Developments in the Area of Freedom, Security and Justice brought about by the Constitutional Treaty

By Dagmara Kornobis-Romanowska[*]

A. Introduction

The main purpose of this paper is to consider the impact of the Treaty establishing the Constitution for Europe[1] (hereinafter: the Constitutional Treaty or CT) on the realization of the Area of Freedom, Security and Justice (hereinafter: the Area or AFSJ). The paper has two parts. The first part deals with the Area in current law, whereas the second part focuses on the provisions of the Constitutional Treaty concerning the Area.[2]

Focussing on the AFSJ and on the reforms agreed in this field in the Constitutional Treaty, the general purpose of this paper is to try to answer the question of what the Area will be under the CT and to what extent it will be re-organized therein. In order to find an answer, this article examines the scope of changes, the significance of the accomplishment and the ability of the EU to build the Area as envisaged in the CT. It seeks to find a conclusion about the appraisal of the reorganization of the Area and its potential evolutionary character.

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[1] Treaty Establishing the Constitution for Europe, Dec. 16, 2004, 2004 O.J. (C 310) 1, 47 [hereinafter CT].

[2] The CT was initially scheduled to enter into force on 1 November 2006, provided that it would be ratified by all Member States. However, in May and June 2005, France and Netherlands rejected it in referenda and in effect other EU countries had to postpone their ratification procedures. On 17 June 2005 at the meeting of the European Council in Brussels, the Heads of State and Government of the EU have adopted a Declaration on the ratification of the CT (Declaration by the Heads of State or Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe, Brussels European Council (June 18, 2005)),

http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/85325.pdf.), according to which they have agreed to come back to the CT matter in the first half of 2006. Thus, the future of the CT depends on their assessment of the respective national debates and on the political agreement of Member States on how to proceed.

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B. The Area of Freedom, Security and Justice in Current Law

I. The Nature and Rationale of the Area

The AFSJ is the continuation and further development of the original concept of cooperation in Justice and Home Affairs (JHA) as introduced to the law of European Union (EU) by the Treaty of Maastricht, which entered into force on 1 November 1993. This treaty created the three-pillar structure of the EU, in which the European Community and its law forms the first pillar, Common Foreign and Security Policy (CFSP) are dealt with in a second pillar and JHA are regulated and organized in a third pillar. The next treaty reforming the EU, signed in Amsterdam in 1997 and in force since 1999, brought basic amendments and reformed the architecture of JHA. This treaty brought about the current structure of the EU and especially its third pillar, which since covers only police and judicial cooperation in criminal matters in the place of the former JHA, whereas other topics were transferred to Title IV of the Treaty on European Communities (TEC). It also introduced a new objective in Art. 2 TEU, which is to maintain and to develop the Union as an "Area of freedom, security and justice." Art. 2 TEU states that in the Area the free movement of persons is assured in conjunction with appropriate measures with respect to the external border controls, asylum, immigration and the prevention and combating of crime. Art. 29 TEU confers on the Union the responsibility to provide citizens with a high level of safety within this Area 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.

Hence, until now provisions on the AFSJ are found in the first as well as the third pillar of the EU. One part of the Area, that is Title IV of the TEC, concerning visas, asylum, immigration and other policies related to free movement of persons, external border controls and civil law matters, belongs to the European Community and it is related to the legal achievement of the internal market. Legal acts are adopted here by using the community instruments, like regulation, directive and decision and procedures. Nevertheless, within the supranational legal order, strong intergovernmental features can be seen. These features are, for instance, the predominance of unanimity voting, limits to the elsewhere exclusive right of initiative of the European Commission, the very limited role of the European Parliament, and the number of limitation imposed on the role of ECJ.[3]

[3] Jörg Monar, *The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs*, 39 J. COMMON MKT. STUDIES 747, 763 (2001).

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Another part of the Area is dealt with in the TEU. Title VI concerns the provisions on police and judicial cooperation in criminal matters and constitutes the intergovernmental part of the Area. New legal instruments have been introduced to reach its goals in this rather intergovernmental dimension, like the framework decisions, the decisions or the conventions (Art. 34 TEU). But, then again, here some Community law elements can be noticed, such as the quite extensive powers of the ECJ, the obligatory consultation of EP or the strong legal and political links with the areas under Title IV TEC.[4]

