Justice and Home Affairs in the EU Constitutional Treaty. What Added Value for the 'Area of Freedom, Security and Justice'?

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Area of freedom, security and justice. One of the most significant developments in European integration. Assessment of the contribution of the Constitutional Treaty to further development. Formal abolition of pillar structure partially undermined by special provisions. Relevance of Charter of Fundamental Rights. Union powers strengthened, but likelihood of restrictive interpretation. Revised policy objectives: few new openings, but possibly important implications. Solidarity as a new integration principle. Is majority voting justified in particularly sensitive areas such as police and judicial co-operation in criminal matters? Monstrosity of the emergency-brake procedure. Strengthening of European Parliament and Court of Justice, but not overall. Perspective of enhanced co-operation.

Introduction

Future historians are likely to regard the creation of the 'area of freedom, security and justice' of the European Union, with its large array of justice and home affairs policy-making areas, as one of the most significant developments in European integration at the beginning of the 21st century. This statement may look like an exaggeration, but it is validated by the following three considerations.

First, the creation of the area of freedom, security and justice touches 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 the 17th and 18th century and its theoretical underpinning in the writings of Hobbes, Locke, Montesquieu and Rousseau, all belonged to the basic justification and legitimacy of the state. The fact that since the 1990s the EU has developed a steadily increasing role in these areas means that it has entered

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into one of the last domains of exclusive national competence. This it has done not by replacing the state as a provider of internal security and justice, but by emerging as a more and more important additional provider of these essential public goods.

Second, the area touches upon a number of very sensitive political issues. The fight against crime and illegal immigration, ensuring that asylum systems are fair, 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 among European citizens' concerns.

Third, the area has by now not only become a fundamental treaty objective[1] but also one of the major areas of 'growth' of EU action. Since 1999 the EU Council has been adopting on average around ten new texts per month,[2] with most of these texts now being – unlike in the earlier 1990s – of a binding legal nature. Today measures relating to the area belong to the fastest growing domains of the EC and EU legal *acquis* and are wide-ranging and ambitious to an extent that would have been difficult to imagine at the beginning of the 1990s.

Having regard to the importance gained by the area of freedom, security and justice as a policy field of the EU, the European Convention, entrusted with the drawing up of a draft constitutional treaty for the EU, obviously had to give it considerable attention. And it did. Its Presidium defined a specific set of questions and challenges in the justice and home affairs domain,[3] a special Working Group ('X') then worked out a range of substantial proposals,[4] which were complemented by additional initiatives (such as the ambitious Fischer/de Villepin proposals of November 2002)[5] and, finally, numerous changes and new elements regarding the area were introduced in the final draft of the Constitution adopted by the Convention in July 2003.[6] Some of these reforms proved to be rather controversial in the subsequent Intergovernmental Conference, meant to turn the Convention recommendations into binding text. This applied, in particular, to the question of majority voting on legislative measures in the criminal law domain and the

[1] Formally codified in Art. 2 of the Treaty establishing the European Union with equal legal status as, for instance, Economic and Monetary Union and the Common Foreign and Security Policy as fundamental Union objectives.

[2] *See*, for instance, the list of 125 texts adopted by the Council in 2004: <ue.eu.int/uedocs/cms_data/docs/2004/12/20/{8CC3FF2E-9766-4D66-AEF0-29B4188108ED}.pdf>.

[3] CONV 69/02 and 206/02.

[4] Final Report: CONV 426/02.

[5] CONV 435/02.

[6] CONV 850/03.

introduction of a European Public Prosecutor's Office. In the end some tortuous compromises were reached, which have been duly codified in the Treaty establishing a Constitution for Europe (hereinafter referred to as 'Constitutional Treaty') as adopted in the final session of the Intergovernmental Conference on 18 June 2004 and signed on 29 October 2004 in Rome.[7]

Having regard to the prominence given to the area of freedom, security and justice in the work of the Convention and the Intergovernmental Conference, it seems worthwhile to ask to what extent the results, i.e., the provisions of the Constitutional Treaty, are likely to create a new basis and framework for the area if – at the time of writing still a big 'if' – the new Treaty is going to pass all hurdles of the ratification process. This question is an all the more pertinent one as the Treaty of Amsterdam, which entered into force in 1999, had already brought very extensive reforms together with a long list of objectives that are still far from being fully implemented.

