

Working Group X

Working document 29

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

Subject : Changes to the Draft Final Report (WD 18) proposed by :  
- Anne Van Lancker  
- Elena Paciotti  
- Iñigo Mendez de Vigo

Reactions from Anne Van Lancker on the proposal of a report from the working group on “liberty, security and justice”.

A first general remark: Shouldn't we extend the scope of the AFJS to "citizenship" and "non-discrimination"?

\*\*\*

As I can consent with the two general principles, I nevertheless have the following remarks:

On the first principle that we need a common general legal framework, almost recognising the particularities of this area, I have strong objections to give a mandate to the European Council to set up multi-annual strategic programme, defining an overall framework for legislation and operational collaboration. I prefer to give this competence to the Council or eventually the Council at the level of heads of state and government, and the European parliament, acting on a proposal of the Commission. In defining the procedure we need to take in account the fact that National parliaments need an opportunity to discuss their position with the government, represented in the Council.

On the second principle, I agree on the separation between “legislative” and “operational” tasks. The reinforced co-ordination of operational collaboration will be situated in the Council, but I prefer that a clear distinction would be made between the Council, acting as a legislator and the Council as co-ordinating body. In the second function, the Council should be chaired by the responsible Commissioner, because executive powers are exercised.

\*\*\*

## **A. Legislative procedures.**

### **I. Areas related to the TEC.**

I can agree with the conclusions on asylum, refugees and displaced persons, and also with the conclusions on migration policy or visa policy, but I would like to add to the first recommendation that legislation has to be proposed only by the Commission, as is the case in the first pillar. I am not happy with the restriction to the definition of common minimum standards; the Union must be able to work on a common asylum policy. Where the area on civil law is concerned I also defend that all legislation would be taken in codecision between Parliament and Council, acting with QMV as foreseen in the first pillar, on a proposal of the Commission.

Where the legal status for long-term legal residents with third country citizenship is concerned, I am in favour on giving third country nationals equal rights as the citizens of the Union if they reside on the territory of the Union more than five years.

### **II. Police and judicial co-operation in criminal matters.**

#### **1. Reform of legal instruments.**

I agree with the recommendation of the draft conclusions to abolish the instrument of Conventions in these matters.

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

- a) Approximation in certain areas of substantive law.

With regard to the three criteria for defining certain fields of crime where minimum rules on constituent elements of criminal acts and penalties can be adopted, I have problems with the limitation to "crimes with crossborder nature": what about "child abuse", domestic violence, ....? A list of crimes to be drawn up in the Treaty could block evolution of EU's competencies on crime, unless we agree at the same time to foresee a procedure to amend the list in a more flexible way, where the need appears due to changes in criminal phenomena. The Council, acting by QMV, in codecision with the European Parliament, on a proposal of the Commission, should be able to take such a decision.

- b) Approximation of elements of criminal procedure.

I agree with the draft-report, but taken into account that legal instruments need to be decided by codecision between the European parliament and the Council, acting by QMV on a proposal from the Commission.

- c) Rules on police and judicial co-operation between member States authorities.  
d) Supporting measures on crime prevention.

On this item there is a need for a consistent "European security plan", to be decided by the Council and the European parliament after a strong political debate not only on European level but also on national level.

### 3. Reform of legislative procedures.

- a) The codecision between European parliament and Council, deciding by QMV and acting on a proposal from the Commission as the normal procedure to be used for any legislation.

Decision making by unanimity will be very difficult in a Union with more than 25 MS, and should be abolished. If there is not a consensus to do this, it will be important to foresee reinforced co-operation.

I am in favour of maintaining the exclusive right of initiative of the Commission, be it with a possible right of coercion on behalf of the Council.

\*\*\*

## **B. Strengthening operational collaboration.**

### I. Enhanced collaboration within the Council.

I agree with the idea of a executive Council, but instead of nominating a Mister JHA, be it a high representative for justice and home affairs or a high-ranking official, elected or appointed by the Council, I prefer that the Council, acting as executive would be chaired by the responsible Commissioner, and controlled by the European parliament.

II. Management of external borders.

III. Development of Union bodies.

I agree with the recommendation about Europol and Eurojust, but I am not in favour of unanimity decision making procedures in the Council on this issue

\*\*\*

**C. Horizontal questions.**

I. More efficient implementation and the maintenance of high standards.

I agree with the consideration about mechanisms of mutual evaluation or peer review, but I argue for a more central role from the Commission in policy coordination and for the implication of the European parliament in these procedures.

