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Jörg Monar

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The Results of the European Convention

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CENTER FOR INTERNATIONAL RELATIONS
ul. Emilii Plater 25, 00-688 Warszawa
TEL.: (22) 646 52 67, FAX: (22) 646 52 58
www.csm.org.pl, info@csm.org.pl

Towards a New Framework of Co-operation in EU Justice and Home Affairs? The Results of the European Convention

Professor Dr. Dr. Jörg Monar*
Sussex European Institute
University of Sussex

INTRODUCTION

Future historians are most likely to regard the emergence of justice and home affairs as a major policy-making area of the European Union (EU) as one of the most significant developments in the European integration process in the 1990s and at the beginning of the 21st century. This may at first sight look like a slightly exaggerated statement, but it is validated by the following three considerations:

First, justice and home affairs touch upon essential functions and prerogatives of the modern nation-state. Providing citizens with internal security, controlling external borders and access to national territory and administering justice have since the gradual emergence of the modern nation-state in the17th/18th century and its theoretical underpinning in the writings of Thomas Hobbes, John Locke, Montesquieu and Rousseau all belonged to basic justification and legitimacy of the existence of the state. The fact that since the Treaty of Maastricht (1993) the EU has developed a steadily increasing role in this domain means that it has entered into one of the last domains of exclusive national competence, not by replacing the state as a provider of internal security and justice as essential public goods, but by emerging as a more and more important additional provider.

Second, justice and home affairs touch upon a number of very sensitive political issues. The fight against crime and illegal immigration, ensuring that asylum systems are both fair and protected against abuse and facilitating access to justice are issues which matter for European citizens. This is reflected in the importance which internal security issues have acquired in national elections campaigns – the last French general elections can be taken as one example among many -, but also in opinion polls which indicate that internal security related issues rank very high in European citizens concerns. The latest Eurobarometer opinion poll indicates, for instance, that 80% of EU citizens count terrorism amongst their

* Professor of Contemporary European Studies, Co-Director of Sussex European Institute, Associate Director – One Europe or Several? Programme.

primary fears and 71% of them organised crime. 90% of them think that the fight against terrorism should be one of the priorities of the Union, 88% think the same about the fight against organised crime and drug trafficking and 81% about the fight against illegal immigration.[1] This means that by developing its role in this domain the EU is responding to some fundamental concerns (and expectations) of citizens which are more pronounced than in many other policy-making areas of the EU, including the Common Foreign and Security policy.

Third, under the label of the "area of freedom, security and justice" (AFSR) justice and home affairs co-operation within the EU has by now not only become a fundamental integration and treaty objective[2] but also one of the major areas of "growth" of EU action. During the last three years the Council has adopted each year around hundred texts in this field, most of which have been legally binding, a range of new structures have been created with Europol and Eurojust being only the most prominent ones, in the context of the JHA Council ministers of interior and justice are now normally meeting on a monthly basis (which makes the JHA Council one of the most frequently meeting Council formations) and already on two occasions (Tampere in October 1999 and Seville in June 2002) the Heads of State or Government of the Union have dedicated European Council meetings almost exclusively to JHA issues. The EU acquis is justice and home affairs is among the fastest growing areas of legal action, and – although progress is sometimes slow – the EU's agenda in the JHA domain is now wide-ranging and ambitious to an extent which would have been difficult to imagine still at the beginning of the 1990s.

Having regard to the importance gained by JHA co-operation as a policy-making area of the EU the European Convention, entrusted with the drawing up of a draft constitutional treaty for the EU, obviously had to give considerable room to this domain in its work. And it did so: Its Presidium defined a specific set of questions and challenges in the JHA domain,[3] a special Working Group ("X") then looked at reform needs and made a range of substantial proposals,[4] there were several major initiatives on far-reaching initiatives (such as the ambitious Fischer/de Villepin proposals of November 2002)[5] and, finally, numerous changes and new elements regarding the AFSR were introduced in the final draft of the constitution adopted by the Convention in July 2003.[6]

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[1] Standard Eurobaromter 59, July 2003, pp. 9 and 58-59.
[2] Formally codified in Article 2 of the Treaty establishing the European Union of equal legal status as, for instance, Economic and Monetary Union and the Common Foreign and Security Policy as fundamental Union objectives.
[3] CONV 69/02 and 206/02.
[4] Final Report: CONV 426/02.
[5] CONV 435/02.
[6] CONV 850/03.

Having regard to the prominence given to the JHA domain in the work of the Convention it seems worthwhile to ask to what extent the results, i.e. the provisions of the draft constitution, are creating a new framework for this domain if adopted by the 2003/2004 IGC. This question is an all the more pertinent one to ask as the Treaty of Amsterdam, which entered into force in 1999, had already brought very extensive reforms together with a long list of objectives which are still far from being fully implemented. Inevitably one has to combine the question about the new framework with the question of the "value added" the new reforms, following so rapidly after the Amsterdam reforms, will bring.