On the basis of an analysis of the content of relevant Treaty provisions, this article will provide an assessment of both the 'added value' and problems the new Treaty could bring for the further development of the area of freedom, security and justice.

The new legal framework

The by far most fundamental change the Constitutional Treaty brings for the area of freedom, security and justice is the recasting of its overall legal framework. A single legal framework in a single legal text replaces the existing division between the EU's three 'pillars'. This step will remove the existing split inside the justice and home affairs 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[8] as a single legal

[7] Official Journal of the European Union, No. C 310/1 of 16 Dec. 2004.

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

actor with a single set of legal instruments, which will be an important contribution to a more coherent and clear-cut legal *acquis*. Not only will the current division between 'first' and 'third pillar' instruments vanish with the introduction of the new 'European laws' and 'European framework laws' as primary legal instruments across all area of freedom, security and justice domains, but also the principle of the primacy of EU law over national law (Article I-6) will uniformly apply, something which currently cannot be taken for granted for measures under Title VI TEU. Combined with this is the abolition of most of the restrictions on and distinctions between the role of the European Court of Justice in the justice and home affairs 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 justice and home affairs 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 this right with the member states in police and judicial co-operation in criminal matters. Whereas in the aforementioned areas (asylum, etc.) the Constitutional 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.[9] A similar distinction applies to the European Parliament, which is granted co-decision in most of the first series of policies, but is limited to assent or consultation on quite a number of the last named ones. 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 will reduce the transparency of the provisions relating to the area of freedom, security and justice and runs against the principle of a single legal framework.

In view of its increasing importance, it is interesting that no effort has been made further to define the area as an autonomous treaty objective. Article I-3(2), dealing with the area of freedom, security and justice, contains only a reference to an EU 'without internal frontiers' and establishes a link between the area and the single market with its 'free and undistorted' competition. This seems rather misleading and even unfortunate as the area as a political project has since long far outgrown the Schengen objective of allowing for the abolishing internal border controls and its links with the economic aims of the single market are now of a rather peripheral nature. The language here seems to fall back in the 1980s, which

[9] Certain measures in the criminal law domain according to Art. III-270(2)(d) and 271(1); establishment of a European Public Prosecutor's Office and extension of its mandate, Art. III-274(1) and (4); operational police co-operation, Art. III-275(3); framework law on operations of national authorities in another member state, Art. III-277 (*see* below).

is rather astonishing as this formula was drawn up by a Convention on the 'future of the European Union'.

The charter of fundamental rights as part of the legal framework

The Charter of Fundamental Rights, which is fully incorporated in part II of the Constitutional Treaty, must now be understood also as part of the legal framework of the area of freedom, security and justice. There can be no doubt that measures in the justice and home affairs domain can affect fundamental rights of individuals in a much more direct way than, for instance, most of the single market measures. The full incorporation of the Charter in the Constitutional Treaty clearly creates a better basis for comprehensive fundamental rights through – and where necessary – against Union institutions. 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 Community legal order, there are still a number of gaps of relevance for justice and home affairs 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 is of increasing importance, having regard to the proliferation of data-bases and exchange systems in the context of the area (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).

Of considerable relevance for the area of freedom, security and justice 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 criminal offences and penalties (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 justice and home affairs 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.[10]

It is worth mentioning that the preamble of the Charter contains a special reference to the area of freedom, security and justice as one of the elements through which the Union places man 'at the heart of its activities'. While this sounds nice as a general affirmation of goodwill, it could have been given more substance by an explicit mandate for the construction of the area to contribute to the effective protection of the Charter rights within the EU. It should also be noted that the Constitutional 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 cases may reach the Court in most cases only through the preliminary rulings procedure, arising from cases brought before national courts.

