CENTRE FOR EUROPEAN REFORM
opinion

Can the EU achieve an area of freedom, security and justice?

By Adam Townsend

In 1997 the EU member-states committed themselves to constructing an 'area of freedom, security and justice' – a task at least as ambitious as the creation of the single market. To guarantee freedom and justice while enhancing security, member-states will have to co-ordinate their justice and home affairs (JHA) policies, and in some areas grant the EU wide-ranging new powers. These include: powers to make national criminal laws more similar; make national police forces and prosecutors work together more effectively; build a common border guard; develop common asylum and visa policies; make the EU courts more efficient; and guarantee the rights of individuals.

However, the EU has found it difficult to develop effective JHA policies in these areas for a number of reasons. Member-states must agree unanimously to take most decisions, which makes policy-making painstakingly slow. Moreover, the EU treaties have a confusing legal structure which spreads JHA policies across all three of the Union's pillars, and applies different procedures to policy-making in each pillar.

In 2001 European heads of government decided to establish a 'Convention on the Future of Europe' to prepare a single draft constitutional treaty to replace the patchwork of treaties that set out the way the EU is run. Convention members had a prime opportunity to equip the EU with the tools needed to build the promised area of freedom, security and justice.

The Convention completed its draft of the constitutional treaty in July 2003. EU member-states are now debating the treaty and preparing a final version in an intergovernmental conference (IGC) that started in October. Governments may try to make large-scale changes to the draft treaty in the IGC. Whether they do or not, the new constitutional treaty will become the EU's most important document, codifying what the Union can and cannot do.

The new draft constitutional treaty strengthens the EU's role in justice and home affairs, but it does not make the major changes that would be necessary to achieve the EU's overall goal for an area of freedom, security and justice. On the positive side, the draft treaty would:

★ allow the Union to apply only one procedure when it makes JHA laws and policies – which should make policy-making faster and more coherent;

★ require the EU's Council of Ministers to use qualified majority voting rather than unanimity when voting on most JHA legislation – which should help to speed up decision-making;

★ expand the role of the European Parliament in JHA law-making, which will enhance democratic scrutiny of JHA decisions;

★ strengthen the legal impact of EU legislation in member-states by giving more laws direct effect;

★ extend the jurisdiction of the European Court of Justice to cover JHA, which would strengthen the rule of law at EU level;

★ incorporate the Charter of Fundamental Rights into the new constitution and codify other rights and principles of EU law, strengthening the formal protection of citizens' rights; and

★ bring the emerging European police office, called 'Europol', within the EU's legal framework.

However, the treaty does not provide the EU with enough powers to achieve an area of freedom, security and justice. Europe needs to do more to address major cross-border issues such as crime and international terrorism; to regulate migration; and to reform its judiciaries to cope with the creation of an area of free movement. Individual member-states cannot tackle these problems on their own. EU leaders readily admit this, but many governments are unwilling to accept that they should pool more sovereignty at the EU level in order to address these problems.

This paper will examine how the constitutional treaty might improve the EU's ability to build the area of freedom, security and justice. In particular, it considers the effect of the incorporation of the Charter of Fundamental Rights into the treaty; the proposed reforms to the EU courts; the changes to the internal security powers of the EU; and proposals for the harmonisation of national criminal laws.

Progress so far

The Union has made only slow progress in constructing the 'area of freedom, security and justice' promised in 1997. At Tampere in 1999, EU heads of government attempted to flesh out this agenda, supplying a number of targets and deadlines for the implementation of policies on immigration, border control, police co-operation and asylum. However, four years on, they have not met these targets. The EU has developed only the vaguest outline of an immigration policy, while making slightly more progress on building a European asylum system. Moreover, some 18 years after the founding members of the Schengen area signed the original agreement to remove border controls, Schengen still lacks an effective policing system.