THE NEW LEGAL FRAMEWORK

The by far most fundamental change the draft constitution brings for JHA co-operation is the recasting of its overall legal framework. The existing division between the EU's three "pillars" is replaced by a single legal framework in a single legal text. This step will remove the existing split in the JHA domain between, on the one hand, asylum, immigration, border controls and judicial co-operation in civil matters falling under Title IV of the EC Treaty ("first pillar") and, on the other hand, judicial co-operation in criminal matters and police co-operation falling under Title VI of the EU Treaty ("third pillar"). The formal abolition of the "pillar" division will put an end to the need to adopt "parallel" legislative acts under the different "pillars" in certain domains of "cross-pillar" implications (such as money laundering), will reduce the potential for controversies over the appropriate legal basis, will put an end to the artificial separation of decision-making structures between "first" and "third pillar" matters in the Council and will facilitate the negotiation and conclusion of agreements with third countries on "cross-pillar" matters. The new single legal framework also means that the Union will be able to act internally and externally[7] as single legal actor with a single set of legal instruments – not the current division between "first" and "third pillar" instruments – which will be an important contribution to a more coherent and clear-cut legal acquis. Combined with this is the abolition of most of the restrictions and distinctions between the role of the European Court of Justice in the JHA domain under the two pillars (see below).

Yet the major progress made with the abolition of the "pillar" structure is partially undermined by a number of special provisions for the individual JHA policy areas: According to Article III-165 the European Commission will have an exclusive right of initiative for asylum, immigration, border control and judicial co-operation in civil matters, but will have to share the right of initiative with the Member States in police and judicial co-operation in criminal matters. Whereas in the aforementioned areas (asylum etc.) the draft constitution

provides with one small exception (family law) for qualified majority voting, substantial parts of police and judicial co-operation in criminal matters will still be governed by the existing unanimity requirement. A similar distinction applies to the role of the European Parliament which is granted co-decision on most of the issues of the first named areas, but is limited to assent or consultation procedures on quite a number of last named ones. All this means that from an institutional and procedural point of view the old "pillar division" will at least to some extent continue to exist. This "hidden" continuation of the pillar separation could lead to problems in the adoption of cross-cutting packages of measures because of different procedures, majority requirements and forms of involvement of the Parliament. It also significantly reduces the transparency of the JHA provisions and – of course – runs against the principle of a single legal framework.

A further weakness of the new single legal framework is the absence of any clearer definition of the objectives of the AFSR as a fundamental treaty and integration objective. As fundamental public goods "freedom", "security" and "justice" are so extremely broad objectives that a somewhat more precise definition of the AFSJ's objectives – as this is done, for instance, for the Common Foreign and Security Policy in Article I–39 - would have been highly appropriate. Instead Article I-3(2) dealing with the AFSJ contains only a reference to an EU "without internal frontiers" and establishes a link between the AFSJ and the single market with its "free and undistorted" competition. This seems rather misleading and unfortunate as the AFSJ as a political project has since long far outgrown the Schengen objective of allowing for the abolition of internal border controls and as its links with the economic aims of the single market are of a rather peripheral nature. The language used here seems to fall back in the 1980s, which is rather astonishing for a Convention on the "future of the European Union". The "specific provisions" on the AFSJ in Article I-41 only contain some general guidelines for its construction (trust building etc.) and add little to a clarification of its concept and basic aims. It seems particularly regrettable that the occasion has been missed to spell out the need for a balanced development of the AFSJ with equal consideration given to all three of the public goods. So far around 80% of the measures adopted have been directly or indirectly linked to internal security – and correspondingly few to "freedom" and "justice".

THE CHARTER OF FUNDAMENTAL RIGHTS AS PART OF THE LEGAL FRAMEWORK

In a wider sense part of the new legal framework of JHA co-operation is also the Charter of Fundamental Rights which is fully incorporated in part II of the draft constitution.

[7] By virtue of Article I-6 the Union is vested with full legal personality which removes current

There can be no doubt that measures in the JHA domain can affect fundamental rights of individuals in a much more direct way than, for instance, most of the single market measures. With the full incorporation of the Charter the draft constitution clearly creates a better basis for comprehensive fundamental rights protection at EU level – and not only through national constitutional law and international legal instruments (such as the European Convention on Human Rights). Although it is true that the protection of certain fundamental rights – such as non-discrimination – can already be regarded as adequately ensured in the current EC legal order, there are still a number of gaps of relevance for JHA measures which will be filled through the incorporation of the Charter. This applies, in particular, to the right to the protection of personal data (Article II-8) which – having regard to the proliferation of data-bases and exchange systems in the context of the AFSJ (SIS, Europol, Eurodac, etc.) and the rapidly developing co-operation with third countries (example: the Europol-USA agreement of December 2002 which provides for the exchange of personal data) – is of increasing importance.

