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## **THE CASE FOR A DG JUSTICE AT THE EUROPEAN COMMISSION**

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**Conseil des barreaux européens – Council of Bars and Law Societies of Europe**

*association internationale sans but lucratif*

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### Introduction

This briefing paper considers the way in which issues of justice are handled at European level by the European Commission. It argues that the present structure of the European Commission is not conducive to such issues being handled appropriately and in the way that they are dealt with by most Member State governments. It concludes that the best solution is for the establishment of a separate DG Justice.

Justice is one of the founding values of the European Union, and is an area of increasing activity of EU institutions. Without justice, there is no rule of law and no democracy, and so it is justifiably considered as one of the vital components of all properly constituted societies. Indeed, justice is often considered to be a separate branch of government, along with the legislative and executive branches.

With the anticipated introduction of the Lisbon Treaty, work on justice will gain further importance in the EU for a number of reasons – for instance, because the Treaty offers greater impetus for judicial cooperation in criminal and civil matters, and sets an objective of adopting measures to facilitate access to justice. In addition, the need for unanimity in the justice area will be abolished, allowing more to be achieved

These values, and this probable future, need stressing because it is only by understanding the importance of justice in itself, and its role in guaranteeing the rule of law and democracy, that it is possible to see how the current arrangements in the European Commission may lead to a justice deficit, and to a failure properly to serve the needs of European citizens.

At present, justice is dealt with by DG Justice, Freedom and Security (JLS). It has the word 'justice' in its name, indeed as the first word. But JLS does not deal with justice alone. And there are other DGs which often have responsibility for justice issues. These facts give rise to the two reasons why the structure of the European Commission demands a separate DG Justice:

- (1) Separation of powers and avoidance of conflicts of interest;
- (2) The need to co-ordinate legislation, in particular that which affects the justice sector.

### Separation of powers and avoidance of conflicts of interest

Separation of powers is a well-known principle of democratic governments. Of course, the European Commission is not like an ordinary government. Nevertheless, within its work it deals with issues which, under normal governmental structures, would be separated – for instance, between the executive and the judiciary. It also has mixed responsibilities within a single DG which lead automatically to a conflict of interest.

Besides justice, JLS has important responsibilities, such as:

- borders and visas
- immigration and asylum
- anti-drugs policy
- internal security
- the fight against terrorism
- the fight against several kinds of crime

Within these areas, there are obvious conflicts. Justice is one thing; freedom, and particularly security, are others, and they may not always be compatible. For example, the needs of the fight against terrorism, or the combat against illegal immigration, do not always balance with the needs of justice.

Certainly criminal justice should be dealt with separately from security. But there is another example. The CCBE is still fighting against the sweeping anti-money laundering legislation which was introduced in the understandable panic after the 9/11 attacks, because we believe that the measures breached justice and fundamental rights. This is a DG Internal Market matter, not JLS, but it has highlighted clearly for us that security and justice are two different, and sometimes opposing, values. We fully understand that governments have to balance them and come to difficult decisions in the interests of citizens, even if we do not always agree with their outcomes. But any system of checks and balances should ensure that the two conflicting values are not put in the same directorate, or one will suffer. We believe that there is a strong potential for attention to the interests of justice to suffer within the broad and conflicting responsibilities of JLS.

Some believe that, if justice and rule of law issues are not put together with security, those responsible for security will disregard justice concerns altogether. Therefore, they believe, justice and security should be put within the same DG. This boils down to a question of whether justice is better served within one department where the decision-makers need always consider it, or whether it is better served by having an independent advocate with an equal voice in government. Of course, it is impossible to legislate for all circumstances, but in general the CCBE believes that justice is better served by having a separate department advocate for it. There is support for this from those with experience in Germany at the time when justice and internal affairs were combined in North Rhine-Westphalia in 1998, and then separated again after a ruling from the German Constitutional Court on 9 February 1999.

In nearly all Member States, the system of separation of powers and avoidance of conflict of interest is followed, and there are as a result two departments of government, one dealing with home affairs, including security, immigration and the police, and the other dealing with justice. We know of at least one country, Spain, where the two used to be in the same department, but were separated for just the reasons that we outline in this paper. There are many governments in the EU, and the border between home affairs and justice is doubtless delineated somewhat differently in each, but essentially they are seen as two different responsibilities. Unhappily, this is not the case at European level, where they are brought together with serious ramifications regarding possible conflict.

It is important to define the terms of a justice directorate in advance, and to know what justice means for this purpose. We see the aims of a DG Justice being similar to the aims of many Ministries of Justice, namely to:

- strengthen democracy, rights and responsibilities;
- deliver fair and simple access to justice, and to protect the public;
- ensure an effective, transparent and responsive legal system; and
- guarantee a safe society.