With the creation of the Schengen zone, organised crime gangs and terrorists can now move freely across the fifteen countries in the same way that they can operate across the United States. Western intelligence agencies say that Abu Dahdah, the Spanish-based al-Qaeda operative who supported some of the September 11th hijackers while they were resident in Hamburg, travelled widely throughout Europe. Al-Qaeda members from across Europe and the US met several times in Spain while planning the attacks. And after the attacks, police rolled up additional al-Qaeda related cells in Italy, Belgium, Spain, Britain and France. This suggests al-Qaeda had already taken advantage of the lack of border controls within the Schengen area. But EU member-states have not responded to this new threat. They still organise their police forces, prosecution services and judiciaries largely at national level.

As a result, police forces cannot cross borders as easily as the criminals and terrorists they pursue. And even when police forces arrest suspects involved in cross-border crime, prosecutors find it hard to convict them, because identifying and collecting evidence and witnesses from different member-states is legally complicated, time-consuming and expensive. The German prosecutors of four terrorists who planned to bomb the Christmas market in Strasbourg in 2000 had to drop some criminal charges – including those of belonging to a terrorist organisation – partly because they could not easily bring evidence and witnesses from France.

Moreover, member-states define and punish the same crime in different ways. So individuals who belong to the same criminal organisation, but who are arrested in different member-states, will be prosecuted by different authorities in separate cases and may receive different punishments for the same crimes. One Italian prosecutor described this as "jurisdiction falling behind criminality". This can undermine the public's trust in the judicial system. The creation of a single area of justice should imply, as a minimum, similar punishment for the same criminal act throughout the EU.

The removal of internal border controls also means that the 15 Schengen states together rely upon the remaining external border controls to keep out the people and illegal goods that they do not want. If Schengen members share the

same external border, then they should also co-ordinate their border controls. At present, each member-state takes responsibility for controlling its section of the Schengen area's external border. More significantly, they do so using different methods, different equipment and to varying standards.

So why, if there is such a pressing need, has the EU failed to deliver? The answer lies in a web of political, institutional and practical problems. First, police, criminal law, human rights and the administration of justice are politically very sensitive issues over which national politicians are reluctant to relinquish any control. Second, the national institutions and lobby groups involved are powerful, and they are not natural Europhiles. Ministries of the interior and justice, for example, tend to be inward-looking institutions, while lawyers and judges are often amongst the more conservative members of society when it comes to changing the law. Third, the member-states have very different criminal laws and procedures, and they conduct law enforcement in very different ways. This makes it difficult for police officers and prosecutors in different countries to exchange information and to manage joint investigations and prosecutions. And because there is such variety in national legal systems, it is difficult for the EU to convince courts not to question the decisions taken by their counterparts in other member-states.

Some commentators predicted that '911' would dissolve nationalist instincts in Europe, and push the member-states to reform radically the way the EU makes and implements justice and home affairs policies. The Convention began its work at a time when member-states were regularly uncovering suspected terrorist cells. Hence it was no surprise that in December 2002 the Convention's justice and home affairs working group handed an ambitious final report to the praesidium.

The draft under discussion at the IGC maintains many of the key positive reforms recommended by the working group. But it also gives the member-states room to block, avoid or water down future proposals, reflecting the concerns of the more cautious governments.

Increased freedom – and uncertainty

The new constitutional treaty proposes reforms that would increase the emphasis on citizens' rights, and improve oversight of the EU institutions and agencies. Unfortunately, some member-states insisted on amendments that have made the impact of the treaty unclear. The lack of clarity could increase litigation, and reduce the popularity of the treaty. The uncertainty also makes it difficult to judge the extent to which the EU's draft constitution would protect rights in practice because it is difficult to interpret. Much will depend on how the European Court of Justice interprets the rights provisions in the treaty.

The European Union's draft treaty is full of provisions giving formal protection to human rights – it even repeats some rights twice. The second article of the draft confirms that one of the Union's core values is respect for human rights. Meanwhile, draft article 7 sets out the three main planks of the EU's commitment to fundamental rights:

★ the Charter of Fundamental Rights is incorporated into the treaty;

★ the Union can seek to accede as a whole to the European Convention on Human Rights; and

★ fundamental rights should become "general principles of the Union's law".

