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Justice and Home Affairs in the European Constitutional Process – Keeping the Faith and Substance of the Constitution

The failure of the Constitutional Treaty (CT) in 2005 could very well have been the end of the European constitutional process for a long time.[1] Too harsh was the impression of the declining votes in France and the Netherlands and too opaque the motives of those who voted against the Treaty. Even today it appears surprising that the project of a European Constitution was resumed so quickly after the Constitutional Treaty failed. There is surely a host of reasons why this became possible. However, among the most important ones, two are very striking: first of all, the project was favoured by the skilful and able approach of the German Presidency, which recovered as much as possible from the Constitutional Treaty of 2004 and abandoned most of the disturbing provisions which ulti-

1 Cf. on the European Constitutional Process: *Oppermann* (2007); *Oppermann* (2006); *Fischer* (2006); *Geiger* (2006); *Einem* (2006); *Stark* (2007), *Ziller* (2005); *Amato / Ziller* (2007).

mately led to its rejection among European citizens.[2] The second even more important aspect was the alluring political success which would be bestowed upon those governments finalising the long-lasting and prestigious endeavour of a European constitution. The goal of a consolidated and further developed European constitutional framework was too tempting for the current political leaders in Europe (especially those who were not involved in the constitutional process of 2004) to resist the opportunities related to this project. This is also the reason why the setback caused by the negative Irish referendum of 12 June 2008 will presumably not bury the project of the Lisbon Treaty. However, there is the need of negotiations between the Member States which ultimately will result in some delay of the procedure. Hence, the Treaty will not enter into force on 1 January 2009, but probably later.

For the field of Justice and Home Affairs it has to be added that the possibilities conferred by the current set of intergovernmentalist rules have almost been exhausted within recent years. Therefore, the transfer of additional competencies and a supranational mode of decision-making, as specified under the Lisbon Treaty, are needed in order to further develop the existing legal framework and to enhance its shortcomings.[3] The scope of the analysis at hand will mainly be confined to the changes made after the failure of the 2004 Constitutional Treaty and incorporated into the Lisbon Treaty of 2007. The analysis begins with some short introductory remarks (I.) and then - in the second part – it addresses the general structure of the provisions in this field of law (II.). Subsequently, the analysis will focus on the major changes, supplemental modifications and deletions made during the drafting of the Lisbon Treaty (III.). Finally, the conclusions to be drawn from the identified changes and supplementary provisions will be outlined (IV.).

I. Introductory Remarks

The expanded and more detailed rules in the field of Justice and Home Affairs – as laid down in Articles III-257 through III-277 of the Constitutional Treaty – were not in the centre of the controversial discussion on the 'ill-fated' project of European Constitution-

2 Cf. *Häberle* (2008), 523.

3 See *Amato / Ziller* (2007), 220.

alism in France and the Netherlands three years ago.[4] The same applies to the Irish referendum in 2008. Although there are, from time to time, issues in the realm of Justice and Home Affairs that reach the public's attention in at least some Member States – like the Commission's Blue Card initiative of September 2007[5] – this field of law lives mostly in the shadows when it comes to public debates on the scope of European constitutional change.[6]

One reason for this is that the provisions on immigration, visa policy and asylum are in many cases assessed as being chiefly of a technical nature, and not worth further analysis. While this is, on the merits, not entirely false, this attitude contrasts strongly with the true impact of the new provisions in Justice and Home Affairs on the Member States' sovereignty and on the everyday life of many third-country nationals and EU-citizens within or beyond the borders of the European Union.

It may be that debates on these issues are the domain of the academic community insofar as it gives room for a more thorough analysis than public discussions would offer. Bearing this in mind, an interesting question arises as to whether the European heads-of-state have even used this remarkable gap between the impact and meaning of provisions on the one hand and the almost complete lack of public attention on the other to expand or supplement the provisions of the 2004 Constitutional Treaty while drafting the Lisbon Treaty of 2007.

One would not lift the veil prematurely in stating that the provisions of the two treaties in the field of Justice and Home Affairs strongly resemble each other in structure and contents. This result is neither very striking nor surprising: considering the fact that the public debate on the 2004 Constitutional Treaty almost entirely ignored subjects of Justice and Home Affairs, there was no real need to question the fundamental rules of this chapter. However, even marginal and slight changes, supplementary provisions and deletions can cast light on the dominant intentions and purposes

4 Cf. on the historical background *Mayer* (2007), 1142; *Weber* (2008a), 7; *Weber* (2008b), 55.

5 COM (2007) 637 final.

6 Also intimating this: *Amato / Ziller* (2007), 220 *et seq*. ("…where the European response has not met significant opposition from the citizens, there has been a continuous change").

during the drafting of the Lisbon Treaty and the conclusions drawn from the failure of the 2004 Constitutional Treaty.

