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Vedr.: Rapport fra Overhusets Særlige Udvalg vedrørende Den Europæiske Union forelagt af Lord Tomlinson og Lord MacLennan
"Udkast til artikel 31 og udkast til artikler i anden del (frihed, sikkerhed og retfærdighed)"

Generalsekretæren for konventet har fra Lord Tomlinson og Lord MacLennan, suppleanter til konventet, modtaget vedlagte rapport fra Overhusets Særlige Udvalg vedrørende Den Europæiske Union, som de forelægger på egne vegne som bidrag til konventets arbejde.

HOUSE OF LORDS

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SELECT COMMITTEE ON
THE EUROPEAN UNION

**THE FUTURE OF EUROPE:
CONSTITUTIONAL TREATY—DRAFT
ARTICLE 31 AND DRAFT ARTICLES FROM
PART 2 (FREEDOM, SECURITY AND
JUSTICE)**

REPORT

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

THE FUTURE OF EUROPE: CONSTITUTIONAL TREATY—DRAFT ARTICLE 31 AND DRAFT ARTICLES FROM PART 2 (FREEDOM, SECURITY AND JUSTICE)

CONV 614/03 Area of freedom, security and justice

—Draft Article 31, Part One

—Draft articles from Part Two

INTRODUCTION

In this, our third,¹ Report on the draft Treaty Articles now being discussed in the Convention on the Future of Europe, we² consider those articles which will replace Title IV TEC (Visas, Asylum, Immigration and Other Policies related to the Free Movement of Persons) and Title VI TEU (Provisions on Police and Judicial Cooperation in Criminal Matters, *ie* the Third Pillar). These provisions are brought together in Article 31 in Part One of the new Treaty under the new heading “Policy on police matters and crime”.

We qualified our earlier Reports by reference to the fact that the procedure adopted by the Praesidium, the Convention steering group, is to bring forward the text of the Treaty in stages. Consequently it is not possible to consider the full text of the draft Treaty. Article 31 was omitted from Title V (Implementation of Union Action) examined in our second Report. The reason was that it would contain special rules and the Praesidium decided that in order to make the overall position more comprehensible Article 31 should be presented along with the relevant chapters of Part Two of the Constitution. Article 31 has now been published along with 23 Articles from Part Two.

These Articles would bring about a number of important changes. They would take forward common policies on immigration, border controls and asylum. They would strengthen the roles of Europol and Eurojust and enhance operational cooperation between police forces and other law enforcement agencies across Europe. The Commission would have a right of initiative in police and criminal law matters and the majority of measures would be adopted by co-decision (of the European Parliament and Council) and by qualified majority voting (QMV). The jurisdiction of the European Court of Justice would be significantly extended. Particular concern arises from the proposals to increase Union competence over criminal procedures and to create a European Public Prosecutor.

The format of this Report follows that of our earlier Reports in this series. Each Article is followed by an Explanatory note³ (the text of which has been prepared by the Convention Secretariat) and a Commentary added by the Committee.

We make this Report to the House for information.

¹ The text of the new Constitutional Treaty is appearing in stages. In our first Report, *The Future of Europe: Constitutional Treaty—Draft Articles 1-16* (9th Report, Session 2002-03, HL Paper 61) we examined Titles I-III of the new Treaty; Definition and objectives of the Union, Union citizenship and fundamental rights and Union competences and actions. Our second Report, *The Future of Europe: Constitutional Treaty—Draft Articles 24-33* (12th Report, Session 2002-03, HL Paper 71), dealt with Title V—Implementation of Union Action. We are following the order in which the Articles are presented to the Convention. Articles 17-23 will be dealt with when received.

² See Appendix I for membership of the European Union Committee; and of Sub-Committee E (Law and Institutions) and Sub-Committee F (Social Affairs, Education and Home Affairs) which undertook the detailed scrutiny work.

³ The Convention document uses the term “Comments”.

