

Working Group X

Working document 22

## **Working group X "Freedom, Security and Justice"**

**Subject :**      **Comments by Baroness Scotland of Asthal and Mr. Antti Peltomäki, Alternate Members of the Convention, to the WD 05.**

## **Contribution submitted by Baroness Scotland of Asthal and Mr Peltomäki:**

### **"The common area of Freedom, Security and Justice"**

#### **Introduction**

1. When the Convention on the Future of Europe was established at Laeken, one of its main purposes was to discuss the objectives of the Union, the fields in which it should act and how it could best add value. These are particularly relevant questions in the justice and home affairs area. It is clear that joint action at the level of the Union is required to respond to the challenges on asylum which we all face, to fight against illegal immigration, and to tackle organised crime. Our judicial co-operation will be most effective if it is founded on mutual recognition and enforcement of each others' decisions rather than attempts to harmonise criminal codes and systems. Approximation of substantive law should be limited to certain defined areas where a Union level response is appropriate and compatible with the principle of subsidiarity.
2. The Tampere European Council provided a good basis for developing the Union's justice and home affairs co-operation. It set ambitious goals whilst remaining focused on achieving real results which will benefit our citizens. We must build on the excellent foundation which Tampere provides.
3. The Laeken Declaration emphasized, in particular, democracy, legitimacy and fundamental rights as foundations of the European Union. In the sphere of justice and home affairs, it is vitally important both to respect fundamental rights and to guarantee the security of citizens. The Convention should examine the ways in which EU JHA co-operation can be intensified and made more streamlined in the areas currently covered by the Community Treaty (asylum, immigration, visas borders and civil law) as well as in the area of police and criminal law co-operation.
4. We can support the idea of integrating provisions on justice and home affairs into a single Treaty structure. All the existing JHA Treaty provisions should be brought together under a single title on the common area of Freedom, Security and Justice. (Obviously it would be possible to have further subdivisions within that Title.).
5. We welcome the interim report presented by the chairman of the working group on Freedom, Security and Justice (Working Group X, Working Document 05) as a good basis for further work.

In particular, we agree with the two “golden rules” proposed, which recognise first the need for an approach which mixes community procedures and enhanced intergovernmental co-operation tailored to the needs of JHA and second the need to separate legislative and operational tasks. We need procedures which deliver effective European Union legislation, and which support the operational activities of member states’ immigration and law enforcement services. This paper comments on a number of the questions raised in the chairman’s interim report.

## **A. LEGISLATIVE PROCEDURES**

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

*a. Asylum, refugees and displaced persons*

*b. Common policy of immigration*

6. The new Treaty provisions on asylum and immigration policy should be drafted in broader and simpler terms. At the same time, they should set out the basic objectives of our co-operation, focussing in particular on what was agreed at Tampere. They should provide a full basis for the development of a common asylum system, action with source and transit countries and common efforts to fight illegal immigration and strengthen the management of the external border.

7. Minimum rules on asylum, as provided for in the current Treaty, are not sufficient in themselves. We should go further, providing a Treaty base for a system based on the 1951 Geneva Convention, but that integrates rules on subsidiary forms of protection. This is to ensure that 'asylum shopping' is not simply replaced by 'protection shopping'. The provisions for subsidiary protection should be tightly focused on our common obligations under the European Convention on Human Rights.

8. We also need to look further afield. It makes little sense to expend all our effort, including financial, on those who have arrived at our borders or who have entered illegally. Some are genuinely in need of international protection but many are seeking to improve their economic circumstances and in doing so they reduce our ability to protect those in need. It is, therefore, absolutely vital that we develop policies which maintain and indeed enhance our ability to protect those who are genuinely at risk while maintaining the integrity of our asylum systems and dealing robustly with illegal immigration.

9. This approach should be built on a number of principles which should be written into the Treaty. Firstly we should seek to control migratory pressures at source, in particular by encouraging protection in the region of origin. We should aim to promote stability and good government in source countries and encourage asylum applicants to claim in the first safe country they reach. Where it is not possible to offer protection in the source region we should develop resettlement schemes so that the EU provides protection in an organised fashion.

