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Implications for the *common* Area of Freedom, Security & Justice

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The period of reflection is over. Now it is for the member states' experts and EU institutions to sculpt a readable, comprehensible and coherent legal entity out of the complex material that has been put on their desks.

On the already voluminous but comparatively sublime Constitutional Treaty of 2004, the June 2007 European Council has superimposed the mandate for the Intergovernmental conference (IGC Mandate)[1]. This mandate is in itself complicated enough but it only forms the sketched outline from which a 'non-constitutional' Reform Treaty revisiting the already existing Treaties will be constructed, generating two 'new' treaties. The result will constitute the legal foundation upon which the EU as a political project will have to be built in the foreseeable future – always provided everything turns out as planned.[2]

Aspects related to the 'Area of Freedom, Security and Justice' (AFSJ) - the EU label for Justice and Home Affairs (JHA) - will be among those experiencing a substantial institutional revision. This policy field has been notorious for its inability to respond to its specific challenges under the existing institutional framework. From many sides, substantial reform has long been considered urgent.

By looking at the nature of the renewed institutional setting and the effects that the latter will have on the sustainability and crystallisation of an AFSJ, this Policy Brief assesses the major innovations brought about by the IGC Mandate to the Area of Freedom, Security and Justice (AFSJ).

As we will argue, one of the most relevant amendments compared to the present regime will be the *formal* scrapping of the Pillar division (EC First Pillar vs. EU Third Pillar).[3] In doing so, the Reform Treaty will provide a necessary and positive[4] response to the deficiencies and vulnerabilities that characterise the current legal duality of Pillars. At the same time, however, the Mandate goes way beyond the 'flexibility mechanisms' already foreseen in the Constitutional Treaty and further opens the door for a considerable number of derogations from general rules. While there are different positions on these flexibility mechanisms, we see a tangible risk of 'exceptionalism' and 'differentiation' that may have serious implications for the construction of a *common* Area of Freedom, Security and Justice.[5]

Equally, catchy and technocratic terms like 'emergency brakes', 'flexibility', 'enhanced cooperation', 'opt-ins' and 'opt-outs', 'two-speed Europe' are ever present characteristics of this new institutional setting. In essence these mechanisms entail that in sensitive policy areas individual member states will be enabled to suspend (or stay entirely clear of) legislative procedures, paving the way for small groups of member states to go 'forward' without the fortified participation of others and the EU as a whole. This 'exceptionalism' and 'differentiation' gives rise to a number of key questions:

Is the Reform Treaty truly going to 'de-intergovernmentalise' all the policies falling within the scope of an AFSJ, and hence put a *material* – not only a *formal* - end to the 'Era of the Pillars'? Is the much-praised 'flexibility' not in fact likely to

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create many 'Areas' with possibly different and even competing degrees, notions and 'speeds' of Freedoms, Securities and Justices? To what extent is the mainly positive connotation of moving 'ahead', moving 'forward' (as if European integration were a one way street) justified? How much moving 'ahead' can the political project of an AFSJ bear before it moves 'apart'? In short, and sticking to the Greek temple metaphor that has so far described the EU/EC construction: did we scrap the pillars only to construct a 'mosaic' (a 'patchwork') in the Areas of Freedoms, Securities and Justices?

This paper is divided into three core sections: the first offers a concise overview of the most relevant innovations in the AFSJ. The second section assesses exceptions and derogations applicable to this renewed institutional architecture. The third section presents a critical analysis of the implications that may arise from the application of exceptions and differentiation in the building of a common European Area of Freedom, Security and Justice. Finally, we offer some conclusions and suggestions for policy-makers.

I. The Mandate for a Reform Treaty: Innovations for an AFSJ

The Reform Treaty will emerge from a combination of the amendments presented by the IGC Mandate along with those provisions that will survive from the Treaty Establishing a Constitution for Europe as signed in Rome in October 2004 (the Constitutional Treaty).[6] The main innovations as regards the future Area of Freedom, Security and Justice are highlighted here:

1. The End of the Pillars

The Reform Treaty will generate two separate bodies of law: an amended version of the Treaty on European Union (TEU)[7] and the Treaty on the Functioning of the Union (TFU). The TFU, which will be the new denomination[8] of the current Treaty establishing the European Community (TEC), will contain the new title: 'Area of Freedom, Security and Justice', comprising five chapters and bringing together the currently dispersed[9] JHA policies under one heading.[10] As an outcome, the pillar division will be formally abolished. The direct consequence of this restructuring will be the expansion of what is - at present - called the 'Community method' to police and judicial cooperation in criminal matters.

2. The Procedural & Decision-Making Mechanisms

The Reform Treaty will in principle create an improved decision-making procedure which will lead to a higher degree of efficiency, legal certainty, accountability and democratic control.

First, as regards the decision-making processes, the standard procedure in the AFSJ will be co-decision (present Art. 251 TEC) with a Commission right of initiative and qualified majority voting (QMV) in the Council. In this way, the procedural amendments that had been proposed by the Constitutional Treaty will remain valid (Art. III-396). Therefore, and in contrast to the current state of affairs, the co-decision procedure and QMV will apply to:

- Police and judicial cooperation in criminal matters;
- Legal migration and integration of third country nationals;
- Measures dealing with those non EU nationals subject to visa requirements and rules on uniform format for visas.

