Decision-Making in EU Justice and Home Affairs: Current Shortcomings and Reform Possibilities

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DECISION-MAKING IN EU JUSTICE AND HOME AFFAIRS: CURRENT SHORTCOMINGS AND REFORM POSSIBILITIES[1]

INTRODUCTION

If one examines the state of development of EU justice and home affairs (JHA) in a short, medium or long-term perspective different conclusions can be made. In the short-term perspective, the decision-making procedures and institutional developments seem to be slow, unwieldy, badly structured and without coherence. If, however, one examines the area in a medium and longer-term perspective the picture becomes different. Much progress has been made since nine years[2], in particular when one compares to the 40 years of the creation of the Internal Market. Approximation of criminal laws, the Tampere Conclusions that created the concept of mutual recognition in this area and the building of new institutions such as Europol, Eurojust and the European Judicial Network must however be consolidated and made more coherent.

In this paper, I will take a critical look at the current decision-making structures and possible developments in the future. I will in particular examine some of the practical shortcomings of the decision-making in the area of the "third pillar"[3] and make suggestions on how to improve them. This becomes particularly interesting in the light of the Convention that currently examines the "new Constitutional Treaty" and is in an intensive period of discussion within Working Group X, chaired by the former Irish Prime Minister John Bruton, on how to make necessary reforms in this area.

I therefore propose to examine the way that decisions are made within (mainly) the third pillar in practice and how the structures could be improved.

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1 Hans G. Nilsson, Head of Division, Council of the EU. This paper constitutes the essence of an intervention that the author made at a seminar organised by the University of Leicester in September 2002. The opinions expressed in this paper are those of the author and not necessarily those of the Institution for which he works.

2 The Treaty of Maastricht entered into force on 1 November 1993. The TREVI cooperation and the cooperation within the Council of Europe was purely intergovernmental Maastricht however brought about an "institutional intergovernmentalism" which became more accentuated with the Amsterdam Treaty.

3 Title VI TEU, Provisions on Police and Judicial Cooperation in Criminal matters.

INITIATIVES

Initiatives of the member states are often reactive to the political situation of the day. If a Member State perceives of a political problem, there is always a tendency to bring this matter up to the European level although the perceived problem may not particularly interest other Member States or be within the scope of long term planning of the Union. Since the Presidency is the "motor" in the third pillar, such initiatives will often come from the Presidency that devotes more resources to the 6 months that it will keep the Presidency. Examples of this practice are initiatives concerning violent attacks on truck drivers or the setting up of a European office to deal with missing children. These initiatives were not in any of the Action Plans[4] that have been adopted during recent years. This does however not detract from their interest or perceived need in some Member States. One may however question if it is appropriate, in the light of the principle of subsidiarity, to deal with such issues at European level.

However, initiatives of member states may also be enriching and follow programmation made by the action plans and the Tampere European Council conclusions of 1999. Examples are recent initiatives on confiscation of the proceeds from crime and the Eurojust initiatives of the group called "the four Presidencies"[5] that tabled the initiative that led to the setting up of Eurojust.

Some initiatives, like the one on extended confiscation powers, would possibly not have been feasible to bring forward within the framework of the Commission. However, a single member state may be bold enough to take such initiatives.

Commission initiatives are becoming increasingly well prepared as it gains experience in this area, they often follow the legislative programmes and are made in consultation with the member states. One may therefore conclude that they reflect the "European views" in that they are situated somewhere in the mainstream politics of what a majority of the member states want. They however, take long time before they are tabled (because they are thoroughly prepared) and are not always therefore in line with the necessity of a rapid reaction to new events. It was just a hazard that the Commission was able to table the initiative for a Framework Decision on terrorism and the European Arrest Warrant after 11 September[6]. They had been prepared for two years within the Commission after the Tampere European Council.

It may be doubted whether member states would be willing to give up their rights of initiative in this highly sensitive area. A right of initiative may also be seen as an expression of democracy and may contribute to bringing the people closer to the decision-making process in Brussels. From that point of view, initiatives of member states could be seen as positive, although they may reflect the internal situation in one country only.