I do not only support extending the ECJ's role with regard to article 226 TEC, but also the need to give the ECJ a role with regard to the respect of Human Rights or Fundamental rights. In this respect the access for citizens or groups of citizens to the Court needs to be foreseen.

II. Involvement of national parliaments.

On the first proposal I suggest to replace the European Council by the Council, acting in his executing function, presided by the Commission. I think it will be very important to foresee an important role for national parliaments by defining strategic guidelines and priorities. But, I underline that the decision on this action programmes need to be taken in codecision with the European parliament, to guarantee democratic legitimacy.

I am not in favour of the "early warning mechanism" for national parliaments. Using the early warning system for control over subsidiarity on the crossborder nature of crime would dramatically limit the scope of the Union's competence, due to the vague nature of this concept.

The political control on Europol should be done by the European parliament and not by a new mixed committee. Nevertheless national parliamentary control will be necessary at national levels and on certain elements of the police and judicial co-operation. Common meetings should be organised between EP and responsible committees of national parliaments.

III. International agreements.

I support the idea that it is the Commission that would represent the Union at international co-operation platforms concerning these issues, but the mandate can be defined by the Council .

IV. Mechanisms of Opting-in / opting-out

V. Judicial Control

I am of the opinion of the majority of the group concerning the abolition of the special mechanisms foreseen in articles 35 TUE and 68 TCE. I also agree that the general system of jurisdiction of the Court of justice should be extended to the area of freedom, security and justice, including actions by Union bodies in this field.

Anne Van Lancker  
Member of the Convention  
22 November 2002

## **Reactions of Elena PACIOTTI, MEP, to the Draft Final Report (WD 18) of Working Group X on Freedom, Security and Justice.**

While reinstating the proposals already submitted in Working Document nrs. 09 and 23 together with colleagues Iñigo Mendez de Vigo and Anne Van Lancker, I observe that:

1. in the final draft there's no mention to the issue of individual access to the European Court of Justice which was long discussed in our Group. Therefore, I would propose the following amendment:

### ➤ **Amendment n.1**

Page 24, Part C., V., after the 4th paragraph, before the last paragraph:

***Referring to the measures related to the Area of Freedom, Security and Justice, it is necessary to allow individual access to the European Court of Justice when measures adopted while implementing EU law should violate their fundamental rights. To this end the Group suggests a modification of article 230, IV indent, TEC.***

2. while stating the proposal introduced by several members of the Working Group aiming at the institution of a European Public Prosecutor, the document doesn't highlight the fact that this request is based on the inadequacy of police and judicial co-operation (even if duly improved ) to face properly the crimes that damage directly the Community budget.

I therefore propose the following modification:

### ➤ **Amendment n. 2**

Page 18, Part B, paragraph c)

**The possible creation of a European Public Prosecutor or a Public Prosecutor Office**

The Group also considered some proposals made in favour of the creation of a European Public Prosecutor. Some Members pointed out that the fraud perpetrated to the detriment of the Community's financial interests are very important and that current instruments ***based on judicial co-operation*** are inadequate to remedy this situation. They thus propose the creation of a European Public Prosecutor responsible for detecting, prosecuting and bringing to judgement the perpetrators of crimes prejudicial to the Community's financial interests before the national courts. Others have considered that a convincing case was not made for the creation of such a body and that there were strong objections on both practical and accountability grounds. To some other Members, the need exists for a proper European Public Prosecutor Office with a scope of action going beyond the protection of the financial interests of the Union. They believe that the current Eurojust could evolve towards that Office.

The Working Group is in favour of exploring the idea - on a medium/long term basis - of strengthening the powers of Eurojust enabling it, on the basis of a decision taken by the college, to bring cases before national courts, through his/her national representative. The legal basis concerning Eurojust should in this case permit such evolution enabling the adoption of a decision (under the codecision procedure and by unanimity of the Council).

EUROPA-PARLAMENTET  
EUROPAISCHES PARLAMENT  
ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ  
EUROPEAN PARLIAMENT

PARLAMENTO EUROPEO  
PARLEMENT EUROPEEN  
PARLAMENTO EUROPEO

EUROPEES PARLEMENT  
PARLAMENTO EUROPEU  
EUROOPAN PARLAMENTTI  
EUROPAPARLAMENTET



---

**DÉLÉGATION DU PARLEMENT EUROPÉEN A LA CONVENTION EUROPÉENNE**

Monsieur John BRUTON  
Président du groupe de travail X  
Secrétariat de la Convention  
européenne  
Rue de la Loi, 175  
B – 1048 Bruxelles

**I. Dear John,**

I am extremely grateful for the high quality and political courage shown by the draft final report of the Working Group X of the Convention « Freedom, Security and Justice », which you submitted to me last week.

