

THE “AREA OF FREEDOM, SECURITY AND JUSTICE” IN THE EU’S DRAFT CONSTITUTIONAL TREATY AND ITS IMPLICATIONS FOR THE MEDITERRANEAN

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1. Introduction

Under the heading of the “area of freedom, security and justice” (AFSJ) cooperation and integration in the domain of justice and home affairs (JHA) has by now not only become a fundamental integration and treaty objective of the EU¹ but also one of the fastest growing areas of its legislative and other action. According to statistics from the EU Council General-Secretariat,² the JHA Council adopted from 1 May 1999 (the date of the entry into force of the Amsterdam Treaty) to the end of December 2003 no less than 500 texts in this field, 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* in 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 at the beginning of the 1990s.

Having regard to the importance gained by the AFSJ as a policy-making area of the EU it is not surprising that the AFSJ figured high on the agenda of both the European Convention, entrusted

¹ 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.

² Kindly made available to the author by Hans Nilsson, Head of the Judicial Co-operation Unit.

with the drawing up of a draft constitutional treaty for the EU, and the following IGC. Numerous changes and new elements regarding the AFSJ were introduced in the final draft of the constitution adopted by the Convention in July 2003, some of which proved to be rather controversial in the subsequent IGC. This applied, in particular, to the question of majority voting on legislative measures in the criminal law domain and the introduction of a European Public Prosecutor's Office. These issues actually belonged to those which had remained unresolved at the time of the "failure" of the Brussels summit in December 2003. In the end some tortuous - and in part rather questionable - compromises were arrived at which have been duly codified in the Draft Treaty establishing a Constitution for Europe (hereinafter referred to as "Draft Treaty") as adopted in the final session of the IGC on 18 June 2004.³

Because of the prominence given to the AFSJ in the work of the Convention and the IGC it seems worthwhile to provide a critical evaluation of the results and to ask, at the end what implications a successful ratification could have for the EU's cooperation with its Mediterranean partners.

2. The New Legal Framework

By far the most fundamental change the Draft Treaty brings for the AFSJ 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 (TEC) ("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

³ This chapter is based on the latest available consolidated version of the Draft Treaty which was published on 6 August 2004 (Council document CIG 87/04) with its revised numbering of the articles.

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 externally⁴ 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-264 the European Commission, which has an exclusive right of initiative for asylum, immigration, border control and judicial co-operation in civil matters, 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 Treaty 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.⁵ 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

⁴ By virtue of Article I-7 the Union is vested with full legal personality which removes any currently remaining uncertainties on this issue.

⁵ Certain measures in the criminal law domain according to Article III-270(2)(d) and 271(1); establishment of a European Public Prosecutor’s Office and extension of its mandate, Article III-274(1) and (4); operational police cooperation, Article III-275(3); framework law on operations of national authorities in another Member State, Article III-277 (see below section 7).

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 provisions relating to the AFSJ and - of course - runs against the principle of a single legal framework.

It should also be mentioned that according to Article III-258 it is up to the European Council to “define the strategic guidelines for legislative and operational planning” within the AFSJ. This is at best a rather superfluous re-emphasis of the general guideline-setting competence of the European Council. Yet it can also be interpreted as an attempt to strengthen the role of the European Council in the JHA domain and to give it a more intergovernmental orientation. This again does not serve the idea of a single and coherent legal order.

A further weakness of the new single legal framework is the absence of any clearer definition of the objectives of the AFSJ as a fundamental treaty and integration objective. As fundamental public goods “freedom”, “security” and “justice” are such extremely broad objectives that a somewhat more precise definition of the AFSJ’s objectives - as is done, for instance, for the Common Foreign and Security Policy in Articles I-40 and I-41 - 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 long since 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 here seems to fall back to the 1980s, which is rather astonishing as this was drawn up by a Convention on the “future of the European Union”. The “specific provisions” on the AFSJ in Article I-42 only contain some general guidelines for its construction (mutual confidence promotion 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”.

3. The Charter of Fundamental Rights as Part of the Legal Framework

In a wider sense part of the new legal framework of the AFSJ is also the Charter of Fundamental Rights which is fully incorporated in Part II of the Draft Treaty. 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 Treaty 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-68) 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.

