through » on that issue in the Treaty by giving mandate to the Council for developing the specific provisions for its implementation in the medium term

# C. HORIZONTAL QUESTIONS

## I. More efficient implementation

I stand as follows on that issue :

- « peer evaluation » already exists (its efficiency is sometimes doubtful and is really expensive) : why should the final report bother with that ?
- giving the Commission the right to bring infringement procedure : that would be logical if we abolish the Third Pillar structure ;
- since the EU deals here with matters whose application remains in the hands of MS, an individual should be enabled to go to the Court of Justice (Luxembourg) when the practices of a MS do not respect the basic rights of the individuals.

## II. Involvement of national parliaments

In this area, I see no reason for making an exception for JHA to the general procedure of co-decision : the political control of all normative (legislative) JHA activity – which supposes that this control does not apply to the police and judicial operational co-operation that remain in the competences of the MS - must lie in the competences of the EP.

There is therefore no need to develop a new mechanism of association between the European Parliament and the national Parliaments : sufficient control possibilities *already* exist at the national level – but they often remain unused – and experience clearly shows that such formula's simply cannot work efficiently.

Furthermore, I agree with the idea that our report should « build on results found in the Convention generally on this issue, rather than to devise special mechanisms exclusively for the current Third Pillar ».

## III. International agreements

The Commission should be designated chief *negotiator* for the agreements relating to Third Pillar matters – which supposes that the MS must still give their agreement on the draft text under negotiation. Our report should also build on the results of the WG « External action ».

## IV. Judicial control

As a general rule applying to all JHA matters, the jurisdiction of the Court of Justice must be extended to all areas that affect the fundamental rights of the individuals – which supposes the adhesion of the EU to, among others, the European Convention on Human Rights and the EU Charter of Minimum Rights.

## V. Enhanced cooperation (« Coopération renforcée »)

It must be reminded here, among other examples, that the Schengen cooperation initially started with 5 MS and that the five Scandinavian countries have developed a very strong JHA cooperation between themselves.

It should be possible to apply enhanced cooperation to JHA more easily, when needed : there remain an important a number of domains in which enhanced cooperation could be successfully referred to, especially when it comes to (police) geographical cross-border cooperation.

The conditions under which enhanced cooperation can today apply remain too strict, although they were made more supple by the future Treaty of Nice. From a JHA point of view, the number of participating countries should be lowered at 5 (a higher number of participants *quasi* automatically brings difficulties of « Cultural nature » among the different participating authorities). On this issue as well, our report should also build on the results of the relevant WG.