The draft treaty also prohibits discrimination and outlines the special rights that EU citizens receive from the Union. These include the rights of citizens to move and reside freely throughout the Union, and to vote and stand in elections for the European Parliament in the member-state in which they reside, not just in their country of origin.

The draft treaty would also strengthen parliamentary oversight of the Union's institutions and agencies. The treaty would give national parliaments a role in scrutinising Europol and Eurojust, the EU's fledgling police and prosecutor's offices. The European Ombudsman would have an explicit remit to follow up complaints about EU institutions, bodies and agencies. These treaty clauses enshrine existing practice. Some Convention members proposed the wording 'EU

institutions' for the ombudsman's ambit. However, this definition could exclude some EU agencies and bodies which conduct activities that might infringe human rights, such as Europol and Eurojust. The proposed treaty would also extend the jurisdiction of the ECJ to allow it to hear cases concerning laws made on justice and home affairs.

National governments have debated for some time whether to make the Charter of Fundamental Rights legally binding. Despite serious reservations from the UK government – whose former Europe minister Keith Vaz famously said that the Charter would have as much legal force as 'The Beano' (a popular British comic) – the draft constitutional treaty would in fact make the Charter legally binding. However, the Convention agreed a number of compromises to the text designed to limit its effect. It is thus very difficult to gauge what influence the Charter would have over the lives of the citizens and residents of the EU.

Some governments, such as the UK, Denmark and Ireland, are worried that the Charter might be used to increase the powers of EU institutions. The UK government is also worried about the lack of domestic public support for the Charter. Sections of the British press have portrayed the Charter as a danger to the rights of British citizens, rather than a protector of them. One headline in 'The Sun' newspaper of May 27th 2003 claimed that incorporating the Charter would cost Britain 2 million jobs. This is a nonsensical claim. But British suspicions about the Charter are based on more than irresponsible media reports. They also reflect the fact that the UK does not have a modern bill of rights – nor a written constitution – so its contents are difficult for British citizens to comprehend. Moreover, explicit written limitations on the power of government sit uneasily with the British system of parliamentary sovereignty.

Most Convention members strongly favoured making the Charter legally binding. So those governments that were opposed to its incorporation in the constitution have switched tactics, seeking to ring-fence the operation of the Charter as far as possible. The most potent amendment is a draft article which establishes a distinction between rights and principles. Principles, the draft article asserts, "may be implemented by legislative acts", which suggests that they are optional. Crucially, the Charter does not say which articles are principles and which are rights. If the IGC does not clarify this distinction, then the uncertainty could lead to long years of litigation.

Lawyers and politicians will continue to debate whether some of the other amendments could have much practical effect. These include a draft article asserting that the Charter would only apply to EU legislation and not to purely national laws, and a provision stating that the Charter should not become a back-door method of giving EU institutions new powers over member-states. In addition, phrases in the Charter like "in accordance with Union law and national laws and practices" are intended to prevent contentious articles from altering national law. This phrase appears in articles enshrining the right to conclude collective wage agreements, the right to strike and the right to receive social security benefits. However, the Charter would only apply to EU law, and the EU cannot make laws about issues such as when national workers can and cannot strike. This means that the amendments are technically not needed to restrict the application of the Charter, although they are politically helpful in calming fears in countries such as the UK.

Some of the Charter's detractors base their arguments on a misreading of the document, and a lack of understanding of how national and EU courts are likely to apply the rights in practice. Few rights are absolute in any country: most are restricted by other considerations that can form specific or general exceptions to their operation. For example, libel laws restrict the right to free speech in most democracies – while firemen in Germany do not have the right to strike because of the danger to public safety. The US and UK courts – and the European Court of Human Rights – have even, in the context of fighting terrorism, allowed governments to breach the prohibition on detention without trial. So commentators should not read the Charter in the abstract. To interpret the Charter, it is necessary to consider not only the limitations imposed by other parts of the draft treaty, but also the restrictions and exceptions the courts are likely to apply in interpreting it.