Second, there will be a common nomenclature of legal instruments. However, instead of using the innovative terms coined in the Constitutional Treaty (i.e. European laws, European framework laws, European regulations, etc.[11]), the new structure will retain the traditional instruments of the EC First Pillar (regulations, directives, decisions, etc). The current EU Third Pillar instruments (framework decisions, common positions, conventions, etc) will disappear. The heterogeneity in the types of legal acts - product of the institutional duality characterising current FSJ policies – and negative effects in terms of their genuine nature and legal effects will therefore come to an end. This will in turn foster transparency and comprehension of the legislative procedures.[12]

3. An Enhanced role for the European Parliament & National Parliaments

As mentioned above, the general rule will be that the AFSJ acts will be subject to the co-decision procedure as currently foreseen in Art. 251 TEC and as revised by Art. III-396 of the Constitutional Treaty (the so-called 'ordinary legislative procedure'). At present, the European Parliament is still not sufficiently involved in the decision-making processes covering EU Third Pillar policies. The Reform Treaty will - in principle - provide a single legislative procedure that guarantees democratic accountability. This will respond to the democratic shortcomings that have so far characterised European cooperation on police and judicial cooperation in criminal matters.

Furthermore, the mandate foresees a strengthened involvement of national parliaments. Under the new Title II of the TEU - to be called 'Provisions on Democratic Principles' - national parliaments will take part in the evaluation mechanisms for the implementation of the Union's AFSJ policies. In

this regard it is interesting to note that the IGC Mandate intends to slightly alter the wording of the relevant provision in comparison to the 2004 Constitutional Treaty. While the latter provided in article I-42.2 that "National Parliaments *may*, within the framework of the area of freedom, security and justice, participate in the evaluation mechanisms" and "*shall* be involved in the political monitoring of Europol and the evaluation of Eurojust's activities" (emphasis added), the IGC mandate states that "National parliaments *shall* contribute *actively* to the good functioning of the Union (…) *by taking part*, within the framework of the area of freedom, security and justice in the evaluation mechanisms (…) and *through being involved* in the political monitoring of Europol and the evaluation of Eurojust's activities"[13] (emphasis added). This new wording seems to intend to provide an even stronger role of national parliaments than that foreseen in the Constitutional Treaty.

In addition, the mandate goes beyond the 2004 Constitutional Treaty in relation to national parliaments' role in keeping watch over the principles of subsidiarity and proportionality. There will be a "reinforced control mechanism of subsidiarity" so that "*if a draft legislative act is contested by a simple majority of the votes allocated to national parliaments the Commission will re-examine the draft act, which it may decide to maintain, amend or withdraw*".[14] If the Commission decides to maintain the draft act, a new specific procedure will be triggered that may eventually – depending on the Council's and EP's position on the matter – result in the dropping of the Commission's draft act. Finally, the time period which national parliaments will have for the examination and delivery of opinions on the subsidiarity of draft legislative acts will be extended from 6 to 8 weeks.[15]

4. The Jurisdiction of the European Court of Justice (ECJ)

Judicial control is critical for the protection and safeguarding of civil liberties, fundamental rights and the rule of law. This is particularly true in the context of transnational policies dealing with FSJ, as these entail many implications on the status of the individual that go beyond traditional 'person-state' relations within a nationally confined legal system. At present, the ECJ has no full jurisdiction over the measures activated within the AFSJ. In particular, it does not hold a *per se* recognised competence to review and interpret measures on judicial cooperation in criminal matters and police cooperation. Article 35 TEU foresees a high number of exceptions and alterations, among which is a merely voluntary declaration by member states as to whether to accept the jurisdiction of the Court,[16] the absence of individual standing to bring suit against certain measures as well as the absence of infringements proceedings instigated by the Commission against member states.

In addition, deviations also exist under the umbrella of Title IV TEC (*Visas, Asylum, Immigration and other policies related to free movement of persons)*. According to article 68 TEC, for example only last instance courts under national law are entitled to ask the ECJ for a preliminary ruling.

The new institutional framework that is going to be provided by the Reform Treaty will grant the ECJ - in principle - general jurisdiction to interpret and review the validity of the acts adopted within any field of the AFSJ. Overall this will ensure a higher level of judicial control and protection in the EU.

5. The Charter of Fundamental Rights

The debate around the legal status of the Charter of Fundamental Rights of the Union will be – for the vast majority of member states - finally resolved.[17] The new article 6 TEU will provide a cross-reference to the Charter on Fundamental Rights "*as agreed in the 2004 IGC*".[18] This will render the Charter directly legally binding for the European institutions, Union bodies, offices and agencies as well as member states when they implement Union law.