However, in the future, one could possibly think of initiatives by several member states such as the 4 Presidencies or of an obligation for the Commission to take an initiative if several member states request them to do so. It is however unlikely that the Commission would appreciate such a rule. One solution that has been advocated within the framework of the Convention Working Group X

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4 Vienna Action Plan or Tampere Milestones.

5 Portugal, France, Sweden and Belgium.

6 These initiatives were tabled on 19 September 2001.

has been to give a right of initiative to 1/3 of the member states. Personally, I would think that it would suffice with 1/4 or even 1/5 to ensure that the initiatives are carefully thought through.

In the long run, practice will in any case show that most of the initiatives will be taken by the Commission. Practice shows also that if an initiative does not have any support in the Council it will remain undiscussed. One example is an initiative on harmonisation of public procurement crimes. It has never been discussed in any working group of the Council.

TRANSPARENCY

After the translation into 11 languages and jurist linguist scrutiny, the initiative is publicised and immediately placed on the Internet. This is a great achievement for transparency and open debate. It is however not without practical problems as it has become clear that some national parliaments examine the initiative in detail and give negotiating directives to the government representative. The negotiator in the Council Working Group will therefore have his hands tied. This may of course be seen as a triumph for democracy but it also makes the decision making process extremely difficult. Negotiation takes place with 15 representatives of the member states but also with more and more parliaments. But the Parliament is not represented in the Working Group. It is not infrequent that a negotiator says that he cannot change the position of his parliament.

The solution to this matter resides of course in the more general solution relating to co-decision and the role of national parliaments in general in this area. However, I for one would not have anything against representatives of the European Parliament and/or of national parliaments in the Council Working Group observing the proceedings and making parliamentary voices heard. From an institutional perspective however, this would seem rather utopian.

In the Amsterdam Treaty[7] only legislative initiatives are subject of consultation with the European Parliament. However, Action Plans are of crucial importance in this area (1997 High Level Group Action Plan, Millennium Strategy on organised crime, Immigration Action Plan, etc.). There should in the future be a mandatory consultation with European Parliament on action plans as well. In practise Presidencies have often forgotten (or there was simply no time) to send the action plans for information[8] to the European Parliament. Although the European Parliament has in reality the documents, it creates institutional tensions which are unnecessary since there is no official consultation with Parliament.

The action plan by the European Council on terrorism[9] was not communicated to the European Parliament before it was adopted. This lack of consultation of important documents constitutes a deficit which should be remedied. For the sake of ensuring regular information, it should be the Secretary General of the Council that informs the Parliament of discussions and consults it and not the Presidency or the Council as such. This would ensure consistency in handling of the question.

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7 Article 34 TEU.

8 Article 39, paragraph 2.

9 Adopted on 21 September 2001.

ROLE OF THE EUROPEAN PARLIAMENT

It often takes several weeks (because of translations into the official languages) before the Parliament is officially consulted on an initiative. In the meantime, the Council Working Group begins the discussion on the initiative and changes it often radically. When the European Parliament then four or five months later gives its opinion, the initiative has often been agreed upon politically by the Council or is near agreement. The opinion of the Parliament, based on the original initiative, is therefore very often obsolete. Parliament has then to be re-consulted since the text has been changed so much but, as the Ministers have agreed politically, it is not possible to make any changes to the text. Because of the rule of unanimity, delegations are not willing to change anything even if a proposal from Parliament is good in substance. In practice, the Parliament's opinion is often examined by JHA counsellors and the Presidency proposes to accept or reject the Parliament amendment. All Presidencies seek to accept as many amendments as possible, but very often one single delegation does not accept the proposal of the Presidency, and since unanimity governs there will be no change. It is not infrequent that no amendment whatsoever from Parliament is accepted. This means that the European Parliament is not able to fulfil its democratic role, its opinion has no value and it becomes "irresponsibilised". The resolution of this issue must be to make Parliament more responsible for its opinion, not to permit discussion in the Council until Parliament has given its first opinion so that it may play a role and, seen from this angle, to have codecision between Council and the European Parliament.