How to implement the provisions of the Amsterdam Treaty concerning the Area was not obvious and there was still the need of more detailed policy orientations and clarification of the nature of its innovations. The answer for this need was given on one hand by the Vienna Action Plan on how best to implement the provisions of the Treaty[5] and on the other hand, by the conclusions of the European Council Meeting in Tampere in October 1999.[6] The latter conclusions for the new Area were in fact a five-year agenda that came to an end in 2004. After this period, a Communication from the Commission to the Council and the European Parliament[7] was issued. It pointed out the realization of the programme as well as its future orientations. In this document, the Commission concluded that considerable work had been done, even though much still remained to be done. In the view of the Commission, the final adoption of the CT and its rapid entry into force are becoming essential, in order to meet expectations of the citizens to enhance their freedoms. In realization of these ambitions, the Union must continue to show the same degree of determination as it did for the completion of the internal market[8] but the actions should be taken in practical form, with detailed priorities and a precise timetable. As a result, five years after the European Council's meeting in Tampere a new program has been approved by the Presidency Conclusions of Brussels,[9] known as the Hague Program. This is a five-year program for closer co-operation in justice and home affairs at EU level from 2005 to 2010. It

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[4] *Id*.

[5] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, 1999 O.J. (C 19) 1.

[6] Presidency Conclusions, Tampere European Council, (Oct. 15-16, 1999), http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm.

[7] *Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations*, COM (2004) 4002 final (June 2, 2004).

[8] *Id*. at para. 3.

[9] *The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice*, COM (2005) 184 final (Nov. 4-5, 2004).

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aims to make Europe a more homogeneous Area and is focussed on setting up a common immigration and asylum policy for the enlarged Union of 25 Member States. In security and justice matters, the Hague program highlights, among others, the key measures directed to make greater use of Europol and Eurojust, to ensure greater access to justice, more judicial co-operation and the full application of the principle of mutual recognition.

II. Material and Geographical Dimension: the Asymmetry of the ASFJ

It must be considered that the form in which the Area presents itself today is not only the effect of the evolution within the European Communities and the Union themselves. Although in transition, the Area remains also the result of different and specific actors having an impact on the Community from the outside.[10] These actors gave the external inspiration and an impetus to pave the way to the establishment of the fundamental elements of the Area within the EU, such as judicial cooperation, free movement of persons, the fight against the international terrorism, together with all related compensatory measures. Although certain domains, such as border controls or policing, have always belonged to the domain of states,[11] it became clear that the Member States acting individually had lost their ability to control international crimes and migration, and that these questions cannot any longer be dealt with effectively by States acting autonomously on their own, national level.[12] This was the reason why the Member States were interested in the "Europeanization," as says Monar, of certain national problems[13] and reaching for forms of co-operation in Europe, outside the European Community.[14]

For the purpose of the analysis of the present material and geographical scope of the Area, one of these international factors deserves, it seems, special attention, which is the Schengen co-operation.[15] Its objective is the gradual abolition of checks

[10] These driving forces are: Council of Europe, Trevi and Schengen. *See* Monar, *supra* note 3, at 763.

[11] Monar, *supra* note 3, at 760.

[12] Chairman of Working Group X, *Final report of Working Group X "Freedom, Security and Justice," delivered to the European Convention,* CONV 426/02, WG X 14 (Dec. 2, 2002), *available at* http://register.consilium.eu.int/pdf/en/02/cv00/00426en2.pdf.

[13] Monar, *supra* note 3.

[14] Monar, *supra* note 3, at 763 ; WŁADYSŁAW CZAPLIŃSKI, OBSZAR WOLNOŚCI, BEZPIECZEŃSTWA I SPRAWIEDLIWOŚCI, WSPÓŁPRACA W ZAKRESIE WYMIARU SPRAWIEDLIWOŚCI I SPRAW WEWNĘTRZNYCH 5 (2005) (about the foundings of the co-operation in justice and home affairs).

[15] The Agreement signed in Schengen, Luxembourg, ('Schengen Agreement') on 14 June 1985 by the three States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, and the Convention implementing that Agreement, signed on 19 June 1990 by the same contracting