In order to focus on the most important modifications introduced by the Lisbon Treaty as compared with the Constitutional Treaty, the specific contents of the provisions on Justice and Home Affairs will not be addressed and outlined in depth. However, it should be noted that the basic change contained in the Constitutional Treaty, which merged the former Title VI of the Treaty on European Union (Arts. 29 to 42 TEU) together with the provisions of Title IV of the Treaty establishing the European Community (Arts. 61 to 69 TEC) under the heading of an 'Area of Freedom, Security and Justice', endures in the Lisbon Treaty.[7] The second most important change relates to the decision-making process in Justice and Home Affairs, as all measures concerning border controls, immigration and asylum are shifted to a qualified majority vote in the Council while the European Parliament is given joint decision-making powers with the introduction of the co-decision procedure.[8] In addition, some very pertinent and important provisions with regard to the relationship between the Constitutional Treaty and the Lisbon Treaty and the changes carried out in the meantime will be also mentioned.

II. General Structure of the Treaties in Comparison

In the Constitutional Treaty, the provisions on Justice and Home Affairs were enshrined in Chapter IV, ranging from Art. III-257 to Art. III-277, with altogether 21 provisions distributed among 5 sections. Similarly, the Lisbon Treaty's provisions on Justice and Home Affairs are located in Title IV, which is separated into 5 chapters of a total of 23 provisions ranging from Art. 67 to Art. 89 of the Treaty on the Functioning of the European Union (TFEU).

This means that, instead of the term "Chapter", the term "Title" is now used, and instead of 5 "sections" there are 5 "chapters" in the TFEU. So there are only minor terminological changes so far, while the mere number of provisions on Justice and Home Affairs remained almost the same: originally 21, now 23. However, the two new provisions deserve a closer look; they will be discussed below in part III.

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7 Cf. *Weber* (2008a), 55; *Weber* (2008b), 13; *Peers* (2006), 90.

8 Cf. *Peers* (2006), 86.

Additionally, with respect to the general structure of the provisions, a comparison of the headings of the Sections (respectively Chapters) shows that they are identical. The headings are correspondingly the following:

- Section 1 / Chapter 1: '*General Provisions*' with 8 (respectively 10) provisions (Arts. III-256 to III-264 CT, resp. Arts. 67 to 76 TFEU);
- Section 2 / Chapter 2: '*Policies and Border Checks, Asylum and Immigration*' with correspondingly 4 provisions (Arts. III-265 to III-268 CT, respectively Arts. 77 to 80 TFEU);
- Section 3 / Chapter 3: '*Judicial Cooperation in Civil Matters*' with 1 provision in each text (Art. III-269 CT, respectively Art. 81 TFEU);
- Section 4 / Chapter 4: '*Judicial Cooperation in Criminal Matters*' with 5 provisions in each text (Arts. III-270 to III-274 CT, respectively Arts. 82 to 86 TFEU); and
- Section 5 / Chapter 5: '*Police Cooperation*' with 3 provisions in each text (Arts. III-275 to III-277 CT, respectively Arts. 87 to 89 TFEU).

Prima facie, the result of the structural comparison is not very exciting as it shows many corresponding details between the 2004 Constitutional Treaty and the Lisbon Treaty. Yet this result is quite astonishing because it means that the sweeping changes the field of Justice and Home Affairs has undergone in the Constitutional Treaty have almost entirely been maintained. Therefore, the changes between the Constitutional Treaty and the Lisbon Treaty might not be very remarkable, but the changes between the current legal situation in the field of Justice and Home Affairs and the prospective framework of the Lisbon Treaty will be extensive.

III. Major supplemental modifications and changes

Compared with the Constitutional Treaty of 2004, the Lisbon Treaty provides for four major changes and supplemental modifications on the merits and some minor, mostly terminological changes. The analysis below will focus on the more important elements.

A. Return to the original legislative procedure

The first change to mention is the return to the previous legislative forms and procedures, which are laid down in today's Arts. 249 to 256 TEC. As is well known, one of the major obstacles for the rati-

fication of the 2004 Constitutional Treaty, and an important reason for its ultimate failure, were the provisions and concepts indicating the state-like quality of the new European Union (e.g., the flag, anthem, and symbols[9]). These symbolic elements alienated several Member States, and the supposed impending foundation of a European Super-State also put off many EU citizens, especially in France and in the Netherlands. As a result, in drafting the Lisbon Treaty the Member States refrained from any references to the state-like quality of the EU.