The incorporation of the Charter is also not without importance for the development of external relations in the JHA domain. The right to life and the prohibition of the death penalty (Article II-2) as well as the right to the integrity of the person (Article II-3) and the prohibition of torture and inhuman or degrading treatment or punishment (Article II-4) could clarify and help to strengthen the Union's position in negotiations with third countries on legal assistance and extradition agreements. It should be recalled here that the problem of the death penalty was one of the most difficult issues in the negotiations on the EU-US extradition agreement signed on 25 June 2003.[8]

It is worth a special mentioning that the preamble of the Charter contains a special reference to the AFSJ as one of the elements through which the Union places man "at the heart of its activities". While this sounds nice a general affirmation of goodwill, one would have wished a slightly stronger reference to the fact that JHA co-operation in the context of the AFSJ can actually (and should) make a contribution to the effective protection of the Charter rights within the EU. It should also be noted that the draft constitution does not provide for a right of individuals to bring direct actions before the Court of Justice on fundamental rights issues. As a result fundamental rights protection by the Court will normally be exercised via the preliminary rulings procedure, arising from cases brought before national courts.

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uncertainties on this issue.

THE REVISED POLICY-MAKING OBJECTIVES

The first thing to note as regards the policy-making objectives for JHA co-operation is that the draft constitution maintains the Treaty of Amsterdam approach of providing detailed lists of individual objectives for each of the main policy-making areas which almost read like legislative programmes. This has to be regretted. First of all it is most unusual for constitutional texts to include such detailed programmatic elements which can quickly become outdated and drastically reduce the transparency of the text. Then there is also the disadvantage that these lists of objectives can be interpreted as excluding everything from EU action which is not explicitly mentioned. This is all the more of relevance as the draft constitution reinforces the principle of conferral by explicitly stating that all competences not (explicitly) conferred upon the Union remain with the Member States (Article I-9(2).

The policy-making objectives currently contained in Title IV TEC and Title VI TEU are both amended and added to by the draft constitution. Only the more important changes can be mentioned here:

Policies on border checks, asylum and immigration

As regards border controls the draft constitution now provides for a "policy" rather than the current "measures" only. This seems to imply a higher degree of integration, although the term "common policy" – not very popular in some capitals – has been avoided. The most significant innovation is the gradual establishment of an "integrated management system for external borders" (Article III-166(1)(c) and (2)(d). This reflects the Member States recent move towards a much more intensified co-operation on external border issues which – driven also by the challenges of enlargement – has already come out very clearly in the Council plan for the management of external borders[9] and the Seville European Council conclusions (both June 2002). The project of a Common European Border Guard/Police – which had some support also inside of the Convention – has not found its way into the draft, but the term "integrated management" is wide enough not to exclude it in a more distant future.

As regards asylum the draft constitution introduces for the first time the traditionally highly charged term "common policy" (Article III-167(1). Yet the use of this term is less revolutionary than it might seem since the asylum policy objectives set by the European Council of Tampere in October 1999 were already so ambitious that the term could have been used ever since if some Member States would not have preferred the less charged term "common asylum system". Nevertheless the formal introduction of a "common policy"

[8] Council document no. 9153/03.

reinforces the common ambition in this area, which is indeed added to by a number of additional objectives. This applies, in particular, to the introduction of a "uniform status of asylum" (Article 167(2)(a), a "uniform status of subsidiary protection" (Article 167(2)(b), common procedures for the granting and withdrawing of the asylum or subsidiary protection status (Article 167(2)d) and "partnership and co-operation" with third countries for the purpose of managing inflows of people applying for either status (Article 167(2)(g). Although some elements of these objectives are already to be found in current Article 63 TEC, the foreseen common uniform status goes clearly beyond the more fragmentary current treaty provisions which were largely based on a common minimum standards approach only. The explicit empowering of the Union to take action in relations with third countries seems a useful and even necessary complement to the substantial internal objectives in this field.

More surprising than in the area of asylum policy is the use of the term "common policy" in the area of immigration policy where the draft constitution seems to expect the Union to deliver on issues on which many Member States have so far largely failed to deliver effective policy responses: "efficient management of migration flows", "fair treatment" of legally resident third country nationals, "prevent" and enhanced combating of illegal immigration and trafficking in human beings (Article III-168(1). These very ambitious objectives are unfortunately not matched by correspondingly comprehensive powers of the Union. New are only provisions on measures against illegal immigration, unauthorised residence, trafficking in persons (Article III-168(2)(c) and (d) as well as the conclusion of readmission agreements with third countries (Article III-168(3), all areas, however, in which the Union has already become active. Provision is also made, it is true, for measures promoting the integration of third-country nationals, but these have to exclude any harmonisation of the laws and regulations of the Member States (Article III-168(4). It seems rather doubtful whether much of a "common policy" on the crucial issue of integration can emerge on that basis.

The most significant restriction on a "common immigration policy", however, is imposed by Article III-168(5) which provides that Member States will fully keep their right to determine "volumes of admission" of third-country nationals for work purposes, whether employed or self-employed. With this provision one of the most crucial aspect of any policy on legal immigration – the decision on numbers - is taken out of the sphere of potential EU action. This will clearly not help with the development of common approach on opening up more channels for legal immigration, which the Commission had already advocated in 2000 because of the dramatic demographic change within the EU. It could well mean that the "common immigration policy" of the EU might remain – as it currently is - largely a policy on illegal immigration. One has to ask oneself, however, whether in a Union of 25 Member

[9] Council document no. 10019/02.