I have drafted some amendments, which are attached, and would most appreciate them being considered at the final meeting.

Yours sincerely

Iñigo MENDEZ de VIGO

Annex

## Annex

### Amendement n°1

Page 2, Introduction, troisième paragraphe

« ... Il est important que les citoyens aient le sentiment qu'un ordre public européen (« European public order ») bien conçu a pris forme et est visible aujourd'hui dans les faits et dans leur vie quotidienne. À cet égard la création de l'espace de liberté, sécurité et justice est indissociable du renforcement des droits de citoyenneté européenne et des politiques pour combattre les discriminations (art. 13 TCE) et promouvoir l'intégration des non-citoyens. Il ne peut d'ailleurs se réaliser qu'en respectant les principes de transparence et contrôle démocratique »

### Amendement n°2

Page 3, Introduction, premier point, à la fin du deuxième paragraphe, ajouter après « ...*police et du droit pénal.* »:

« Celui-ci, comme l'expérience de la coopération Schengen l'a pleinement démontré, doit se fonder sur la confiance et la solidarité mutuelle entre les Etats membres puisque dans un espace sans frontières la sécurité de chacun dépend des actions et omissions des autres. Une pareille confiance et solidarité doit être garantie par la prévision dans le Traité :

- a) du principe de la reconnaissance mutuelle tant des mesures législatives qu'opérationnelles prises au niveau des EEMM <sup>(1)</sup>
- b) de l'adoption de règles et standards communs pour autant que cela soit nécessaire pour assurer l'efficacité de la reconnaissance mutuelle ainsi qu'à la réalisation des objectifs prioritaires de l'Union
- c) de la définition d'un programme cadre pluriannuel visant les objectifs spécifiques à atteindre, les mesures législatives et opérationnelles à adopter au niveau de l'Union et des Etats membres pour la réalisation de l'espace de liberté, sécurité et justice.

Les difficultés rencontrées dans la mise en œuvre des programmes stratégiques de Vienne ('98) et de Tampere ('99) suggèrent que un tel programme cadre soit un acte contraignant comme les programmes pour l'environnement ou la recherche à adopter à l'unanimité par les Chefs d'Etats et gouvernements après avis conforme du Parlement européen.

Le plan et ses mises à jours annuelles seraient préparés par la Commission sur la base des contributions et informations des EEMM et des agences européennes opérant dans ce domaine <sup>(2)</sup> et feraient l'objet d'un débat spécifique annuel tant au niveau des parlements nationaux que du Parlement européen. Les mesures retenues comme prioritaires par le programme seraient adoptées à la majorité qualifiée »

### Amendment n°3

Page 4, Introduce before in part A., I., before 1., a section - 1 a (new) with title « external border controls» and the following text

---

<sup>1</sup> En développant l'aquis des Conventions de Schengen, de la Convention sur l'assistance mutuelle dans le domaine pénal et de la décision cadre sur le mandat d'arrêt européen)

<sup>2</sup> notamment Eurojust, Europol, Olaf, Réseau Judiciaire européen



In order to fulfil the ambitious program adopted on this matter by the European Council of Séville, the Group considers it necessary that the related provisions be adopted in the normal framework of codecision and qualified majority voting.

#### **Amendment n°4**

Page 5, Part A, I., 2., second paragraph

In the light of the foregoing, the Group has not discussed substantive changes to the legal bases contained in Article 63 § 3 and § 4 TEC on the understanding that these include already fight against illegal immigration, including criminal sanctions (see part B). The main recommendation of the Group is to move to qualified majority voting and codecision for Union legislation in these areas. However, it also recommends that the scope of article 63 be extended in order to provide a legal basis for the adoption of measures to support national integration efforts.

#### **Amendment n°5**

Page 6, Part A, I., 4., first and second paragraph

The Group has had a discussion about the current drafting of Article 65 TEC, and in particular about the limitation of that article to action on "civil matters having cross-border implications" and "insofar as necessary for the proper functioning of the internal market". The majority of the Group believes that these limitations are no longer necessary and takes the view that this legal basis on judicial co-operation in civil matters could, within the new overall structure of a single Constitutional Treaty, be dissociated from matters of asylum and immigration and visa policies.