Of considerable relevance for the AFSJ are also the judicial rights laid down in Title VI of the Charter. With the inclusion of the right to legal aid (Article II-107, last sentence), the principle of proportionality of offence and penalty [Article II-109(3)] and the right not to be tried or punished twice for the same criminal offence (*ne bis in idem* principle, Article II-110) these judicial rights go clearly beyond mere minimum guarantees such as the rights to an

effective remedy and of defence and the principles of presumption of innocence and of legality. Taken together they define important elements of a common approach of the Member States to criminal justice and could well serve as important foundation stones for the gradual creation of an EU criminal justice system.

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-62), the right to the integrity of the person (Article II-63), the prohibition of torture and inhuman or degrading treatment or punishment (Article II-64) and the right to an independent and impartial tribunal previously established by law (Article II-107) 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 and the revolting US practices in the Guantanamo Bay prison camp were among the most difficult issues in the negotiations on the EU-US legal assistance and extradition agreements signed on 25 June 2003.⁶

It is worth 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 good as 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 Treaty 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.

⁶ Council document no. 9153/03.

4. The Revised Policy-Making Objectives

The first thing to note as regards the policy-making objectives for JHA co-operation is that the Draft Treaty 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 is 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 Treaty reinforces the principle of conferral by explicitly stating that all competences not (explicitly) conferred upon the Union remain with the Member States [Article I-11(2)].

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

Policies on Border Checks, Asylum and Immigration

As regards border controls the Draft Treaty 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-265(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 borders⁷ 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 Treaty, but the

⁷ Council document no. 10019/02.

term “integrated management” is wide enough not to exclude it in the more distant future.

As regards asylum, the Draft Treaty introduces for the first time the traditionally highly charged term “common policy” [Article III-266(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 had not preferred the less charged term “common asylum system”. Nevertheless, the formal introduction of a “common policy” 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 III-266(2)(a)], a “uniform status of subsidiary protection” [Article III-266(2)(b)], common procedures for the granting and withdrawing of asylum or subsidiary protection status [Article III-266(2)(d)] and “partnership and co-operation” with third countries for the purpose of managing inflows of people applying for either status [Article III-266(2)(g)]. Although some elements of these objectives are already to be found in current Article 63 TEC, the foreseen common uniform status clearly goes beyond the more fragmentary existing 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 Treaty 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, “prevention” and enhanced combating of illegal immigration and trafficking in human beings [Article III-267(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-267(2)(c) and (d)] as well as the conclusion of readmission agreements with third countries [Article III-267(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-267(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-267(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 elements 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 a 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 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 applicable limitations, the use of the term “common policy” in the Draft Treaty 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-269(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. It is important that by virtue of Article III-269(1) co-operation in civil matters is to be based on the principle of mutual recognition, but “may” also include measures of approximation of national laws - which introduces a harmonisation dimension.

Judicial Co-operation in Criminal Matters

In this area the Draft Treaty increases the number of objectives from the current four (Article 31 TEU) to twelve, a number which would be even higher if one included 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-270(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-271(1)], an authorisation for EU action in the field of crime prevention (Article III-272) and the possibility of the establishment of a European Public Prosecutor’s Office (Article III-274). All these are innovative elements, but they also raise a number of questions.

One may welcome the inclusion for the first time of criminal procedure in the treaty-defined domain of judicial co-operation as a necessary and even overdue addition. Yet harmonisation measures in the criminal justice domain are almost inevitably a sensitive issue, especially for the English and Irish “common law” systems whose criminal procedures are significantly different from those of the civil law countries. It is hardly surprising therefore that this point raised serious difficulties during the IGC negotiations, this all the more so because the Convention draft had provided for qualified majority voting on this issue. In the end the new EU competence in this domain was retained, but at the price of the introduction of a very peculiar compromise regarding decision-

making in this area (see section 7 below). Rather than establishing a rather incomplete list for potential EU action it might also have been more appropriate to open the whole area of criminal procedure to 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-272).

The provision on the possible - not mandatory - establishment of a European Public Prosecutor’s Office has been amongst the most controversial ones in the IGC negotiations. The Convention draft had provided for a very broad mandate for the Office which would have included all “serious crimes affecting more than one Member State”. This met stiff opposition primarily from the British Government which was rather sceptical anyway about the idea of establishing such an office. In the end a compromise was arrived at which limits the Office’s mandate to crimes affecting the financial interests of the Union [Article III-274(1)] but provides for the possibility of the European Council deciding to extend the Office’s mandate generally to serious crime having cross-border implications [Article III-274(4)]. As unanimity will already be required in the Council (of ministers) for the establishment of Eurojust, this means that a European Public Prosecutor’s Office with enlarged competences will have to take the double hurdle of unanimity in both the Council and the European Council. It also

has to be said that the Draft Treaty remains vague on how the Office should actually be created, providing that it should emerge “from” Eurojust. This leaves the question open whether the Office will be part of Eurojust, a separate institution, or whether it may indeed replace Eurojust.