States with major differences between the historical, cultural and socio-economic context of national immigration policies and, indeed, very different immigration pressures a fully fledged "common policy" including legal immigration is indeed feasible. Yet in any case, having regard to the applying limitations, the use of the term "common policy" in the draft constitution in relation to immigration policy matters seems hardly justifiable.

Judicial co-operation in civil matters

In this domain the current catalogue of aims in Article 65 TEC is added to by the objectives of a "high level of access to justice", the development of alternative methods of dispute settlement and support for the training of the judiciary and judicial staff (Article III-170(2)(e), (g) and (h). As the Union has already become active in all of these areas this represents largely a codification of existing practice, although it clearly creates a clearer basis for future action. Important is that by virtue of Article III-170(1) co-operation in civil matters is to be based on the principle of mutual recognition, but "may" also include measures of approximation if national laws which introduces a harmonisation dimension .

Judicial co-operation in criminal matters

In this area the draft constitution increases the number of objectives from currently four (Article 31 TEU) to twelve, a number which would be even higher if one would include the tasks defined for Eurojust and the European Public Prosecutor's Office. New is, in particular, the possibility to adopt framework laws on minimum rules regarding the mutual admissibility of evidence, the rights of individuals in criminal procedure, the rights of victims of crime and other "specific aspects" of criminal procedure (Article III-171(2), the considerably increased list (which can be added to further) of the areas of "particularly serious crime" for which minimum rules concerning the definition of criminal offences and sanctions can be established (Article III-172(1), an authorisation for EU action in the field of crime prevention (Article III-173) and the possibility of the establishment of a European Public Prosecutor's Office (Article III-175). All these are innovative elements, but they also raise a number of questions:

While one may welcome the inclusion for the first time of criminal procedure in the treaty defined domain of co-operation as a necessary addition, this could also expose more the tension between the civil law and common law systems in the Union. Rather than establishing a rather incomplete list for potential EU action it may also have been more appropriate to open the whole are of criminal procedure for co-operation, subject to a

unanimity requirement to adequately protect the interests of Member States with fundamentally different legal traditions.

The extension of the list of forms of "serious crime" eligible for EU legislative action has to be seen as a step forward, especially as regards cross-border crimes of rapidly increasing importance, such as trafficking in human beings and computer crime. One can, of course, question the approach of listing individual crimes as this will require a cumbersome separate decision-making process if other forms of crime would need to be added at a later stage.

There can be no doubt that EU action in the field of crime prevention (on best practice identification and training, for instance) can add a useful additional dimension to EU measures in the fight against cross-border crime. Yet the scope of this action is limited by the exclusion of any approximation of national legislative and regulatory provisions (Article III-173).

The provision on the possible – not mandatory - establishment of a European Public Prosecutor's Office is one of the most controversial ones in the draft constitution and could still become one of the victims of the Intergovernmental Conference. While a reasonable case can be made for enabling such a European "prosecution service" for the investigation, prosecuting and bringing to justice of offences against the Union's financial interests – especially if the prosecutors would still operate under national law before the national courts – the inclusion in the Office's scope of "serious crimes affecting more than one Member State" seems very broad (and daring) indeed. From a political point of view the resistance against such an Office in some Member States could probably be reduced significantly if the scope of its function would – at least as long as there are still very fundamental difference between national criminal law systems – be limited to the protection of the Union's financial interests.

As regards Eurojust Article III-174 largely codifies existing functions, this, however with the exception of Eurojust being enabled to also "initiate" criminal prosecutions conducted by national authorities. In this form this is currently not provided for by the Eurojust Decision[10], but could indeed help with making the best possible use of the information and expertise available to Eurojust in the fight against cross-border crime.

Police co-operation

The draft constitution streamlines and simplifies current provisions on general police co-operation while leaving their substance largely unchanged (Article III-176) – one of the few instances in which the Convention has actually succeeded in simplifying provisions,

which was part of its original mandate. As regards Europol (Article III-177) there are some clearly innovative elements. According to Article III-177(2)(b) Europol can not only be vested with co-ordinating functions but also have as tasks the "organisation and implementation" of investigative and operational action carried out jointly with national authorities. At first sight this may appear like a significant step forward in the direction of an "operational" role of Europol. This remains controversial in several Member States, and in many cases substantial changes to national legislation would indeed need to be introduced to enable Europol officers to take an active role in implementing policing measures. Yet Article III-177(3) severely restricts what would appear as a stronger operational role of Europol by reserving "coercive measures" exclusively to national authorities and by providing that any operational action by Europol must be carried out "in liaison and in agreement with" national authorities. One can detect a slight tension here between an attempt, on the one hand, to strengthen Europol's role, and, on the other hand, to remove grounds for fundamental objections from the Member States. The underlying idea seems to be to make a distinction between powers of investigation – which Europol should to some extent be vested with – and operational law enforcement measures – which should remain with national authorities. This, however, should have been made much more clear in the relevant provisions which are of a rather tortuous wording. Interestingly the Convention seems to have been willing to go much further with operational powers on the prosecution side – as the provisions on the European Public Prosecutor's Office show – than on the policing side, an asymmetry which is clearly not in the interest of effective co-operation between European police and prosecution authorities.