ANALYSIS OF NEW TREATY ARTICLES

General comments

It is proposed that there should now be one Title (in Part Two of the new Treaty) to be called “Area of freedom, security and justice”. It would encompass, with some significant changes and additions, both the current Title IV TEC and Title VI TEU (Third Pillar—Police and Judicial Cooperation in Criminal Matters). Proposing one Title is noteworthy for two reasons. First, it demonstrates most clearly the collapsing of the Pillar structure. Since Maastricht a number of matters have been moved from the Third (Union) Pillar into the First (Community) Pillar. Notable examples are immigration, asylum and civil law cooperation policies. Second, it is a departure from the scheme of the Preliminary draft Constitutional Treaty (the “skeleton text”) published in October.¹ That draft envisaged that two separate titles (or chapters) would remain, albeit with new names (“Visas, asylum and immigration and other policies related to the movement of persons” and “Policy on police matters, and against crime” under the general headings of “Internal market” and “Internal Security” respectively). The difference of approach may be simply explained by reference to the timing. The final report of Working Group X did not appear until December.

The new Title contains nine general Articles followed by four separate chapters. With the exception of Articles 6 (Measures concerning public order and internal security), 7 (Administrative co-operation) and 9 (Judicial control) which derive from Articles 33 TEU and 64 (1) TEC, 66 TEC and 35 (5) respectively, the introductory Articles are new. The main sources of the four chapters are set out in the following table.

Table of Derivations

Chapter 1: Policies on border checks, asylum and immigration	<i>Article 10 Checks on persons at borders</i>	Articles 61(a) and 62 TEC
	<i>Article 11 Asylum</i>	Articles 61(a) and (b), 63(1) and (2) and 64(2) TEC
	<i>Article 12 Immigration</i>	Articles 61(a) and (b) and 63(3) and (4) TEC
	<i>Article 13 Principle of solidarity</i>	New Article
Chapter 2: Judicial cooperation in civil matters	<i>Article 14 Judicial cooperation in civil matters</i>	Articles 61(c) and 65 TEC
Chapter 3: Judicial cooperation in criminal matters	<i>Article 15 Judicial cooperation in criminal matters</i>	Articles 61(e) TEC and 29 and 31(1) TEU
	<i>Article 16 Criminal procedure</i>	New Article
	<i>Article 17 Substantive criminal law</i>	Articles 29 and 31(1)(e) TEU
	<i>Article 18 Crime prevention</i>	New Article , but reference to preventing crime in Article 61(e) TEC
	<i>Article 19 Eurojust</i>	Articles 29 and 31(2) TEU
	<i>Article 20 European Public Prosecutor's Office</i>	New Article
Chapter 4: Police cooperation	<i>Article 21 Cooperation with regard to internal security</i>	Article 30(1) TEU
	<i>Article 22 Europol</i>	Article 30(2) TEU
	<i>Article 23 Operations on the territory of another Member State</i>	Article 32 TEU

¹ A copy of the skeleton text is reproduced in Appendix 2 to our Report *The Future of Europe: Constitutional Treaty—Draft Articles 1-16* (9th Report Session 2002-03, HL Paper 61).

The majority of the provisions in the new Title will, as the Working Group recommended, become subject to the so-called “Community method”. This principally means that the Commission would have the sole right of initiative in respect of legislative proposals. This would be a major departure from the current position under which in some areas the Commission has no right of initiative. The ‘legislative procedure’¹ (*ie* co-decision by the European Parliament and the Council) and majority voting would apply. There remain a number of provisions in this Title whose adoption will not be by co-decision and qualified majority voting QMV, as follows:

—Article 7: Administrative cooperation (QMV and consultation)

—Article 11(3): Asylum – sudden influx of refugees (QMV and consultation)

—Article 14(3): Judicial cooperation in civil law—family law (unanimity and consultation)

—Article 16: Criminal Procedure “other specific aspects” (unanimity and assent)

—Article 20: European Public Prosecutor’s Office (unanimity and consultation)

—Article 21(3): Cooperation with regard to internal security—operational cooperation (unanimity and consultation)

—Article 23: Operations on the territory of another Member State (unanimity and consultation)

Special arrangements for the UK—opt-ins and opt-outs

The Praesidium document is silent of the special position of Denmark, Ireland and the UK in relation to matters the subject of this group of Treaty Articles.