This will put EU actors and member states under a clear legal obligation to ensure that in all their areas of activity – and in particular in the AFSJ - fundamental rights are duly respected. It will also reinforce the onus upon them to respect fundamental rights when legislating, implementing and practising these policies. Finally, the altered nature of the Charter will strengthen the freedom dimension of an AFSJ.[19]

6. An EU with a Single Legal Personality

As foreseen in the Constitutional Treaty, the Reform Treaty will recognise the European Union as a single legal personality. The new version of article 6.2 TEU will additionally establish that the EU shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950. It will also contain the proviso that "*Such accession shall not affect the Union's competences as defined in the Treaties*". From an EU perspective, the eventual accession to the ECHR will require unanimity in the Council and ratification by member states. However, it must be kept in mind that accession by the EU to ECHR is not a unilateral act. In order to achieve this step, all 47 ECHR signatory states will have to agree and certain amendments to the Strasbourg texts will be required.[20]

Further, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states, will continue to be considered as general principles of EU law. While accession to the ECHR would serve as an excellent reminder for member states of the obligations and commitments undertaken within the realm of the Council of Europe, careful attention will need to be paid as to the actual legal and judicial consequences of the changing relationship between the ECHR, the Charter of Fundamental Rights and the national constitutions.[21]

7. The European Public Prosecutor

The possible establishment of a European Public Prosecutor's Office from Eurojust was already foreseen in article III-274 of the Constitutional Treaty. This has been kept by the mandate. The European Public Prosecutor's Office will be a judicial body with direct enforcement authority, responsible for investigating, prosecuting and bringing to judgment offences against the Union's financial interests. In this respect it will exercise the functions of prosecutor directly in the competent courts of the member states.

While the term "offences against the Union's financial interests" is as such already quite wide and imprecise, there will also be the possibility to extend the powers of this body to include "serious crimes having a cross-border dimension" (article III-274.4). A fully fledged European Public Prosecutor's Office responsible for investigating and bringing to trial serious cross-border crime throughout the EU would be a quite fundamentally new and powerful actor in the area of judicial cooperation in the EU; its development therefore deserves close attention.[22]

8. A Standing Committee on Internal Security

Also in line with the Constitutional Treaty is the setting up of a standing committee within the Council "in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union" (article III-261). According to the Constitutional Treaty, this standing committee – also known as COSI - will have the task of facilitating the coordination of the actions of member states' competent authorities.

Nevertheless, the composition, concrete tasks and competences of COSI remain as vague as they were three years ago, when the Constitutional Treaty was signed. That the EP and national parliaments "shall be kept informed of the proceedings" of COSI is only a minor remedy, as the obligation to mere information only highlights the fact that this potentially seminal committee will not be subject to genuine parliamentary control. In this respect, the IGC mandate should have addressed the concerns formulated by some observers.[23]

9. Further aspects related to specific AFSJ policies

Finally it is worth pinpointing a number of modifications to the Constitutional Treaty that the IGC Mandate intends to introduce.

1. With regard to *diplomatic and consular protection* of EU citizens – one of the existing rights connected to the status of citizenship of the Union – it seems as if the IGC mandate has actually taken a step back. The Constitutional Treaty gave competence to the Council to adopt a European law (comparable to the existing regulation) to establish the "measures necessary to facilitate" diplomatic and consular protection (article III-127). The IGC mandate, in contrast, provides for the "adoption of directives establishing coordination and cooperation measures"[24] In both, the legal instrument (directive instead of regulation) and the scope (coordination and cooperation instead of facilitation of protection), the IGC mandate waters down the innovation of the Constitutional Treaty. But in comparison to the existing rules (see article 22.2 TEC: ratification necessary), this watered down innovation is nevertheless a step forward.

2. The provision on *financial sanctions* - like the freezing of funds against entities or individuals suspected of having links with terrorism (known as targeted sanctions, smart sanctions, 'terror lists', etc.) - newly shaped by the Constitutional Treaty (article III-160) will be moved from the Treaty section on "Capital and Payments" to the one on the AFSJ.[25] The fact that a clear legal base for this counter-terrorism measure - that has already sparked many controversies in the ECJ - will be established, explicitly requesting the adoption of 'legal safeguards' – is to be welcomed. Yet, the shifting of this provision into the AFSJ section gives rise to suspicion: in the end, the opt-outs of the UK, Ireland or Denmark might now also take hold of this measure which before had been secured in the clear cut Treaty section on 'Capitals and Payments".[26]

3. Finally another major innovation of the Constitutional Treaty affecting the AFSJ is likely to be hampered under the new structures. While the first would have guaranteed a common standard and common legislative procedures related to *data protection* in all policy fields (I-51), the IGC mandate is likely to reintroduce (i.e. maintain) different standards and procedures. According to para. 19 f) of the IGC Mandate, a specific legal basis for data protection in the Common Foreign and Security Policy will be introduced as well as another sectoral declaration on data protection in the

field of police and judicial cooperation in criminal matters.[27]

II. Exceptions & Derogations to the Renewed Institutional Regime on FSJ

After having illustrated the main trends and general principles that are to be expected from the new institutional setting, this second section will provide an overview of the high number of fundamental exceptions and derogative clauses that appear to become characteristics of the new AFSJ.

Among others:

1. *Maintenance of law and order and the safeguarding of internal security* will remain the sole responsibility of member states. As foreseen in the current article 64 TEC and III-262 of the Constitutional Treaty, the EU provisions on the AFSJ "shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

However, the IGC mandate has introduced a new subparagraph stating that member states are free "to organize between themselves and under their responsibility forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security".

