



No Constitutional Treaty?

Implications for the Area of Freedom, Security and Justice

Elsbeth Guild and Sergio Carrera

Abstract

The future of the Constitutional Treaty is now very much in doubt. The blows received from the French and Dutch referenda in such rapid succession have made it difficult to imagine that the Treaty, at least in its current form, will ever enter into force. Inter alia, the Constitution promised to consolidate and extend the flagship of the Amsterdam Treaty – the Area of Freedom, Security and Justice. This paper examines what the failure of the Constitutional Treaty would mean for this critical area, and what could be done to mitigate those effects that are negative through other alternative mechanisms.

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NO CONSTITUTIONAL TREATY?

IMPLICATIONS FOR THE AREA OF FREEDOM, SECURITY AND JUSTICE

ELSPETH GUILD AND SERGIO CARRERA

1. Introduction

The Amsterdam Treaty ‘Europeanised’ policies relating to “Freedom, Security and Justice”. Since its entry into force in 1999, the progressive development of a European area encompassing these three dimensions has been constantly reaffirmed as a priority for the Union. The European Constitution positively revisited the foundations and prospects of the EU’s Area of Freedom, Security and Justice (AFSJ) and proposed a far-reaching reallocation of competencies.¹ Firstly, most of the complex institutional and legal frictions that currently characterise cooperation in these sensitive policies would have been substantially solved with the entry into force of the Constitution. Secondly, it would have provided a uniform juridical framework facilitating efficiency and legal certainty, and overcoming the current democratic and judicial deficit that policies dealing with ‘Freedom, Security and Justice’ quite often suffer from. Thirdly, by collapsing the current pillar structure, the Constitutional Treaty would have abolished the EU Third Pillar, which is the intergovernmental dimension from which the most far-reaching policies dealing with ‘security’ emerge. Police and judicial cooperation in criminal matters would have mutated into a Community competence. Finally, the Constitution, and particularly the Charter of Fundamental Rights of the European Union inserted as its Part II, would have guaranteed the accountability (*democratic check*) of the legal measures adopted and their full compliance with the rule of law and fundamental rights.

The future of the Constitutional Treaty, however, is now very much in doubt. The blows received from the French and Dutch referenda in such rapid succession have made it difficult to imagine that the Treaty, at least in its current form, will ever enter into force. In this paper we examine what the failure of the Constitutional Treaty would mean for the Area of Freedom, Security and Justice. What are the effects should the Constitutional Treaty fail and what could be done to mitigate those effects that are negative? These are the questions we propose to address here.

This paper proceeds in two main sections: first we examine the implications that a failing Constitutional Treaty would have towards the progressive building of an AFSJ. Secondly, we address the negative consequences that the failure of the Constitution would cause, and whether they could be overcome through other ‘alternative mechanisms’. In the final section we specifically consider what some may see as an attractive option – seeking to limit the damage via institutional behaviour that conforms to the norms set out in the Constitution – and examine the risks inherent in such an option.

¹ Treaty Establishing a Constitution for Europe, as signed in Rome on 29 October 2004 and published in the Official Journal of the European Union on 16 December 2004 (C series, No. 310). See Art. I-3.2 (The Union’s Objectives) which stipulates that “The Union shall offer its citizens an area of freedom, security and justice without internal frontiers”.

2. What benefits are promised/lost by the ratification/rejection of the Constitutional Treaty?

This section highlights seven main benefits, promised by the Constitutional Treaty for policies under the rubric of “Freedom, Security and Justice” and considers the implications of its failure.

1. The complexity, ambiguity and lack of transparency inherent to the current regime would be considerably diminished by the abolition of the already familiar ‘pillar division’ in the treaties. These policies are currently placed in two different locations within the wider EU legal framework: the EC First Pillar, which contains Title IV of the EC Treaties, ‘Visas, Asylum, Immigration and other policies related to free movement of persons’, and the EU Third Pillar, which resides in Title VI of the TEU, ‘Provisions on Police and Judicial Cooperation in Criminal Matters’ (see table in the annex).² The negative effects that this division encompasses have often been pointed out:³ a lack of transparency regarding the institutional and procedural settings, a high degree of inefficiency owing to the duality in the legal dimension⁴ and a serious lack of democratic and judicial accountability. The Constitution would have ‘communitarised’ most of the policies falling within the EU Third Pillar and offered a unique framework common for all these fields under Chapter IV “Area of Freedom, Security and Justice” (Arts III-257 until III-277). This consolidation would have considerably facilitated the development of more integrated, legitimate and coherent policies.

2. The Constitution would harmonise the package of legal acts that are being used to develop policies on Freedom, Security and Justice. As mentioned, at present there is a dual legal dimension which creates uncertainty as regards the precise legal effects of each of the acts, as well as in terms of their particular scope. The instruments that are used to adopt measures under the First Pillar are already well known: Regulations, Directives, Recommendations, Decisions and Opinions. Under the umbrella of the Third Pillar, instead we find conventions, common positions and framework decisions. The latter, which are binding on member states in their entirety and do not require national ratification,⁵ do not have direct effect. However, a recent judgement by the European Court of Justice (Pupino ruling⁶) confers direct effect for Framework Decisions. In paragraph 38 of that crucial ruling, the ECJ stated that its “jurisdiction would be deprived of most of its useful effect if individuals were not entitled to invoke

² About the evolution of the EU Third Pillar in an institutional perspective, see P. Jan Kuijper, “The Evolution of the Third Pillar from Maastricht to the European Constitution: Institutional Aspects”, *Common Market Law Review*, 41, 2004, pp. 609-626.