As a basis for the area of freedom, security and justice, and in particular to facilitate the removal of internal border controls, the Amsterdam Treaty incorporated into the framework of the EU the Schengen *acquis*.² Some of the *acquis* went into Title IV TEC, some into Title VI TEU. The Schengen arrangements incorporated into Title IV apply, as EC law, only to 12 Member States. Denmark is outside Title IV, but remains, as a party to Schengen, bound in international law. The UK and Ireland, by contrast, are not parties to Schengen but may, with the agreement of the 13 Schengen States, opt-in selectively.³

In addition to the Protocol on Schengen, a separate Protocol to the TEU safeguards the position of the UK and Ireland confirming that the UK is entitled to exercise frontier controls (TEU Protocol No 3).

Further Denmark, Ireland and the UK stand in a special position as regards Title IV TEC (Visas, asylum, immigration and other policies related to free movement of persons). The UK and Ireland can opt-in selectively to (non-Schengen) measures under Title IV (TEU Protocol No 4). Denmark cannot be selective but can opt-in to Title IV *in toto* (TEU Protocol No 5).

What is to be the future of these Protocols when the new Constitutional Treaty replaces the TEU? Whether the new Treaty will signify the end of the UK’s ability to opt out of, for example, immigration measures waits to be seen. When giving evidence to the Committee on 25 March Mr Peter Hain MP said that the Government did not want to see any change in the UK’s position as contained in the current Protocols.

¹ We commented on the inaptness of this term in our Report *The Future of Europe: Constitutional Treaty—Draft Articles 24-33* (12th Report, Session 2002-03, HL Paper 71, at para 23).

² Including the 1985 Schengen Agreement, the 1990 Schengen Convention and the decisions of the Executive Committee established by the Schengen agreements. See the Protocol No 2 TEU. The position is explained more fully in our Report *Incorporating the Schengen Acquis into the European Union* (31st Report, Session 1997-98, HL Paper 139). The UK’s participation is set out in Council Decision 2000/365/EC of 29 May 2000.

³ The UK has sought to maintain its border controls and has so far elected to participate in Schengen only in respect of police and judicial co-operation, drugs and the Schengen Information System (SIS—a computerised database). Ireland has taken a similar approach.

Article 31: Implementation of the area of freedom, security and justice

1. The Union shall ensure an area of freedom, security and justice:

- by adopting laws and framework laws intended in particular to approximate¹ national laws in the areas listed in Part Two of the Constitution;
- by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions.
- by operational cooperation between all competent authorities of the Member States for internal security.

2. Within the area of freedom, security and justice, national parliaments may participate in the evaluation mechanisms foreseen in Article [4, Part Two] of the Constitution, and shall be involved in the political monitoring of Europol's activities in accordance with Article [Article 22, Part Two] of the Constitution.

3. In the field of police and judicial cooperation in criminal matters, Member States shall have a right of initiative under the arrangements set out in Article [8, Part Two] of the Constitution.

Explanatory note

“This article contains the specific characteristics of Union action within the area of freedom, security and justice. The first paragraph mentions the areas of Union action, namely legislative and operational cooperation (with the latter being a characteristic specific to this Union policy).

Paragraph 2 specifies the role of national parliaments, in particular concerning evaluation conducted in the Council of the implementation of Union policies (see Article 4, Part Two and their involvement in the political monitoring of Europol (see Article 22, Part Two).

Paragraph 3 mentions another specific characteristic, namely the Member States' right of initiative, which would co-exist alongside the Commission's right of initiative in the fields of police and judicial cooperation in criminal matters.”