In practice, when ministers have agreed on a text (reached a 'general approach' as it is often called in the jargon of the Council) then follows a period of four months to one year or more where national parliaments scrutinise the agreement. In the case of the European Arrest Warrant it took 6 months for some parliaments to scrutinise the Framework Decision. The decision on illegal entry of aliens was scrutinised for nearly two years. In some member states national parliaments must take a formal decision to agree on a framework decision before the governments can lift a parliamentary scrutiny reservation in Council. This procedure requires these governments to present bills in which the negotiated instrument is presented before the parliaments. This means that, at least sometimes in one country, legislation will even enter into force or will have been adopted even before the Council adopts formally the act. In other countries, there is a necessity for the national parliament to have the actual final adopted text published in the Official Journal. This creates an imbalance where in some countries there is an enacted legislation and in others it may take years before the legislation is adopted.

The obvious solution to this matter would be to create direct effect of instruments in this area. This would probably mean that the constitutions of some member states will have to be changed as they may not have delegated legislative powers to the Union (and only to the Community). Whether that is really possible remains to be seen.

ROLE OF NATIONAL PARLIAMENTS

More and more member state parliaments are examining in detail initiatives in the area. Very often parliamentary reservations are kept for several months or longer. This is the expression that national parliaments take a keen interest in the issues discussed in Brussels and they are becoming increasingly aware that Framework Decision and Decisions are binding on the member states, including parliaments.

However, in a Europe of 25 member states it may be difficult to maintain the current situation. The question is: Should one reinforce or abolish the involvement of national parliaments in this area? Is it politically realistic to take away the role of national parliaments in enacting criminal law

legislation - one of the most sensitive areas of the law and one of the ultimate expressions of sovereignty? Some say that since it was possible to abandon national currencies and share a single currency, it should also be possible to share sovereignty in this area.

The discussions in the Convention seems to indicate that it is not possible or appropriate to develop a special body for national parliaments such as the current COSAC. This would only complicate further the decision-making process. However, I personally believe that there must somewhere in the decision-making process be some kind of involvement of national parliaments. This is not only because of reasons of sovereignty but I also believe that the legitimacy of the decisions in this area will become much greater if one may be confident that national parliaments are backing the process of European integration.

It seems to be only one solution available, namely co-decision with the European Parliament and to make the European Parliament really responsible for legislation in this area together with the Council. As the European Parliament is directly elected this would increase democratic legitimacy. However, national parliaments should also play a role. Could one combine co-decision with some possible period of reflection with national parliament after the Council has taken a decision? Could one for instance give them a final right of veto if they would not accept the legislation at European level, thus creating a Europe à la carte as already foreseen in the Treaty?

One possible solution could be (with 25 member states) to have a qualified majority (combined with co-decision for the EP) of a certain number of votes, eg 20 out of 25 member states. For the 5 (or less) member states that have been formally outvoted in the Council, there would be a period of reflection for the national parliament of one year during which year the parliament may decide to opt in to the measure adopted by the Council and the EP. If it does not do so, the member state would stay outside the instrument and any of its developments until the parliament has opted in.

In reality, this final safety valve would probably not be used very often. Where governments, as they do more and more, keep parliaments informed at early stages of negotiations, the parliaments will in any case become more and more involved. They are therefore likely to accept the measure in the end anyway.

If I am right in saying that national parliaments will not give up its powers this area something must be done to accommodate them and give them a final possibility of saying no. The Community "orthodoxists" will no doubt say that only QMV and co-decision is the solution. I, for one, however believe that when national parliaments realise that they will no longer have the power to make their own criminal law in the most important areas such as organised crime and terrorism, they will simply say no to any constitutional treaty.