³ See T. Balzacq and S. Carrera, *Migration, Borders and Asylum: Trends and Vulnerabilities in EU Policy*, CEPS, Brussels, July 2005.

⁴ For an analysis of the concept of efficiency in relation to Justice and Home Affairs policies, see M. Anderson and J. Apap, *Striking a Balance between Freedom, Security and Justice in an Enlarged European Union*, CEPS, Brussels, 2002, pp. 25-28.

⁵ According to Art. 34 of the TEU, “Framework Decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect.” On the other hand, Art. 249 EC Treaty establishes that “A Directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods”. Directives may be addressed to any one member state and do not have to be addressed to all. Even though this article implies that the provisions contained in a directive are not directly applicable, the ECJ has ruled otherwise: an individual can rely on the provisions of a directive against a defaulting state after the time limit for implementation has expired. For an in-depth study of the legal instruments that are being used to develop EU policy, see P. Craig and G. de Búrca, *EU Law: Text, cases and materials*, Oxford: Oxford University Press, 2000.

⁶ Case C-105/03, Criminal Proceedings against Maria Pupino, 16 June 2005.

framework decisions in order to obtain a conforming interpretation of national law before the courts of the Member States”.

Art. I-33 of the Constitutional Treaty would have required the institutions to use certain legal instruments in order to exercise the Union’s competences: European Laws (which have the same features as the traditional Regulations), European Framework Laws (which correspond to Directives), European Regulations, European Decisions and Recommendations. This uniform set of legal instruments would have brought a substantial degree of legal certainty to the whole system. However, the way in which the transition towards the new juridical regime presented in the Constitutional Treaty would actually take place remains far from clear.

If the Constitutional Treaty is indeed not adopted, the heterogeneity in the types of EU laws would unfortunately continue. This would have substantial disadvantages for the Union, the member states and individuals. Already Framework Decisions – the preferred instrument of the EU Third Pillar – have required interpretation by the ECJ regarding their precise legal effects. The unfortunate tendency inside the Council to treat Framework Decisions as ‘gentlemen’s agreements’ rather than as ‘real law’ is likely to change but for the moment member states seem to make compromises on wording that is based on what now appears to be a fallacious belief that Framework Decisions do not have direct legal effects. The failure of the Constitution would leave in doubt the real effects of different types of measures under the AFSJ fields. This, in turn, will lead to conflict.

3. As regards the decision-making process, following Art. III-396, qualified majority voting (QMV) and the co-decision procedure would become the applicable procedural rules. This would bring numerous positive elements to the regime. Art. 67 of the EC Treaty foresaw that five years after the Amsterdam Treaty entered into force (1 May 1999), the Council would take a decision providing for all or parts of the areas covered by Title IV (Visas, Asylum, Immigration and other Policies related to Free Movement of Persons) to be governed by the co-decision procedure (Art. 251 EC Treaties) and QMV voting. Following that official call for action, the Council Decision 2004/927 of December 2004 indeed provides for the extension of co-decision to all the fields of JHA included in the EC First Pillar, except for the case of legal migration.⁷ The first measure ready to be adopted under the extended co-decision procedure is the so-called the ‘Community Borders Code’.⁸ However, this only applies to the First Pillar. The EU Third Pillar remains far from being the best democratic practice of the EU.

Under the Constitution, the European Parliament would be more directly involved in the overall decision-making process of those fields currently covered by the EU Third Pillar. At present, the European Parliament is not sufficiently included in the decision-making of Third Pillar-related policies, which have profound consequences in the daily lives of every individual inside the EU.⁹ While the EC First Pillar has now been brought into conformity with EU norms and

⁷ Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure set out in Art. 251 of that Treaty, OJ L 396/45.

⁸ Proposal for a Council establishing a Community Code on the Rules Governing the Movement of Persons across Borders, COM(2004)391 final, Brussels 26.5.2004, 2004/0127/CNS. This Regulation establishes rules governing the movement of persons across external and internal borders in the European Union.

⁹ See J. Apap and S. Carrera, “Progress and Obstacles in the Area of Justice and Home Affairs in an Enlarging Europe”, in J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Cheltenham: Edward Elgar, 2004, pp. 1-24.

settings, the EU Third Pillar remains *sui generis*.¹⁰ The advantages of a single legislative procedure where democratic accountability of any measure being proposed and adopted is guaranteed would be lost if the Constitution is rejected.

4. The Constitutional Treaty would also confer an enhanced accountability to the national parliaments over decisions taken under these areas.¹¹ The importance of national parliamentary scrutiny and its direct linking with the EU system cannot be underestimated as we have seen in the ratification process of the Constitutional Treaty. The distance between the people of Europe and the EU institutions is far too large. The engagement of national parliaments in the legislative machinery of instruments of heightened sensitivity such as the ones dealing with “Freedom, Security and Justice” is crucial for a high involvement of the people of Europe. A clear and more active role for national parliaments in the decision-making process and monitoring of EU security agencies (such as Europol and Eurojust) is necessary to strengthen democracy inside the Union.¹² Rejection of the Constitution would deal a severe blow to this key objective.