Finally, it has been proposed that *all* aspects of judicial co-operation in civil matters, i.e. also aspects touching on family law, be covered by the same procedure of qualified majority voting and co-decision. Some others have disagreed with this idea. The Group suggests that a compromise be found, e.g. by covering in article 65 « aspects of family law which are related to parental responsibilities ».

#### **Amendment n°6**

Page 7, Part A., II. 2, second paragraph

The Group recommends that this principle of mutual recognition of judicial decisions should be formally enshrined in the Treaty, provided that approximation of certain elements of criminal procedure and of specific areas of substantive criminal law can be effectively reached (which implies that QMV and codecision is used as the normal procedure).

#### **Amendment n°7**

Page 9, Part A., II. 2, a), fourth paragraph

Against this backdrop, the Group recommends that a list of crimes<sup>1</sup> be drawn up in the Treaty, subject to modification by unanimous decision of the Council after assent of the EP.

---

<sup>1</sup> based on the list in the European Arrest Warrant -OJ L190/1 -18/7/2002

### **Amendment n°8**

Page 11, Part A., II. 2., d), second paragraph

The Group recommends that a specific legal base be included in the Treaty allowing, through the adoption of a legislative act, supporting measures for the prevention of crime, while fully respecting the particular importance of subsidiarity in this area.

### **Amendment n°9**

Page 12, Part A., II. 3., b), i.

i. minimum rules on constituent elements and sanctions of the crimes enumerated; (rest deleted)

### **Amendment n°10**

Page 13, Part A., II. 3., b), last paragraph.

Improving the effectiveness of Europol and Eurojust is crucial to the European police and judicial cooperation and should therefore ~~in principle~~ be possible by qualified majority voting and codecision; this should be the case for any possible extension of Europol's and Eurojust's scope of action to new types of crime, for all rules on their organisation and management, and for any extension of their existing powers.

### **Amendment n°11**

Page 13, Part A., II. 3., c), add after the second paragraph.

In these cases nevertheless, the assent of the EP should be required.

### **Amendment n°12**

Page 14, Part A., II. 3., d), fourth paragraph.

Against this background, the majority of the Group accepted that the right of initiative of the Commission in this area could be reconciled with a right of submission by Member States; in order to enhance the idea that the latter's submissions respond to a general concern, the Working Group recommends to set a threshold of 1/4 of the Member States for submission to create an obligation for the Commission to table a legislative proposal, on the basis of an Union-wide impact assessment (cf. conclusions of WG on subsidiarity)

### **Amendment n°13**

Part B., I., page 16, delete fourth paragraph and modify fifth paragraph

~~If there were such a reformed structure of high technical level, the question of its chairmanship would arise. That committee could have a chairman on a permanent basis appointed either by the Council or elected amongst its members. Such a high-ranking official would give visibility to the~~

~~operational co-operation within the Council. He / she could report regularly to the JHA Council and to the EP and possibly to the national parliaments, and have authority vis-à-vis Europol (e.g. chairing the management board).~~

~~However, this recommendation should be distinguished from a A proposal for a "High Representative for Justice and Home affairs" with a political role (such as chairing the JHA Council) which has also been made, but has not found sufficient support within the Group. Hence, the group has considered that, if there is a need for such a structure, it should be of technical nature.~~

#### **Amendment n°14**

Page 19, Part B., III, c), third paragraph

The Working Group is in favour of exploring the idea - on a medium/long term basis - of strengthening the powers of Eurojust enabling it, on the basis of a decision taken by the college, to bring cases before national courts, through his/her national representative. The Group therefore recommends that the legal basis concerning Eurojust be adapted to permit such evolution through the adoption of a decision of the Council after assent of the European Parliament.