NEGOTIATIONS IN THE COUNCIL

We live under the tyranny of unanimity. It will not possible in a European Union of 25 to take decision by unanimity. Already with 15 the lowest common denominator is sought after. In particular in instruments on harmonisation we cannot achieve much more. The whole negotiation seems sometimes to have as its goal to achieve a status quo, namely not to change the criminal law. Only after 11 September some progress was made but we cannot have an 11 September event every year. One must realise that if nothing is done to change this, for every area where unanimity is maintained, a complete standstill will follow.

In my opinion, unanimity is an undemocratic method. In a national context there is no parliament that adopts criminal law by unanimity among members of parliament or requires unanimity among

political parties. Criminal laws are adopted by simple majority. If the Union moves towards a system of qualified majority or a special JHA system (e.g. 20 out of 25 member states) we would therefore be much more democratic. In addition, we would become more efficient.

Discussions in the Council take a lot of time, sometimes one to two years, and in the process we are finding blurred compromises, lowest common denominators and "one-size-fits-all" solutions. Often, especially in instruments seeking to approximate criminal law, no real progress has been made.

DECISION-MAKING STRUCTURES

The Justice and Home Affairs area is one of the few areas in the Council that has four decisions making layers. It could therefore be questioned whether one should not abolish the Article 36 Committee and SCIFA as it complicates decision-making and there is always a tendency to push reservations to the next level. Working groups are suitable to solve technical questions and political matters will in any case often have to be resolved at ministerial level. Moreover, if a matter needs input from Directors General, nothing would in principle hinder that they meet within the framework of a Council Working Group.

More and more frequently the European Council has been called upon to resolve some questions or give political input. In practise, the Council therefore even had periods of 5 layers of decision-making. Many recommendations have been made[10] that the European Council should concentrate on strategic and political orientations and not solve issues of detail. This has however been difficult to live up to in practice as the issues of immigration, terrorism and organised crime have become extremely political.

What works well is the Justice and Home Affairs Counsellors, but the representation is uneven from the member states: some are high level ranking officials such as a "Prefet", whereas others seem simply to act as post boxes. One answer to this problem could be to move the Article 36 Committee to Brussels and ensure that they have a high rank. This would create a real dynamic and could be a way to maintain the Article 36 Committee and SCIFA but through the creation of an efficient working structure and not one that does not add much value to negotiations. There will be tensions with Coreper in such a decision-making structure but this could be levelled off with at further reinforcement of Coreper's role and clearly place it above that group.

INSTRUMENTS

The instruments have no direct effect and there is even now a tendency within some member states to try to take away the binding effect of the Decisions and Framework Decisions. The word "should" appears already in the European Arrest Warrant[11] and there was recently a proposal on the table of a Council working group which could mean that one of the instruments on mutual recognition 'should' have a certain scope of application. This is of course totally contrary to the intentions (and the letter) of the Treaty. But since the Council operates under rules of unanimity, it would seem difficult to get away from traps like these ones.

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10 For instance in the so-called "Trumpf-Piris" report, drafted by the then Secretary General of the Council and its Jurisconsult.

11 See the articles relating to delays for decisions to be taken.

This reinforces the necessity of instruments with direct effect and a control by the Court of Justice through the regular Community procedures.

Common positions are very difficult to negotiate as they have to be adopted with unanimity and the member state delegations that are negotiating the instrument on site in Vienna or Paris or New York are often not willing to let “Brussels decide” on what position they should take in negotiations. The Union is ineffective in external relations. One way to remedy this could be to set up a High Representative JHA who could gradually gain confidence and better steer external relations - proposals to that effect have also been made within the framework of the Working Group X of the Convention. Some common positions have had real effect but they took enormous effort to negotiate in Brussels and Coreper had to become involved very much in the specific file.

The legal status of Article 38/24 agreements is unclear. Mandatory consultation with European Parliament should take place on those agreements. This seems not to be the case today as the Agreements to conclude would follow second pillar procedures.

The principle of mutual recognition should be recognised in the Treaty. One way to do that could be to insert a "full faith and credit clause" as has been done in the US Constitution,[12] for instance in connection with Article 10 TEU. We are in the Union condemned to put faith and trust in each others' decisions. Otherwise we will maintain mutual mistrust. We must however combine this with enacting minimum standards - beyond the ECHR - and making efforts at internal level in training and fighting corrupt practices wherever they exist.