5. Judicial control over executive action in the fields of AFSJ is critical to the protection of civil liberties and fundamental rights, as well as the rule of law. The European Court of Justice does not have full competence to review and interpret legal instruments dealing with judicial cooperation in criminal matters and police cooperation. This variable geometry of the ECJ jurisdiction in the Third Pillar is problematic. In particular, the relegation of immigrants, asylum-seekers and refugees to an inferior level of judicial protection inside the EC Treaty is not acceptable.¹³ Some limitations to the jurisdiction of the Court in Luxembourg would remain under the Constitution, however, such as the stipulation presented in Art. III-377.¹⁴

Further quick and universally applicable interpretation and accountability of each EU measure dealing with these fields are vital for the development of a strong AFSJ. The legitimacy and legality of this European area depend on individuals being able to rely on, and challenge the legislation in place. Without the direct and open engagement of citizens of the Union, the area cannot succeed. The approval of citizens depends on their confidence about the protection of the rule of law. As we have seen in the ECJ’s judgment in *Pupino*, the extension of fundamental

¹⁰ Art. 29 TEU says that “Without prejudice to the powers of the European Community, the Union’s objective shall be to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among the Member States in the fields of police and judicial cooperation in criminal matters and by preventing and combating racism and xenophobia”.

¹¹ Article III-259 stipulates that “National Parliaments shall ensure that the proposals and legislative initiatives submitted under Section 4 and 5 of this Chapter comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality”.

¹² See Art. I-42.2 of the Constitutional Treaty, which establishes that “National Parliaments may, within the framework of the area of freedom, security and justice participate in the evaluation mechanisms provided for in Art. III-260. They shall be involved in the political monitoring of Europol and the evaluation of Eurojust’s activities in accordance with Art. III-276 and III-277”.

¹³ For an examination of the evolving role of the Court in the fields of immigration and asylum and its implications for individual immigrants and asylum seekers in the Union, see E. Guild and S. Peers, “Deference or Defiance? The Court of Justice’s Jurisdiction over Immigration and Asylum”, in E. Guild and C. Harlow (eds), *Implementing Amsterdam: Immigration and Asylum Rights in EC Law*, Oxford: Hart Publishing, 2001.

¹⁴ This provision states that “the ECJ shall have no jurisdiction to review the validity or proportionality of operations carried out by police or other law-enforcement services, 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”.

rights to these areas in order to protect the citizen is necessary as part of the legal framework that protects the coherence of the rule of law.¹⁵

6. The field of JHA most affected by the Constitutional Treaty would clearly be police and judicial cooperation in criminal matters.¹⁶ These areas, which currently reside in the EU Third Pillar, have been developed in a rather loose legal framework (the intergovernmental method). A ‘no’ to the Constitution would trap this area in its existing legal limbo, causing substantial problems for its overall efficiency. There is a pressing need to bring these policies to the ‘Community method’, which would be the only way to provide them with a greater coherency, certainty and legitimacy. The Constitution would have helped considerably to fill this gap. Its failure would mean that the current incoherencies will persist. All the weaknesses of using exclusive mutual recognition of judgements and judicial decisions under a weak legal framework as an organising principle would be magnified.¹⁷ The weakness inherent in the most important Third Pillar measure in criminal justice – the European Arrest Warrant¹⁸ – was made apparent when the Constitutional Courts in Germany and Poland found their national implementing legislation conflicted with constitutional guarantees.¹⁹

Further, the failure of the Constitutional Treaty would put an end, at least in the short term, to the possibility of creating a ‘European Public Prosecutor’ who would coordinate the provision of criminal justice in cross-border situations.²⁰ This is unfortunate as it is precisely legal ‘coordination’ more than anything else that is lacking in these policies.²¹

¹⁵ In particular, the Court highlighted in this ruling that “in accordance with Article 6(2) EU, the Union must respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, and as they result from the constitutional traditions common to the Member States, as general principles of law. The Framework Decision must thus be interpreted in such a way that fundamental rights, including in particular the right to a fair trial as set out in Article 6 of the Convention and interpreted by the European Court of Human Rights, are respected”. See paragraphs 58 and 59 of the judgement.

¹⁶ For a study of the proposed constitutional framework of the EU from the perspective of the gradual realisation of measures in criminal law, see E. Guild, “Crime and the EU’s Constitutional Future in an Area of Freedom, Security and Justice”, *European Law Journal*, Vol. 10, No. 2, March 2004, pp. 218-234.

¹⁷ See S. Peers, “Mutual Recognition and Criminal Law in the European Union: Has the Council got it wrong?”, *Common Market Law Review* 41, 2004, pp. 5-36, which highlights that “...the principle of mutual recognition in criminal matters is different from the traditional principle of cooperation between States...in the system of mutual recognition, the decision of the first State takes effect as such within the legal system of the second State...[T]he effect of the mutual recognition system is that the executing State has in principle lost some of its sovereign power over the full control of the enforcement of criminal decisions in its territory”.

¹⁸ See J. Apap and S. Carrera, *The European Arrest Warrant: A Good Testing Ground for Mutual Recognition in the Enlarged EU?*, CEPS Policy Brief No. 46, CEPS, Brussels, February 2004.

¹⁹ Judgement of 18 July 2005, 2 BvR 2236/04, Bundesverfassungsgericht, which states “The European Arrest Warrant Act infringes the guarantee of recourse to a court (Art. 19.4 of the Basic Law) because there is no possibility of challenging the judicial decisions that grants extradition”. See also Judgement of the Polish Constitutional Tribunal concerning the European Arrest Warrant, 27 April 2005, P1/05, which ruled that “Article 607t § 1 of the Criminal Procedure Code, insofar as it permits the surrendering of a Polish citizen to another Member State of the European Union on the basis of the European Arrest Warrant, does not conform to Article 55(1) of the Constitution”.