In spite of these slightly more problematic aspects, the importance of the agreement in principle reached on the introduction of a European Public Prosecutors Office should not be underestimated: According to Article III-274(2) the Office will be responsible - within the limits of its mandate - for both the investigation and prosecution of crimes, exercising the functions of prosecutor in the competent courts of the Member States. After the introduction of the European Arrest Warrant at the beginning of 2004 this constitutes a further major step away from the principle of territoriality in the direction of a real European criminal justice area.

As regards Eurojust, Article III-273 largely codifies existing functions, this with a strong emphasis on Eurojust’s task to strengthen coordination and cooperation between national prosecution authorities. The only innovative element is the possibility to enable Eurojust to also “initiate” criminal prosecutions conducted by national authorities. In this form this is currently not provided for by the Eurojust Decision.⁸ Such an initiating role 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 Treaty streamlines and simplifies current provisions on general police co-operation while leaving their substance largely unchanged (Article III-275) - one of the few instances in which the Draft Treaty actually simplifies existing provisions, which was part of the Convention’s original mandate. As regards Europol (Article

⁸ Article 6 of the Eurojust Decision is much more vague in this respect (Official Journal of the European Communities, No. L 61 of 6.3.2002)

III-276) there are some clearly innovative elements. According to Article III-276(2)(b), Europol can not only be vested with coordinating 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-276(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 - and in the end the IGC - seem to have been willing to go 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-277). This has been a notoriously difficult issue for several decades with major differences persisting in 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 could well delay adoption of common legislation for many years to come.

5. Division of Powers and Subsidiarity

According to Article I-14(2)(j) of the Draft Treaty the AFSJ is a domain of “shared competence”, i.e. a domain in which the Member States shall exercise their competence 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 further 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-11(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-18(1)⁹ 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 of manoeuvre for extending its scope of action in the JHA domain.

Apart from the principle of conferred competences, however, the Draft Treaty 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-11(3) which now provides that the Union shall act in domains

⁹ A continuation of the current general enabling clause of Article 308 TEC.

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-259 specifically mentions the role of national parliaments in ensuring compliance by legislative initiatives in the areas of police and judicial co-operation in criminal matters with the principle of subsidiarity in accordance with the “early warning” procedure provided for by Protocol on the application of the principles of subsidiarity 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, especially for the European Commission.

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 Treaty. These functions explicitly include “maintaining law and order” and “safeguarding internal security”. Article III-262 takes up this principle again by 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 Treaty 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 could well come up sooner or later before the Court of Justice.

6. 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 Treaty. 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 after the accession of the ten new Member States in 2004, some of which still have major capability deficits in terms of implementing some of the JHA *acquis*, particularly the EU(Schengen) external border security standards.

The Draft Treaty 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-257(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-266(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, Articles III-268) and - outside of the provisions on the AFSJ - the general solidarity clause of Article I-43(1) on the mobilisation of all instruments at the Union’s disposal to prevent terrorist threats, to protect democratic institutions and the civilian population and to assist a Member State in the event of an attack. Although different meanings can obviously be given to the term “solidarity” and although a considerable margin of discretion is left to the Member States as regards the fulfilment of their solidarity

duties¹⁰, the formal introduction of the principle nevertheless marks 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.

7. 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 the issue of the persisting unanimity requirement as one of the reasons for lack of sufficient progress in a number of areas. The Draft Treaty provides indeed for a number of substantial reforms on the decision-making side.

As regards voting requirements, the Draft Treaty 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-269(3)], the establishment of minimum rules concerning “other” (i.e. not explicitly mentioned) aspects of criminal procedure [Article III-270(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-271(1)], the European law on the establishment of the European Public Prosecutor’s Office [Article III-274(1)], the extension of the Prosecutor’s Office’s mandate [Article III-274(4)], legislative measures regarding operational co-operation between national law

¹⁰ A Declaration to Final Act on Articles I-43 and III-329 (see Council document CIG 86/04 ADD2 of 25 June 2004) leaves it to the individual Member State to choose “the most appropriate means” to comply with its solidarity obligations.

enforcement authorities [Article III-275(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-277). While all these are clearly important and sensitive areas, these exclusions from majority voting should not conceal the fact that the Draft Treaty 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 constitutes certainly 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 blockage or major delays, and even where decisions are taken agreements on the basis of the least common denominator. In view of the 2004 enlargement (and possible further rounds of enlargement) the advantage of increasing decision-making capacity through majority voting carries considerable weight.