This new subparagraph reaffirms the exclusion of any EU involvement in the safeguarding of internal security, while explicitly allowing for intergovernmental cooperation and coordination. The old Third Pillar thinking becomes apparent and one wonders whether this provision is not in fact laying the ground for further extra-EU but trans-European exercises like the famous Prüm Treaty.[28] One wonders, furthermore, whether the IGC Mandate explicitly used a different term in this new subparagraph: *national* security instead of *internal* security and what further implications this choice of wording might have.

2. At the same time *administrative cooperation* between the relevant departments of the member states 'in all areas' covered by the label AFSJ (apart from the ones just mentioned) will fall within the scope of the general institutional renewal. However, the European Parliament will be only consulted and the right of initiative will be shared between the member states and the European Commission.[29]

3. There will be a *shared right of initiative* between the European Commission and a quarter of the member States in judicial cooperation in criminal matters, police cooperation and cooperation between administrative departments.[30] This is a partial exception to the rule that only the Commission shall be entitled to propose EU legislation.

4. For the first time, the ordinary legislative procedure will apply to *judicial cooperation in criminal matters.* While the UK has secured an opt-out possibility of this innovation, Ireland will still have to decide on the matter.[31] These opt-outs go beyond what has been agreed under the Constitutional Treaty.[32]

In addition to this, issues related to the establishment of minimum rules in criminal law (with the exception of matters concerning the principle of mutual recognition) will be subject to the mechanisms of 'emergency brake' and 'enhanced cooperation'. While the Constitutional Treaty already foresaw this possibility (see articles III-270 and III-271 respectively), the IGC Mandate has brought about an important amendment.

What do these terms entail and what is the innovation introduced by the IGC Mandate?

There will be the possibility of an 'emergency brake' if one member state considers that a draft legislative act may affect fundamental aspects of its criminal justice system. In this case the member state may request the draft to be referred to the European Council and the ordinary legislative procedure will be temporarily suspended. Whereas this possibility was already foreseen in article III-271 of the Constitutional Treaty,[33] the mandate has modified this procedure in one crucial aspect, i.e. by abandoning the possibility for the European Council to request from the European Commission or the initiating group of member states the submittal of a new draft of the proposal.

Further, the Mandate provides the possibility for at least one third of the member states (currently nine)[34] wishing to establish 'enhanced cooperation' to move onwards. Once the 'emergency brake' has been applied and the European Council is unable to find an agreement, a simple notification to the European Parliament, the Council and the European Commission will suffice to allow this group to establish enhanced cooperation on the basis of the initial draft proposal that gave rise to the suspension of the ordinary legislative procedure.

An imaginary scenario might help to highlight possible ramifications and the underlying ratio of the change of procedure brought about by the IGC Mandate in relation to the Constitutional Treaty:

> A group of seven member states (i.e. the necessary quarter, cf. III-264) presents a proposal on minimum rules related to criminal law, which they know will never obtain the necessary majority in the Council. The European Commission may have been

working on a similar or related issue, trying to find a more consensual position. Yet, because of the difficulties of reaching a consensus among member states and the requirement to draft an extensive impact assessment – something member states are not obliged to do when tabling a draft – the Commission has not been able to present its own draft ahead of the 'avant-garde' group.

The member states' proposal reaches the Council and suffers – as expected - the 'emergency brake' by at least one member state. The ordinary legislative procedure is suspended and the European Council is unable to find a solution within four months. Following the new mechanism introduced by the IGC Mandate, the European Council can no longer request the initiating party to come up with a new, more balanced proposal. This is what the seven had been waiting for. They have managed in the meantime to convince two more member states to join their proposal and the minimum number of nine member states for the enhanced cooperation mechanism is achieved. The only thing left for them to do is to notify the EP, the Council and the Commission about their wish to establish enhanced cooperation among themselves. According to the modified rules, the normally required authorisation is hence "deemed to be granted".[35] In this way, thanks to the new 'emergency brake' and enhanced cooperation mechanisms, the seven member states have succeeded in putting through an initially hopeless and unbalanced proposal with only the obligation to notify the EU institutions.

Therefore, one of the more important consequences of the abandonment of the possibility for the European Council to request from the initiating party the submittal of a new draft will be the prevention of compromised solutions. It further enhances 'enhanced cooperation' and might limit the Commission's role in the whole legislative process. The way in which the principle of loyalty among member states and in relation to the EU might translate in this respect, will be open to consideration.

5. In the field of *judicial cooperation in civil matters*, an exception is provided for measures concerning family law with cross-border implications. Here the unanimity rule and consultation procedure will remain applicable as was previously stipulated by article III-269 of the Constitutional Treaty. However, it was already foreseen that the Council may move certain aspects of family law to the ordinary legislative procedure. The IGC Mandate intends to significantly impede this possibility by making it subject to a notification of all national parliaments. If only one national parliament objects, the decision to move certain family law matters to the ordinary procedures shall not be adopted.[36]

6. Further, provisions concerning *passports, identification documents, residence permits and other related identification documents* will be subject to unanimity and mere consultation of the European Parliament. While this procedural aspect had already been foreseen in the Constitutional Treaty, the IGC Mandate intends to create a systematically new positioning within the Treaties. According to para. 19 d) of the IGC Mandate, this provision shall be placed in the Title on the AFSJ, in the part dealing with "border controls" – "for the purpose of facilitating the rights of every citizen of the Union to move and reside freely (..).". The transfer of these areas to the Title on AFSJ of the TFU constitutes a substantial move from the current contextualisation within the scope of Union citizenship.[37]