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on internal common borders, the strengthening of external borders, and to provide a list of the necessary compensatory measures, which would minimize the possible lack of security that might result from the abolition of internal border controls.[16] Without any doubt, it has been a precursor and played an important supporting role for the EU in matters of immigration, asylum, visa policies and police cooperation.[17] Formally brought within the framework of *acquis communautaire*[18] by the Amsterdam Treaty, the Schengen *acquis* is aimed at enhancing European integration and, in particular, at enabling the EU to develop more rapidly into an AFSJ. It covers all but two Member States and functions, depending on the matter concerned, within the institutional framework of the first or of the third pillar. United Kingdom and Ireland do not formally belong to Schengen and have not sought to participate in the external border measures. Nevertheless, they participate in the judicial and police co-operation elements of the Schengen *acquis*. Another Member State, Denmark, has a special status in this field, since Schengen measures are applicable to it by virtue of public international law and not by community law, what means this is not a part of its obligations from supranational law for this Member State. A special, international character of co-operation in the AFSJ is also well illustrated by the third countries association with Schengen *acquis* in the area of police and judicial co-operation in criminal matters. Iceland and Norway participate in Schengen as non-EU countries by virtue of an Association Agreement.[19]

Although the participation of the United Kingdom and Ireland, as well as Denmark in the Schengen *acquis,* is based on different provisions, all new Member States after

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parties; the Schengen *Acquis* also includes the accession protocols and agreements, both to the Agreement of 1985 and to the Convention implementing it, of other Member States of EU, the decisions and declarations adopted by the Executive Committee set up by the latter Convention, as well as the acts adopted by the organs on which the above mentioned Committee has conferred decision-making powers. A list of the elements which make up the *Acquis*, setting out the corresponding legal basis for each in TEC or TEU can be found in Council Directives. Council Directive 1999/439 1999 O.J. (L 176) 35 (EC); Corrigendum Jan. 12, 2000, 2000 O.J. (L 9).

[16] *See* Robert Rybicki, *Schengen and Poland*, 25 POLISH Y.B. INT'L L. 97 (2001).

[17] Monar, *supra* note 3, at 763.

[18] Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Art. 1.

[19] Council Decision 1999/438, 1999 O.J. (L 176) 42 (EC) (on certain arrangements for the application of the Agreement concluded by the Council of the European Union and the Republic of Iceland and the Kingdom of Norway concerning the association of those two States with the implementation, application and development of the Schengen *acquis*).

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the 2004 enlargement of the EU were obliged to accept fully the Schengen *acquis*.[20] Consequently, the Protocol integrating this *acquis* annexed to the Treaty of Amsterdam stipulated that it must be accepted without any derogation or exception by all candidate States, although existing Member States are not bound by this obligation.[21] This is an example of the differentiation of the "old" and "new" Member States and their legal situation within the Union.[22] It is important since this differentiation will be maintained by the CT.

III. Conclusions

The process of constructing and developing an AFSJ was started by the Amsterdam Treaty and it was considered one of the most remarkable concepts of this treaty. In order to come to a conclusion as to what the AFSJ is today, and to compare it with what it is going to be under the CT, it must be kept in mind that since the moment of its establishment the Area, as the Union as such, is in fact a kind of schedule; it is designed as a process of gradual creation of an area, in which the free movement of persons is assured. This design ensures to evaluate consistently, even today, how far the Area has developed within the non-homogenous structure the EU. The Area's scope presently covers the Community part enshrined in the TEC and an intergovernmental part of co-operation within the TEU. Nevertheless, there are many strong legal and political links between both parts and a growing number of common measures taken by the Member States to achieve their common goals.

The differentiation of the Area and the mixture of rather supranational Community and rather intergovernmental Union measures without any doubt reduce the transparency of its structure. But the lack of transparency is not just a negative aspect of the Area. In practice, such complexity can be also seen as having a positive impact on its gradual realization.[23] The Area is furthermore criticized for

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[20] *See* European Union Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community Protocol 2, Dec. 24, 2002, 2002 O.J. (C 325) 1 (integrating the Schengen *acquis* into the framework of EU); *see also* Antonio Vitorino, Eurpean Commissioner for Justice and Home Affairs, Address to the Royal Institute for International Affairs/ National Bank of Belgium: Models of Co-operation within an enlarged European Union (Jan. 28, 2003), *available at* http://www:europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/03/31&format=HTML&aged=1&language=EN&guiLanguage=en.

[21] *See* Vitorino, *supra* note 20.

[22] CZAPLIŃSKI, *supra* note 14, at 39.

[23] Its gradual realization is illustrated by the very broad list of *acquis* of the EU, accepted under the Title IV TEC and Title VI TEU, and consolidated by the European Commission into a complete list. European Commission, DG Justice, Freedom, and Security, Acquis of the European Union (Dec. 2004), http://www.europa.eu.int/comm/justice_home/doc_centre/intro/docs/jha_acquis_1204_en.pdf.