On the other hand, however, this comes at a price which at least some Member States might increasingly regard as heavy. The Draft Treaty 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 judgments and judicial decisions [Article III-270(1)(a)], the establishment of minimum rules concerning the definition of criminal offences in areas of serious crime (Article III-271) and the rules regarding the functions and the scope of action of the European law enforcement agencies Europol and Eurojust (Articles III-273 and III-276). It should be mentioned that measures regarding the collection, storage, processing, analysis and exchange of "relevant information" - an 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 in 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-267(2)(a) and (b)] is fully justified.¹¹ There have been, inter alia, major concerns in Germany about this issue.

Against this background, it is unsurprising that the Convention’s proposals on majority voting met some opposition in the IGC. This was strongest in the domain of criminal justice cooperation, mainly because of the substantial differences between common and civil systems in this domain. As most of the other Member States were not willing to go back to a general unanimity requirement a compromise had to be negotiated, the bases of which were already worked out in November/December 2003. This compromise consists of two different elements.

The first element is the introduction of a clause in Article III-270(2) providing that any minimum rules adopted in the criminal procedure domain shall take into account the differences between the legal traditions and systems of the Member States. An earlier proposal in the IGC - in the end discarded - had in this context even referred explicitly to the “common law” systems.¹²

¹¹ However, already under current treaty provisions (Article 63 TEC) some of these aspects would have come under majority voting by 2004.

¹² See the so-called “Naples Document” (CIG 60/03 of 9 December 2003).

While this constitutes a relatively moderate protective clause which may have more impact on proposals made than on the actual decision-making process, the second element of the compromise - which has become known as the so-called “emergency brake” - is a far more problematic innovation. According to Article III-270(3) and Article III-271(3) a Member State which considers that a draft European Framework Law in the respective domains of procedural and substantive criminal law is likely to affect “fundamental aspects of its criminal justice system” can refer this draft legislative act to the European Council. This has the effect of suspending the normal legislative procedure under Article III-396. The European Council can then within four months either refer the draft back to the Council - in which case the normal legislative process is resumed - or request the Commission or the proposing group of Member States to submit a new draft which automatically means non-adoption of the original draft. In case the European Council does not act within the four months deadline or if the legislation concerned is not adopted within twelve months after the submission of a new draft, Article III-270(4) and III-271(4) provide that a group of at least a third of the Member States willing to proceed with the proposed legislation on the basis of an “enhanced cooperation” as defined in Articles I-44(2) and III-419(1) will automatically be given authorisation to do so.

This provision constitutes a monstrosity, and not a small one in a “constitution” which has its fair share of such features. It enables any of the Member States to simply interrupt a legislative procedure through a referral to the European Council. This not only undermines the idea of regular legislative process, but also gives to the European Council a *de facto* legislative role which according to the institutional system of the Union it should not have. No less questionable is the automatic granting of a permission to proceed with “enhanced cooperation” in case of a failure of the referral procedure. This not only eliminates the formal decision of the Council which would normally be required but also the mandatory assessment of such an “enhanced cooperation” framework, which could well affect the interests of non-participating Member States, by the European Commission. Here one really has to ask whether it would not have been a much “cleaner” and certainly more

transparent solution - especially in a Treaty claiming some sort of a “constitutional” status - to simply maintain the unanimity requirement for the criminal justice domain.

Another aspect of the decision-making system to which the Draft Treaty 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-264). 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 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 Treaty which will leave legislative co-ordination responsibility solely with the COREPER. Yet Article III-261 provides for the establishment - without prejudice to the role of the COREPER - 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 ask, however, whether it is actually necessary to formally provide for such a committee in a “constitution”.

8. 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. This is an all the more important issue in the recently enlarged Union where much trust still needs to be built up between authorities in “old” and “new” Member States. 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 impartial evaluation” of the implementation of Union policies in the AFSJ context (Article III-260). 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-360 to III-362).