7. Establishment and extension of the competences of the *European Public Prosecutor's Office* will require unanimity in the Council and consent of the European Parliament. Whereas these exceptions to the ordinary procedures had been already stipulated in the Constitutional Treaty (article III-274), the IGC Mandate introduced yet another 'enhanced cooperation mechanism' allowing one third of member states to cooperate with each other in case the necessary unanimity inside the Council cannot be established and the European Council cannot provide a solution. It is quite remarkable, however, that this possibility is only foreseen with regard to the *establishment* of the European Public Prosecutor's Office and not for the *extension* of its competences. This raises a number of contentious questions. It will not only send a somewhat contradictory message that only a handful of member states cooperate to protect the EU's entire financial interests by establishing the European Public Prosecutor's Office, but these member states will henceforth not be able to extend the Office's competences.

8. In the field of *'police cooperation'*, i.e. "cooperation between police, customs and other specialized law enforcement services in relation to the prevention, detection and investigation of criminal offences" (article III-275) the most visible exception is again a confirmed opt-out from the UK and a possible opt-out from Ireland.[38] With regard to procedures the ordinary legislative procedure will apply as a general rule. However, as stated above, the right of initiative will be shared between the Commission and the member states. In addition, unanimity in the Council and mere consultation of the European Parliament will be required when it

comes to measures on operational cooperation between these authorities. It is furthermore with regard to this operational cooperation that the IGC Mandate once more introduced the possibility to establish enhanced cooperation in the case of no unanimity in the Council and after having submitted the matter to the European Council. Yet, at the same time another important 'counter exception' has been foreseen in relation to article III-275(3) which will stipulate that any operational cooperation "*which constitutes a development of the Schengen acquis*" will not fall under this special enhanced cooperation scheme.

9. The position of the UK and Poland as regards the *Charter of Fundamental Rights* quite possibly constitutes one of the most controversial exceptions. First and foremost they will have a major impact on the way in which Freedom is going be guaranteed across the EU. Both countries have asked for a special positioning in respect of the applicability of the Charter to their national arenas. Poland presented a Unilateral Declaration according to which the Charter will not affect the right of the member states to enact legislation in the areas of public morality, family law, the protection of human dignity and the respect for human physical and moral integrity.[39]

Further, a special protocol will be annexed to the Treaties on the position of the UK in respect of the Charter. According to Art. 1.1 of this Protocol:

> "The Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms".[40]

Further in paragraph 2 of the same provision, it states that nothing in the Charter creates justiciable rights applicable to the United Kingdom except in so far as the UK has provided for such rights in its national law. In addition, two other (unnamed) delegations have reserved their right to join this UK Protocol.

10. Finally, with regard to the *judicial control* exercised by the ECJ, there is one exception foreseen in article III-377 of the Constitutional Treaty: The ECJ will not have jurisdiction to review the validity and proportionality of operations carried out by the police or other law-enforcement services of a member state or the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security. This however is an exception already maintained by the Constitutional Treaty and not the result of the European Council deliberations of June 2007.

III. The Impact of 'Exceptionalism' and 'Differentiation' in FSJ

What are the possible implications of these exceptions, differentiation and deviations for EU JHA policies? How might they influence the articulation between EU governance and national sovereignty and the building of a common Area of Freedom, Security and Justice and what is the impact on the individual affected by theses policies?

In our opinion, the Reform Treaty will institutionalise a high degree of 'exceptionalism' in the AFSJ. The exceptions that have been highlighted above in section two will mainly aim at constraining the European integrationist processes over fields considered to be traditionally attached to national sovereignty prerogatives. Certain fields such as the maintenance of law and order, internal security, cooperation and coordination among national security authorities, passports and other identification documents, family law will remain outside the institutional renewal. They will continue to be subject to the intergovernmental method of cooperation, characterised by unanimity voting or even being beyond the scope of the EU.

In addition, the IGC Mandate fosters 'differentiation' as regards European cooperation on policies related to an AFSJ. The 'differentiation' will translate in an Area where transnational cooperation over Freedom, Security and Justice will be subject to a complex matrix of 'speeds'. Some areas such as the harmonisation of criminal law, operational cooperation of police forces or the establishment of the European Public Prosecutor's Office will be subject to emergency brakes and/or enhanced cooperation. In the field of data protection, the crucial innovation of the Constitutional Treaty will be reversed and the differentiation of protection linked to certain policy fields will be maintained, albeit in a less visible manner (see above I.9.3).

Differentiation as a product of 'enhanced cooperation' in all these areas may lead to the instauration of various Areas of Freedom(s), Security(ies) and Justice(s). It may put an end to the political project of having a sole and unique Area where a common level of Freedom, Security and Justice is guaranteed. Yet it is this common level that provides the justification for EU-specific supranational (as opposed to mere international) cooperation and provides the basis for the establishment of mutual trust, necessary, for instance for the application of the EU principle of mutual recognition. Under the new structures, there is a real danger of competing areas and dispersed

levels of Europeanisation and integration as regards the dimensions of FSJ.