The Lisbon Treaty thus entirely abandons those of the Constitutional Treaty's legislative concepts that indicated a state-like legislative branch, replacing the terms 'European laws' or 'framework laws' with the traditional legislative forms of regulations, directives and decisions.[10] Whereas, in Chapter IV of the Constitutional Treaty, there were frequent references to 'European laws' 'framework laws', or to 'European regulations and measures', the Lisbon Treaty now regularly contains the phrase "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure", or it simply refers to 'measures'. These terminological and procedural alterations necessitated a total of 33 changes in the new Title IV to avoid creating the impression that the Lisbon Treaty would also eventually lead to a European state. In this context, it appears less important that this change engendered only minor alterations with respect to the contents of the applicable rules.

In sum, these changes are predominantly an expression of a general intention of the Member States to initiate a new European constitutional process by abandoning any indication of the state-like quality of the new European Union; they are not specifically related to issues of the "area of freedom, security and justice". By contrast, the three major changes between the Constitutional Treaty and the Lisbon Treaty which are described in the following paragraphs are more closely connected with the peculiarities of the field of Justice and Home Affairs.

B. National Security Concerns (Art. 73 TFEU)

The second major change relates to an entirely new provision introduced by the Lisbon Treaty: the new Art. 73 TFEU. This new pro-

9 *Häberle* (2008), 537, laments the removal of these symbols, referring to "major losses" ("*Die schwersten inhaltlichen Abstriche*").

10 See *Mayer* (2007), 1172.

vision stipulates the right of the Member States to enter "between themselves" into "such forms of cooperation and coordination as they deem appropriate "in order to safeguard "national security".[11] Obviously, the Member States found it necessary to supplement the statutory framework of the Constitutional Treaty which guaranteed the states' own "exercise of the responsibilities" in Art. 72 TFEU (former Art. III-262 CT) and, in Art. 74 TFEU (former Art. III-263 CT), measures to be adopted by "the Council" to "ensure administrative cooperation" between the Member States.

Indeed the issue of 'national security', which is addressed by the new Art. 73 TFEU, appears to be too important for the Member States to be addressed either by themselves alone or in the rigid organisational scheme of the Council. Furthermore, decisions of the Council with respect to administrative co-operation require a proposal of the Commission and the consultation of the European Parliament. Such decisions thus entail a rather time-consuming procedure which, in case of an emergency, might not be fast enough to safeguard the Member States' national security interests. At any rate, it seems that the Member States sought to shift the competencies in the field of Justice and Home Affairs slightly to their side by allowing co-operation or co-ordination outside the organisational framework of the EU, and hence without the involvement of the Council.

At first glance, when seen in the context of Chapter 1, Art. 73 TFEU appears to be a technical addition for reasons of clarification. However, where national security interests are at stake, most Member States would take all necessary steps which appear to them to be necessary and effective, regardless of what the other Member States or bodies of the EU would advise. Therefore, the opportunity offered by Art. 73 TFEU provides for a procedure which would be self-evident in the case of an emergency. Hence, by insisting on adopting the right to enter into co-operation or co-ordination measures, this supplemental addition to the Constitutional Treaty does not enhance the Member States' sovereignty but rather emphasises their dependence on the explicit authorisation in the European Treaties. The newly adopted Art. 73 CT therefore proves the opposite of what was intended by its introduction.

11 See *ibid.*, 1170.

C. Combating the financial basis of terrorism (Art. 75 TFEU)

The newly inserted Art. 75 TFEU is a provision authorising the EU to combat terrorism and related activities by taking measures with respect to capital movements and payments. In the Constitutional Treaty, a similar provision was already part of the section on the free movement of capital and payments.[12] By transferring it to the new Title IV, it has become subject to possible British opt-outs, which was ultimately the purpose of the transfer.

Among the examples mentioned in Art. 75 TFEU, there are the freezing of funds, of financial assets and of economic gains, irrespective of the person, group or organisation in question.[13] After all, Art. 75 TFEU in its new context supplements Art. 83 para. 1 subpara. 1 TFEU, which refers in more neutral terms to criminal offences "in the areas of particularly serious crime with a cross-border dimension", including, *inter alia,* "terrorism" (subpara. 2). However, in Art. 83 TFEU, which is one key element of the "judicial cooperation in criminal matters" (Chapter 4), only minimum rules concerning the definition of criminal offences and sanctions are allowed. Therefore, the more palpable measures with respect to capital movements and payments required a more precise competence for the EU, which is now provided by Art. 75 TFEU.

