

Reforming Justice and Home Affairs

A Question of Balance: The Area of Freedom, Security and Justice

Franziska Hagedorn

The Convention's last plenary session on 3-4 October demonstrated that the future status of important policy fields, such as CFSP and Justice and Home Affairs, is still just as controversial as the question of whether or not they should be communitarized. Yet consistent and well-balanced policies in these fields can probably be achieved only by conferring additional powers on the EU level. The Convention should create the appropriate framework for such a step.

The Amsterdam Treaty states that maintaining and developing the Union as an area of freedom, security and justice (AFSJ) is one of the priorities of the European Union. Although some progress has been made, especially in Amsterdam, a coherent policy has not yet been developed. Rather, this policy area consists of a conglomeration of intervention areas, of numerous instruments and procedures. This leads to confusion, inefficiency, a great deal of administrative work, insufficient transparency, difficulty with regard to democratic control, and, ultimately, to a lack of legitimacy.

Thus enhancing European involvement in home affairs constitutes one of the Union's major reform challenges. It must now continue to develop the different policy elements of freedom and security, member-state and EU competencies, as well as their internal and external impact, in a well-balanced manner. Freedom and the protection of the fundamental rights of the Union's citizens must be accorded the same status as measures designed to improve security, such as data transmission and surveillance. The legal traditions of the member states must be reconciled with the necessary harmonization and co-operation. Focusing on internal policy objectives of the Union should not obscure the external impact. It is important to maintain the balance between national responsibility, the joint fulfilment of tasks, and financial burden-sharing.

Meanwhile, numerous proposals for a future constitution of Europe have been presented – and their number is still rising. Our website is providing an overview of the different proposals as well as downloads, links, and explanations:
<http://www.eu-reform.de/>

A coherent and balanced policy in this area calls for a number of measures. For this reason the Convention Working Group on Freedom, Security and Justice should concentrate on the following points:

(1) Clear Definition of Aims

In order to define the AFSJ, the present text of the Treaty only refers to the guaranteed freedom of movement. In order to serve as the basis for a coherent policy, there is a need for a more comprehensive description of this area which emphasizes that the EU is a legal community which in particular respects and protects fundamental rights (as laid down in the Charter).

Chapter IV TEC 'Visa, Asylum, Immigration' should also refer quite clearly to the objectives of the Union. The formulation of basic objectives, such as a common migration policy and the aim of integrating immigrants into society and the labour market, is of considerable importance. Such clearly stated objectives also make a contribution to the clarification of competencies and serve to prevent undesirable centralization.

(2) Overcoming the Pillar Structure

The basic subdivision of the measures designed to implement AFSJ in two different pillars (police and judicial co-operation in criminal matters in the third pillar; immigration, asylum and visa issues in the second pillar) can no longer be retained. The procedures and measures are too confusing, and, in terms of content, such subdivision is illogical. Some policy fields in which citizens would prefer a joint European policy, such as combating drug trafficking and organized crime, remain in the hands of intergovernmental co-operation. Furthermore, the distinction between internal and external security is no longer obvious. For this reason subdivision on the basis of pillars does not seem appropriate. A merger would emphasize the necessity to develop a coherent policy. It would also simplify procedures and lead to an increase in efficiency and transparency. Due to their cross-border character and their significance for the implementation of basic treaty objectives, measures in the field of Justice and Home Affairs should on the whole be deemed to be common policies.

(3) Decision-making Procedures

The division of Justice and Home Affairs among two pillars and the attendant application of different decision-making procedures is complicated, difficult for citizens to understand, and leads to inefficiency.

For this reason decision-making procedures for the entire area should be based on those in the first pillar. Thus majority decisions should be made as often as possible, particularly in areas in which, as stipulated in the Amsterdam Treaty, majority voting can be applied from 2004 onwards. Qualified majority voting is particularly important

in the field of asylum and immigration policy in order to ensure that burdens are shared fairly among EU member states. Stepwise solutions must be found for areas in which national interests are opposed to the possibility of majority voting. However, there needs to be a clear perspective of how to convert these elements to majority voting at a later date. In the medium term, the Commission should play a larger role and have the sole right of initiative. It can then assume the function of co-ordinating the various policy areas.

(4) Control by the European Parliament

The European Parliament must be put in a position to exercise its democratic control function in the area of Justice and Home Affairs more efficiently. The co-decision procedure should always be applied in this policy area. A special solution must be found in the case of enhanced co-operation. In this context the question arises as to the role members of the European Parliament from those member states not participating in the co-operation might be able to play. Europol, Olaf, Eurojust, and an EU prosecution service, which is currently being established, must also be subject to control by the EP and, if need be, by the ECJ. The same applies to a common border police force, which was agreed on at the Seville summit as a long-term option.

(5) Standardization of Instruments

On account of their varied legal character, the instruments available in the area of Justice and Home Affairs aggravate the lack of transparency. Whereas regulations, directives, and decisions are applied in the first pillar, in the third pillar the instruments are common positions, framework decisions, decisions, and conventions. The disadvantage is that none of the instruments of the third pillar is immediately effective, and that common positions are not binding.

There should be fewer instruments in order to maintain the unity of Community Law. Thus it follows that the instruments of the first pillar, i.e. regulations, directives, or binding decisions, ought to be applied in all policy areas. The use of such instruments, which have a direct impact, would also contribute to an increase in efficiency.

(6) Control by the European Court of Justice

In the light of the nature of political decision-making and the far-reaching powers to intrude upon the basic rights of the individual, judicial control in the area of Justice and Home Affairs continues to be insufficient.

Any judicial body of a member state should have the right to submit provisional rulings, in which courts of the member states present to the ECJ disputed questions arising from ongoing proceedings. All member states should acknowledge that the European Court of Justice is responsible for provisional rulings. This would abolish the current regulation, according to which each member state must explicitly declare that it

acknowledges the ECJ's responsibility. Selective commitment should be avoided. Art. 35 (2) TEU would therefore have to be amended.

Moreover, the limitation of the ECJ's judicial powers should not exceed the protection of member-state competencies provided for in other sections of the TEC. Specific protection of member states is granted only in the areas of public order, safety and health.

(7) Transparency

Access to EU documents should be as open as possible. Such openness should be made even clearer in the treaties. It includes not only citizens' right to access, but also the actual possibility to make use of this right, i.e. access to archives or specific information via email and the internet. At the same time simplified access to documents should not lead to an excessive amount of information. Thus it would make sense to establish an agency dedicated to preparing and organizing documents and making them accessible, and providing support for citizens looking for specific documents.

Conclusion

Securing freedom and protecting individual rights within the framework of effective democratic control are at the heart of a successful European Union. In the long run the European Union can reckon on the legitimacy of European internal policy only if EU member states manage to strike a balance between the various requirements. It will be necessary to reconcile political leadership and responsiveness towards the expectations of Europe's citizens.

Important documents of the EU Convention on Justice and Home Affairs:

Mandate of the Working Group X on the „Area of Freedom, Security and Justice“

CONV 179/02

<http://register.consilium.eu.int/pdf/en/02/cv00/00179en2.pdf>

Annotated Mandate of the Working Group X on the „Area of Freedom, Security and Justice“

CONV 258/02

<http://register.consilium.eu.int/pdf/en/02/cv00/00258en2.pdf>

Justice and Home Affairs - Progress report and general problems

CONV 69/02

<http://register.consilium.eu.int/pdf/en/02/cv00/00069en2.pdf>

Link to the Working Group X „Freedom, Security and Justice“

http://european-convention.eu.int/doc_register.asp?lang=EN&Content=WGX