²⁰ The European Public Prosecutor would be a judicial body with direct enforcement authority, not just an individual with powers to facilitate and coordinate the action of the member states. It would be responsible for the investigation and prosecution of financial crimes against the EC throughout the EU. The financial crimes would include for example fraud, corruption and money laundering. See C. Van den

The coherency of the system of police cooperation at the EU level would also be weakened if the Constitution fails.²² Already a small number of member states have moved ahead in regulating the exchange of sensitive police data outside the EU framework by concluding the Prüm Convention (commonly called ‘Schengen III’).²³ This new challenge to solidarity in the area among all the member states requires a robust common European response. This is now further excluded, or at least inhibited by the failure of the Constitution.

7. Finally, the inclusion of the Charter of Fundamental Rights of the Union in Part II of the Constitution would place the EU under a clear legal obligation to ensure that in all its areas of activity, fundamental rights and ‘liberty’ are respected and actively promoted. The accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950 as provided in Art. I-9 of the Constitution would have served as an excellent reminder to the member states of the obligations and commitments they have undertaken with respect to the ECHR.²⁴

The Charter, originally agreed in 2000 in a non-binding form,²⁵ constitutes the central plank of rights of the Constitutional Treaty. While it contains all the rights already included in the ECHR, it goes much further, codifying the rights and freedoms already existing in the EU treaties as well as those human rights and fundamental freedoms as recognised by international agreements to which the Union, the Community or all the member states are party.²⁶

In the field of AFSJ, the transformation of the Charter into a Constitutional Bill of Rights is critical. While the Constitution makes few changes to the fields of immigration and asylum, the Charter, as a legally binding part of the Constitution, is likely to have deep and beneficial effects.²⁷ The application of the principles of fundamental rights in EU instruments adopted in immigration and asylum has been hotly disputed. For instance, the European Parliament has

Wyngaert, “Eurojust and the European Public Prosecutor in the Corpus Juris Model: Water and Fire?”, in N. Walker (ed.), *Europe’s Area of Freedom, Security and Justice*, Oxford: Oxford University Press, 2004, pp. 201-239.

²¹ See Anderson and Apap, *op. cit.*, pp. 45-53.

²² For an evaluation of the police cooperation at EU level see C. Fijnaut, “Police Cooperation and the Area of Freedom, Security and Justice”, in N. Walker (ed.), *Europe’s Area of Freedom, Security and Justice*, Oxford: Oxford University Press, 2004, pp. 241-282.

²³ The Prüm 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, was signed on 27 May 2005, Council Secretariat, Brussels, 7 July 2005, 10900/05.

²⁴ Art. I-9 of the Constitution establishes that “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competences as defined in the Constitution. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s laws”.

²⁵ The Charter of Fundamental Rights of the Union, OJ C-364/1, 7 December 2000.

²⁶ Art. II-113 of the Constitutional Treaty stipulates that “Nothing in this Chapter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions”.

²⁷ See E. Guild, “The Variable Subject of the EU Constitution, Civil Liberties and Human Rights”, *European Journal of Migration and Law*, Vol. 6, No. 4, 2004.

taken action before the European Court of Justice to strike down provisions in the family reunification directive which it considers in opposition to the principle of respect for family life contained in Art. 8 of the ECHR.²⁸ The UN High Commissioner for Refugees (UNHCR) has urgently called for the withdrawal of a proposal for a directive on minimum procedural standards for qualification as a refugee²⁹ on the grounds that it does not meet the minimum requirements provided by the UN Convention on the status of refugee of 1951 and its 1967 protocol.³⁰ Finding comprehensive tools to limit this sort of ‘human rights dispute’ is certainly in the interest of all the parties involved.

The insertion of the Charter as a justiciable part of EC law would assist in clarifying the duties of the EU institutions in protecting fundamental rights and freedoms. It is now clear that the current, relatively weak, references to fundamental rights in the EU treaties have been insufficient to ensure that all the measures in AFSJ actually comply with them.³¹ In addition, the by now familiar passage that is usually incorporated in the preamble (or Explanatory Memorandum) of those legislative proposals and drafts instruments considered as having a link to fundamental rights does not provide a solution.³² This is because preambles do not have binding legal effect for the member states, and only provide interpretative guidance.

In the AFSJ, the loss of a justiciable Charter of rights is among the gravest consequences of the failure of the Constitution. All of these sensitive areas covered by an AFSJ need to be placed within a strong legal framework that also incorporates fundamental rights as norms of Europe. The development of a strong fundamental rights system in the EU based on the right of the individual to rely on her/his rights directly before the courts has been central both to democracy and stability since the end of WWII. The confidence of the citizen in judicial protection against any executive incursion in respect of these rights and freedoms (right to an effective remedy),³³

²⁸ Council Directive 2003/86 of 22 September 2003 on the right to family reunification, OJ L 251/12, 3.10.2003. See Case C-540/03, *European Parliament v. Council*, Case pending. The specific grounds being contested are: a) Member States are permitted under the Directive to exclude children over 12 if they have not complied with an integration requirement; b) children over 15 may be excluded altogether from family reunification; and c) Member States may restrict or exclude family reunification where the sponsor has been living less than two years in its territory. See Balzacq and Carrera, *op. cit.*, p. 8.