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having adverse effects because of the need to adopt parallel legislative acts in different pillars with cross-pillar implications,[24] too little involvement of national parliaments or a deficit in judicial control.[25] The opt-outs of certain Member States on one hand and the participation of non-EC countries in Schengen on the other hand, conjure a picture of complexity and fragmentation, shows a tendency towards restriction and exclusion,[26] rather than towards unity, homogeneity and transparency. One might ask whether the envisaged CT is going to solve these problems. To answer this questions is the task for the next part of this paper.

C. Structure of the Area of Freedom, Security and Justice under the Constitutional Treaty

I. The New Architecture of the Area

An agreement on the CT was reached by the Heads of States and Governments at the European Council on 18 June 2004, and it was signed on 29 October 2004. The CT provides a new legal basis and framework for the EU, it merges the existing treaties into one single text, that encompasses all the powers, rights and duties of the EU. To put it briefly, the task of the CT is to restructure and consolidate the present constitutional arrangements to make them more transparent and efficient.

The first and most visible step towards the consolidation of the Union within the CT is the formal abolition the three pillar structure. This means the abolition of the current dichotomy between Community and the intergovernmental method and the formal achievement of textual unity. This operation provided by the CT results in the application of the same principles, the same sources of law and procedures to decision-making in justice and home affairs and other European polices. In this field, by virtue of the Art. I-42 CT, the relevant parts of Title VI TEU and Title IV of Part Three TEC are summarized and revised to produce a new framework for action in the Area.[27] In consequence, with the CT, third Pillar's activities are moved from being essentially intergovernmental to ones in which Member States act in accordance to the community procedure.

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[24] Final report of Working Group X "Freedom, Security and Justice," CONV 426/02 (Dec. 12, 2002).

[25] Treaty on European Union, 1992 O.J. (C 191) 1 [hereinafter TEU]. For the system of opt-outs from ECJ preliminary ruling under TEU art. 35 (2); *see infra* Part C IV this piece.

[26] Monar, *supra* note 3, at 763.

[27] Arts. III-257, 277 CT (set out legal basis for EU action in this area).

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According to the CT, the Union's aim is to promote peace, the furtherance of its values and the well-being of its citizens. To reach these goals, two fundamental objectives of the Union are to be accomplished. One of them is the Area, an objective introduced by the Treaty of Amsterdam and now, under the current legislation, included in the fourth paragraph of Art. 2 TEU and referred to in the TEU's Preamble and Art. 29 TEU. For the future, Art. I-3 CT states that the European Union offers its citizens an AFSJ without internal frontiers, and an internal market where competition is free and undistorted.[28] This provision is wider, because it states not only the single market, which has been a Community objective from the beginning,[29] but another fundamental objective, which is the free movement of all persons within the Area even without economic goals.

The CT also defines the Area and its aims. It first states that the AFSJ falls within the sphere of the shared competences of the Union,[30] which means that the Union acts in the Area within the limits of the competences conferred upon it by the Member States. This is a consequence of a wider rule that the CT makes clear, that the EU has only those powers that Member States have agreed to confer upon it. Competences not conferred upon the Union remain with the Member States which may act to the extent that the Union has not acted, or has decided to cease exercising its competence.[31]

According to Art. III-257 CT, the Union constitutes an AFSJ with respect for fundamental rights and the different legal systems and traditions of the Member States.[32] The "Area of freedom" means here the space without internal border controls for persons and frame of a common policy on asylum, immigration and external border control,[33] based on solidarity between Member States, which is fair towards third-country nationals. Also stateless persons, upon the CT, shall be treated as third-country nationals.[34] The central point of the Area is therefore the individual and his fundamental rights guaranteed not only by the Union but also

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[28] Art. I-3 CT.

[29] Commentary to the Constitutional Treaty, *available at* http://www.fco.gov.uk/Files/kfile/Commentary_Part2_Parts1-4.pdf.

[30] Art. I-14(2j) CT.

[31] Art. I-11(2) CT.

[32] Art. 29 TEU; Art. II-61 CT.

[33] The aspiration of the Member States already acknowledged under the Tampere and The Hague programmes.

[34] Art. III-257(2) CT.