It is bewildering that some national governments are so opposed to embedding human rights and freedoms in the fabric of the European Union. All European governments now proclaim themselves to be the protectors of freedom and justice. So why oppose giving the EU a strong and clear foundation of rights? Apart from the legal and political importance of incorporating the Charter, a single list of rights would also make the Union more understandable and popular with its citizens. The US bill of rights makes American citizens aware and proud of their rights, and every French school child learns about the 1789 Declaration of the Rights of Man.

The uncertainty surrounding the Charter and other rights provisions in the draft treaty is bad for citizens and for the popularity of the EU, but it also makes the legal impact of the Charter uncertain. A strong legal foundation for human rights would make it easier for courts throughout Europe to build a single framework of human rights law as part of EU and national law, with fewer contradictions and clearer principles than the variety of sources that exist now. Moreover, those member-states which opposed the incorporation of the Charter into the treaty have hurt their own cause by increasing the uncertainty surrounding its operation. They have handed some of the initiative for defining the balance of power between member-states and the EU institutions over to the vagaries of litigation in the European Court of Justice.

It is unclear whether the ECJ will interpret the Charter in such a way as indirectly to increase the powers of the EU institutions at the expense of national governments. The ECJ has traditionally been a force for integration in the EU. But although the rights in the EU treaties have guided the Court's decisions throughout its history, the ECJ has been far less activist than the US Supreme Court, and has rarely struck down legislation on the grounds that it breaches rights.

However, the constitutional history of federal states like Germany, the US and Australia suggests that when federal courts interpret rights granted by a federal constitution, they tend to transfer power upwards. If this proves true for the Court of Justice, the Charter of Fundamental Rights could become one of the defining elements of the European Union. Over time, the ECJ might change the balance of power between the Union and its member-states. In any case, the Charter is likely to exert a steady positive influence over the legislation and behaviour of the European Union and its institutions and agencies in ensuring that citizens' rights are respected.

Justice delayed is justice denied

The Convention's draft treaty continues the cautious reforms that member-states made to the workings of the European Court of Justice at Nice in 2000. The treaty would reinforce the rights of persons who are on trial, and increase the jurisdiction of the ECJ to cover most of JHA. It would also slightly improve the ability of the EU to align national criminal law systems. However, the proposed reforms would greatly increase the caseload of the already overburdened EU courts without changing their working practices. Moreover, the new powers to make criminal law reforms are likely to lead to another decade of haggling over different definitions of crimes and criminal procedures.

In many ways, the European Court of Justice has been the most successful of the EU's institutions. The ECJ's biggest problem is its slowness: it can take two years for it to make a preliminary ruling on a question referred by a national court. There are four additional factors that will increase the Court's caseload over the next decade and suggest that national governments should make the court more efficient now.

First, the Charter of Fundamental Rights could generate a lot of litigation as plaintiffs test out its limits and meaning. Member-states have increased the chances of litigation by making the operation and interpretation of the Charter unclear.

Second, the regular caseload of the EU courts will inevitably increase with enlargement. The courts of the new members are also less familiar with EU law, and may request more preliminary rulings from the EU courts.

Third, the adoption of the new constitutional treaty could make the overall Union legal framework more uncertain for a time, which could lead to an increase in disputes.

Constitutional engineering on this scale inevitably leads to a period of uncertainty when the new framework comes into operation. But the member-states could have made the treaty clearer. The treaty's subsidiarity principle and the provisions on competences (what the EU can do, what member-states can do, and what is shared) are likely to generate a lot of litigation.

Fourth, the draft constitutional treaty expands the court's jurisdiction to cover almost all aspects of justice and home affairs, which is a very contentious and sensitive area.