### **The need to co-ordinate legislation, in particular that which affects the justice sector**

There are two factors here, a general and a particular co-ordination. The general co-ordination can be easily stated. There should be a directorate with responsibility for ensuring that there is consistency and coherence in European-level legislation. We are fully aware of the roles of bodies such as the Commission's Legal Service and the Fundamental Rights Agency, but there nevertheless appears to us to be a gap in ensuring such consistency and coherence, and we would want it placed with DG Justice.

On the particular level, we note that at the same time as justice is placed together with home affairs like homeland security and immigration, it is also not dealt with at JLS alone. There is a range of matters which the CCBE considers to be justice matters, which are currently dispersed to other DGs and not dealt with by JLS at all, or only marginally.

The CCBE is currently dealing or has recently been dealing with a list of four procedural and substantive law items. They are given below, with the DGs responsible against their titles:

- costs of justice (JLS);
- alternative dispute resolution (JLS);
- collective redress (DG Health and Consumer Protection and DG Competition);
- contract law (DG Consumer Protection and DG Internal Market).

That means that, just taking this small selection of justice matters, there are four DGs dealing with them, which has a number of important consequences:

- with different DGs in charge, there is no general overview of all justice initiatives at European level to be sure that they are coherent with other initiatives;
- not all the DGs mentioned have the administration of justice as their central concern, nor are they fully briefed on what its values include;
- there is no single DG which sees itself as responsible for all matters affecting justice and its administration; this means that despite JLS's title, the justice brief is not properly addressed at an institutional level when other DGs take up matters in the field;
- and of course, it is in any case strange that two of the initiatives mentioned above have two DGs looking after them, which raises the risk of incoherence.

The need to co-ordinate legislation which affects the justice sector is important because it usually involves exercises which result in some measure of harmonisation of the different legal systems of 27 Member States. In many other areas of the Commission's work, the needs – say, of a consumer – are universal. But, as is well known, the legal systems of the Member States are deeply embedded in each country's national culture. It is more efficient and effective if the understanding necessary for proper co-ordination is located in one DG which deals with all justice issues.

The CCBE is not asserting that justice should be dealt with by JLS without input from other DGs. There is a clear consumer interest, for instance, in the issues of collective redress and contract law mentioned. But we would expect JLS to take the lead on them, ensuring that the goals of justice are met, with DG Health and Consumer Protection feeding in views in relation to its responsibilities.

### **Other options**

Some observers believe that the division should not be between justice and security issues, but between civil and criminal law. The European institutions are involved in large-scale exercises on civil law issues, and these are not centralised (see above for a few examples). For such observers, it is vital that co-ordination of these initiatives takes place within a DG Justice (which would be closer to a DG Civil Law). This option is attractive also to those who oppose the idea of a DG Justice which would separate justice from security – for them, the retention of criminal law and human rights within the current structures would satisfy them that justice and security issues were kept together, and that both sides would have to continue to take account of the others' concerns. The CCBE understands these points, but still prefers that all justice issues, including criminal law and human rights, is put within the co-ordinating jurisdiction of one DG Justice.

This raises the question of whether human rights are seen as part of a future DG Justice's portfolio. The CCBE is aware that human rights in Europe is already dealt with by a complex structure – for instance, there is the Fundamental Rights Agency, the work of the Council of Europe, and the European Parliament's important role. The CCBE certainly does not believe that all this vital work should be subsumed within a DG Justice. Rather, the co-ordinating role with those external bodies and with other human rights initiatives within the European Commission should fall to a DG Justice.

The CCBE is aware also of a current discussion within the European Parliament about the re-organisation of its own committee structures, including the proposal to establish a Justice Committee.

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However, the CCBE does not believe that the structure of the European Commission – which is the topic of this paper – should automatically and faithfully follow the Parliament’s own committee structure, or vice versa.

## **Conclusion**

Accordingly, and taking account of all the views expressed above, the CCBE believes that there should be a DG Justice, which has responsibility only for justice without any conflicting responsibilities such as security, and which also deals with all matters of justice, and not just some of them, even if other DGs have subsidiary responsibilities on aspects of legislation. In addition, it should have an overall role for ensuring consistency and coherence in European legislation.

We would be delighted to offer our assistance and to work with others to help bring this about. We believe that a DG Justice will lead to more focus and purpose in the area of justice at the European level, will ensure better justice for citizens, and enable the relevant provisions of the Lisbon Treaty to be introduced more effectively when the time arrives for its foreseen changes.