9. Democratic and Judicial Control

As a domain which in many cases directly touches citizens’ interests and rights, effective democratic and judicial control is of obvious “constitutional” importance to JHA co-operation. The Draft Treaty considerably strengthens the role of the European Parliament which gains co-decision powers under the “ordinary legislative procedure” [Article III-396]) or - in the case of “other” aspects of criminal procedure [Article III-270(2)(d)], the extension of the list of areas of serious crime subject to potential harmonisation measures [Article III-271(1)] and the establishment of the European Public Prosecutor’s Office and the extension of its competences [Articles III-274(1) and III-274(4)] - 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 Treaty still be limited to its current purely consultative role: administrative

co-operation between Member States [(Article III-263)], measures in favour of Member States facing an emergency situation because of a sudden inflow of third country nationals [Article III-266(3)], measures concerning family law with cross-border implications [Article III-269(3)], operational co-operation between national law enforcement authorities [Article III-275(3)] and the definition of the conditions under which national authorities may operate in the territory of another member State (Article III-277). While one can see a certain logic in limiting the EP's role under provisions such as Articles III-263, 275(3) and 277 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 Treaty 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-260) and the proceedings of the standing committee on operational co-operation (Article III-261) as well as its involvement in the evaluation of the activities of Eurojust [Article III-273(1)] and Europol [Article III-276(2)].

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 sometimes had to struggle to keep pace with the occasionally massive legislative 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-258), that it has no say if the "emergency brake" procedures according to Articles III-270(3) and III-271(3) lead to an "enhanced cooperation" 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 strengthened by Article III-259 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 that 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. Yet making full use of these new possibilities of scrutiny will require quite substantial reorganisation in some national parliaments, not all of which currently have effective monitoring procedures for EU JHA measures in place.

Regarding judicial control, it 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 have been removed. There is only one exception: According to Article III-377 the Court’s jurisdiction does 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 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 and this 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.

10. Overall Assessment

The reforms of the Draft Treaty are substantial enough to regard them as creating indeed a new basis and framework for the further development of the AFSJ. 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 clear “added value” in respect of the existing framework. They create a significant potential for the further development of the AFSJ as a major political project of the EU, both in terms of an increased capacity to act in all the main policy areas, including highly sensitive domains such as cooperation on criminal justice issues, and more guarantees for citizens in terms of protection of their rights and democratic control.

The Draft Treaty also has its flaws. No effort has been made to arrive at a clearer definition of the fundamental objectives of the AFSJ or to emphasize the need for a better balance between “freedom”, “security” and “justice”. In the absence of that it is rather likely that the current emphasis on security, reinforced by the terrorist threat since 11 September 2001, will continue to shape the further development of the AFSJ. This increases the risk of the AFSJ becoming a pure internal security project with its inevitable accumulation of primarily restrictive measures.

Then the Draft Treaty is also unbalanced, providing in some areas much more progress than in others. The provision for potential cross-border prosecution powers for the European Public Prosecutor’s Office on the one hand, while on the other Europol is still not vested with any operational powers is one example. The introduction of a “common” immigration policy with much more action possibilities on the side of the fight against illegal immigration than on that of legal immigration is another.

Finally the Draft Treaty bears in many parts the mark of cumbersome compromises. 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.

11. Implications for EU Relations with Mediterranean Partners

Justice and home affairs played a comparatively marginal role during the first years of the Barcelona process, but they gradually moved up on both the multilateral and bilateral agenda, mainly as a result of the extension of internal EU objectives and action in this domain. When the Union included in June 2000 a substantial range of JHA issues in its Common Strategy on the Mediterranean Region¹³ - from visa policy issues over migration to the fight against organised crime and terrorism - there could not any longer be any doubt that this domain had become one of the priorities also in relations with the Mediterranean partners. Although not all aspects of the EU’s JHA cooperation agenda have been met with enthusiasm by Mediterranean partners - the Union’s strong pressure regarding readmission arrangements is probably the most prominent example - the overall response has been positive enough to allow for some real progress of cooperation in this domain. While provisions relating to justice and home affairs have been included in all Euromed association agreements concluded or under negotiation, a major step forward at the multilateral level was achieved with the adoption of the “Regional cooperation programme in the field of justice, combating drugs, organised crime and terrorism as well as cooperation in the treatment of issues relating to the social integration of migrants, migration and movement of people” by the Euromed ministerial conference in Valencia on 22/23 April 2002.¹⁴ Its most concrete results have so

¹³ OJ L 183/5 of 22.7.2000 (paragraphs 22 and 23).