In line with the Nice treaty, the draft constitution establishes three levels of federal courts. The European Court of Justice remains the supreme court of the Union, and its function is largely unchanged – it interprets the treaties and provide rulings on important questions of EU law. The draft treaty would rename the Court of First Instance the 'High Court'. The draft treaty would allow the Union to establish 'specialised courts' below the High Court to hear cases in certain specific areas of law – intellectual property for example. The Union should establish these specialised courts immediately – the Nice Treaty of 2000 already permits this – to test whether they improve the administration of justice.

The draft treaty would also restrict the ability of persons to appeal from the High Court to the ECJ, which should help reduce the ECJ's caseload. These changes add up to a half-hearted attempt to reduce the overload, but they do not go far enough. Citizens must ultimately go to the courts to enforce their rights. If they cannot get timely protection from the court system because it is overstretched, fancy constitutional provisions designed to protect human rights are pointless.

At present, it is very difficult for individuals to challenge EU legislation in front of the ECJ. The rule for 'standing' – the legal term for the right to bring a case before a court – is that the person must have both a "direct and individual concern". The courts have interpreted this rule very narrowly. The draft treaty would maintain the current 'direct and individual concern' test for standard legislation, but would make it easier for individuals to challenge so-called delegated acts. 'Delegated acts' are ones made by the Commission under an authority granted by an existing EU law. The rationale for making it easier for individuals to challenge delegated acts for breaches of the constitutional treaty is that they are enacted without going through the full democratic review process. By this logic, they should be subject to enhanced judicial review. Citizens affected by Union legislation would thus find it easier to seek justice.

The draft treaty confirms the supremacy of EU law over national law. Some national politicians were up in arms when this draft clause emerged, announcing that it represented the final takeover of the nation-state by Brussels. But this draft article correctly reflects the situation as it has been at least since 1964.

As the single market deepens and people move freely across borders, the volume of court cases with a cross-border element is increasing. To deal with such cases, the European Union needs to knit national civil law systems together more closely. The Union's ultimate aim is to ensure that courts throughout Europe efficiently enforce laws relating to cross-border issues. This is one part of the 'area of justice', and implies far-reaching reforms.

The Union should make the decisions by judicial authorities in one member-state valid and binding throughout the Union. For example, if a court in Spain decides a child should live with its mother in a custody case, courts in other countries should not be able to come to different conclusions subsequently. This should apply not only to final judgements, but also to the procedural decisions that courts make before reaching a final decision. For example, if during a dispute about an alleged non-payment, a German court orders the freezing of a defendant's assets contained in a bank account in Portugal, then the Portuguese authorities should freeze them immediately, rather than allowing the defendant to appeal to a Portuguese court. The owner of the bank account can, of course, still dispute the decision in the usual way in Germany.

The EU also needs to reform criminal law to deal with cross-border crime, especially now that there are no border controls between Schengen members. The treaty provides a

definitive list of such crimes – which include money laundering, terrorism, drug and arms trafficking, corruption and computer crime. The draft treaty also extends qualified majority voting into some aspects of policy-making in the field of criminal law. But it still requires unanimity in several important areas. For example, the Council must agree unanimously to extend the EU's common list of cross-border crimes, and to set up a European Public Prosecutor's office.

Crucially, the draft treaty would restrict the Union to using laws which leave member-states with lots of room to apply them as they see fit. This aspect of the draft constitutional treaty reflects the belief of national governments that the best way to improve the Union's ability to prosecute cross-border crime is to make national criminal justice systems 'interoperable'. This means that member-states must ensure that their courts recognise each others' decisions – the principle of 'mutual recognition'. And, to some extent, member-states must smooth out differences between the way their laws define and punish crimes, and the way they run their prosecutions and trials – a process called 'approximation'.

Member-states are divided as to how far approximation has to go. Germany, Belgium and France support harmonisation of criminal laws and procedures. They argue that member-states should reform their national criminal codes to adopt the same definitions for serious cross-border crimes, and the same criminal procedures for courts trying them. The UK, Ireland and others prefer the looser approximation method: agree at the EU level on upper and lower limits for the definition of crimes and their penalties, and ensure that national courts recognise each other's decisions. The draft constitutional treaty's approach to criminal law reform thus mostly reflects the UK government's preference rather than Germany's.