A further new element is the provision for a European law or framework law on the conditions and limitations under which national law enforcement authorities may operate in the territory of another Member State (Article III-178). This has been a notoriously difficult issue for several decades with major differences persisting between national legislation which – in many Member States – continues to impose very tight restrictions on even only the movements of police officers from other Member States within the national territory. Not surprisingly unanimity is provided for this sensitive issue – which may delay adoption of common legislation for many years to come.

DIVISION OF POWERS AND SUBSIDIARITY

According to Article I-13(2) of the draft constitution the AFSJ is a domain of "shared competence", i.e. a domain, in which the Member States shall exercise their competence

[10] Article 6 of the Eurojust Decision is much more vague in this respect (Official Journal of the

only to the extent that the Union has not exercised, or has decided to cease exercising, its competence. This means to some extent a strengthening of EU competence as Union action in the JHA domain will automatically generate a pre-emptive effect on further national measures in this domain, which is currently far from clear, at least in the area of the "third pillar". As a result of this pre-emptive effect Member States could well find it more difficult to take national action on a given issue, such as, for instance, illegal immigration, even if the Union has only taken partial action.

There is a furthers element of strengthening the Union side of the division of powers between the EU and its Member States. The strong emphasis placed in Article I-9(1) and (2) on the principle of conferred competences would seem to provide a heightened barrier to a gradual extension of "shared" EU powers. Yet the "flexibility clause" of Article I-17(1)[11] allows EU action beyond explicitly mentioned powers if such action "should prove necessary (…) to attain one of the objectives set by the constitution". As pointed out the AFSJ is indeed one of these fundamental "objectives" listed in Article I-3, but lacks any more precise definition as regards its content and scope. At least in principle this could offer the EU quite a wide margin to manoeuvre for extending its scope of action in the JHA domain.

Apart from the principle of conferred competences, however, the draft constitution contains at least two other elements which are likely to support a restrictive interpretation of Union powers in the AFSJ domain. One of those is the revised subsidiarity principle of Article I-9(3) which now provides that the Union shall act in domains outside of exclusive Union competence only "if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central or at regional and local level". Apart from generally increasing the burden of proof for EU action also in the JHA domain, the EU institutions will now also have to take into account the regional level which – especially in the case of the German *Länder* can have quite substantial powers to act on a number of JHA issues. It should also be mentioned that Article III-160 specifically mentions the role of national parliaments in ensuring compliance of legislative initiatives in the areas of police and judicial co-operation in criminal matters with the principle of solidarity in accordance with the "early warning" procedure provided for by Protocol on the application of the principles of solidarity and proportionality. Although this controlling role of national parliaments applies in principle to all legislative initiatives the specific mentioning of it in respect of these areas of JHA co-operation could increase the pressure of justification for new measures.

The second element which could contribute to a restrictive interpretation of Union powers is the new principle of the "respect" of "essential State functions" introduced by Article I-5(1) of the draft constitution. These functions explicitly include "maintaining law and order" and "safeguarding internal security". Article III-163 takes this principle again up by

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European Communities, No. L 61 of 6.3.2002).

providing that the JHA provisions shall not affect the exercise of national responsibilities with regard to maintaining law and order and safeguarding internal security. As most of the areas covered by the AFSJ are directly or indirectly linked to public order and internal security issues these articles could provide substantial arguments for Member States opposing an extension of EU action in certain fields of the JHA domain.

On the whole the picture regarding the division of powers is therefore a rather mixed one, with the draft constitution providing both some potential for strengthening the Union side of the division of powers scale, and new grounds for the Member States to restrict Union action. All this looks like a recipe for controversies which may well come up before the Court of Justice.

SOLIDARITY AS A NEW INTEGRATION PRINCIPLE

The introduction of an explicit principle of solidarity into the context of JHA co-operation is one of the most significant innovations of the draft constitution. If one takes the idea of the AFSJ as a single "area" in which Member States want to find common responses to common challenges seriously then it would seem only logical that Member States are also solidary with each as regards the burden of these common responses. A particularly obvious example for the need of solidarity is the protection of the EU's external borders where Member States face rather different challenges and problems because of their different geographical positions, the result being that some face a significantly higher "bill" for ensuring the high common standards of external border security agreed at the EU level. the question of solidarity is all the more important in view of the accession of ten new Member States in 2004, some of which still have major capability deficits in terms of implementing external the EU(-Schengen) external border security standards.

The draft constitution introduces the principle of solidarity no less than four times regarding areas of relevance to JHA co-operation. These are the framing of a common policy on asylum, immigration and external border controls (Article III-158(2), the adoption of provisional measures for the benefit of Member States experiencing an emergency situation caused by a sudden inflow of third-country nationals (Article III-167(3), the validity of the "principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States" for the whole of Section 2 of Chapter IV (policies on border checks, asylum and immigration, Article III-169) and – outside of the provisions on the AFSJ – the general solidarity clause of Article I-42 on the mobilisation of all instruments at the Union's disposal to prevent terrorist threats, to protect democratic institutions and the civilian

[11] A continuation of the current general enabling clause of Article 308 TEC.

population and to assist a Member State in the vent of an attack. Although different meanings can obviously be given to the term “solidarity”, the formal introduction of the principle nevertheless mark a substantial step forward towards a system of common support for common tasks and effective burden-sharing – with the significant inclusion of the use of EU budgetary means. One can regret, however, that the solidarity principle has not simply been extended to all domains of the AFSJ as needs for solidarity can also emerge in other fields such as, for instance, the fight against organised crime where at least some of the new Member States still lack sophisticated investigation equipment.