10. We should move to qualified majority and co-decision for asylum. At Nice, heads of state decided to move to qualified majority voting and co-decision with the European Parliament once the basic rules and common principles on asylum and protection issues had been agreed by unanimity. More recently, the Seville European Council established a clear timetable for the adoption of these various measures by the end of next year. Even if the Seville timetable which will trigger a move to QMV and co-decision cannot be met, we should make the switch in any case. There is a clear political imperative for progress in this area.

11. There will continue to be pressures at our external borders. We need mutual trust in the ability of all Member States to protect the external border, and should accept that this is a common responsibility. It is important, therefore, that we are able to offer assistance to Member States which, because of their geographical position, are particularly vulnerable to the threat of illegal immigration. There therefore needs to be a Treaty basis for measures to promote solidarity between Member States. This is already found in the Treaty in relation to refugees and displaced persons, but the concept needs to be extended to management of the external border.

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

12. We consider that the existing treaty article on civil judicial co-operation (Article 65 TEC) takes broadly the right approach with the current provisions which make a specific link with cross border cases and with the internal market. Mutual recognition should, as Tampere recognised, be the cornerstone of judicial co-operation, both civil and criminal. This principle should be written into the Treaty.

13. The Treaty should make clear that the focus of civil judicial co-operation should be on the interface between systems. It should promote compatibility between systems so as to improve

cross-border justice, insofar as necessary for the proper functioning of the internal market, whilst respecting their fundamental principles.

## **II. Areas related to TUE (current Third Pillar)**

### *a. Reform of Legal Instruments*

14. Conventions have proved slow and cumbersome, and should be abolished. We should simplify arrangements for justice and home affairs by moving to a single set of legal instruments: regulations, directives and decisions. These could be used for matters currently covered by the third pillar, as well as for immigration, asylum and civil law matters. Different instruments will obviously be appropriate in different areas. The Union's work on substantive and procedural criminal law should be to set minimum standards, and this should therefore be done by means of directives rather than regulations. The question of whether directives in this area should be capable of having direct effect needs careful consideration, given that the instruments currently used under the Union Treaty do not, and national parliaments have a vital role to play in legislating to frame a Member State's criminal law.

15. We agree with the analysis that the Europol Convention is difficult to amend because of the need for national ratification by all Member States, and that this gives rise to some difficulties. It would therefore be appropriate to replace the Europol Convention with a Council instrument under the new Treaty arrangements. This could then be amended more easily by the Council. The replacement of other Conventions with regulations, directives or decisions should be considered on a case by case basis.

### *b. Clearer identification of the scope of Union legislation*

#### *Preliminary remark*

16. As we said in the introduction to this paper, it is essential that the Treaty should define the areas where the Union should have competence to act because it can add value. It will be important that the extent of Union competence on police and criminal law matters is established in clear terms. This is a necessary pre-requisite for moving to a single Treaty structure and applying Community instruments and procedures. Criminal judicial co-operation can be divided clearly into co-operation between criminal judicial authorities on the one hand and substantive criminal law on the other. Whilst it will be appropriate to develop minimum standards relating to criminal procedures, these measures should be developed for the explicit purpose of facilitating criminal co-operation and mutual recognition. The legal base for procedural guarantees should therefore be a subset of the

legal base for criminal co-operation and mutual recognition measures rather than a Treaty objective in its own right.

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

17. As the chairman's interim report suggests, we should define as precisely as possible the areas in which approximation of the minimum constituent elements of substantive criminal law is necessary. Union competence in the substantive criminal law should be defined in an exhaustive list of serious crimes which have a clear cross-border dimension and which are connected to organised crime.

18. The primary criteria for the list of crimes should be that the crime is serious, organised and has a cross border dimension. Cross border impact or dimension would include cases where disparities in national laws have a clear impact on crime developments, notably in organised crime.

19. There should be flexibility to amend the list, but the Union's action on substantive criminal law should not be driven by short-term pressures. The power to add to the list should be reserved for cases where new forms of serious transnational organised crime emerge, and where a Union response is clearly required. It would therefore be appropriate to have a mechanism along the lines of Article 67(2) second indent TEC, which would allow the Council unanimously to add to the list after consulting the European Parliament. In practice, we would not expect this mechanism to be used frequently.