²⁹ See Amended Proposal for a Council Directive on minimum standards on procedures in the Member States for granting and withdrawing refugee status, Council of the European Union, 2000/0238 (CNS), 14203/04, Asile 64, Brussels, 9.11.2004.

³⁰ See UNHCR, *The European Union, Asylum and the International Refugee Protection Regime*, UNHCR’s recommendation for the new multi-annual programme in the area of freedom, security and justice, UNHCR, New York, September 2004. See also UNHCR, *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, Council Document, 14203/04, Asile 64, 19 November 2004.

³¹ Art. 6.1 of the EC Treaty provides that “the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States”. Paragraph 2 of the same article establishes that “the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the member states, as general principles of community law”.

³² The passage is worded as follows in SEC(2001) 380/3: “This [act] respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union”. In some other cases a second sentence is added: “In particular, this [act] seeks to ensure full respect for [right XX] and/or to promote the application of [principle YY] / (Article XX and/or Article YY of the Charter of Fundamental Rights of the European Union)”.

³³ Otherwise provided in Art. 13 of the ECHR (Right to an Effective Remedy), which reads as follows: “Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective

is a key element of the constitutional traditions of the member states. A failure of the Constitution would diminish this essential constitutional element to the legitimacy of the EU project to create an ever closer union among the peoples of Europe and the goal to achieve a truly coherent AFSJ.

3. Could the negative effects of these seven implications be resolved without the Constitutional Treaty being approved?

In this section we examine what mechanisms are available to consolidate the legislative, operational and judicial mechanisms of AFSJ. Our objective is to see whether the AFSJ can be brought into the system of the EC First Pillar in the absence of a Treaty amendment.

Complexity, ambiguity and lack of transparency are consequences of the current First and Third Pillar divide in the AFSJ realm.³⁴ As long as this obscure structure continues to exist, the defects inherent to the dual dimension will stay with us. Without the Constitutional Treaty it will not be possible for uniform legal acts to have the same legal effects, nor will it be feasible to adopt for instance, policies on judicial cooperation in criminal matters and police under the EC First Pillar (Community Competence).

Already at the moment, practical efficiency and effectiveness are subject to a variable geometry of EU law in these areas. While Denmark, Ireland and the UK have opted out of measures taken in the field of immigration and asylum (Title IV EC Treaty – First Pillar), they participate fully in measures in police and judicial cooperation in criminal matters (Title VI TEU – Third Pillar).³⁵ Moreover, in the First Pillar, Ireland and the UK have the possibility to opt in to measures, unless they are building on the Schengen *acquis*. Denmark’s position is slightly nuanced as it is opted out of all aspects of the TEU that are contained in Arts J.3.1 and J.7 on defence but opted in on Title IV EC measures on mandatory visa countries. There is no opt-out for any of the 10 new member states under the First or Third Pillars. They have been required to participate fully in both Title IV EC Treaty and Title VI TEU. However, they are not yet integrated in the free circulation area and border controls still apply at their borders with the other member states.

Art. 42 TEU is initially quite interesting as a potential mechanism to resolve the incoherence of Third Pillar serving as the vehicle for police cooperation and judicial cooperation in criminal matters. This appearance, though, is deceptive. Under this provision, the Council may take a decision, acting on the basis of unanimity that action in areas referred to in Art. 29 TEU shall fall under Title IV EC Treaty (First Pillar). This decision can only be based on an initiative by the Commission or a member state. Further it must be adopted by unanimity.³⁶ The matters

remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

³⁴ See M. den Boer, “The European Convention and its Implications for Justice and Home Affairs Cooperation”, in J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement*, Cheltenham: Edward Elgar, 2004.

³⁵ Denmark, Ireland and the UK have negotiated special protocols attached to the Amsterdam Treaty that allow them to remain outside the measures adopted under the umbrella of Title IV of the EC Treaty. Ireland and the UK may, however, opt into any legal instrument dealing with these matters in a case-by-case basis.

³⁶ Art. 42 TEU states that “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”.

covered in Art. 29 TEU include closer cooperation between police forces, customs authorities and other competent authorities in the member states, including cooperation through the European Judicial Cooperation Unit (Eurojust) and approximation of the rules on criminal matters in the member states. When and if such a decision is ever adopted, the relevant voting conditions are also to be established.

Thus at first glance it would appear that there could be an easy transfer of fields of responsibility from the Third Pillar to the First in the areas that have caused so much concern. This would bring these policies under a single, coherent, legislative, effective and judicial supervisory structure. But this impression is incorrect. Art. 42 TEU goes on to state that the Council shall recommend to the member states to adopt the decision “*in accordance with their respective constitutional requirements*”. This means that there would have to be a ratification procedure in the Member States in accordance with national constitutional requirements. As many aspects of judicial cooperation in criminal matters and police have far-reaching constitutional implications, some member states may be required to carry out constitutional amendments before they could ratify a decision following Art. 42 TEU. In some member states this may include referenda approving the decision before it could take effect. Therefore this article does not get around the problem of ratification in the member states; it merely disguises the issue behind a decision of the Council. In fact there is not much difference between the Art. 42 TEU procedure and a Treaty amendment. Politically it may be easier to argue that a referendum is not required under Art. 42 TEU, but this depends on national Constitutional norms of each member state.