THE REFORMS OF THE DECISION-MAKING SYSTEM

Much attention was given before and during the work of the Convention to the deficits of the decision-making system regarding the AFSJ, and in particular to issue of the persisting unanimity requirement as one of the reasons for lack of sufficient progress in a number of areas. The draft constitution provides indeed for a number of substantial reforms on the decision-making side:

As regards voting requirements the draft constitution brings a major breakthrough towards qualified majority voting. Co-decision by the European Parliament with majority voting in the Council becomes the standard decision-making procedure also for the domain of JHA co-operation. There are a number of exceptions. Unanimity will still apply to measures concerning family law with cross-border implications (Article III-170(3), the establishment of minimum rules concerning “other” (i.e. not explicitly mentioned) aspects of criminal procedure (Article III-171(2)(d), the identification of “other” (i.e. not already explicitly mentioned) areas of serious crime for which minimum rules concerning the definition of criminal offences may be introduced (Article III-172(2), the European law on the establishment of the European Public Prosecutor’s Office (Article III-175(1), legislative measures regarding operational co-operation between national law enforcement authorities (Article III-176(3) and the laying down of the conditions and limitations under which national law enforcement authorities may operate in the territory of another Member State (Article III-178). While all these are clearly important and sensitive areas, these exclusions from majority voting should not conceal the fact that the draft constitution introduces majority voting on a very broad scale indeed, and this in areas such as criminal justice co-operation which were at the last IGC (2000) still far from being considered as eligible for majority voting.

While this extension of majority voting may be regarded as a significant change, it also raises certain questions. On the one hand there can be no doubt that more majority

voting on JHA matters will increase the Union's decision-making capacity on the further development of the AFSJ. The last few years have amply demonstrated – especially in the domain of asylum and immigration – that unanimity means all too often blocked or major delays, and even where decisions are taken agreements on the least common denominator. In view of the upcoming major enlargement (and likely further rounds of enlargement) the advantage of increasing decision-making capacity through majority voting carries considerable weight.

One the other hand, however, this comes at a price which at least some Member States might increasingly feel as heavy. The draft constitution provides for majority voting in areas where Union measures can cut deeply into national legal systems and traditions as well as national concepts of law and order. Examples are the establishment of rules and procedures to ensure the recognition "throughout of the Union" of "all forms" of judgements and judicial decisions (Article III-171(1)(a), the establishment of minimum rules concerning the definition of criminal offences in areas of serious crime (Article III-172) and the rules regarding the functions and the scope of action of the European law enforcement agencies Europol and Eurojust (Articles III-174 and III-177). It should be mentioned that measures regarding the collection, storage, processing, analysis and exchange of "relevant information" – and area of particular sensitivity to citizens - are also subject to majority voting. It seems quite a legitimate question to ask to what extent the advantage of an increased decision-making capacity outweighs the cost of some Member States potentially being forced to introduce substantial changes which could run "against the grain" of their national legal systems as a result of being outvoted in the Council. Differences between national legal systems and concepts of public order are at least in some areas - the different approaches to violent demonstrators or drug addicts are only two examples among many – so considerable that the "costs of adaptation" for outvoted Member States could be very high indeed. This applies particularly to police and judicial co-operation criminal matters. Yet because of the still very different situations and challenges in the field of immigration one may also wonder whether passing to majority voting on conditions of entry and residence and the rights of legally resident third country nationals (Article III-168(2)(a) and (b) is fully justified.[12]

Another aspect of the decision-making system to which the draft constitution introduces changes is the right of initiative. While the European Commission is vested with an exclusive right of initiative for border checks, asylum, immigration and judicial co-operation in civil matters, the draft provides that it has to share its right of initiative in the areas of police and judicial co-operation in criminal matters with the Member States (Article III-165). Those, however, can only introduce initiatives with at least one quarter of their total

number (i.e. after the 2004 enlargement seven). This provision would seem to be a good compromise between, on the one hand, the preservation of a right of initiative of the Member States (which have introduced a number of useful proposals during the last few years) and, on the other, the need to prevent a proliferation of initiatives from individual Member States which are all too often inspired by purely national interests. The one quarter requirement could lead to a healthy "concentration" of national initiatives.