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by the Member States and their legal systems and traditions. The next factor, "security," has two aspects here, internal and external, and it should be ensured through the measures to prevent and combat crime, racism and xenophobia. As far as the aspect of "justice" is concerned, it is defined through the full access to the judicial systems and the measures for coordination and cooperation between competent authorities, police, judicial and others,[35] as well as through the mutual recognition of judgments in criminal matters[36] and, if necessary, through the approximation of criminal laws.[37]

Formally, the provisions concerning the AFSJ are placed within the CT in its Chapter IV, divided into five sections: general provisions, policies on border checks, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters, police cooperation. Originally, the new approach in the CT is to eliminate the adverse effects of the Area and the mean to safeguard its efficiency through the coherence, transparency and judicial oversight. It should reduce the potential for controversy over the appropriate legal basis and no need to adopt parallel legislative acts in different pillars and facilitate the negotiation and conclusion of agreements with third countries on cross-pillars matters.[38] It marks new policy making objectives, like the formal provision for an integrated management system for external borders, a common asylum policy and the uniform status of asylum (Art. III-266-268 CT), a common policy in the immigration domain – the possibility of adoption of framework laws on minimum rules regarding the mutual admissibility of evidence, the rights of individuals in criminal procedure, the rights of victims of crime and other specific aspects of criminal procedure, authorization for EU action in field of crime prevention, possibility of the establishment of a European Public Prosecutor's Office.[39] Also, aspects of criminal law fall into the scope of the CT. A common approach by the Member States to jurisdiction in criminal matters is enshrined in Art. III-270(1) CT and is broadly illustrated by the Charter of Fundamental Rights, formally incorporated to the CT in order to strengthen the formal protection of the rights of individuals.[40]

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[35] It corresponds to Art. 29 TEU.

[36] Art. 31(1a) TEU.

[37] It has been widened: under the existing Treaties these powers applied only to minimum rules regarding constituent elements of crimes and sanctions and only referred to the fields of organized crime, terrorism and drug trafficking; Arts. 29, 31(1e) TEU.

[38] Jörg Monar, *Justice and Home Affairs*, 42 J. COMMON MKT. STUD. 117, 129 (2004).

[39] *Id*.

[40] The Charter however makes no change to the redress procedures provided for by the Treaties, since it opens up no new procedures for seeking redress in the courts of the EU. The problem of the Charter of

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II. New Principles

According to the CT, an Area is built on the common policy of Member States in general matters such as border controls, asylum, immigration, but also in the specific questions, like common instruments to protect democratic institutions and civilian population from any terrorist attack and in the event of a natural or man-made disaster.[41] The basis for this common approach lies in the solidarity among these States, which is newly emphasized and placed on Member States and on the Union to act jointly and to request assistance in action, Art. I-43 CT. This solidarity clause is a part of the ASJF and does not only cover the obligation to act, but also a fair sharing of responsibility, including the financing of measures and the military resources.[42] The arrangements implementing the solidarity clause should be adopted under Art. III-329 CT. They apply when a Member State that becomes a victim of an attack should request assistance from the other Member States under the arrangements defined to it by the Council. Regular assessments of the threats facing the Union are to be undertaken by the European Council. There is nevertheless the reservation that these provisions do not affect the right of a Member State to choose the most appropriate means to comply with the solidarity obligation towards another Member State.[43] The latter provision of the CT is very important for the general framework of the Area when taking into consideration an opt-out of the United Kingdom and Ireland.[44]

Another principle that appears in the CT in a broader context than in the treaties so far is the principle of mutual recognition. This holds that judgments in one Member State are recognized by the authorities of another for the reason of mutual trust in the adequacy of other Member State's rules and their correct application.[45] Under the current Title VI of the TEU it is provided that common action in criminal matters includes facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to

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Fundamental Rights of the EU is very broad and its scope reaches much further beyond the topic of this paper. This is the reason why the Charter, although mentioned, is not discussed in this article.

[41] Art. I-43 CT.

[42] Monar, *supra* note 38, at 129.

[43] CT Declaration 9.

[44] *See* Monar, *supra* note 38, at 130; *see also* David Phinnemore, *The Treaty establishing a constitution for Europe: An Overview*, Royal Institute for International Affairs (Chatham house), June 2004, *available at*: http://www.riia.org/pdf/research/europe/BN-DPJun04.pdf

[45] See the opinion of Advocate General Ruiz-Jarabo Colomer in Case C-187/01 Gözütok and Brügge, 2003 E.C.R. I-1345, para. 6.

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proceedings and the enforcement of decisions. As it was observed, this goal cannot be achieved without the mutual trust of the Member States in their criminal justice systems and without the mutual recognition of their respective judgments, adopted in a true common area of fundamental rights.[46] This observation of the Advocate General have been shared and expressed by the Judges of the ECJ in the first judgment concerning the third pillar, in the *Gözütok and Brügge* case.[47] The ECJ stated that there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States, even if the outcome would be different according to its own national law.[48]

The CT distinctly requires in this field that the Union promotes mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extra-judicial decisions.[49] It can be noticed that from this perspective, the mutual recognition, based on mutual trust, serves as a factor preserving a high degree of autonomy of the Member States.[50] It is most important in police and criminal matters,[51] where the EU's competences are expressly limited to minimum standards and the horizontal co-operation between Member States is required.