The existence of Art. 42 TEU highlights a further problem, the separation of competences among the pillars. Those fields of competence that have been assigned to the Third Pillar are exclusive to it and cannot be subsumed into the EC Treaty (i.e. First Pillar) without the correct procedural requirements being fulfilled (i.e. Art. 42 TEU). Art. 308 EC Treaty provides that where action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and the EC Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures. However, this provision cannot be used to adopt measures in the fields of police and judicial cooperation in criminal matters as there are express powers in Title VI TEU. The only mechanism by which the powers could be moved into the First Pillar would be by means of Art. 42 TEU or a Treaty amendment.³⁷ Art. 308 EC Treaty cannot be invoked to circumvent the express arrangements of the TEU and the clear will of the member states. Such action would almost certainly be *ultra vires* and the ECJ would be obliged to find null and void any measures adopted under such a procedure.³⁸

³⁷ The European Parliament called in 26 May 2004 on the Council to move judicial and police cooperation into the Community sphere and on the Commission to draw up a proposal for a decision, on the basis of Art. 42 of the EU Treaty, providing that actions in areas referred to Art. 29 are to fall under Title IV of the EC Treaty and, at the same time, requiring that such action to be decided on by qualified majority. See European Parliament resolution on progress made in 2004 in creating an area of freedom, security and justice (AFSJ), Art. 2 and 39 of the EU Treaty, P6_TA-PROV(2005)0227, adopted on 8 June 2005.

³⁸ The separation of powers between the First and Third Pillars as regards judicial cooperation in criminal matters has recently been confirmed by the European Court of Justice. In Case C-176/03, *Commission v. Council* of 13 September 2005 the ECJ was asked to strike down a Framework Decision which required Member States to create criminal sanctions for the failure to respect environmental norms whose norms are included in a First Pillar measure. The Court held in paragraph 26 that “The Council and the Member States which have intervened in these proceedings, with the exception of the Kingdom of the Netherlands,

Even if it were possible to use Art. 42 TEU to transfer a field of activity from the TEU to the EC Treaty, the question would arise of where it could be transferred to. The special venue for such a field which is intrinsically tied to the AFSJ is Title IV EC Treaty. But to transfer it to this part of the Treaty would have the consequence of placing it within the realm of the three protocols on opt-outs by Denmark, Ireland and the UK (see above).³⁹ This might not be agreeable to those three states – one of which, at least, argued strongly in the intergovernmental conference leading to the Amsterdam Treaty for the retention of the EU Third Pillar as an area of weak legislative, democratic and judicial control. But it would constitute a derogation from the Union principle of ‘an ever closer Union’, as member states that had accepted the binding effect of provisions in one venue would have the possibility to opt-out of the legal effects of those same provisions simply because it had been moved to another Treaty dimension. The other possibility, if the national ratification requirement could be resolved, might be to create a new Chapter in Title IV EC Treaty to accommodate these fields without engaging the opt-out protocols.

A Treaty amendment that would only move judicial cooperation in criminal matters into the EC First Pillar might be possible to negotiate inside the Council not least in light of the ongoing debate about the European Arrest Warrant. Member states might well prefer to have less far-reaching policy measures in these controversial fields but ones that are clearly legally binding in the sense of the EC First Pillar-related laws, rather than EU Third Pillar ones, which are too wide to be accepted at the national constitutional level.⁴⁰

The co-decision procedure and the inclusion of the European Parliament in the decision-making process will continue not to apply in all AFSJ policies as far as some of them will remain under the EU Third Pillar framework. It is of course possible that a minor Treaty amendment could be made in order to extend the scope of Art. 251 EC Treaty to the Third Pillar. This outstanding possibility has not yet been proposed, but if it is, it would constitute a Treaty amendment, thus requiring ratification by the member states.

Some national parliaments, like the ones in the Netherlands and the UK, have struggled to gain participation and a more active role in the development of EU policy. This has been hampered, however, by the lack of a proper legal base on which to do so. Once more, a separate Treaty amendment could enhance their role and competencies over these areas. This would indeed be highly advisable for the sake of democracy in an enlarging Europe.

The limitations as regards the jurisdiction of the ECJ could paradoxically be remedied more easily in the EU Third Pillar because under this framework, following Art. 35 TEU, the member states can make a declaration recognising the jurisdiction of the Court in Luxembourg over

submit that, as the law currently stands, the Community does not have power to require the Member States to impose criminal penalties in respect of the conduct covered by the framework decision”. In paragraph 27 stipulated that “Not only is there no express conferral of power in that regard, but, given the considerable significance of criminal law for the sovereignty of the Member States, there are no grounds for accepting that this power can have been implicitly transferred to the Community at the time when specific substantive competences, such as those exercised under Article 175 EC, were conferred on it. See also Case C-170/96, *Commission v. Council* [1998] ECR I-2763”.

³⁹ See Protocols added by the Treaty of Amsterdam, Protocol on the position of the United Kingdom and Ireland and Protocol on the position of Denmark, OJ 1997 C340/92-114.