In this context, the provision appears predominantly to be a technical provision when it comes to adopting specific measures against terrorism which now appears appropriately located in Title IV. Notably, this specific rule addresses the financial aspects of terrorism, which are considered to be both very important and vulnerable. Therefore, measures with respect to capital movements and payments are deemed to be very effective for combating terrorism. Furthermore, Art. 75 TFEU conveys the impression of a highly political provision, in that it declares a strong commitment against international terrorism. In this regard, Art. 75 TFEU might address some security concerns of the Member States, and it can also be interpreted as an accommodation directed to the United States, which is of course also actively combating international terrorism.

12 Cf. Art. III-160 Constitutional Treaty.

13 Cf. *Weber* (2008a), 55; *Mayer* (2007), 1169.

D. The 'fundamental aspects' exception and enhanced cooperation

Besides the return to the original legislative forms (under 1.), the two new provisions of Art. 73 TFEU (under 2.) and the transfer of Art. 75 TFEU to Title IV (under 3.), the most crucial change under the Lisbon Treaty has been made simultaneously in three distinct provisions of chapter 4 on 'judicial cooperation in criminal matters', namely in Art. 82 para. 3, Art. 83 para. 3 subpara. 3 and – with slight changes – in Art. 86 para. 1 subparas. 2 and 3 TFEU.

Pursuant to each of these three provisions, when the EU adopts harmonisation measures by establishing minimum rules, or when it is supposed to act unanimously, any Member State can request that a draft be referred to the European Council if it "would affect fundamental aspects of its criminal justice system". In this case, the legislative procedure is suspended. If the Member States find a compromise the rules of the Lisbon Treaty are quite similar to the ones of the 2004 Constitutional Treaty. However, if a compromise is not entered into within four months, there is the chance to save the legislation when "at least nine Member States" wish to establish enhanced co-operation pursuant to Art. 20(2) of the Treaty on European Union, which is currently stipulated in Arts. 11 and 11a of the EC Treaty.

This loophole of 'enhanced co-operation' for a group of at least nine Member States is supposed to reduce the bargaining power and obstructive potential of individual Member States which might feel inclined to invoke the 'fundamental aspects' exception too often if there was no danger of becoming isolated over time. Even though the 'enhanced co-operation' has not been a success lasting recent years, the behaviour of several Member States in the accession process and during the drafting of the Constitutional Treaty (2004) and the Lisbon Treaty (2007) has amply shown the necessity of some kind of a pressurising medium. Otherwise, a union of now 27 Member States runs the risk of becoming inflexible and vulnerable to the obstructive tactics of individual Member States.

IV. Conclusion

The changes and supplementary additions to the Constitutional Treaty brought about by the Lisbon Treaty are indeed of marginal nature. Therefore, the most striking conclusion of the analysis at

hand is that the far reaching and sweeping changes between the current statutory framework of the TEU and the EC Treaty on the one hand and the 2004 Constitutional Treaty on the other have almost entirely been maintained. In particular, the Lisbon Treaty reaffirms the merging of Title VI of the TEU and Title IV of the EC Treaty, as well as the changes made to the decision-making process by shifting several measures to a qualified majority vote in the Council and by giving the European Parliament joint decision-making powers by introducing co-decision.

This has to be ascribed – as already pointed out in the introductory remarks – to the fact that the field of Justice and Home Affairs does not attract very much attention from the public because of its rather technical nature. In any case, this should not lead to the conclusion that the Lisbon Treaty does not bring along extensive changes compared to the current legal situation – on the contrary. By maintaining most of the provisions provided for in the failed 2004 Constitutional Treaty, the Lisbon Treaty administers a difficult task which is typical for the whole constitutional process of 2007. One could reduce this approach to the dictum: "How to avoid all harmful references to the foundation of a state-like organisation while keeping as much substance as possible of the Constitution".[14]

In conclusion, the rules now at hand in the Lisbon Treaty constitute a further step in the ongoing development in the field of Justice and Home Affairs. While this area only two decades ago was assessed to be the sole and sovereign domain of the Member States,[15] it has become more and more harmonised over the years. At their heart, the provisions of Title IV of the Lisbon Treaty appear to be an adequate basis for the current challenges with which the European Union is confronted in the realm of Justice and Home Affairs. Their shortcomings will soon be put to the test of experience and emerging practical requirements. Nevertheless, the Lisbon Treaty's provisions on Justice and Home Affairs are more than one could hope for after the failure of the 2004 Constitutional Treaty. Therefore, in order to obtain additional competencies which can be filled within the next years, the Member States have to find a solu-

14 In fact, this was almost the motto of the German Presidency in 2007, cf. *Häberle* (2008), 524.

15 Cf. *Hailbronner* (2000), 35 f. ("*domaine réservé*"); *Amato / Ziller* (2007), 220.

tion to overcome the negative result of the Irish referendum of June 2008.

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