COMMENTARY

The instruments listed and defined in Article 24 (European laws, European framework laws, European decisions etc) are intended to apply in all areas of the new Constitution, including those which currently fall under the Second Pillar (Common Foreign and Security Policy) and Third Pillar (Cooperation in police and criminal matters). But as the Working Group IX on Simplification recommended, what are now Second and Third Pillar matters could be subject to special rules. Hence Article 31 has been produced. The two “specific characteristics”² of Freedom, Security and Justice are (1) operational cooperation and (2) Member States’ right of initiative.

Article 31 contains a number of important innovations. First, Article 31(1), second indent, ‘constitutionalises’ the principle of mutual trust/confidence between the competent authorities of the Member States. The principle of mutual recognition has been “the cornerstone of judicial cooperation”³ and a fundamental feature of the creation of an area of freedom, security and justice. However, the term ‘competent authorities’ is potentially wide and unrestricted. So too is the reference to “extrajudicial decisions”. Some clarification is needed as to the extent this provision would reach beyond the recognition of judicial decisions and judgments.

¹ *Ie to harmonise.*

² As the Praesidium’s Explanatory note indicates, Article 31 contains two “characteristics specific” to Union policy on Freedom, Security and Justice. This terminology links Article 31 with Article 24 (the legal acts of the Union). See the Praesidium’s note to Article 24 (reproduced in our Report on Articles 24-33) and our commentary at paragraph 15 of that Report).

³ Presidency Conclusions, Tampere European Council 15/16 October 1999.

Article 31(1) clearly separates legislative measures from operational cooperation. Indeed there would, for the first time, be express reference to ‘operational cooperation’ between “*all* competent authorities of the Member States for internal security” (emphasis added). Again the meaning of ‘authorities’ is unclear but presumably in this context it is intended to cover not only judicial (including Continental-style investigating magistrates) authorities but also police and customs authorities.¹ Most significantly, the Article gives prominence to “operational cooperation”, which may be of particular importance in policing matters.

Article 31(2) is also innovative in two respects. First, it implies the establishment of ‘evaluation mechanisms’ (for more detail see comments on Article 4 below). Second, it provides for an enhanced role for national parliaments, in participating in such evaluation as well as in monitoring Europol’s initiatives. **We welcome both these developments. We support, in particular, the notion of national parliaments scrutinising the activities of Europol**, though as we said in our recent Report on Europol, that scrutiny might better be done by national parliaments working together with the European Parliament so as to avoid unnecessary duplication of work.² There is, however, a problem with the language of the second clause of Article 31(2). The words “shall be involved” imply that the new Constitutional Treaty can impose obligations on national parliaments. **We therefore suggest that “shall be involved” should be deleted or that “shall” be replaced by “shall have the right to”**.

Article 31(3) maintains Member States’ right of initiative in the field of police and judicial cooperation in criminal matters.³ But following the Working Group’s suggestion, Member States’ initiatives would have to have the support of a quarter of Member States. **This is a welcome limitation**. The “arrangements” are set out in Article 8 (see below).

1. TITLE X: AREA OF FREEDOM, SECURITY AND JUSTICE

¹ Those currently identified in Article 29 TEU.

² *Europol’s role in fighting crime* (5th Report, Session 2002-03, HL Paper 43, at para 40).

³ Member States currently have a right of initiative in respect of matters falling under Title IV TEC (Visas, asylum, immigration and other policies related to the free movement of persons). That right is presently shared with the Commission. From 1 May 2004, the Commission has the sole initiative as regards those matters. See Article 67 TEC.

Article 1: [Definition of the area]¹

The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and taking into account the different European legal traditions and systems.

It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control based on solidarity between Member States and fairness towards third-country nationals.

The Union shall ensure a high level of safety by measures to prevent and combat crime and promote coordination and cooperation between criminal police and judicial authorities and other competent authorities, as well as by the mutual recognition of judgments in criminal matters and the approximation of criminal laws.

The Union shall facilitate access to justice, in particular by the free movement of documents and judgments in civil matters based on the principle of mutual recognition.