The perception that 'enhanced cooperation' is one-dimensional; that a group of avant-garde member states goes 'ahead' and the other more reluctant ones follow as soon as they perceive this 'ahead' is the right way, might turn out to be illusory in the long-run. Who guarantees that 'enhanced cooperation' might not lead to a situation in which a group of nine member states goes 'ahead', but another group of nine decides to take a bend in another direction, leaving another group of nine behind that finally decides to move 'enhanced backwards'?

Such scenarios might not only hamper the political project of achieving a common AFSJ; they might also impair the effectiveness of JHA policies. In the end, it is national officials, police forces, judges, prosecutors, etc. who must make use of the cooperation mechanism. Yet, already now, mutual legal assistance is a long way from being a top-priority in every day business at practical member state level. With multiple speeds, things will get considerably more difficult as national officials will – in every single case - have to assess which possible cooperation partner belongs to which flexible group of member states. In the end, ever changing 'flexibility' can reach a degree of complexity that may paralyse the everyday cooperation of national authorities.

While acknowledging that some of the 'enhanced cooperation' elements were already been contained in the Constitutional Treaty, the IGC Mandate has considerably exacerbated the dangers inherent in 'flexibility' and 'multiple speeds'. Not only does the IGC Mandate enhance 'enhanced cooperation', as exemplified above in the case scenario on criminal law, the most crucial difference between 2004 and 2007 is that differentiation and exception have now even been allowed for the Charter of Fundamental Rights. An unrestrained application of the Charter - as foreseen in the Constitutional Treaty – would have constituted the only brace able to keep drifting "Areas of Freedoms, Securities and Justices" together. It would have been a most important mechanism for ensuring equal treatment of all inhabitants of the AFSJ throughout the EU in respect of JHA policies.

Differing status of individuals depending on the location within the Areas of Freedoms, Securities and Justices, in fact gives rise to the most serious concerns. Which safeguards will apply, for instance, if Eurojust, together with an enhanced cooperation group of member states, investigates a cross-border case involving a British citizen arrested in Mallorca on holiday? Will this British suspect be treated differently because the UK decided not to join the enhanced cooperation group? And how will the opt-out of the Fundamental Rights Charter translate in such a case?

With the Charter of Fundamental Rights limited and the risk of drifting in the Areas of Freedom, Security and Justice increased, it will now be for the European Commission and the European Parliament to play a seminal role in ensuring the coherence and sustainability of the project of creating an AFSJ in the EU. Furthermore, with the ECJ's competencies increased, this institution will have to be even more instrumental in ensuring the solidity of a common EU approach in these fields and guaranteeing the rule of law. The Court will have to ensure that the principle of dispersion and differentiation will not undermine the building of a common space where Freedom, Security and Justice are guaranteed equally across the entire EU.

Furthermore, in order to consolidate human rights protection throughout the AFSJ, also with regard to EU institutions, bodies and agencies, the ECHR will have to fill the gap opened up by some member states' opt-out of the Fundamental Rights Charter. In this respect, the swift accession of the EU to the ECHR is crucial.

Finally, thorough attention must been given to national parliaments. They should make cautious and wise use of their strengthened position as regards subsidiarity, proportionality, and use of the new family law 'passarelle' in order to avoid increasing the risk of differentiation. In particular, they should refrain from weakening the role of the EP in the European integration processes; national parliaments should not conceive of themselves as a third EU chamber. While the engagement of national parliaments in the legislative machinery of instruments related to Freedom, Security and Justice is crucial for a close involvement of the people of Europe, careful attention will need to be paid in order to guarantee efficiency and effectiveness in the decision-making processes.

VI. Conclusions and Suggestions for Policy-Makers

This paper has provided an overview of the major innovations that are to be expected from the new Reform Treaty for the EU Area of Freedom, Security and Justice and has assessed possible implications.

We have argued that the IGC Mandate has provided a mostly positive response to some of the main complaints that have often been put forward in respect of the institutional and decision-making mechanisms. The institutional fragmentation will be over, along with a large number of its negative

externalities. The abolition of the Pillar duality over the Area of Freedom, Security and Justice will lead to increasing legal certainty, a set of uniform legal acts, stronger involvement of the European Parliament in the decision-making process, as well as the widening of the ECJ's jurisdiction to review and interpret these policies. This will facilitate the development of more comprehensive, legitimate, efficient, transparent and democratic responses to the dilemmas posed by the Europeanisation processes and the creation of a common AFSJ.

Nevertheless, the Mandate has also increased the possibilities of enhanced cooperation, granted opt-outs and brought about a limited scope for the Charter of Fundamental Rights. We have argued that this aspect of the 'innovations' might actually undermine the construction of a common AFSJ and its sustainability as a plausible political project for an enlarged EU. Allowing the possibility of too many 'speeds' going in too many different directions might have helped to end the pillarisation but may create an Area of Freedom, Security and Justice prone to 'differentiation' and 'exceptionalism'; the exception might well become the norm.

