

Working Group X

Working document 33

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

**Subject :** Paper by M. Elmar Brok, Member of the Convention  
"What the Constitution of the European Union will need to say on Freedom,  
Security and Justice"

## **What the Constitution of the European Union Will Need to Say on “Freedom, Security and Justice”**

1. Freedom, Security and Justice are key for the citizens of the European Union. It is in this field in particular where they will measure whether the work of the Convention has been successful. It is in this field in particular that the Convention needs to make progress to present, in the end, credible results to the citizens.

2. It has already been outlined, in a joint paper by Mrs. E. Paciotti, Mrs. A. Van Lancker and Mr. Méndez de Vigo submitted to Working Group X, that, as the Treaties stand, it is very difficult for the Union to attain successfully the objective that it has set itself – in Article 2 of the EU Treaty – to develop the Union as an area of freedom, security and justice. This critical observation has been confirmed by experts heard by the Working Group, including national officials and leading officials of Europol, Eurojust and OLAF<sup>1</sup>.

In line with these observations, I would like to summarise the outcome to be desired from this Working Group as follows:

- First, to ensure efficiency, the “Community method” must be applied to the entire field of “Freedom, Security and Justice”, including the current third pillar. This means in particular that the Commission should have the monopoly right of initiative for legislation<sup>2</sup>; that legal instruments adopted in this field will have direct effect, i.e. create rights for individuals, and will be enforceable; that for this purpose, “framework decisions” will have to be replaced by “Union framework acts”; and that, last but not least, there should be, as required by the rule of law, no holes in the jurisdiction of the European Court of Justice.
- Second, the European Parliament must have a right to co-decide with the Council in all legislative matters regarding “Freedom, Security and Justice”, regardless of whether they currently fall under the first or third pillar, at least in cases where the Council decides by majority.
- Third, qualified majority voting should become the rule with regard to “Freedom, Security and Justice”. Exceptions to this rule, if necessary at all, should be very limited and include only fundamental issues such as the setting up of new bodies or organisations in this field or the extension of the mandate of such bodies or organisations.
- Finally, efficient Union organisations are needed to prevent and combat cross-border crime in the Union and to protect the Union’s external borders. For this purpose, *Europol*, *Eurojust* and *Eurobord* – which could be the name for the new European border control organisation – should be given a firm legal basis in the Constitution of the European Union.

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<sup>1</sup> Cf. in particular the minutes of the WG X meeting of 25 September 2002.

<sup>2</sup> It should be further discussed whether there is a need for maintaining, for a transitional period, a parallel right of Member States to initiate legislation, as currently is the case under the third pillar (Article 34 EU) and – until 1 May 2004 – under Article 67 (1) EC.

- *Europol* should be integrated into the supranational legal system of the Union. For this purpose, Europol should be referred to in the institutional part of the Constitution, and the Europol-Convention should be attached to the Constitution as a protocol.
- *Eurojust* should be given the potential to develop the functions of a European Public Prosecutor, in accordance with future decisions of the Union's legislature. In addition, to simplify structures and decision-making processes, the function of fraud prevention (currently exercised by OLAF) should be assigned to Eurojust, of which OLAF should become an integral part<sup>3</sup>.
- *Eurobord* should, in close coordination with national border control systems, guarantee the protection of the Union's external borders. Better management of the Union's external borders will help in the fight against terrorism, illegal immigration and the traffic in human beings<sup>4</sup>.

Integration of these three organisations will also ensure (1) parliamentary control of their activities; (2) their financing from the Union's budget and (3) their submission to judicial control by the European Court of Justice.

3. Against this background, it is therefore suggested to include the following provisions in the Constitution of the European Union (Part One)<sup>5</sup>:

### **in Title II: Definition and Objectives of the Union**

#### **Article 58** (Union objectives)

(1) The Union shall set itself the following objectives:

...

- c) to maintain and develop, through a common policy in police and judicial matters, the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime<sup>6</sup>;

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<sup>3</sup> In the hearing of 25 September, both the Director of Eurojust and the Director of OLAF stressed the need for better coordination between their units or even a common solution, and criticised the current duplication of efforts.

<sup>4</sup> Cf. Communication from the Commission to the Council and the European Parliament of 7 May 2002: Towards Integrated Management of the External Borders of the Member States of the European Union.

<sup>5</sup> The structure follows that of the Preliminary Draft Constitutional Treaty of the Convention Presidium, as amended and supplemented by the Discussion Paper of the EPP/ED Convention Group of 10 November 2002 (Frascati draft).

<sup>6</sup> Cf. Article 2, fourth indent EU.

### **in Title III: Union Competences and Action**

#### **Article 67 (Shared competences)**

The Union's shared competences shall be:

...

- measures concerning visas, asylum, immigration and other policies related to the entry and movement of third-country nationals in the Union;
- the combat of fraud detrimental to the Union's budget<sup>7</sup>;
- the control of the external borders of the Union;
- the laying down of minimum criminal sanctions for crimes against the Union's financial interests, the single currency and for serious crimes of a cross-border nature;

...