#### **Amendment n°15**

Page 19, Part C., I., second, third, fourth and fifth paragraphs

~~The Group considers it indispensable to improve implementation by Member States in this area. a distinction should be made between monitoring of practical implementation of Union policies and standards, and control of compliance with legal obligations.~~

~~As for the former, Without prejudice to the Commission's monitoring of implementation as guardian of the Treaty (possibly leading to infringement proceedings), the Working Group considers that mechanisms of "mutual evaluation" or "peer review", as practised successfully within the Council over the last years (e.g., in the field of fight against organised crime or concerning effective application of the Schengen acquis), should be encouraged and applied more widely. This technique has proven a powerful tool for monitoring an efficient *practical* implementation of Union policies, thus helping to build up mutual confidence in each others' police and judicial systems, which is at the heart of a common area of freedom, security and justice. Indeed, if the system of mutual recognition is to work, there must also be a complete mutual confidence of police and judicial systems in the Member States. High standards not only must be attained, but must be maintained. The Group would see merit in an explicit mention in the new Treaty of this technique of mutual evaluation, which is to be implemented flexibly through procedures guaranteeing objectivity and independence. In addition, the "peer review" reports should be supplied to, and where possible debated, by national parliaments.~~

~~As for the obligations upon Member States of a legal nature relating to the area of current Third Pillar, The Working Group believes that the Commission should fully play its role as Treaty guardian and that it should be competent to introduce infringements proceedings before the European Court of Justice, in conformity with Article 226 TEC, in case Member States do not comply with their obligations.~~

The Group takes the view that both control mechanisms are complementary and of equal importance. ~~monitoring practical implementation in the operational area can be achieved efficiently~~

through "peer review", not by the infringement procedure; that procedure is in turn the natural tool for strictly legal control.

### **Amendment n°16**

Page 21, Part C., II., second paragraph, second indent

- use of the "early warning mechanism" (devised by WG I) also for the specific aspects of subsidiarity in criminal law matters, in particular where it is questionable that a crime has actually a "cross-border effect" and is of a serious nature. ~~One could also consider extending this mechanism to cases where certain national parliaments consider that an initiative runs counter to basic features of national criminal law policy. This mechanism could be triggered in this area by a threshold 1/4 of national parliaments entitled to early warning. In view of the special character of Justice and Home Affairs work, the Working Group also recommends that, subject to proper controls qualified minorities in national parliaments should be able to activate the "early warning mechanism" if concern about a particular issue is sufficiently widespread in the Union. This could be achieved if, for example, the activation of the mechanism could take place if a minimum of 1/3 of the membership of 2/3 of all the national parliaments sign a petition to this effect (this would encourage active co-operation on an inter-parliamentary basis between Parties in national parliaments);~~

### **Amendment n°17**

Page 22, Part C., III., second paragraph

The Working Group stresses the need for a stable representation of the Union in the negotiation of international agreements and of an appropriate association of the legislative authority as a whole in the determination of the mandate and in the course of the negotiations. ~~It considers that when the latter cover simultaneously different areas, the choice of the negotiator by the Council needs to take into account the content of the agreement in order to optimise the capacity of negotiation of the Union.~~ The Working Group acknowledges that these issues are linked with the institutional development concerning the future international representation of the Union and need further consideration by the Working Group "external action" and by the Convention.

### **Amendment n°18**

Page 22, Part C., IV., first and second paragraph

One element of the Groups' mandate concerns the *existing* opting-in / opting-out arrangements provided for by the Treaty of Amsterdam in favour of certain Member States in the area of Title IV TEC Treaty and of the Schengen acquis. The Group submits for consideration of the Convention whether these opt-out arrangements can now be abolished. ~~this might be the case especially in the areas of cooperation in civil law matters and of asylum, given the practice meanwhile established in these areas. The area of border control is of a different nature since there are objective geographical factors which might suggest that there are continued reasons for having opting-in arrangements.~~

~~Another question relates to the possible need for using opting-in or opting-out arrangements *in the future*, permitting solutions in cases of particular sensitivity (like those identified above on which moving to qualified majority poses difficulty). While Justice and Home affairs is a policy area~~

~~where the need for such solutions might be particularly strong, this is a general issue which could potentially arise in other policy areas as well and needs to be examined by the Convention. The JHA experience teaches that one of the principal questions to be addressed in that context is whether opting in / out possibilities should exist *en bloc* for well defined policy areas (border control would be a candidate for this, for the geographical reasons mentioned above), or whether they should be opened on a case-by-case basis for individual legislative initiatives.~~

**Amendment n°19**

Page 24, Part C., V., fourth paragraph

The Working Group suggests that the specific mechanisms foreseen in Articles 35 TEU and 68 TCE should be abolished and that the general system of jurisdiction of the Court of Justice should be extended to the area of freedom, security and justice, including action by Union bodies in this field and action by police or other authorities when acting in the framework of EU-law (exception foreseen in article 35 paragraph 5 TEU to be deleted). Accordingly article 33 TEU should specify that it applies only when national authorities are acting on the basis of national prerogatives.