Too much 'flexibility', we have argued, might lead to too much complexity, paralysing the practical cooperation of national authorities at 'ground level'. Differing Areas of Freedoms, Securities and Justices may furthermore endanger the status and legal safeguards of EU citizens that might find themselves caught up between the gaps and rifts of this patchwork.

In spite of this, we welcome the fact that many of the aspects provided by the Constitutional Treaty have been retained. To lessen the perils inherent in the likely new structures, we conclude with the following considerations:

1. Notwithstanding the theoretical possibilities of 'moving ahead', member states should always aim to reach a common consensus among all member states. This should be and should remain their first obligation, preventing any abuse of the enhanced cooperation mechanisms.[41]

2. On the other hand, sceptical member states should refrain from abusing the 'emergency brake'. A train in which someone constantly pulls the red lever will not only arrive late, it will suffer materially in the long-run. This is why the abuse of emergency facilities is a crime in many member states.

3. With their competencies strengthened, it will be mainly for the European Commission, Parliament and the ECJ to keep a careful eye on the common interest, refraining from everything that might stimulate the drifting apart of the common, the single Area of Freedom, Security and Justice.

4. The Charter of Fundamental Rights, together with the ECHR – once the EU has acceded – should be conceived as instruments that stabilise the position of the individual and guarantee equal treatment, thereby constituting a necessary brace for drifting Areas.

References

[1] Presidency Conclusions, Brussels European Council 21/22 June 2007, Council doc. 11177/07, CONCL 2, 23.6.2007; cf. J.-D. Giuliani, (2007) *Understanding the Brussels Agreement on the Reform Treaty (23rd June 2007) and the Intergovernmental Conference*, Fondation Robert Schuman, European Issues No. 69, 23.7.2007.

[2] Cf. on the looming difficulties and dangers, S. Hagemann, (2007) *The EU Reform Treaty: easier signed than ratified?*, EPC Policy Brief, July 2007.

[3] Cf. N. Scandamis and K. Boskovits (2006), *Governance as security*, Sakkoulas: Athens, Bruylant: Brussels, 2006.

[4] Cf. D. Gros and S. Micossi (2007), *The new deal, a good deal?*, CEPS Commentary, 25.6.2007; see also S. Kurpas and S. Micossi (2007), *Will the European Council end the institutional deadlock in the EU?*, CEPS Policy Brief No. 130, May 2007.

[5] Similarly with regard to the cohesion of the Union as such, European Parliament, Resolution of 11 July 2007 on the convening of the Intergovernmental conference (IGC): the European Parliament's opinion (Article 48 of the EU Treaty), 11222/2007 – C6 -0206/2007 – 2007/0808(CNS), para. 4.

[6] Treaty Establishing a Constitution for Europe, as signed in Rome on 29 October 2004, OJ C 310, 16 December 2004.

[7] Title I of the current Treaty on European Union (TEU) will be amended according to the arrangements that had been already agreed in the IGC of 2004 and will provide the following reference to the AFSJ: "*2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime*". This has changed in comparison with the previous Art. I-3.2 of the Constitutional Treaty according to which "*The Union shall offer to its citizens an area of freedom, security and justice without internal frontiers, and an internal market where competition is free and undistorted*".

[8] The entirely prosaic term "Functioning of the Union" had been used already in the Constitutional Treaty as headline of Part III: "The policies and functioning of the Union".

[9] For an analysis of the negative effects of the Pillar division in Justice and Home Affairs see T. Balzacq and S. Carrera, (2005) *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy*, CEPS: Brussels.

[10] The chapters will be: Chapter 1 on general provisions, Chapter 2 on policies on border checks, asylum and immigration, Chapter 3 on judicial cooperation in civil matters, Chapter 4 on judicial cooperation in criminal matters and Chapter 5 on police cooperation. For the first time in the history of European integration Chapter 2 will offer a legal base for developing European policies on "the integration of immigrants", see Art. III-267.4 of the former Constitutional Treaty.

[11] See Art. I-33 of the Constitutional Treaty.

[12] The 'old', i.e. existing legal instruments that had been adopted under the pillar structure will remain in force until repealed, annulled or amended, (which is considered likely in the long run, as had happened in the transition from the Maastricht to the Amsterdam framework), cf. draft article 8 of draft protocol No. 10 on transitional provisions, *Draft Treaty amending the Treaty on European Union and the Treaty Establishing the European Community – Protocols,* Conference of the Representatives of the Governments of the Member States, CIG 2/07, Brussels, 23.7.2007 (31.07); cf. also S. Peers (2007), *EU Reform Treaty Analysis 1: JHA provisions*, Statewatch, August 2007, p. 4 (retrieved from www.statewatch.org on 8.8.2007).

[13] See Annex 1 No. 7 IGC Mandate.

[14] Para. 11, IGC Mandate.

[15] The Protocol on National Parliaments and on subsidiarity and proportionality will be modified accordingly.

[16] See S. Carrera and E. Guild (2006), 'No Constitutional Treaty? Implications for the Area of Freedom, Security and Justice', in T. Balzacq and S. Carrera (eds), *Security v. Freedom? A Challenge for Europe's Future*, Ashgate Publishing: Aldershot, pp. 223-240.