20. We do not believe that approximation of criminal law is required as a prerequisite to mutual recognition. Approximation of substantive criminal law should be limited to those areas where it is required.

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

21. We strongly agree that the principle of mutual recognition should be enshrined in the Treaty. As the Tampere European Council concluded, mutual recognition should be the cornerstone of judicial co-operation. The Treaty should make it clear that mutual recognition will be the normal mechanism for criminal judicial co-operation. We believe that this is the only practical way to proceed. Irrespective of whether approximation of level systems and criminal codes is desirable, a question on which we could have a long and sterile debate, it is not an effective way of addressing quickly the criminal threats which face the Member States now.

**4. Rules on police and judicial co-operation between Member States authorities (examples: the present Convention on Mutual Legal Assistance; the European Arrest Warrant)**

22. We think there should be Treaty change in this area, but only in the sense that, as set out above, the principle of mutual recognition as the cornerstone of our co-operation should be written into the Treaty (and the European Arrest Warrant is of course a mutual recognition instrument). We agree that mutual recognition instruments should not be limited to the types of serious cross border organised crime for which approximation of substantive criminal law would be permitted. Union citizens are able to move freely from one Member State to another. We need to counterbalance this with provisions which ensure that free movement rights cannot be exploited to evade justice. This applies to people who commit crimes such as rape and murder as well as to the organised criminal gangs. The Treaty base for co-operation based on mutual recognition and mutual legal assistance does, therefore, need to be broader than the legal base for substantive criminal law.

**c. Reform of Legislative Procedures**

*1. Is unanimity unavoidable?*

23. It will be possible to introduce qualified majority voting and the co-decision procedure for many areas of justice and home affairs. The move to QMV and co-decision is likely to be easier and quicker in those areas which are already covered by the Community Treaty and where transitional arrangements apply.

24. The unanimity requirement remains appropriate in particular in the following areas:

- (i) Minimum standards (including sanctions) concerning criminal law.
- (ii) police co-operation in cases where executive powers of the police and other law enforcement agencies may be involved, including operational powers of joint police teams on the territory of another member state
- (iii) creating new Union bodies with operational powers.

**2. Right of initiative**

25. Some reform of the current arrangements for right of initiative in the area of police and criminal judicial co-operation is required. The aim must be to ensure that initiatives genuinely address

common challenges facing the Member States, within the framework of priorities which should be agreed by the European Council. The guidelines provided first by the Tampere Council and more recently by the Seville European Council have set an excellent framework. We need to ensure that the Council is not distracted from the agreed priorities by initiatives which are of interest only to a single Member State. There are a number of possible models for reforming right of initiative. We should work on the basis of Commission initiatives or group Member State initiatives. The minimum size of the group should be set in the region of between a fifth and a third of Member States. Options (b) and (c) in the chairman's interim report both merit further consideration (and are not mutually exclusive).

## **B. STRENGTHENING OPERATIONAL COLLABORATION**

### **Operational collaboration within the Council**

26. The Union's operational co-operation in the law enforcement area could be strengthened by giving an enhanced role of operational oversight to a senior officials committee within the Council. This body's enhanced oversight role could encompass Europol and Eurojust. There needs to be a fundamental re-examination of how the operational planning role originally envisaged for the Police Chiefs Task Force can best be performed, but the line of accountability for operational planning should also be to the strengthened senior officials committee.

27. We do not support the creation of a permanent structure such as a European Police Headquarters based on the model of the military structure in the second pillar. Nor do we think that there is a need to appoint a High Representative or high official within the Council to oversee operational co-operation.

### **Management of external borders**

28. We support the idea of the gradual development of an integrated system of border management. In our discussions, Commissioner Vitorino has set out a sensible and practical view on how co-operation in this area would develop. On the basis of the Seville conclusions, we have agreed to establish the External Borders Practitioners Common Unit, which leads and coordinates inter alia joint operations, common analysis, common training and the sharing of best practise. Over time this could develop into arrangements to assist national border control services at weak points on the border or respond to new threats or influxes. We would not, however, envisage the creation of a structure which would replace national border control services.