Explanatory note

“This Article constitutes the general definition of both aspects of the area of freedom, security and justice: the legislative and the operational. The text is based on the Working Group's final report. The general reference to the principles of subsidiarity and respect for the different legal traditions and systems is included in this provision. The same applies to the reference to solidarity in the field of the common policy on immigration, asylum and external borders. In the field of police and judicial cooperation in criminal matters and judicial cooperation in civil matters, the Working Group – following the Tampere conclusions – decided that the principle of mutual recognition of judgments should be explicitly enshrined in the Constitution. By the same token, and in the light of the Tampere conclusions, it was considered appropriate to add the reference to access to justice.”

COMMENTARY

Article 1 reproduces the main elements that constitute an ‘area of freedom, security and justice’ found in the current Treaties. But some changes have been made. First, there is an express reference to the need to respect fundamental rights and to take account of “the different European legal traditions and systems”. **This is welcome.**

Second, common policies on asylum, immigration and border controls have to be based on ‘solidarity between Member States and fairness towards third country nationals’. The issue of solidarity between Member States in this context is not new and was discussed when we considered the so-called Dublin II Regulation.² It is also under consideration in the current inquiry by Sub-Committee F into the European Border Guard. The principle of solidarity is also the subject of a separate Article 13, on which we comment below.

Third, Article 1 also makes express reference to the Union facilitating ‘access to justice’. The Praesidium justifies its inclusion by reference to the Tampere Conclusions. We note that Chapter VI of the EU Charter of Fundamental Rights may be relevant here, especially Article 47 which contains a broad statement relating to the provision of legal aid. The phrase “access to justice” also appears in Article 12(2), where it seems clear that it is not restricted “in particular” to the free movement of documents and judgments as in Article 1. The implications (most notably financial) of these statements on access to justice may be considerable. We return to this in the context of Article 12 below.

Finally, the Praesidium’s Explanatory note makes no mention of the special rights which apply to the UK. The reference in the second paragraph of Article 1, to “ensure the absence of internal border controls for persons”, has to be read in the light of the Protocols (described at paragraphs 9-13 above) enabling the UK to maintain its border controls.

¹ The Praesidium notes that since the articles in Part Two of the Constitution will have no headings, the headings in square brackets are given simply as an aid to Convention members at this stage, but will disappear in the final version.

² The subject of our Report: *Asylum applications: who decides?* (19th Report, Session 2001-02, HL Paper 100).

Article 2¹: [Role of the European Council]

The European Council shall define the guidelines for legislative and operational action within the area of freedom, security and justice.

Explanatory note

“This Article takes up the Working Group's conclusions according to which, based on the Tampere European Council model, the European Council can establish a multiannual strategic programme defining a general framework for Union action on legislative and operational cooperation.

(cf. page 4 of the report):

“In addition, one could envisage that, in line with the example of the Tampere European Council, a multiannual strategic programme might be set by the European Council (or the Council at the level of Heads of State or Government) following consultation of the European Parliament and national parliaments, defining an overall framework for the Union's action in relation to legislation and operational collaboration.”

It became clear that the European Council was able to set broad guidelines and bridge the legislative and operational programmes. The particular role assigned to the European Council within the area of freedom, security and justice is one characteristic of the matter under consideration and this was recognised by the Working Group (cf. page 4 of the report). The Working Group considers that a single legal framework does not mean that Union procedures must necessarily be applied in exactly the same way as those currently under the first pillar. The wording chosen reflects the reality, as it emerges in particular from the decisions and guidelines adopted at the Tampere and Seville European Councils.”

COMMENTARY

This is a new provision, giving constitutional expression to what the European Council has been doing *de facto* over the past few years in these matters (with the example of the Tampere Conclusions being the most prominent). What is noteworthy is that the European Council is to become obliged to define guidelines for legislative and operational action. It is envisaged that the European Council will continue to set multiannual strategic programmes, but will not get immersed in the detail of particular legislative measures. The involvement of the European Council (*ie* the Heads of State or Government of the Member States and the President of the Commission) and not just the Council of Ministers in this way is identified as a “characteristic of the matter” and reflects the continuing political importance and sensitivity of Union action in the area of freedom, security and justice.