III. Decision-Making

1. Legislative Initiative

The ordinary procedure for the adoption of acts which are legislative in character (i.e. laws and framework laws) under the CT is the co-decision procedure, as stated in Art. I-34(1) CT[52] and spelled out by Art. III-396 CT.[53] According to this

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[46] *Id*. at para. 124.

[47] *Id*.

[48] *Id*. at para. 33.

[49] Art. I-42(1b) CT.

[50] Daniel Thym, *The Area of Freedom, Security and Justice in the Treaty Establishing a Constitution for Europe*, WALTER-HALLSTEIN-INSTITUT FÜR EUROPÄISCHES VERFASSUNGSRECHT, Dec. 2004, http://www.rewi.hu-berlin.de/WHI/deutsch/papers/whipapers1204/index.htm.

[51] Program of Measures to Implement the Principle of Mutual Recognition of Decisions in Criminal Matters, 2001 O.J. (C 12) 2, para. 3.

[52] Art. I-34(1) CT.

[53] It corresponds to the co-decision procedure in Art. 251 TEU.

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procedure, the European Parliament and the Council are equal co-legislators which means that if for any reasons an agreement between them cannot be reached, an act shall not be adopted.

The Commission is the institution that "normally" has the power to initiate legislative acts and the Member States in the Council in cooperation with the European Parliament act on the basis of its submitted proposals. The CT introduces special provisions in the CFSP and AFSJ, which have no equivalent in the existing Treaties. These provisions allow that in specific circumstances the proposals for laws or framework laws can be submitted by a group of Member States or the European Parliament.[54] In the field of co-operation in criminal matters and for the administrative cooperation in related areas, Art. III-264 (b) CT further provides that one quarter of Member States can retain the right to make proposals.[55] The European Council, according to Art. III-258 CT, defines the strategic guidelines for legislative and operational planning within the AFSJ.

In addition, the CT provides further guarantees for a compliance with the law in fundamental rights legislation. One example is the pre-eminent role of the European Council to define the strategic guidelines for legislative and operational planning within the Area.[56] It must be pointed out that this is to be regarded as a very important procedure since the measures taken in the field of justice and home affairs can have a broad direct effect and many serious implications for the rights of individuals.[57]

The mechanism of decision-making proposed by the Constitutional Treaty seems to fulfil the essential requirements of transparency and democracy. The role of the European Parliament as co-legislator and for the national parliaments is expanded. The new task for the latter is to ensure that proposals and legislative initiatives regarding the AFSJ comply with the principle of subsidiarity and proportionality.[58] There are also new provisions to allow the European Parliament and national parliaments to have a role in the evaluation and political monitoring of Eurojust's and Europol's activities, as well as of the Member States' authorities.[59] The voting

[54] Art. I-34(3) CT; Art. III-396(15) CT.

[55] Art. 34(2) TEU (any Member State can make a proposal); Thym, *supra* note 50.

[56] Art. III-258 CT. An example of this role can be seen in the measures of the European Council taken in Tampere (1999) and Brussels (2004).

[57] Monar, *supra* note 3, at 760 (on the evaluation of the parliamentary control under the current EU law).

[58] So called subsidiarity mechanism.

[59] Arts. III-260, III-273, III-276 CT.

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requirement in these matters has moved from unanimity to Qualified Majority Voting (QMV) and co-decision.[60]

The analysis of the new legislative procedure, including the right of legislative initiative shared between the Commission and Member States within the ASFJ, brings also to mind the risk, that the proposals from Member States may not represent the common interest or do not take into account the specific position of Member States.[61] From this point of view, the deficiency of the exclusive right of initiative of the Commission accepted in the CT is a compromise and another remnant of the international character of the AFSJ.

2. Qualified Majority Voting

Co-decision by the European Parliament and the Council, which applies QMV, is the standard decision-making procedure within the AFSJ. QMV will be applied to a majority of areas, including the areas of asylum, immigration and judicial co-operation in criminal matters.[62] However, there are a number of exceptions when QMV in the Council is replaced by a unanimity requirement and co-decision by mere consent of the European Parliament. These special rules relate, for example, to the measures of family law with cross-border dimension, the extension of Union competences in substantive criminal law and criminal procedure, or for operational cooperation between national law enforcement authorities.[63] Unanimity will also apply to the adoption of European law on the establishment of the office of the European Public Prosecutor.[64] In fact, within the Area a vast number of decisions needed for its creation are to be taken unanimously by the Council after consulting the European Parliament.