### **in Title IV: Union Institutions, Organisations and Bodies**

(in a specific Chapter dedicated to the Union's specialised organisations with own legal personality)

#### **Article 87 (Europol)<sup>8</sup>**

(1) The objective of Europol shall be to improve the effectiveness and cooperation of the competent authorities in the Member States in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime where there are factual indications that an organized criminal structure is involved and two or more Member States are affected by the forms of crime in question in such a way as to require a common approach by the Member States owing to the scale, significance and consequences of the offences concerned<sup>9</sup>.

(2) Europol shall have legal personality<sup>10</sup>.

(3) The European Police Office (hereinafter referred to as "Europol") shall act within the limits of the tasks and competences conferred upon it by the Europol-Agreement, annexed to this Constitution as a Protocol<sup>11</sup> and by a Union act<sup>12</sup>. It shall be entirely financed from the Union's budget.

(4) Europol shall make good any damage caused by its decision-making bodies or servants in the performance of their duties; Article 41 paragraph 3 shall apply accordingly<sup>13</sup>.

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<sup>7</sup> Cf. Article 280 EC.

<sup>8</sup> Cf. the Europol-Agreement, concluded under the former Article K.3 EU.

<sup>9</sup> Cf. Article 2 of the Europol-Agreement.

<sup>10</sup> Cf. Article 26 (1) of the Europol-Agreement.

<sup>11</sup> For this purpose, the Eurpol-Agreement will have to be reformed.

<sup>12</sup> Unions acts should always be adopted by codecision between the European Parliament and the Council, the latter acting by qualified majority.

<sup>13</sup> Cf. Article 39 (2) of the Europol-Agreement.

### **Article 87a** (Eurojust)

(1) The objective of the European Judicial Cooperation Unit (Eurojust) shall be to ensure close cooperation between judicial and other competent authorities of the Member States with a view to fight against serious cross-border crime, particularly in the case of organised crime, taking into account, in particular, the analyses carried out by Europol<sup>14</sup>. In addition, Eurojust shall prevent fraud to the detriment of the Union's budget<sup>15</sup>.

(2) Eurojust shall have legal personality<sup>16</sup>.

It shall be composed of one national member seconded by each Member State in accordance with its legal system, being a prosecutor, judge or police officer of equivalent competence<sup>17</sup>.

(3) Eurojust shall act within the limits of the tasks and competences conferred upon it by a Union act<sup>18</sup>. It shall be entirely financed from the Union's budget.

An extension of Eurojust's mandate to include the functions of a European Public Prosecutor shall require the Council acting unanimously and the assent of the majority of the members of the European Parliament.

(4) Eurojust shall make good any damage caused by its decision-making bodies or servants in the performance of their duties; Article 41 paragraph 3 shall apply accordingly<sup>19</sup>.

### **Article 87b** (Eurobord)<sup>20</sup>

(1) The objective of the European Border Control Organisation (Eurobord) shall be to coordinate and supervise, while having recourse to the competent national external border authorities, the control of the external land, maritime and borders of the Union

(2) Eurobord shall have legal personality.

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<sup>14</sup> Cf. Article 29, second subpara and Article 31 EU, as amended by the Nice Treaty.

<sup>15</sup> Integrates the functions of OLAF into Eurojust.

<sup>16</sup> Cf. Article 1 of Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, O.J. 2002 L 63/1.

<sup>17</sup> Cf. Article 2 (1) of Council Decision of 28 February 2002 setting up Eurojust.

<sup>18</sup> Unions acts should always be adopted by codecision between the European Parliament and the Council, the latter acting by qualified majority; cf. Article 94 of the EPP/ED Discussion Paper of 10 November 2002.

<sup>19</sup> When Eurojust becomes a Union organisation fully subject to the Union's rule of law, it is no longer appropriate, as currently foreseen in Article 24 of Council Decision of 28 February 2002 setting up Eurojust, that liability cases are heard by national courts. Instead, the general principle of Article 41 (3) of the Charter should also apply to Eurojust.

<sup>20</sup> Cf. Communication from the Commission to the Council and the European Parliament of 7 May 2002: Towards Integrated Management of the External Borders of the Member States of the European Union, where a "European Corps of Border Guards" is proposed on pp. 20 et seq.

The staff of Eurobord shall have the full prerogatives of public authority needed to perform their functions, irrespective of their nationality and their place of deployment.

It shall be placed under the operational command of the Eurobord Executive Council, composed of a Director, appointed jointly by the Council acting with qualified majority and the European Parliament acting with the majority of its members, and the heads of the competent national external border control authority.

(3) Eurobord shall act within the limits of the tasks and competences conferred upon it by a Union act<sup>21</sup>. It shall be entirely financed from the Union's budget.

(4) It shall make good any damage caused by its decision-making bodies or servants in the performance of their duties; Article 41 paragraph 3 shall apply accordingly.

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<sup>21</sup> Unions acts should always be adopted by codecision between the European Parliament and the Council, the latter acting by qualified majority; cf. Article 94 of the EPP/ED Discussion Paper of 10 November 2002.