¹ When the Convention has the text of a more general article describing the tasks and operation of the European Council, it will have to determine whether the above provision belongs in this chapter or whether it would not be preferable to insert it into the article in Part One concerning the European Council (Article 15 in the preliminary draft Treaty).

Article 3: [Role of national parliaments]

1. National parliaments may participate in the evaluation mechanisms contained in Article 4 of the Constitution and shall be involved in the political monitoring of Europol's activities in accordance with Article 22 of the Constitution.
2. [Notwithstanding the provisions foreseen in the Protocol on the application of the principles of subsidiarity and proportionality, where at least one quarter of national parliaments issue reasoned opinions on non-compliance with the subsidiarity principle of a Commission proposal submitted in the context of Chapters 3 and 4 of this Title, the Commission shall review its proposal. After such review, the Commission may decide to maintain, amend or withdraw its proposal. The Commission shall give reasons for its decision. This provision shall also apply to initiatives emanating from a group of Member States in accordance with the provisions of Article 8 of this Title.]¹

Explanatory note

“A broad consensus emerged within the Working Group to recognise the particular role of national parliaments in the area of freedom, security and justice. This area affects fundamental freedoms and is at the very heart of the principle of subsidiarity. Under the current system, national parliaments participate in the adoption of applicable rules, in particular via the national ratification of conventions. Since this legal instrument will no longer appear in the Constitution, the Working Group felt that national parliaments should continue to play an important role. The various measures proposed make it possible to take into account this specific feature of the area of freedom, security and justice. (cf. page 22 of the report on national parliaments):

“The specific nature of this area has already been stressed. The work and the organisation of national police and the content of national criminal law are at the core of the competencies that define a state. On the one hand, there is a need to take account of the particularities of this area, especially sensitive to human rights and at the heart of subsidiarity, for which the national parliaments have responsibility (e.g. ratification of conventions).¹ Reform of the legal instruments, the legislative procedures and operational cooperation is indispensable and will lead to increased responsibility for the European Parliament, but national parliaments should continue to play an important role. On the other hand, the Group could try, as much as possible, to build on results found in the Convention generally on this issue, rather than to devise special mechanisms exclusively for the current 3rd pillar. The Working Group submits the following proposals:

—involvement of national parliaments in the definition by the European Council (or the Council at the level of Heads of State or Government) of the strategic guidelines and priorities for European criminal justice policy. Such involvement will only be meaningful if there are substantive debates in national parliaments about the options to be considered at the European Council well in advance of the latter taking place;

—regular inter-parliamentary conferences on the Union's policies in this area (in particular by joint meetings of the responsible committees on Justice and Home Affairs of national parliaments, as suggested by WG IV);

—use of the “subsidiarity early warning mechanism” (devised by WG I) in particular for the specific aspects of subsidiarity in criminal law matters, i.e. where it is questionable that a crime has actually a “cross-border dimension” and is of a serious nature;

—recognising the continuing role for national legislation through exclusive use of directives (or successor) in approximation of substantive criminal law;

—involving national parliaments in the mutual evaluation mechanism (“peer review”) (see above);

—involving national parliaments in the consideration of annual reports on the activities of Europol.”

It should be noted that several of the proposals formulated by the Group are not necessarily appropriate for inclusion in the text of the Constitutional Treaty.

On the other hand, the current wording provides that the threshold in the Protocol on subsidiarity (set at one third of parliaments) would be lowered to one quarter, for proposals within the scope of judicial cooperation in criminal matters (Chapter 3) and police cooperation (Chapter 4). Since Member States also have a right of initiative in Chapters 3 and 4, it seemed justified to extend the envisaged system to cover cases in which the legislative initiative comes not from the Commission but from the Member States, in accordance with Article 8 of this Title.”