## **Development of Union bodies (Europol, Eurojust)**

29. Europol and Eurojust should remain the key building blocks of our practical law enforcement co-operation. The Treaty does not need to provide a detailed list of what legislation on Europol and Eurojust should cover. The Treaty should, however, at least make clear that Europol's role is as Europe's criminal intelligence agency and Eurojust's role is to facilitate proper co-ordination between Member States' national prosecuting authorities and to support investigations in cases of serious cross-border crime.

30. Clarifying the role of these bodies and facilitating legislative changes are important. However, it is essential for citizens that these bodies perform their role effectively and are politically accountable. There must be appropriate mechanisms to ensure that their resources are aligned to their objectives and that there is strong accountability for delivery against their objectives.

31. As for the other law enforcement bodies, we are not in favour of establishing a European Public Prosecutor. Eurojust has just recently started its work, so we do not have enough experience to say whether there is any need for a Union level enforcement authority. In addition, the mutual recognition approach is founded on respect for our diverse legal systems, and the powers of direction which would be given to a European Public Prosecutor are not compatible with that principle. As stated elsewhere, we believe that the creation of new law enforcement bodies at EU level should only take place where there is a clear need and should be subject to unanimity.

## **C. HORIZONTAL QUESTIONS**

### **Involvement of national parliaments**

32. The work of working group on subsidiarity has provided a good basis for ensuring that national parliaments continue to play an important role. We welcome the suggestion that the subsidiarity early warning mechanism should be used in this area. This is particularly relevant to ensuring that measures respect basic features of national criminal law systems. As mentioned above, we also support the proposal that directives rather than regulations should be used in relation to the limited criminal law approximation envisaged at Union level.

## **II. International Agreements**

33. The Member States are today actively negotiating and concluding international agreements in various fields of judicial co-operation both in bilateral relations between the Member States and third countries and in multilateral negotiations in fora such as the UN and the Council of Europe. If,

however, the Union were granted competence similar to that currently held by the Community under the first pillar, the competence of the Member States to continue to negotiate and conclude agreements on judicial co-operation could be seriously limited, in particular, should common rules on a given question be adopted at the Union level.

34. It is important to search for solutions to protect the freedom of Member States to act in areas such as:

- (i) Agreements concluded by bodies such as Europol with third countries should not have the unintended effect of preventing Member States' authorities themselves negotiating and entering into agreements with the same third countries.
- (ii) In the area of judicial co-operation, the fact that the Union has adopted internal rules on a particular matter such as extradition should not prevent Member States from negotiating and concluding bilateral and multilateral agreements with third countries (a) where the Union has not made an agreement with the third country in question and (b) where the Union has made an agreement with the third country, but the Member State concerned wants to agree additional provisions.
- (iii) As regards agreements with elements of exclusive EC/EU competence, where the subject matter of such conventions is typically overwhelmingly outside EC/EU competence, it is questionable whether a doctrine which potentially allows a minority of Member States, or even a single Member State, to block ratification by other Member States is tenable, particularly in an EU of 25 or more states

35. The justice and home affairs title of the treaty will need to make specific provision to address these issues. Finding a solution in this area should be a priority.

#### **IV. Judicial Control**

36. The jurisdiction of the Court of Justice needs to be reconsidered, both as a consequence of moving to a single Treaty structure with common legal instruments and also in view of the fact that Title IV TEC (asylum, immigration, civil judicial co-operation etc) contains special provisions which are not found elsewhere in the Treaty. It is envisaged that under a single Treaty structure all Member States would accept the jurisdiction of the Court of Justice. Some limitations on the Court's jurisdiction do, however, remain appropriate, in particular the limitation currently found in

Article 35(5) TEU relating to the exercise of Member States' responsibilities relating to the maintenance of law and order and safeguarding internal security.

37. In some sectors, such as civil law, the limitation currently found in Article 68 TEC is not appropriate and the arrangements in Article 234 TEC should apply.