

Introduction

The time is ripe for a re-think of the area of justice and home affairs, and this includes the way in which these policies are re-structured at the institutional level within the European Commission. In most of the EU's member states, the ministries of justice and the interior are separate. This is not just a question of tradition; it is rather the notion of checks and balances that speaks in favour of this separation. The separation of justice and home affairs should therefore progress from being a European standard to becoming a standard for Europe. What has been achieved in nearly all member states should also apply to the European Commission. As there will be a new incumbent in 2009 anyway, now is the time for an independent Commissioner for Justice.

A. Justice and the interior in the European Commission

I. Growing importance

The areas of justice and the interior (home affairs) are becoming ever more important in the European Commission. Once legislation on 'aliens' became a Community matter, the position of Commissioner for Justice and Security was created in 1999 and the importance of the work of this commissioner has grown steadily since then. The policy programmes adopted by the Tampere Council (1999) and the Council at The Hague (2004) led to increased legislative activity in both areas. What was once the smallest Directorate General now has a staff of around 400.

The importance of the areas of justice and the interior will continue to grow now that the Treaty of Lisbon has upgraded the role of both areas:

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Checks and Balances:

Dividing the Directorate General for Justice, Freedom and Security in two – an Interior and a Justice branch

Hasso Lieber

- Home affairs will be strengthened as police cooperation now forms part of the first pillar.
- Justice will be strengthened as cooperation on criminal matters is to be transferred to the first pillar. Powers in the area of civil law have also been widened. They may seem relatively insignificant at first glance, but their effects in actual practice will very much depend on what use is made of them.

II. Justice and the interior: together at all levels

Although justice and the interior are increasing in importance, the two areas have so far seemed to be inseparably linked to each other in the Commission. They share a Commissioner and a Directorate General. Internal security and criminal justice are also combined in a single Directorate within the Directorate General. This means that criminal justice matters do not have their own advocate at the director level when it comes to issues that also involve internal security.

The lack of organisational separation is continued at the level of persons responsible for implementing policy: the present Commissioner for Justice, Freedom and Security, Franco Frattini, takes the view that there is no contradiction between security and freedom rights. But will this really always succeed, or is there a structural problem here?

B. The separation of justice and home affairs: a European standard

In the interests of a system of checks and balances the areas of justice and the interior should be separated in the Commission. In the context of checks and balances, in the first instance we are talking about a separation of powers. Describing the underlying principle of the separation of powers a good 250 years ago, Montesquieu said:

Que le pouvoir arrête le pouvoir (May power check power!)¹

Could this concept of the limitation of power by power also be applied to a separation of the areas of justice and home affairs?

Let us take Germany as a case in point. It is typical for the ministries of justice and the interior to be separate in Germany. In 1998 the Minister President of the most populous federal state in Germany, North Rhine-Westphalia, attempted to merge the ministries of justice and home affairs. His attempt failed in the face of public protest and the veto of the federal state's constitutional court. I quote from its ruling:

The establishment of an independent Ministry of Justice has its roots in the end of absolutism, when dispensation of justice gained recognition as an independent function of state [...], and a state founded on the rule of law developed, for which a principal matter of concern was the protection of the rights of its citizens. Following on closely in the time that followed, ministries of justice were established as an expression of the independence of the judiciary [...]. Hence the separation of the Ministry of Justice from the Ministry of the Interior is based on an established tradition in terms of constitutional policies and constitutional law.²

This is not in fact a principle peculiar to Germany, but a standard in Europe. With only a few exceptions, the ministries of justice and home affairs are separate in the member states. It is true that the dividing line between the powers of the two ministries is not the same in all member states. But – and this is what matters – nearly all European governments have an independent advocate for the area of justice in addition to an advocate for the interior (see annex).

It is not only tradition, but also the very idea of checks and balances that speaks in favour of this separation. Procedural theories of justice rightly draw attention to the process of arriving at a ruling. Whether the *outcome*

of this process is right or wrong – is – depending on the point of view – judged differently. This means that at least the *process of arriving at a ruling* should provide the greatest possible guarantee of accuracy.

Assuming this, let me return to the areas of the interior and justice. These are often the ‘trouble spots’ of the state based on the rule of law. There is frequently a dichotomy between security and freedom. From the procedural point of view, it is a good thing for security and freedom to each have a separate advocate at government level. If debate between the different advocates is heard in the wider world, this increases the likelihood of balanced results and, at the very least, the transparency of the process of arriving at a ruling.

C. The separation of justice and the interior: a standard for Europe?

There are good reasons why the separation of the ministries of justice and the interior is a European standard, and why it should progress from being a European standard to becoming a standard for Europe. What has been achieved in nearly all member states should also apply to the European Commission.

This becomes particularly clear in the case of proposed legislation that will restrict basic freedoms for reasons of internal security. The terrorist attacks since 2001 inside and outside Europe have led to proposed legislation being designed to prevent crime of a terrorist nature. In some cases such legislation makes serious inroads into fundamental rights. For example, in a resolution dated 12 December 2007 on the combating of terrorism, the European Parliament expressed its concerns:

... the knee-jerk reaction to anti-terror legislation, in which the desire to send a political message often takes priority over serious and conscientious consideration of the boundaries of the possible and the useful.³

This is not only a danger in the case of the member states but also at the European level. Specifically – to quote the European Parliament again:

a key element in the response to terrorist attacks should be to put in place the necessary, effective and proportionate instruments to support the overall fight against terrorism. [It is] equally important to protect all aspects of the rule of law, citizens' civil rights, [and] judicial and legal safeguards for suspects.⁴

¹ Montesquieu (1748), *De l'esprit des Loix*, Barrillot & Fils, Geneva.