Division of powers and subsidiarity

According to Article I-14(2)(j) of the Constitutional Treaty, the area of freedom, security and justice 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 justice and home affairs 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)[11] allows EU action beyond explicitly mentioned powers if such action 'should prove necessary (…) to attain one of the objectives set out in the Constitution'. As pointed out the area is indeed one of these fundamental 'objectives' listed in Article I-3, but it lacks a precise definition as regards its content and scope. At least in principle this could offer the Union a

[10] Council Document No. 9153/03.
[11] A continuation of the current general enabling clause of Art. 308 TEC.

wider margin to manoeuvre for extending its scope of action in the justice and home affairs domain.

Apart from the principle of conferred competences, however, the Constitutional Treaty contains at least two other elements, which are likely to support a restrictive interpretation of Union powers in the area of freedom, security and justice. One of those is the revised subsidiarity principle of Article I-11(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 proposed action cannot be sufficiently achieved by the member states, either at central level or at regional and local level'. Apart from generally increasing the burden of proof for EU action also in the justice and home affairs domain, the EU institutions will now also have to take into account the regional level which – the German *Länder* are a case in point – can have quite substantial powers to act in certain justice and home affairs areas. It should also be mentioned that Article III-259 specifically mentions the role of national parliaments in ensuring compliance with 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 justice and home affairs area could increase the justification pressure for new measures, especially on 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 Constitutional Treaty. These functions explicitly include 'maintaining law and order' and 'safeguarding national security'. Article III-262 takes this principle up again by providing that the justice and home affairs 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 area of freedom, security and justice 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 justice and home affairs domain. Articles I-5(1) and III-262 constitute a clear reaffirmation of national sovereignty in matters of internal security and public order, and this in a much more explicit way than in the current Treaties.

On the whole the picture regarding the division of powers is therefore a rather mixed one. One the one hand the Constitutional Treaty provides some potential for strengthening the Union side of the division of powers scale, but on the other hand national sovereignty in the internal security domain has been strongly reaf-

firmed and the subsidiarity principle strengthened as an instrument to restrict Union action.

The Constitutional Treaty has thereby codified rather than resolved the fundamental tension between those governments supporting supranational action in the justice and home affairs domain and those preferring essentially intergovernmental action.

The revised policy-making objectives

The first thing to note as regards the policy-making objectives for justice and home affairs co-operation is that the Constitutional 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. 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 Constitutional 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 Constitutional Treaty. Only the more important changes can be mentioned here.

Policies on border checks, asylum and immigration

As regards border controls 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 2002 Council action plan[12] and the 2002 Seville European Council conclusions. Yet the project of a common European Border Guard/Police – which had some support in the Convention and would have been a step in the direction of potential multinational border control forces – has not found its way into the Constitutional Treaty. Borders therefore remain – in line with the traditional territoriality principle – national borders under the control of national border guards.

As regards asylum the Constitutional Treaty introduces for the first time the traditionally highly charged term 'common policy' (Article III-266(1)). Yet the

[12] Council Document No. 10019/02.

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' reinforces the common ambition in this area, which is strengthened by 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 the 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 goes clearly 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 is the use of the term 'common policy' in the area of immigration policy where the Constitutional Treaty seems to expect the Union to deliver effective policy responses on issues on which many member states have so far largely failed to do so: '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 have not been complemented by similarly extensive new 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)).

A very significant further restriction on a 'common immigration policy' 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 control of numbers of immigrants – is left entirely with the member states. This constitutes another powerful assertion of the principle of territoriality. In terms of legal immigration the area of freedom, security and justice as an 'area' remains, as a result, divided into 25 national immigration territories. This will clearly not help the

development of a common approach on opening up more channels for legal immigration, which the Commission has been advocating since 2000 because of the dramatic demographic decline within the EU. It seems therefore rather likely that the 'common immigration policy' of the EU will remain – as it currently is – largely a policy on illegal immigration.