Of importance for the Union's decision-making capacity in the context of the AFSJ is also the structure of the Council. The introduction of the "Legislative and General Affairs Council" who – when acting in a legislative capacity – "shall include one or two representatives at ministerial level with relevant expertise" (Article I-23(1) would in principle allow to have all relevant JHA decisions being taken in this Council formation. Because of the large number and the specificity of issues on the JHA Council's agenda during the last few years, however, it could well turn out to be more practical to include the JHA Council among the "further formations" in which the Council, by decision of the European Council, can meet (Article I-23(3). The senior "Article 36 Committee" which currently co-ordinates Council work in the context of the "third pillar" is not any longer provided for in the draft constitution which will leave legislative co-ordination responsibility solely with the COREPER. Yet Article III-162 provides for the establishment of a standing Council committee in charge of promoting and strengthening operational co-operation on internal security. As operational co-operation between national authorities is crucial for the effective implementation of EU policies in the JHA domain but in its nature very different from the legislative process it certainly makes sense to establish a separate co-ordinating committee for this task, provided that the COREPER – as the supreme decision preparing body below the ministerial level – can still ensure overall coherence and consistency. One may only ask whether it is actually necessary to formally provide for such a committee in a "constitution".

IMPLEMENTATION

The effective and comprehensive implementation of decisions is of particular importance in the JHA domain: Doubts about effective implementation of certain measures in other Member States can increase security risks and therefore make Member States more reluctant to engage in common measures. It can drastically reduce trust between national law enforcement and judicial authorities which is crucial to effective cross-border co-operation. It therefore seems very sensible – though again not absolutely necessary in a "constitution" – that the draft provides for adoption of arrangements for the "objective and

[12] However, already under current treaty provisions (Article 63 TEC) some of these aspects would

impartial evaluation" of the implementation of Union policies in the AFSJ context (Article III-161). The model for this provision have clearly been current "collective evaluation" procedures which – especially in the Schengen context – have led to some positive results. Such "peer review" monitoring of implementation complements the much harder and more inflexible formal treaty infringement proceedings before the Court (Articles III-265 and 267).

DEMOCRATIC AND JUDICIAL CONTROL

As a domain which in many cases touches directly citizens interests and rights effective democratic and judicial control is of obvious "constitutional" importance to JHA co-operation. The draft constitution considerably strengthens the role of the European Parliament which gains co-decision or – in the case of harmonisation measures in the field of criminal law (Article III-171(1) and the establishment of the European Public Prosecutor's Office (Article III-175) – at least "consent" powers in most of the fields covered by the AFSJ. Only in very few fields will the Parliament according to the draft constitution still be limited to its current purely consultative role: administrative co-operation between Member States (Article III-164), measures in favour of Member States facing an emergency situation because of a sudden inflow of third country nationals (Article III-167(3), measures concerning family law (Article III-170(3), operational co-operation between national law enforcement authorities (Article III-176(3) and the definition of the conditions under which national authorities may operate in the territory of another member State (Article III-178). While one can see a certain logic in limiting the EP's role under provisions such as Articles III-164, 176(3) and 178 which concern largely the role of national authorities, this is much less evident in the case of measures in the civil law domain – which can affect all EU citizens – and in the case of "solidarity" measures in favour of Member States facing a mass influx of third country nationals – as this might involve substantial EU budgetary funds. Nevertheless the draft constitution brings a clear breakthrough for democratic control at the European level as the EP becomes in fact a real co-legislator for the further construction of the AFSJ. This breakthrough is further enhanced through explicit information rights of the EP regarding the evaluation of implementation of Union policies (Article III-161) and the proceedings of the standing committee on operational co-operation (Article III-162) as well as its involvement in the evaluation of the activities of Eurojust (Article III-174(2) and Europol (Article III-178).

A slight question has to be raised, however, over the EP's capacity to fully cope with all these increased powers. Already under the current "light" consultation procedure the Parliament had sometimes to struggle to keep pace with the occasionally massive legislative

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have come under majority voting by 2004.

agenda of the JHA Council. One should also note that the EP will have no role in the definition of the strategic guidelines for legislative and operational planning within the AFSJ by the European Council (Article III-159), and that no provision has been made for giving the Parliament a greater say on the multi-annual action plans of the Council which – although non-legislative in nature – have done much to shape the AFSJ during the last few years.

The position of national parliaments is also significantly strengthened by Article III-160(1) which not only gives them a particular responsibility on ensuring EU compliance with the subsidiarity principle in police and judicial co-operation in criminal matters but also grants them the same rights of participation the European Parliament has regarding the evaluation of the implementation of Union policies, the proceedings of the standing committee on operational co-operation and the evaluation of the activities of Eurojust and Europol. Making full use of these new possibilities of scrutiny will require quite substantial reorganisation in some national parliaments not all of which have currently effective monitoring procedures for EU JHA measures in place.

Regarding judicial control its has already been pointed out above that as part of the formal abolition of the pillar structure most of the remaining "pillar specific" restrictions on the role of the Court of Justice, which is called "High Court" in the draft, have been removed. There is only one exception: According to Article III-283 the High Court's jurisdiction will not extend to operations carried out by the police or other national law enforcement services and to measures under national law regarding the maintenance of law and order and the safeguarding of internal security. This restriction is in line with the principle of the "respect" of "essential State functions" in maintaining law and order and safeguarding internal security in Article I-5(1) and should not unduly restrict the High Court's power of judicial review of Union measures. The removal of all other restrictions has to be welcomed as a significant – and overdue – step towards comprehensive judicial control and protection within the AFSJ. Yet the burden of cases arising from JHA issues could significantly increase in the future which may make it necessary to make use of the possibility opened by Article III-264 to establish one or more specialised courts of first instance attached to the High Court for certain classes of action or proceedings brought in specific cases. Asylum and immigration as well as the areas of civil law and criminal co-operation would be the most obvious areas for considering the establishment of such specialised courts.