However, some lawyers question whether either approximation or mutual recognition works in practice. First, the member-states have very different criminal laws and often use contradictory procedures. For example, in Italy courts may try a person in their absence. In other member-states, this is illegal. So how can a German court be expected to recognise the verdict of an Italian court in such a case?

Second, in practice, minimum procedural rules may not be good enough for the courts, because rules vary considerably around the Union – especially between England, Wales and Ireland on the one hand and continental Europe on the other. This makes it possible that an English prosecutor's case could fail because the court will refuse to accept evidence that has been gathered in France under French procedures. Another example would be if the Catalan police detained a suspect for 72 hours without access to a lawyer, which is permitted in Spain but would be regarded as a denial of rights in the UK and might result in the British court setting the suspect free. Defence lawyers will continue to use such inconsistencies to thwart prosecutions until member-states iron them out – which suggests the EU will have to harmonise by attrition. If there is a good chance the member-states will have to harmonise some of their criminal laws anyway, why not give the EU the power to begin the process now and avoid decades of defendants going free on procedural grounds?

Ensuring internal security

Critics argue that the EU has no role fighting terrorism or organised crime. Sensitive security matters should mostly be left to the nation-state, they say. But there is a simple reason why the EU should play a role. Organised crime and international terrorist groups are transnational issues *par excellence*: no individual member-state can address organised crime and international terrorist groups as effectively as when the EU countries work together.

The draft constitutional treaty would make it easier for the Union to adopt internal security policies rapidly. The treaty streamlines the messy law-making procedure, and would allow the EU to use qualified majority voting on most JHA issues.

The treaty proposes other positive reforms. It would put Europol on a much firmer legal basis within the EU treaty structure, so that member-states can reform and develop it more easily. The treaty also encourages more co-ordination between Europol and Eurojust.

These are useful changes, but member-states should go further. In particular, they should co-operate more fully when gathering and assessing intelligence. Member-states are divided about how to respond to the activities of terrorist groups like Hamas and Hizbullah in part because they receive different information about their activities, and assess it in different ways.

Member-states should co-ordinate intelligence-gathering, and deploy their human and technological intelligence resources in order to reduce overlap. None of the big member-states is ready to scale down its intelligence operations, and rely totally on another country. However, one member-state may have a clear lead in information-gathering in a particular region, in which case other countries could reduce their presence further. France has good networks in North Africa, for example, so other countries need not try to replicate those networks.

Apart from co-ordinating their intelligence-gathering efforts, member-states' police and intelligence services should also share more assessments – on terrorist or organised crime groups for example, and on the risk presented by troubled states like Moldova. And they should also do more joint assessments. The national police and intelligence officers seconded to Europol do a limited amount of common assessment on terrorist and organised crime groups. Joint assessments are difficult where the threat is politicised. It is impossible to imagine that Britain, France and Germany could have shared assessments about Iraq in the lead-up to the invasion. But there should be fewer blocks to doing joint assessments of al-Qaeda related threats, or the activities of a major arms trafficker like the infamous ex-KGB trafficker Victor Bout, named by a UN report as a major supplier to conflicts in Sierra Leone and Liberia.

Many different national bodies, ranging from customs to the armed forces, work on terrorism and organised crime issues. EU agencies and institutions, such as Europol, Solana's Situation Centre (SITCEN), the defence chiefs, and the justice and home affairs ministers also undertake their own analyses. At present, there is insufficient co-ordination among the national agencies, nor between the national and EU-level bodies. To rectify this, the draft treaty proposes a sort of internal security committee within the Council, to "facilitate co-ordination of the actions of Member-States' competent authorities".