Judicial co-operation in civil matters

In this domain the current catalogue of aims in Article 65 TEC is supplemented by the objectives of an 'effective 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 reinforces the basis for future action. Important is 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 Constitutional Treaty brings a significant increase of the number of objectives. 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 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 Intergovernmental Conference 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 'emergency brake' in this area (*see* below).

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 Intergovernmental Conference 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 anyway rather sceptical 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 at the same time 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 the Office, this means that a European Public Prosecutor's Office with enlarged competences will have to take the additional hurdle of a consensus in the European Council. It also has to be said that the Constitutional Treaty remains vague on how the Office should actually be created, providing only 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 reached in principle on the introduction of a European Public Prosecutor's 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, and for 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 co-ordination and co-opera-

tion between national prosecution authorities. The only innovative element is the possibility to enable Eurojust also to 'initiate' criminal prosecutions conducted by national authorities, which in this form is currently not provided for by the Eurojust Decision.[13] Such an initiating role could indeed help with making the best possible use of the cross-border information and expertise available to Eurojust.

Police co-operation

The Constitutional 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 Constitutional Treaty actually simplifies existing provisions, which was part of the Convention's original mandate. As regards Europol (Article III-276), there are some innovative elements. According to Article III-276(2)(b), Europol cannot only be vested with co-ordinating functions but also has 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 legal systems would indeed be needed to enable Europol officers to exercise policing powers in their territories. 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. Here, again, the territoriality principle has been strongly reaffirmed. 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, i.e., coercive, measures – which should remain with national authorities. Interestingly, the Convention – and in the end the Intergovernmental Conference – seems 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.

An interesting 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 between national legislations which – in many member states – continue to impose very tight restrictions even on the mere movements of police

[13] Art. 6 of the Eurojust Decision is much more vague in this respect (Official Journal of the European Communities, No. L 61 of 6 March 2002).

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.

Overall the Constitutional Treaty provides for only a few potential new openings in the justice and home affairs policy areas. Yet – provided that the necessary common political will is there (and voting requirements are met) – these new openings could have substantial implications as the example of the European Public Prosecutor's Office shows.

Solidarity as a new integration principle

The introduction of an explicit principle of solidarity into the context of justice and home affairs co-operation is one of the most significant innovations of the Constitutional Treaty. If one takes the idea of the area of freedom, security and justice 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 in solidarity with each other as regards sharing 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 is that some – and amongst those several of the new member states with still significant 'catch-up' burdens as regards the Schengen *acquis* – face a significantly higher 'bill' for implementing commonly agreed border security standards.

The Constitutional Treaty introduces the principle of solidarity no less than four times regarding areas of relevance to justice and home affairs 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 area of freedom, security and justice – 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 a considerable margin of discretion is left to the member states as regards the fulfilment of their solidarity duties,[14] the formal introduction of the principle

[14] A Declaration to Final Act on Art. I-43 and III-329 (*see* Council Document CIG 86/04 ADD2 of 25 June 2004) leaves it to the individual member states to choose 'the most appropriate means' to comply with its solidarity obligations.

nevertheless marks a substantial step forward towards a system of common support for common tasks and 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 area of freedom, security and justice, 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 have deficits of sophisticated investigation equipment.

The reforms of the decision-making system

Much attention was given before and during the work of the Convention to the need of increasing the decision-making capacity of the EU in the justice and home affairs domain, and the Constitutional Treaty provides indeed for a number of substantial reforms on the decision-making side.

As regards voting requirements the Constitutional 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 justice and home affairs 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 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, the exemptions from majority voting should not conceal the fact that the Constitutional 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 Intergovernmental Conference (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 justice and home affairs matters will increase the enlarged Union's decision-making capacity on the further development of the area of freedom, security and justice. The last few years have amply demonstrated – espe-

cially in the domain of asylum and immigration – that unanimity means all too often that decisions are blocked in the Council or at least subject to major delays, and where decisions are taken, they contain agreements on the basis of the lowest common denominator.