This shows the conservative approach of the CT, since the special decision-making procedures render the abolition of pillars and the unity of the EU a mere formal façade.[65] The unanimity requirement in particular makes it very difficult to take

[60] Arts. III-273, III-276(2) CT.

[61] Vitorino, *supra* note 20.

[62] Protocol 34 states that these provisions will only enter into force on 1 November 2009. Before then, the Council will act under the system of weighted majority, as set out in its Art. 2 which is the same as that currently in force under the Art. 205(2) TEC. A definition of a qualified majority within the European Council and the Council is given by the Art. I-25 CT.

[63] Arts. III-269, III-270, III-277 CT; Monar, *supra* note 38, at 130; Thym, *supra* note 50.

[64] Art. III-274 CT.

[65] Monar, *supra* note 38, at 130 ; Vitorino, *supra* note 20.

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binding decisions[66] and in result can lead to delays in decision-making. In extreme cases it can be used as a veto of a Member State to postpone and block the adoption of the measure. There are opinions, that in the context of an enlarged Union such a situation is untenable because it undercuts efficiency, and that it is essential to make a substantial move in favour of a greater use of qualified majority voting in this Area.[67] For all these reasons, the co-decision procedure and the QMV are certainly the instruments of the CT that enhance the legitimacy of the AFSJ, and by using them the CT will significantly reduce the intergovernmental character of judicial cooperation in criminal matters and police co-operation.

IV. Judicial Control

Pursuant to the CT, judicial control of EU measures is conferred upon the judicial organs. Their jurisdiction is extended to almost all areas of EU law[68] and in result also to the AFSJ. AFSJ actions thus become subjects of legal review by the ECJ. Hence the restrictions imposed by Art. 35 TEU and the Art. 68(2) TEC in the fields of visas, asylum and immigration are no longer maintained.[69]

The construction of the preliminary reference procedure, however, deserves special attention here. Under current law, Art. 35 TEU provides the jurisdiction of the Court of Justice to give preliminary rulings on EU third pillar measures - at the request of the national courts on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions adopted for police and judicial cooperation in criminal matters and on the validity and interpretation of the measures implementing them.[70] According to this provision, a Member State which accepts that new jurisdiction of the Court of Justice may choose between

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[66] Working document presented by Jean Louis Bourlanges, *Working on the conditions for strengthening the effectiveness of the area of freedom, security and justice Committee on Civil Liberties, Justice and Home Affairs*, Aug. 18, 2004, *available at* http://www.europarl.eu.int/meetdocs/2004_2009/documents/DT/539/539389/539389en.pdf.

[67] Vitorino, *supra* note 20.

[68] Art. III-376 CT imposes limitations on the jurisdiction of the ECJ in relation to CFSP, equivalently to the current Art. 46 TEU. However, the ECJ has the jurisdiction to monitor compliance with Art. III-308 CT and to rule on proceedings, brought in accordance with the conditions laid down in Art. III-365(4) CT, reviewing the legality of European decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter II of Title V (Exercise of Union competence).

[69] *See* Takis Tridimas, *CFSP and Freedom, Security and Justice*, UNIVERSITY OF SOUTHAMPTON COLLEGE OF EUROPE, Mar. 2004, http://www.fedtrust.co.uk/uploads/constitution/05_04.pdf; Thym, *supra* note 50.

[70] Art. 35 TEU.

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granting the power to refer questions for a preliminary ruling either to any of its courts or tribunals, or only to those courts or tribunals which give a final decision against which there is no further judicial remedy. Therefore, currently the ECJ has limited jurisdiction in police and in criminal matters of co-operation; but its jurisdiction here rather resembles the jurisdiction of international courts.[71] In this optional procedure, the ECJ gives preliminary rulings on legal acts which, although prepared by the Council, are in fact the international agreements, as laid down in Art. 34(2d) TEU. For the reason of their special character and the jurisdiction of the ECJ, it can be noticed that, although the direct effect of such legal instruments is expressly excluded by Art. 34(2) TEU, they are brought closer to Community law through present legislation.[72]