¹⁴ For text see Euromed Report, Issue 44, 29 April 2002

(http://europa.eu.int/comm/external_relations/euromed/publication/euromed_report44_en.pdf).

far been the implementation of cooperation projects on the training of magistrates and of police forces (managed by the European police college CEPOL) as well as the development of a permanent observation and analysis system regarding migratory flows in the Mediterranean. The progress made was welcomed on the occasion of the informal Euromed ministerial meeting in Dublin on 5/6 May 2004,¹⁵ and the second stage of the implementation of the Valencia programme has been programmed for 2005 to 2006 with a total budget of Euro 15 million. A number of JHA relevant projects are also funded - some of them with quite substantial means - under the the bilateral cooperation programmes with individual Euromed partners. The bilateral programme on border control management with Morocco approved on 22 August 2003, which is aimed at a better management of migratory flows by combating illegal immigration of origin and transit and has a total financial volume of Euro 40 million, is a prominent example in this respect.

While clearly some significant progress has been made in recent years as regards the Union's cooperation with Mediterranean partners in the JHA domain, the Draft Treaty, if ratified, will give a new impetus to Euromed relations. The reforms which the Draft Treaty brings to the AFSJ are likely to have major implications for the future development of the Union's relations with the Mediterranean partners in this domain.

First, the enhanced internal capacity to act which the Draft Treaty gives to the Union in nearly all policy-making domains is likely to be paralleled by stronger external action. In addition, the introduction of a single legal personality of the Union in combination with the abolition of the pillar structure makes it easier for the Union to engage in unified comprehensive action vis-à-vis third countries. This could lead to stronger pressure on Mediterranean partners to accept EU priorities in the JHA domain to expand cooperation frameworks.

¹⁵ See paragraph 71 of the Presidency Conclusion of the meeting: <http://www.eu-del.org.il/english/whatsnew.asp?id=280>

Second, with its extended possibilities for the Union to act in domains such as the fight against crime, terrorism and illegal immigration and the absence of any rebalancing between “security” on the one hand and “freedom” and “justice” on the other, the Draft Treaty is likely to enhance the Union’s internal security objectives in JHA relations with the Mediterranean partners. This is all the more probable as there is clearly a growing internal security threat perception vis-à-vis the Mediterranean as a source of major illegal immigration flows, of organised crime¹⁶ and of infiltration by Islamist terrorist groups. As a result, relations in the JHA domain are likely to become even more “securitised” with more emphasis by the EU on restrictive measures and law enforcement cooperation.

Third, as the “common immigration policy” provided for in the Draft Treaty is essentially a common policy on the fight against illegal immigration with much less potential to develop a common approach on legal immigration, measures against illegal immigration are likely to figure even higher on the Union’s agenda in relations with Mediterranean partners than they already do. This could also mean that certain measures in favour of Euromed partners might become more conditional upon the extent to which they cooperate effectively with the Union on “managing” migration.

Fourth, the provision for an “integrated management system for external borders” will - in combination with the general emphasis on internal security - mean that the Union is likely to further harden its external borders. So far, most of the measures have focused on land borders (especially in Eastern Europe), but since the Seville European Council of June 2002 and the Council Action Plan on borders¹⁷ adopted in the same month there has been an increasing number of projects relating to Mediterranean sea borders, including joint patrolling by naval units. The introduction by the Treaty of an

¹⁶ Europol’s “2003 EU Organised Crime Report” (The Hague, 21 October 2003, File number 2530-132) gives several indications in this respect.

¹⁷ “Plan for the management of the external borders of the Member States”, Council document no. 10019/02.

explicit solidarity principle in relation with external border controls could well lead to a significant upgrading of the pooling of resources by Member States and the development of more systematic and more common-standard-based border controls in the Mediterranean. While this would clearly add to the “fortress Europe” aspect of the AFSJ, it might also offer some further potential for cooperation as close operational cooperation with countries on the “other” side of the EU border has increasingly become a central element of the EU’s external border strategy.

Overall, it is to be expected that the strengthening of the AFSJ resulting from the Draft Treaty will lead to a stronger projection of some of its elements, especially its security rationale, to the Mediterranean. This tendency is already very much reflected in the justice and home affairs priorities defined in the European Commission’s European Neighbourhood Policy Strategy Paper of 12 May 2004.¹⁸ From a justice and home affairs perspective the new “European neighbourhood” concept, of which the Mediterranean is a key part, is essentially a neighbourhood relevant for the EU’s internal security - and the Draft Treaty will give the Union the capability to act more than ever before in this perspective.

¹⁸ COM(2004)373, especially pp. 16-17.