² See Constitutional Court of North Rhine-Westphalia, judgement dated 9 February 1999, *Neue Juristische Wochenschrift* 1999, 1243 (1246).

³ See European Parliament resolution of 12 December 2007 on the fight against terrorism, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0612+0+DOC+XML+V0//EN>

⁴ *Ibid.*

The likelihood that the Commission will be able to meet the challenge of this demanding task is, in terms of structure, greater if justice and home affairs are separate: this will make it possible to balance the conflicting principles in discourse between the individual actors. The process of weighing up will be safeguarded organisationally and have external transparency.

The moderating effect of a Commissioner for Justice would therefore go beyond the Commission. A Commissioner for Justice would be able to stand up for and champion common European values in the area of fundamental legal rights in relations with other actors as well.

The following three examples illustrate that a separate Commissioner for Justice would have important fields of activity:

- First: under the German presidency of the Council, the framework resolution on minimum rights in criminal law proceedings failed. This is an issue that will have to be pursued further at the European level.
- Second: the European Court of Justice handed down two judgements of annulment regarding the EU list containing financial sanctions against suspected terrorists. The reason: a violation of fundamental legal rights. The consequence: the Council had to change listing procedures.
- Third: at present a proposal for a framework resolution on airline passenger data records is under discussion. The subject of the proposal is storing the data of all airline passengers crossing an EU border. Storing data for 13 years irrespective of any grounds for suspicion is under consideration. What is so far not intended – at least not to any extent that is acceptable – is informing the persons concerned, or granting rights to information, notification and deletion.

So the relationship between the areas of justice and home affairs is one that is marked by a dichotomy. The advantages of an independent Commissioner for Justice will also be seen in relation to other areas of politics. Here, too, a Commissioner for Justice could concentrate on looking after justice matters. At present other commissioners are in some cases in charge of drafting proposals for legislation with a focus on judicial matters. An example of this is the Common Frame of Reference for Civil Law, developed by the Commissioner for Consumer Protection. A further example is criminal law provisions: they are increasingly dealt with by the commissioner who is responsible for the individual area in which they apply.

The incorporation of the Charter of Fundamental Rights into EU primary constitutional law, which it is anticipated will lead to the EU becoming a signatory to the European Convention on Human Rights, would be a further key area of activity of a Commissioner for Justice.

D. The separation of justice and home affairs: why at this particular time?

It can be argued that the time for an independent Commissioner for Justice is ripe; there will be a new incumbent in 2009 anyway, which would make it an opportune moment. As provided for in the Treaty of Lisbon, this will be the start of the last term in which the Commission has 27 commissioners, as the number of departments is to be reduced from 2014 on.

So why should there be a separate Commissioner for Justice if the number of departments is to be further reduced in 2014 anyway? Precisely because the area of justice would be better placed in the debate on downsizing the Commission if it had its own commissioner.

ANNEX. DIVISION OF THE MINISTRIES OF INTERIOR AND JUSTICE IN THE EU AT 27⁵

EU MEMBER STATE	INTERIOR MINISTER (HOME AFFAIRS)	JUSTICE MINISTER
Austria	Federal Ministry of the Interior	Federal Ministry of Justice
Belgium	Ministry of the Interior	Ministry of Justice and Institutional Reforms
Bulgaria	Ministry of the Interior	Ministry of Justice
Cyprus	Ministry of the Interior	Ministry of Justice and Public Order
Czech Republic	Ministry of the Interior	Ministry of Justice
Denmark	Ministry of Justice and Ministry of Refugees, Immigration & Integration Affairs ⁶	
Estonia	Ministry of the Internal Affairs	Ministry of Justice
Finland	Ministry of the Interior	Ministry of Justice
France	Ministry of the Interior	Ministry of Justice
Germany	Federal Ministry of the Interior	Federal Ministry of Justice
Greece	Ministry of the Interior	Ministry of Justice
Hungary	Ministry of Justice and Law Enforcement	
Ireland	Ministry of Justice, Equality and Law Reform	
Italy	Ministry of the Interior	Ministry of Justice
Latvia	Ministry of the Interior	Ministry of Justice
Lithuania	Ministry of the Interior	Ministry of Justice
Luxemburg	Ministry of the Interior and Territorial Planning	Ministry of Justice
Malta	Ministry for Justice and Home Affairs	
Netherlands	Ministry of the Interior and Kingdom relations	Ministry of Justice
Poland	Ministry of the Interior and Administration	Ministry of Justice
Portugal	Ministry for Internal Administration	Ministry of Justice
Romania	Ministry of the Interior and Administrative Reform	Ministry of Justice
Slovakia	Ministry of Interior	Ministry of Justice
Slovenia	Ministry of Interior	Ministry of Justice
Spain	Ministry of the Interior	Ministry of Justice
Sweden	Ministry of Justice ⁷	
UK	Home Office	Ministry of Justice

⁵ This table was compiled by Miriam Mir and Anaïs Faure Atger, both Research Assistants at the Justice and Home Affairs unit of CEPS.

⁶ In the case of Denmark, the Ministry of Justice and the Ministry of Refugees, Immigration & Integration Affairs are together dealing with Justice and Home Affairs matters. Particularly, the Ministry of Justice includes in its structure, the Department of Private Law, Department of Prisons and Probation and Department of Police Authority and Prosecution Service. On the other hand, the Ministry of Refugees, Immigration & Integration Affairs is divided into the Departments of Aliens, Integration and Administration.

⁷ The Ministry of Justice in Sweden is responsible for legislation concerning the constitution and general administrative law, civil law, procedural law and criminal law as well as for the matters relating to migration and asylum policy. In this Ministry, Beatrice Ask is the Minister for Justice and the head of the Ministry and Tobias Billström is the Minister for Migration and Asylum Policy.