This unclear construction and the fragmentation of the procedure causes problems and compromises the right to judicial protection,[73] as it leaves open its binding force *erga omnes* or just *inter partes*.[74] The envisaged CT formally solves these problems because it abolishes this specific division of preliminary reference procedures provided by Art. 68 TEC for matters concerning visa, asylum, immigration and other policies related to the free movement of persons, and by Art. 35 TEU. In consequence, this means the abolition of the system of opt-outs from ECJ preliminary rulings under Art. 35(2) TEU, which is currently strongly criticized, because it leads to further intransparency within the EC's legal system.[75]

Therefore, under the CT, in police and judicial co-operation in criminal matters, the ECJ would have the jurisdiction to give preliminary rulings on the interpretation of the CT or the validity and interpretation of acts of the institutions of the Union, at the request of Member State's courts, on the interpretation of Union law or the validity of acts adopted by the institutions and would also rule on the other cases provided for in the CT.[76] However, according to Art. III-377 CT, the ECJ in exercising its powers regarding the judicial co-operation in criminal matters and police cooperation would have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement

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[71] CZAPLIŃSKI, *supra* note 14, at 76.

[72] Thym, *supra* note 50.

[73] Thym, *supra* note 50, at 4.

[74] OBSZAR WOLNOŚCI, BEZPIECZEŃSTWA I SPRAWIEDLIWOŚCI, WSPÓŁPRACA W ZAKRESIE WYMIARU SPRAWIEDLIWOŚCI I SPRAW WEWNĘTRZNYCH 53 (2005).

[75] *Id.* at 76.

[76] *Id.*

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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. In substance, this drafted provision is equal to the present Art. 35(5) TEU and the jurisdiction of the Court currently provided in relation to third pillar matters still stays restricted. It seems that the restriction of the ECJ's jurisdiction to review the validity and proportionality of police operations by virtue of mentioned above Art. III-377 CT and, at the same time, the securing of the national courts' competence is a clear manifestation of the protection of the procedural autonomy of the Member States.[77]

D. Conclusions

The Area of Freedom, Security and Justice is a concept and a purpose of the Union which has being established and developed progressively in a politically very sensitive field and in one, which contains very essential questions for every Member State. The truth is, nevertheless, that the Member States acting individually cannot tackle any longer on its own the questions of the cross-border issues, such as migration or international crime and terrorism. For this reason they were condemned, and still are, to seek co-operation. The Union is thus a forum in which the European States decided to establish the Area as a field of Union's activity and their co-operation.

The Area according to the CT is integrated into the new architecture of the Union and it appears as a single project with a coherent structure. But it does not mean absolute homogeneity and the complete abolition of material differences within the specific sphere. Having a single legal and institutional framework does not necessarily mean that the Union procedures need to be applied in an identical way. In fact, the ASFJ procedures in the CT vary according to the action envisaged at Union level and are in fact the combination of the elements of the former Community method with other mechanisms allowing in some cases for reinforced co-ordination between the Member States within the Union. The general principles of application of Union law are here the bases and the conditions for the common approach, together with principles, like solidarity or that of mutual trust in the adequacy of other Member State's rules and their correct application.

The constitutional revision of the foundations of the AFSJ also concerns the problems of legitimacy and democracy within the Union. For example, the CT expands the role of the European Parliament and national parliaments, which enhances without doubt the democratic legitimacy of the Union. Also the co-

[77] Thym, *supra* note 50.

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decision procedure and the QMV are certainly instruments that have an influence on the legitimacy of the AFSJ. It seems that thanks to the procedure of the QMV, the decision-making process can be more effective too, because it is faster and more coherent. The strengthening of the rule of law at EU level justifies also the expansion of the ECJ' s jurisdiction to justice and home affairs. This is, however, not to say under the CT that the ECJ will acquire full jurisdiction in the Area, since in the realm of judicial cooperation in criminal matters its judicial powers, like today, keep an exceptional character and its jurisdiction stays restricted.

To summarize the developments of the Area as proposed by the CT, it can be observed that the Area will continue to be a field of co-operation between Member States, based rather on the international agreements, typical for the present third pillar of the EU, than on the secondary law sources. For this reason, subsequent measures and further steps will still be needed. Also, the geographical asymmetry will be continued, since the United Kingdom and Ireland declared to stay out of the Schengen *acquis*. All these arguments lead to the final conclusion that the Constitutional Treaty largely preserves the existing treaties. However, this consistency justifies the new motto of the Union: *United in diversity*, recognized by the Preamble and Art. I-8 CT. But not only the provisions of the CT relating to the Area make this motto very neat, it is also very accurate when taking into consideration the will of the Member States expressed in the ratification procedures.

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