⁴⁰ For a study on the problems inherent in the rapid development of the principle of mutual recognition and the ways in which these problems might be addressed allowing for full protection of fundamental rights, see S. Alegre and M. Leaf, “Mutual Recognition in European Judicial Cooperation: A Step Too Far Too Soon? Case Study – the European Arrest Warrant”, *European Law Journal*, Vol. 10, No. 2, March 2004, pp. 200-217.

these policies.⁴¹ Under Art 35(3)(a) TEU, member states accept that only courts of tribunals against whose decisions there is no judicial remedy may request the ECJ to give a preliminary ruling. This means that only courts of final instance may refer questions, which is likely to cause substantial delays. Art 35(3)(b) TEU provides that any court of tribunal in a member state may make a request for a preliminary ruling from the ECJ. Thus declarations under Art 35(3)(b) TEU lead to a quicker resolution of outstanding issues.

Table 1. Declarations accepting the jurisdiction of the ECJ in the light of Art. 35 TEU

	Country	Date	Occasion	Art. 35.2	Art. 35.3.a	Art. 35.3.b
1	Germany ^b	2/10/1997	Signature of the Treaty of Amsterdam	X		X
2	Austria ^b	2/10/1997	Signature of the Treaty of Amsterdam	X		X
3	Belgium ^b	2/10/1997	Signature of the Treaty of Amsterdam	X		X
4	Greece ^b	2/10/1997	Signature of the Treaty of Amsterdam	X		X
5	Luxembourg ^b	2/10/1997	Signature of the Treaty of Amsterdam	X		X
6	The Netherlands ^c	2/10/1997	Signature of the Treaty of Amsterdam	X		
7	Sweden	8/05/1998	Ratification of the Treaty of Amsterdam	X		X
8	Finland	10/07/1998		X		X
9	Spain ^b	23/12/1998		X	X	
10	Portugal	19/03/1999	Ratification of the Treaty of Amsterdam	X		X
11	Italy ^b	19/04/1999		X		X
12	France ^b	14/03/2000		X		X
13	Czech Republic ^b	16/04/2003	Signature of the Athens Treaty	X		X
14	Hungary	7/07/2004		X	X	

^a This table was kindly provided by the Council of the European Union, Directorate-General H – Justice and Home Affairs, Directorate II – Police, customs and judicial cooperation. The authors are grateful for having received this valuable information.

^b They reserved the right to include in their national legislation provisions stating that, where a question on the validity or interpretation of an act based on Art. 35 § 1, is raised before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

^c On the 2/10/97 the Dutch Government was examining whether, according to Art. 35 § 3, the faculty to request the Court to give a ruling may be conferred to other courts or tribunals than those against whose decisions there is no judicial remedy.

⁴¹ Following Art. 35.2 TEU, “By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1”.

As the table above shows, a large majority of the ‘traditional’ EU-15 member states has already recognised the jurisdiction of the Court to give preliminary rulings on the validity and interpretation of these acts,⁴² with the exception of the UK, Ireland and Denmark. As regards the 10 new member states, only the Czech Republic and Hungary have issued such a declaration.⁴³

Those member states that have not yet made a declaration (either old and new) should be encouraged to do so as a matter of priority. It is unacceptable that there should be such a variable geometry for the sake of rule of law in an enlarged EU. By a simple declaration, these negative limitations to judicial review could be easily resolved. This is not the case in the EC First Pillar, where Art. 68 EC Treaty provides for the possibility to submit a request for a preliminary ruling only by a court or tribunal of a member state against whose decisions there is no judicial remedy under national law.⁴⁴

Finally, the legal force of the Charter of Fundamental Rights of the Union remains one of the most important aspects of the Constitutional Treaty for an AFSJ. When the Charter was adopted in 2000, it was foreseen that a decision would be taken on its legal effects. The Nice Intergovernmental Conference agreed on the Charter and acknowledged in the set of declarations adopted that its status had to be resolved.⁴⁵ The possibility is always open for the Council to adopt a decision granting legal effects to the Charter. The European Commission’s proposal for monitoring and scrutiny of its proposals for EU legislation in terms of compliance with the Charter of Fundamental Rights does not resolve its lack of legally binding effects or the lack of scrutiny during the overall decision-making process (including the last stage at the Council).⁴⁶

⁴² The initial declaration made by most of the Member States after the entry into force of the Amsterdam Treaty was included in the OJ 1999 C120/24, 1.5.1999, regarding “Information concerning the date of entry into force of the Treaty of Amsterdam”.

⁴³ See for example the Treaty of Accession of the Czech Republic, signed in Athens on 16 April 2003. Specially the section on “Final Act”, III. Other Declarations, G. Declaration of the Czech Republic on Article 35 of the EU Treaty, which says “The Czech Republic accepts the jurisdiction of the Court of Justice of the European Communities in accordance with the arrangements laid down in Art. 35.2 and 3.b of the Treaty on European Union. The Czech Republic reserves the right to make provision in its national law that when a question concerning the validity or interpretation of an act referred to in Art. 35.1 of the Treaty on European Union is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law, that court or tribunal is obliged to bring the matter before the Court of Justice”.

⁴⁴ See E. Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, The Hague: Kluwer Law International, 2004, pp. 182-184. Art. 68 EC Treaty establishes that “...where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon”.

⁴⁵ See Declarations adopted by the Nice Intergovernmental Conference, Declaration 23 on the future of the Union, says that “the process should address, *inter alia*, the following questions: the status of the Charter of Fundamental Rights of the European Union, proclaimed in Nice, in accordance with the conclusions of the European Council in Cologne”.

⁴⁶ Commission Communication, Compliance with the Charter of Fundamental Rights in Commission legislative proposals – Methodology for systematic and rigorous monitoring, COM(2005) 172 final, Brussels, 27.4.2005, which states in paragraph 6 that “the main aim of the methodology is to allow the Commission services to check all Commission legislative proposals systematically and rigorously to ensure they respect all the fundamental rights concerned in the course of normal decision making procedures”.