On the other hand, however, this comes at a price, which at least some member states might increasingly regard as heavy. The Constitutional 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(1) and III-276(2)). 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, as a result of being outvoted in the Council, to introduce substantial changes which could run against the grain of their national legal systems. 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.[15]

Against this background it is unsurprising that the Convention's proposals on majority voting met some opposition in the Intergovernmental Conference. This was strongest in the domain of criminal justice co-operation, 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 which consists of two different elements.

The first 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

[15] However, already under current treaty provisions (Art. 63 TEC) some of these aspects should have come under majority voting by 2004.

the differences between the legal traditions and systems of the member states. An earlier proposal in the Intergovernmental Conference – in the end discarded – had in this context even referred explicitly to the 'common law' systems.[16]

While this constitutes a relatively moderate protective clause, 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 who 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 then 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 respective legislation is not adopted within twelve months after the submission of a new draft, Articles 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 will automatically be given authorisation to do so on the basis of an 'enhanced co-operation' as defined in Articles I-44(2) and III-419(1).

This provision constitutes some sort of a monstrosity. It enables any of the member states simply to interrupt a legislative procedure through a referral to the European Council. This not only undermines the idea of a 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 co-operation' 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 by the European Commission of such an 'enhanced co-operation' framework, which could well affect the interests of non-participating member states. One really has to ask whether it would not have been a much 'cleaner' and certainly more transparent solution – especially in a Treaty claiming to establish a 'Constitution' – simply to maintain the unanimity requirement for the criminal justice domain.

Another aspect of the decision-making system, which the Constitutional Treaty 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 Constitutional Treaty provides that it has to

[16] *See* the so-called 'Naples Document' (CIG 60/03 of 9 Dec. 2003).

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. 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 area of freedom, security and justice 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 Constitutional 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 justice and home affairs 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, even if one may wonder whether it is necessary formally to provide for such a committee in a constitution.

Implementation

The effective implementation of decisions is of particular importance in the justice and home affairs domain. Problems with implementation of certain measures in other member states can not only increase security risks but also 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 Constitutional Treaty provides for adoption of arrangements for the 'objective and impartial evaluation' of the implementation of Union policies in the area of freedom, security and justice context (Article III-260). The model for this provision has clearly been current 'collective evaluation' procedures which – especially in the Schengen context – have led to some positive results. Such 'peer review' monitor-

ing of implementation complements the much harder and more inflexible formal treaty infringement proceedings before the Court (Articles III-360 to III-362).

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 justice and home affairs co-operation. The Constitutional Treaty considerably strengthens the role of the European Parliament. It gains co-decision powers under the 'ordinary legislative procedure' (Article III-396) or at least 'consent' powers in most of the fields covered by the area of freedom, security and justice: 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)). Thereby the EP becomes in fact a real co-legislator for the further construction of the area. 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)).

Yet the picture as regards parliamentary control also has its darker sides. In some fields the Parliament will 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. One should also note that the EP continues to have no role in the definition of the strategic guidelines for legislative and operational planning within the area of freedom, security and justice 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 'enhanced co-operation' and that no pro-

vision 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 area during the last few years.

The position of national parliaments is strengthened by Articles I-42(2), III-259, III-260, III-273(1) and III-276(2), 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 justice and home affairs measures in place.

Regarding judicial control, it has already been pointed out above that, as a result 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 laid down Article I-5(1) and reaffirming the territoriality principle in this domain. The removal of all other restrictions has to be welcomed as a significant – and overdue – step towards comprehensive judicial control and protection within the area of freedom, security and justice.

The burden of cases arising from justice and home affairs issues could significantly increase in the future, which may make it necessary to use the possibility opened by Article III-359 and 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 such specialised courts.

