THE REFORMS IN THE JUSTICE AND HOME AFFAIRS DOMAIN: 
THE END OF THE ‘THIRD PILLAR’?

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INTRODUCTION

What started in 1993 as the ‘third pillar’ of the European Union (EU) has made quite a career in the EU. The original loose intergovernmental cooperation framework set up for justice and home affairs (JHA) on the basis of Title VI Treaty on European Union (TEU) was transformed in 1999 by the Treaty of Amsterdam into the establishment of an ‘area of freedom, security and justice’ (AFSJ) as one of the major political objectives and most ambitious projects of the European Union. Since then the pace of decision-making has been impressive, with the JHA Council adopting on average 10 new texts per month, ranging from asylum over immigration and border controls to judicial cooperation in civil and in criminal matters as well as police cooperation. The JHA domain has in fact become one of the fastest growing areas of the acquis with a significant growth also of institutional structures and financial instruments. Some major breakthroughs have been achieved both on the legislative side—such as by the adoption of the Framework Decision on the European Arrest Warrant in June 2002—and the institutional side—such as by the establishment of the external border management agency FRONTEX in June 2005.

Having regard to the importance gained by the AFSJ as a policy-making area of the EU, the European Convention, entrusted with drawing up the draft Constitutional Treaty for the EU, obviously had to give due attention to this domain in its work. And it did so. Its Presidium defined a specific set of questions and challenges in the JHA domain (CONV 69/02 and 206/02), a special Working Group (‘X’) then worked out a range of substantial proposals (Final Report: CONV 426/02) which were complemented by additional initiatives (such as the ambitious Fischer/de Villepin proposals of November 2002) (CONV 435/02) and, finally, numerous changes and new elements regarding the AFSJ were introduced in the final draft of the constitution adopted by the Convention in July 2003 (CONV 850/03). Some of these reforms proved to be rather controversial in the subsequent Intergovernmental Conference (IGC). This applied, in particular, to the question of majority voting on legislative measures in the criminal law domain and the introduction of a European Public Prosecutor’s Office. In the end some tortuous compromises were codified in the Treaty establishing a
Constitution for Europe (hereinafter referred to as Constitutional Treaty) signed in Rome in October 2004.

One of the most visible reforms introduced by the Constitutional Treaty is the at least formal abolition of the ‘third pillar’ as a separate part of the treaties with distinctly intergovernmental cooperation features. Although already substantially ‘thinned-out’ by the Treaty of Amsterdam,¹ the ‘third pillar’—mainly on account of its strong intergovernmental cooperation features—has never ceased to be the main point of attack for those pointing to the deficiencies of the EU in the JHA domain in terms of effective policy-making and implementation, as well as effective democratic and judicial control. Consequently concerns about the future development of the AFSJ after the negative referenda on the Constitutional Treaty in 2005 have also been primarily focused on the negative implications of the continuing existence of the current ‘third pillar’ and its features Committee on Civil Liberties, Justice and Home Affairs, 24 November 2005; Guild and Carrera, 2005). The European Commission has not left it at the expression of concerns. Pointing in particular to the continuing deficits in terms of decision-making and implementation, it proposed in June 2006 in two Communications to use the existing treaty ‘bridging’ (‘passerelle’) provisions of Article 42 TEU and Article 67(2), second indent, TEC to apply the ‘Community’ method in terms of decision-making rules and judicial control to the areas still remaining under ‘intergovernmental’ Title VI TEU, i.e., police and judicial cooperation in criminal matters (COM(2006) 331 of 28 June 2006 and COM(2006) 346 of 28 June 2006). Such a move, which was strongly supported by the Finnish Presidency of the EU in the second half of 2006 but was put on ice by the following German Presidency, would in fact mean the end of the ‘third pillar’ and in a more decisive way than in the Constitutional Treaty. This initiative is in fact a very interesting initiative as it can be seen as an attempt to implement an important part of the reforms of the Constitutional Treaty, and in a way which would even go beyond it.

In the following chapter we will first provide an assessment of the Constitutional Treaty reforms in the JHA domain with a focus on the question of the abolition of the ‘third pillar,’ and then evaluate the Commission’s passerelle initiative as a move which would in a sense complete this abolition—but with at least as many advantages as disadvantages. These in turn—as will be shown in the Conclusions—can bring out some of the relative advantages of the Constitutional Treaty as a balanced package of reforms.

¹ The Treaty had—in 1999—transferred asylum, immigration, border controls and judicial cooperation in civil matters to the ‘first pillar’ in the context of Title IV TEC.