[17] The Charter of Fundamental Rights of the Union, OJ C-364/1, 7 December 2000. See also the Commission Communication on Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals – Methodology for Systematic and Rigorous Monitoring, COM(2005) 172 final, Brussels, 27 April 2005. A. Ward and S. Peers (2004), *The European Charter of Fundamental Rights*, Oxford: Hart.

[18] Para. 9 IIGC mandate. See Part II of the Constitutional Treaty on "The Charter of Fundamental Rights of the Union", Arts. II-61 – II-114. See E. Guild (2004), 'The Variable Subject of the EU Constitution, Civil Liberties and Human Rights', *European Journal of Migration and Law*, Vol. 6, No. 4, pp. 381-394.

[19] E. Guild and S. Carrera (2006), *The Hague Programme & the EU's Agenda on "Freedom, Security and Justice": Delivering Results for Europe's Citizens?*, CEPS Commentary, 7 July 2006, Brussels.

[20] Cf. Steering Committee on Human Rights (CDDH) of the Committee of Ministers of the Council of Europe, *Study of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights*, DG-II(2002)006, 28.6.2002.

[21] Cf. O. de Schutter (2007), *The division of tasks between the Council of Europe and the European Union in the promotion of Human Rights in Europe: conflict, competition and complementarity*, Working paper series: REFGOV-FR-11, 15.1.2007.

[22] Cf. "Brussels eyes single European public prosecutor", euobserver, 1.8.2007.

[23] Statewatch, *COSI – Standing Committee on Internal Security rescued from the debris of the EU Constitution*, Statewatch News Online, No. 34/05, 28 September 2005.

[24] Para. 19 e), IGC Mandate.

[25] Para 19 h), IGC Mandate.

[26] Cf. S. Peers (2007), *EU Reform Treaty Analysis 1: JHA provisions*, Statewatch, August 2007, p. 7 (retrieved from www.statewatch.org on 8.8.2007).

[27] See also, Letter from the European Data Protection Supervisor to the Presidency of the IGC with Annex *Data Protection under the Reform Treaty*, PH/HH/ab D(2007) 1194 C 2007-0476, 23.7.2007.

[28] Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation particularly in combating terrorism, cross-border crime and illegal migration, Prüm (Germany), 27 May 2005, Council Secretariat, Brussels, 7 July 2005, 10900/05; cf. T. Balzacq, D. Bigo, S. Carrera and E. Guild (2006), *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats*, CEPS Working Document, No. 234, January 2006, Brussels; E. Guild and F. Geyer (2006), Getting local: Schengen, Prüm and the dancing procession of Echternach - Three paces forward and two back for EU police and judicial cooperation in criminal matters, *Journal of European Criminal Law (JECL)* vol. 3, 2006, pp. 61 – 66.

[29] According to article III-263 of the Constitutional Treaty *"The Council shall adopt European regulations to ensure administrative cooperation between the relevant departments of the Member States covered by this Chapter, as well as between those departments and the Commission. It shall act on a Commission proposal, subject to article III-264, and after consulting the European Parliament".*

[30] According to article III-264 of the Constitutional Treaty *The acts referred to in Section 4 and 5, together with the European regulations referred to in article III-263 which ensure administrative cooperation in the areas covered by these Sections, shall be adopted: a) on a proposal from the Commission, or b) on the initiative of a quarter of the member states.*

[31] Para. 19 l), IGC Mandate.

[32] Under the Constitutional Treaty UK and Ireland's opt-out covered only policies in respect of border controls, asylum and immigration, judicial cooperation *in civil matters* and on police cooperation. The Danish opt-out, on the contrary, already covered nearly all policies on the AFSJ, cf. also S. Peers (2007), *EU Reform Treaty Analysis 1: JHA provisions*, Statewatch, August 2007, p. 2 f. (retrieved from www.statewatch.org on 8.8.2007).

[33] Art. III-271.3 of the Constitutional Treaty stipulated that "*When a member of the Council considers that a draft European framework law as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft framework law be referred to the European Council. In that case, where the procedure referred to in Art. III-396 is applicable, it shall be suspended. (…).*"

[34] This might have been the reason why the mandate has stipulated that "*Title IV (former Title VII of the existing TEU) will be amended as agreed in the 2004 IGC. The minimum number of Member States required for launching an enhanced cooperation will be nine*", see para. 14 IGC Mandate.

[35] Annex 2 No. 2 (d) IGC Mandate.

[36] See Annex 2 No. 2 IGC Mandate.

[37] Art. 18.3 EC Treaty which reads as follows "*Paragraph 2* (which deals with the application of the co-decision procedure) *shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection"*. See also, Title II of the Constitutional Treaty on "Non-Discrimination and Citizenship" – article III-125.2 which stipulates that *"…a European law or framework law of the Council may establish measures concerning passports, identity cards, residence permits or any other such document and measures concerning social security or social protection. The Council shall act unanimously after consulting the European Parliament*".

[38] Para. 19 l) IGC Mandate.

[39] See Annex 1 footnote 18 IGC Mandate.

[40] See Annex 1 footnote 19 IGC Mandate.

[41] Cf. S. Kurpas, J. de Clerck-Sachsse, J. Torreblanca and G. Ricard-Nihoul, *From Threat to Opportunity – Making Flexible Integration Work*, EPIN Working Paper No. 15, September 2006.

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