4. Conclusions

The foundations of an Area of Freedom, Security and Justice need to be revisited. The common list of complaints associated with this area would have been largely resolved by the Constitutional Treaty. We have pointed out seven main benefits that the Constitution would have offered to the AFSJ. The overall effects of the Constitution would be of a substantial and positive nature. While bringing a ray of light into the whole decision-making process and structure, the Constitutional Treaty would also have facilitated, and positively promoted democratic and judicial accountability which, at the moment, are seriously weak.

The mechanisms for operational cooperation in “Freedom, Security and Justice” continue to be fragmented between two separate sectors: the EC First Pillar and the EU Third Pillar. This narrow legal duality would have mostly disappeared, and therefore most of the current vulnerabilities and inefficiencies inherent to the regime would have been corrected. The abolition of the duality in pillars would 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.

Judicial cooperation in criminal matters and police cooperation, and the Charter of Fundamental Rights of the Union are the core aspects that would have been most affected by the entry into force of the Constitution. First, judicial and police cooperation would be shifted to ‘Community competence’. This innovation would avoid narrow, nationally oriented and nation-state views of the politics and philosophies concerning these areas. It would also ensure a common European policy subject to democratic accountability (by the European and national parliaments) and the rule of law. The loss of a justiciable Charter is among the gravest consequences of the failure of the Constitution, although it is perhaps the easiest to remedy, requiring only a Council decision. As we have seen in this paper, there are a series of examples demonstrating how the current arrangements at EU level do not prevent ‘human rights disputes’. The Charter would help in achieving this fundamental goal.

As to the question of whether the AFSJ could be easily brought into the system of the EC First Pillar without the Constitution and a treaty amendment, this paper has answered in the negative. Art. 42 TEU provides that the Council shall recommend to the member states to take a decision that action in these areas would move to the First Pillar “in accordance with their respective constitutional requirements”. Since many aspects of the EU Third Pillar (judicial cooperation in criminal matters and police) might have profound constitutional implications, some member states may be required to make amendments to their respective constitutional settings before they could actually ratify a decision following Art. 42 TEU. In some member states, this may include referenda approving the decision before it could actually take effect.

The areas covered by an AFSJ need to be placed in a strong and uniform legal framework which incorporates fundamental rights as norms of Europe. A robust approach is very much needed in order to guarantee a high degree of protection for the individual, and the democratic accountability of each of the legal measures being adopted. It seems clear that there is an increasing need for reform over the institutional and procedural aspects of AFSJ. Whether this will take the form of a Constitution or a Treaty amendment the future will determine.

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Annex

Division of Competences and Institutional Settings for Policy between the First and Third Pillars

	EC FIRST PILLAR	EU THIRD PILLAR
Framework	Title IV Treaty Establishing the European Community (TEC), <i>Visas, Asylum, Immigration and other Policies related to Free Movement of Persons</i> (Arts 61-69)	Title VI Treaty on European Union (TEU), <i>Provisions on Police and Judicial Cooperation in Criminal Matters</i> (Arts 29-43)
Method	<i>Community method</i> – the entry into force of the Amsterdam Treaty on 1 May 1999 brought these matters into the European Community Framework	<i>Intergovernmental method (national sovereignty)</i> – the core objective in these areas is to provide citizens with a high level of safety by developing common action in the fields of police and judicial cooperation in criminal matters.
Legal instruments	Art. 249 EC Treaty – Regulations, Directives, Decisions, Recommendations and Opinions	Art. 34 TEU – Framework Decisions, Common Positions, International Conventions, etc.
Institutional arrangements and decision-making process	The main competence for decision-making in this area lies in the hands of the European Union institutions (the European Commission, European Parliament and the Council). Art. 67 TEC provides that the Council shall act unanimously on a proposal from the Commission or on the initiative of a member state, after consulting the European Parliament. On 22 December 2004, the Council adopted a decision* applying as of 1 January 2005 the co-decision procedure (Art. 251 EC Treaty) and qualified majority voting to all Title IV-related legal instruments, except those	The main competence for decision-making lies with the national ministries of justice and interior. The European Commission, European Parliament and national parliaments play a secondary role in the decision-making process (Art. 34 TEU). To date the decision-making has been purely intergovernmental and member states hold the exclusive right of initiative. All these factors bring a lack of legitimacy, transparency and a worrying democratic and judicial deficit.

* Council Decision 2004/927/EC of 22 December 2004 providing for certain areas covered by Title IV of Part Three of the Treaty establishing the European Community to be governed by the procedure set out in Art. 251 of that Treaty, OJ L 396/45.

	dealing with “regular migration”.	
Main JHA policies	<ul style="list-style-type: none"> • Crossing external borders • Asylum • Regular and irregular immigration 	<ul style="list-style-type: none"> • Police cooperation • Judicial cooperation in criminal matters • The fight against organised crime and terrorism • Irregular immigration and the fight against trafficking and smuggling of human beings
Judicial supervision	The European Court of Justice (ECJ) may receive preliminary questions from courts against whose decisions there is no judicial remedy under national law (Art. 68 EC Treaty).	The member states may declare that they accept the jurisdiction of the ECJ to give preliminary rulings and may specify which national courts may do so (Art. 35 TEU).

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