CONCLUSIONS

The reforms of the draft constitution are substantial enough to regard them as creating indeed a "new framework" for JHA co-operation within the EU. The most significant

elements in this respect are the formal abolition of the three “pillars”, the incorporation of the Charter of Fundamental Rights, the extension of the policy-making objectives, the introduction of solidarity as an integration principle and the breakthroughs on majority voting and parliamentary participation. Taken together these elements constitute a strong potential for the further development of the AFSJ as a major political project of the EU, both in terms of substantial progress with JHA policies and more guarantees for citizens in terms of protection of their rights and democratic control.

Yet this draft constitution also its flaws. Perhaps these were inevitable in a Convention which was permanently torn between the ambition of serving as a pioneer for a stronger and truly “constitutionalized” Union on the one hand and the desire to arrive at a draft which would as far as possible satisfy all of the national governments so that it would have a chance to pass the 2003/2004 IGC largely intact. In any case the flaws are there, and they are not of a minor nature:

First, the “area of freedom, security and justice” remains very much an empty shell in terms of a declared fundamental political objectives. A jungle of individual policy-making objective does not replace a strategic vision of what the AFSJ is all about. Is it essentially an internal security project? Is it much more than that? Is it ultimately only a general enabling objective to allow ministries of interior and justice to co-operate on whatever and whenever they want? This draft constitution does not provide an answer to these questions and, worse, does not contain a vision what this major integration project should ultimately become.

Second, this draft constitution – perhaps because of the lack of an underlying common vision – is seriously unbalanced. One the one hand it is in some areas daring to the point that one can seriously question whether so much “progress” is actually justifiable at this stage of the integration process because of the likely consequences for still highly different national legal and public order systems. The broad remit for the European Public Prosecutor’s Office and majority voting on harmonisation measures in the criminal justice area are key examples in this respect. On the other hand, however, there are plenty of examples where the draft is extremely conservative, allowing for hardly any new development potential. Decision-making rules on family law and the provisions on Europol are key examples for that. All this is a recipe for ample controversies, an uneven development of AFSJ and confusion over its final objectives.

Third, in far too many instances the text of this draft constitution bears the mark of cumbersome compromises. As a result the provisions the AFSJ – especially in Part III of the draft – have become even less legible and transparent than the in this respect much maligned provisions of the Treaty of Amsterdam. Yes, the “pillars” have been formally abolished, but a number of special decision-making rules lend them a sort of “ghostly” after-

life which overshadows and blurs the unity of the AFSJ. More general provisions in one paragraph are in many cases made subject to detailed special rules which partially restrict or change the meaning of the more general provision or obscure the general rationale of Union action in the respective field. The misleading use of the term “common policy” in the immigration field and the extraordinarily complex provisions on judicial co-operation in criminal matters in Articles III-171 and 172 are striking examples in this respect. At least as regards the provisions on JHA co-operation the Convention has clearly failed to simplify current treaty provisions and to make them more transparent, which was, after all, an important part of its mandate. After the adding of the protocols which the Convention has not dealt with (on the British, Irish and Danish opt-outs, for instance) the corpus of provisions on AFSJ will appear at least as complex and impenetrable as before.

Although the creation of a single legal framework and the incorporation of the Charter can be regarded as important elements of “constitutional progress” the above mentioned flaws

make the Convention’s draft look more like the result of an “ordinary” treaty reforming IGC with all its complex compromises and incremental elements of progress. If parts of the JHA provisions are amended by the IGC – which is a distinct possibility – it will become even clearer that the legal framework of the AFSJ will continue to be an international treaty agreed on by national governments and not a “constitution”.

Should the draft constitution’s compromise package be “opened up” by the IGC? Such a step is most unlikely to add any “constitutional” value to the AFSJ. While there may be some scope for individual improvements there is also a huge risk of a negotiation on the actual provisions generating a stream of changes driven by specific national interests which could easily undermine the progressive elements in the draft and even the AFSJ itself. Those intent on amending the Convention’s text would do well to remember the story of Pandora’s box.

The results of the seventeen months of deliberations of the European Convention in the area of JHA co-operation are clearly far from perfect. Yet should the IGC adopt them without change they could still be regarded as substantial and innovative enough to justify the term of “new framework” for what clearly is one of the most important political projects of the Union for many years to come.

Center for International Relations

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The founder and president of the Center for International Relations is Mr Janusz Reiter.

OUR ADDRESS:

UL . Emilii Plater 25, 00-688 WARSZAWA
tel. (0048-22) 646 52 67, 646 52 68, 629 38 98
fax (0048-22) 646 52 58
e-mail: info@csm.org.pl
You are welcome to visit our website:
www.csm.org.pl

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