The Union should avoid creating another toothless standing committee staffed by low-ranking ministerial officials. Rather, member-states should create a European Security Council (ESC). This body would have two tasks: first, to draw upon military, diplomatic, police and intelligence sources to identify and analyse threats, and to propose responses to the European Council. Second, the European Security Council should drive reforms aimed at improving co-ordination between EU and national defence, law enforcement and security agencies.

Attendance at ESC meetings would depend on the agenda. The highest-ranking officials from the main security-related bodies – external as well as internal – would be eligible to participate in ESC planning. This includes Europol, the JHA council of ministers, the new EU foreign minister, the defence chiefs, the chiefs of police task force, and representatives nominated by the national security services and intelligence agencies. The chairmanship would rotate among these bodies and would depend on the principal items on the agenda.

The ESC would need a small permanent staff comprising people with a variety of security policy backgrounds. Some could come from foreign ministries, some from intelligence, others from law enforcement and the military. But all would remain in close contact with their national agencies. This arrangement would help to ensure a broad mix of sources for information and advice.

The EU should task the Security Council with identifying and prioritising threats, and planning responses. Over time, the ESC would take over many of the security tasks currently performed by the High Representative for Foreign Policy, Javier Solana. For example, the ESC should be responsible for drafting an annual EU security strategy. The European Security Council should also drive reforms to make Europe better able to identify and respond to the main threats facing it.

The structure of the ESC should reflect the nature of the main threats to the EU. Solana's draft security strategy identifies three primary threats: international terrorism, the proliferation of weapons of mass destruction, and failed states and organised crime. All of them affect aspects of the EU's internal and external security. To address them, the EU has to co-ordinate the work of national police forces and security services, which are typically justice and home affairs agencies, with the work of its diplomats, spies and armed forces.

The member-states must also strengthen existing agencies like Europol by continuing to push their national police services to feed information to Europol and Eurojust, and to work with them on joint investigations. And in some areas, like border control and intelligence assessment, Europe needs to create new agencies to speed up the integration of national agencies and improve EU-level capabilities. Again, the draft treaty would not allow the EU to proceed swiftly enough in these areas. For example, the enabling article for the widely demanded EU border guard agency is poorly defined. The article simply calls for the "gradual establishment of an integrated management of external border control".

The Union should also continue to remove laws and other impediments that prevent law enforcement services from exchanging information about suspects, cases and threats, and from doing more joint investigations. Aside from lowering legal barriers, the Union must provide the practical infrastructure for co-operation, such as links between computer systems, translation facilities, and common protocols for information exchange. The draft constitutional treaty makes it easier to make JHA laws, so it improves the potential for making these reforms more rapidly. But national politicians have to put pressure on their police and customs officers to co-operate more internationally.

Ultimately, law enforcement officers will only work together if they trust one another, and if they recognise that co-operation would help them get their job done better. So if French and German police officers do not trust one another, or do not believe that cross-border co-operation can help get results, then they will not do joint investigations – even if a law exists that permits it.

For this reason, the Union can only build the area of freedom, security and justice from the bottom up. It cannot rely on the methods used to construct the single market, which was largely built by promulgating laws from above. To knit together an area of security, the EU needs to intensify the exchange of law enforcement and security officers between national agencies, and to create more centres where law enforcement and security officers from different countries and forces can work together on joint projects. France, Germany and Belgium already run a number of successful joint offices in their border areas.

At the moment, member-states are mostly responsible for the exchange of law enforcement officers and the planning of joint operations and exercises – although the EU does provide funding through various mechanisms. The Union could consolidate some of these efforts in an EU exchange programme, similar to the ERASMUS scheme for university students.

Conclusion

The European Union's leaders have always been fond of promising grand things – but delivering them late. The penalty for delay in creating the single market is measured in lost opportunities to spur economic growth. The penalty for delay in building the area of freedom, security and justice could be an increase in crime, a lessening of confidence in the courts and an increase in insecurity on the part of European citizens. The member-states must recognise that the area of freedom, security and justice is not optional, and use the IGC to give the Union the ability to build it.

Adam Townsend
October 2003