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Improvement of decision-making in justice and home affairs

EU citizens want and deserve effective action in response to cross-border crime and terrorism. Over the years, a comprehensive policy has been formed on these issues, a number of legislative measures have been adopted, and a number of bodies (such as Europol, Eurojust, OLAF and Frontex) have been created to provide such a response.

However, it has become increasingly apparent that decision-making in the justice and home affairs sector is hampered by a variety of substantial deficiencies which must be addressed. These include *deficient efficiency*, *deficient implementation* (in particular in the third pillar), and *deficient legitimacy*.

The *efficiency* of decision-making is lessened above all by the need for unanimity, which is increasingly difficult to secure in a Union of 25 Member States. The process is slow and uncertain, as has perhaps most clearly been seen for example with the case of the proposed framework decision on the European evidence warrant and the proposed decision on cross-border police cooperation.

The legislative instruments that emerge through a negotiation process oriented towards unanimity tend to contain a number of exceptions, ambiguities and opt-outs that lower the ambition and the impact of the instruments and make them more difficult to apply. A point of comparison is the use of the "Community method," which has proved to be an efficient way to reach compromise even on delicate and complicated legislative matters, such as the directive on the retention of telecommunication data. The experiences of decision-making under current Title IV using the Community method are similarly positive, as is evidenced for example by the expedient adoption of the comprehensive new Schengen Borders Code regulating the crossing of external borders.

The weakened quality of instruments in the third pillar is reflected in *deficiencies in implementation*. National implementation for example of the framework decision on the freezing and confiscation of assets and evidence has been slow. Although the deadline for its implementation was August 2005, one year later less than half of the Member States have implemented it. Another example is national implementation of the framework decision on the European arrest warrant, which not only has been slow, but in a number of cases one can question whether national implementation has in all respects been in conformity with the original framework decision. At present, no infringement proceedings can be brought by the Commission against Member States to remedy deficiencies in national implementation of third pillar legislation.

The *defective legitimacy* relates to the limited involvement of the European Parliament, and also to insufficient possibilities of the European Court of Justice to afford judicial protection to citizens.

The third pillar deals with fundamental questions of rights and security. In an integrating Europe with increasing free movement, police cooperation and cooperation in criminal matters must be as effective as possible and rest on a strong basis of legitimacy. It is our responsibility as Ministers to ensure that also the procedure for taking decisions on such matters accords with these same standards.

Against this background, on 25 June 2006 the European Council invited the Presidency to explore, in the context of the Hague Programme and in close cooperation with the Commission, the possibilities of improving decision-making and action in the area of Freedom, Security and Justice, on the basis of the existing Treaties. The Commission presented on 28 June 2006 its Communication, "Implementing the Hague Programme: The Way Forward" (COM(2006) 331 final), which provides an excellent basis for this.

When the Maastricht Treaty was drafted, the negotiators foresaw the possibility that the Union might at a later stage wish to review how decisions are taken. Article 42 of the Treaty on the European Union (originally Article K.9 until renumbered by the Treaty of Amsterdam), allows transfer of action in areas covered by Title VI TEU to Title IV of the Treaty establishing the European Community (the so-called bridging clause or *passerelle*). According to Article 42,

> *The Council, acting unanimously on the initiative of the Commission or a Member State, and after consulting the European Parliament, may decide that action in areas referred to in Article 29 shall fall under Title IV of the Treaty establishing the European Community, and at the same time determine the relevant voting conditions relating to it. It shall recommend the Member States to adopt that decision in accordance with their respective constitutional requirements.*

Article 42 therefore allows the Council to decide to transfer action on police cooperation and judicial cooperation in criminal matters to Title IV TEC, which currently deals with border controls, visa, asylum, immigration and judicial cooperation in civil matters.

When using the possibility offered by Article 42, the Council will have to decide on *whether to transfer all or only part of the action under the current third pillar*. A total transfer would be the simplest and clearest approach, and respond to the criteria of effectiveness, accountability and legitimacy. In the case of a partial transfer, the scope of the areas that are transferred to Title IV should be delineated as clearly as possible in order to avoid possible practical and legal complications as well as ambiguities.

A second issue that should be decided is *what voting regime is to be adopted*. It is the position of the Presidency that legislative measures in the transferred areas should henceforth be adopted through the co-decision procedure. However, for issues that the Council deems to be particularly sensitive, consideration could be given to requiring unanimity in the Council, after consultation of the European Parliament.

The Presidency is fully prepared to explore various possibilities for flexibility in the application of the bridging clause. For example, consideration might be given to allowing for a *transitional period* of for example *five years*, after which the Council should decide to have all or parts of the areas subject to unanimity voting governed by the co-decision procedure (cf. Article 67 TEC).

Article 67(2) TEC allows the Council, acting unanimously after consultation with the European Parliament, to decide that areas covered by Title IV TEC shall be governed by the co-decision procedure and to apply the provisions relating to the powers of the Court of Justice. The Presidency notes that this means that the area of legal migration would be governed by the co-decision procedure. As with Article 42, the bridging clause under Article 67 requires a unanimous Council decision. However, it does not require ratification at the national level.

The improvement of the effectiveness and legitimacy of decision-making in justice and home affairs is also connected with the proposal presented by the Commission for adapting the provisions of Title IV of the Treaty relating to the jurisdiction of the Court of Justice with a view to ensuring possibilities for more effective judicial review.

Questions for discussion

The Presidency proposes the following position as the basis for discussion:

Transfer of action on all areas covered by Title VI TEU to Title IV TEC would increase the efficiency and legitimacy of decision-making on justice and home affairs. The Council should therefore use the possibility provided by application of Article 42 TEU. The Council should decide that legislative measures on matters thus transferred shall be adopted following the procedure referred to in Article 251 TEC (co-decision with qualified majority).

Do the Ministers agree with this position?

Should Ministers be of the view that legislative measures in some transferred areas should be adopted (at least during a transitional period) by the Council acting unanimously, after consultation of the European Parliament, they are invited to identify the areas in question.

Should Ministers be of the view that the bridging clause should not be used at this time, they are invited to indicate how they would improve the effectiveness and legitimacy of decision-making on justice and home affairs.