IMPLEMENTATION

When the decision has been taken it is published and needs to be implemented. Several examples of Joint Actions adopted under the Maastricht regime show that this instrument was ineffective. The Joint Action on bribery in private business was not implemented in several member states. This has been discovered during the negotiation of an initiative for a Framework Decision on the same topic which "Amsterdamises" the previous Joint Action. The Joint Action on participation in a criminal organisation is not properly implemented or, perhaps, it was so much watered down in the negotiations that it was not necessary for several member states to change their legislation. In the Framework Decision on terrorism at least one Member State will not enact any provisions on direction of or participation in a criminal organisation. The racism and xenophobia Joint Action is ineffective in at least one Member State. It is highly likely that many other examples could be found on bad implementation or at least uneven implementation among the member states. Therefore the first pillar procedures (role of Commission and Court of Justice) should be adopted also in this area.

In particular, it is necessary for the European Court of Justice to have an increased role. However that Court should be given a criminal chamber which should examine the instruments that are related to criminal law. In several of the cases it would also be necessary to give preliminary rulings extremely quickly e.g. in relation to the European Arrest Warrant. One cannot in the area of criminal law tolerate proceedings that take years.

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[12] Article IV, Section 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State; and the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The area has become much blurred due to “cross-pillarisation” between the first and the third pillar. Many instruments and discussion areas have suffered from the incoherence in the Treaty. In a national context one does not have different pillars with different competence. In the JHA area we have had to have lengthy discussions on whether environment crime is in the first or in the third pillar, and similar discussions have taken place on illegal entry of aliens, public procurement, money laundering, market abuse, protection of the EURO, protection of the financial interests of the community, forgery of luxury articles, insider trading etc. Many more examples could be given on areas where there is a tension between the first and the third pillar. This artificial border should therefore be abolished and the Convention needs do away with this unnecessary complicating factor.

FINANCING

The European Union currently spends 65 million EURO during five years in the AGIS programme. In candidate countries 500 million EURO are spent and in the common agricultural policy 50 billion. It is necessary to increase confidence in each other’s systems and the resources that we are devoting to this area also within the European Union.

Many member States’ prosecutors, courts or police have not sufficient resources. For the first time France augmented the budget next year for Justice by 7%. This has never been done before. But the state of equipment, training and the use of modern means of communications in the courts are at the Stone Age. It is a paradox that at the European Union level we are creating the European Judicial Atlas, CD-ROM’s and websites whereas local prosecutors even in countries that are supposedly "rich" do not even have computers in many member states. We need to spend EU money also within the EU on augmenting Rule of Law, police and judicial institutions. How can we otherwise create necessary trust?

We should therefore make European Union initiatives completely financed through the EU budget; otherwise they risk to remain ineffective due to lack of implementation at national level. There is no point in setting up a European Judicial Network if it is not given the resources at national level to function. The Eurojust members, paid out of national budgets will always suffer from inequality in treatment. Some members will be better treated than others as they will have more and better resources, which cannot be provided by the Eurojust budget. This creates inequality among the states.

Moreover after the candidate countries’ entry into the European Union they will continue to have a need for financial support but also in the "old" member states justice has always been treated as the poor cousin. In order to have a Common Agricultural Policy we are prepared to spend 50 Billion Euro. How much are we prepared to spend for a Common Policy on Freedom, Security and Justice?

Another example for improvement is common use of Union liaison officers. The European Union member states have some 300 liaison officers across the world but they are used bilaterally by the member states and not by the Union as such. If they were paid out of the Union budget they could be used by all member states and not by the one single Member State that sends the liaison officer.

In conclusion, the Convention has a huge task before it. In at least two areas, it cannot afford to fail: Where unanimity is maintained, no progress can be expected. In mutual recognition, a full faith and credit clause must be inserted in the Treaty and coupled with minimum standards.

The future of the development of the Area of Freedom, Security and Justice depends on it.

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