Conclusions

Some of the reforms introduced by the Constitutional Treaty are substantial enough to regard them as being indeed of 'constitutional' importance for the further development of the area of freedom, security and justice. The most significant ele-

ments 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 add to the existing potential for the further development of the area as a major political project of the EU, both in terms of progress in some justice and home affairs policy areas and more guarantees for citizens in terms of protection of their rights and democratic control. With a Union which is rapidly expanding its role in the internal security domain, not the least after the terrorist attacks of 11 September 2001 and 11 March 2004, European citizens should especially appreciate the additional guarantees the Constitutional Treaty brings, although these could have been strengthened by giving them a more direct access to the Court of Justice.

Yet although the Constitution provides for elements of progress, this progress is overall more one of gradual evolution than radical change. This is shown, in particular, by the fact that the Constitutional Treaty does not provide for a major transfer of competences from the national to the Union level. National sovereignty on questions of public order and internal security and the closely related principle of territoriality have been reaffirmed strongly and indeed more explicitly than in the current treaties. It is true that one significant inroad into the territoriality principle is made through the provision for a European Public Prosecutor's Office, but the establishment of this Office and any move to give it more extensive competences remains subject to a unanimous decision of the governments, which may well prove to be elusive. With the exception (perhaps) of the domain of asylum there is little potential for the 'constitutionalised' Union to move to anything worth the name of a full-fledged 'common policy' in the context of the area of freedom, security and justice. The emphasis is clearly on enhancing the effectiveness of cross-border co-operation of national authorities in response to common challenges rather than engaging in supranational policy- and institution-building.

Overall the Constitutional Treaty defines a legally strengthened framework for a co-operative rather than integrated 'area of freedom, security and justice'. Having regard to the persisting significant differences between national priorities, concepts and legal traditions in the public order and security domain, which all have their own legitimacy, this may well be the most appropriate framework for the further development of the area of freedom, security and justice, at least for the time being. The ringing word 'Constitution', under which these reforms have been placed, may well have raised expectations of a more ambitious and coherent area of freedom, security and justice, not riddled by numerous exceptions and

restrictions and ungainly 'monstrosities' in the decision-making rules. Yet this would have required a *constitutional consensus* on some fundamental issues in the justice and home affairs domain – such as legal immigration and harmonisation of criminal law – which is clearly non-existent at this time and which can also not simply be called into being by a treaty.

While the Constitutional Treaty may not satisfy all 'constitutional' aspirations, it provides – as pointed out above – a substantial enough basis for the further development of the area of freedom, security and justice. The question however is whether the opportunities provided by the Constitutional Treaty in this respect are going to be used by all member states or only by some. The Treaty essentially maintains the current 'opt-outs' which were granted to Denmark, Ireland and the United Kingdom by the Amsterdam Treaty as regards policies on border controls, asylum and immigration, judicial co-operation and police co-operation.[17] This means already some differentiation within the area, but more could follow. It seems perfectly possible that some member states might be willing to go further than others in respect of, for instance, the establishment of the European Public Prosecutor's Office, criminal law harmonisation or the integrated management of external borders. In that case they may well be tempted – and indeed regard it as the only alternative open to them – to use the 'enhanced co-operation' possibilities under Articles I-44 and III-416 to III-424 to go ahead in the respective areas.[18] The Constitutional Treaty actually opens up quite a few possibilities for development without making them mandatory and without settling more unequivocally the extent of Union competences. This is not only likely to cause some political friction between the member states but also to increase the likelihood of a group of member states using 'enhanced co-operation' for transforming some of the Treaty's possibilities into realities. The latter may not serve best the idea of a single 'area' of freedom, security and justice, but it could well be the only way to effectively implement some of the more far-reaching development potential opened up by the Constitutional Treaty.

[17] Protocols 18, 19 and 20 annexed to the Constitutional Treaty.

[18] It should be recalled that at least one third of the member states must participate in such an initiative and that a host of other conditions would need to be met.