¹ In a subsequent version of the draft Constitution, this provision will be transferred to the Protocol on the application of the

COMMENTARY

Article 3(1) essentially repeats Article 31(2). As mentioned above (see paragraph 17) **we welcome the involvement of national parliaments in these matters**, especially in exercising some political control over Europol and making it more democratically accountable. For the same reason as given above in relation to Article 31(2), **“shall be involved” should be deleted or “shall” replaced by “shall have the right to”**.

Article 3(2) is intended to be placed in the Protocol on national parliaments and provides a special rule for national parliaments monitoring the principle of subsidiarity in the area of freedom, security and justice. A lower (one quarter in place of one third) threshold for the “yellow card” is proposed (this would require the Commission to reconsider its proposal). **This is welcome in so far as it goes**. As we said in our recent Report on the proposed Protocol on National Parliaments and on Subsidiarity² we welcome a greater role for national parliaments in this facet of the scrutiny of EU legislation. But while the “yellow card” will in most cases strike the right balance between the right of national parliaments to be heard and a right of veto, **the “red card” principle (which would require the Commission to withdraw its proposal if two thirds of national parliaments objected) should be maintained**. As both the Working Group and Praesidium acknowledge, national parliaments have a special role in the area of freedom, security and justice. **If national parliaments are to have a collective voice which could actually make a difference then the “red card” should be available here, perhaps with a one half, instead of a two thirds, threshold**.

principles of subsidiarity and proportionality (a first draft of which (CONV 579/03) had already been submitted to the Convention when this document was drawn up by the Praesidium).

¹ This is misleading as regards the position in the UK. Parliament does not have responsibility for the ratification of conventions, though the Ponsonby rule gives some Parliamentary oversight.

² *The Future of Europe: National Parliaments and Subsidiarity—the Proposed Protocols* (11th Report, Session 2002-03, HL Paper 70). See, in particular, paragraphs 46 and 58.

Article 4: [Evaluation mechanisms]

Without prejudice to Articles [226 to 228] of this Treaty, the Council may adopt arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities. The European Parliament, as well as national parliaments, shall be informed of the content and results of the evaluation.

Explanatory note

"Draft Article based on an important recommendation by the Working Group designed to resolve the problem of inadequate monitoring of implementation of Union policy in this area (see final report, C I, page 21):

"First, that mechanisms of "mutual evaluation" or "peer review", as practised successfully over recent years (....) should be encouraged and applied more widely The Group would see merit in an explicit mention in the new Treaty of this technique of mutual evaluation, which is to be implemented flexibly with the participation of the Commission through procedures guaranteeing objectivity and independence. In addition, the "peer review" reports should be supplied to the European Parliament and to national parliaments. Second, as for the legal obligations of the Member States resulting from Union law, the Working Group believes that the Commission should fully play its role as Treaty guardian and that it should be competent to introduce infringement proceedings (Article 226 TEC) before the European Court of Justice, also in the area of the current "Third Pillar"."

COMMENTARY

This is a new Treaty Article, establishing an 'objective and impartial' evaluation of implementation of EU policies by Member States' authorities. The concept of mutual evaluation first appeared in the 1997 Council Action Plan on Organised Crime.¹ Recommendation 15 called for the establishment, following the model of the Financial Action Task Force (FATF)², of a mutual evaluation mechanism for the implementation in Member States of the relevant international criminal law instruments. This led to the adoption of a Third Pillar Joint Action establishing such an evaluation mechanism.³

This mechanism is now proposed to be 'constitutionalised'. It could be applied not just to the implementation of international instruments related to organised crime, but more broadly to the implementation of any EU Freedom, Security and Justice policy. The Article envisages the adoption of "arrangements". The organisation and impact of evaluation exercises need to be further defined though this could be a matter for secondary legislation. Consideration will need to be given to how such evaluation will be conducted, how standards will be set and decisions reached. It is also not clear whether the evaluation will have any real 'teeth'. What, if any, sanctions would there be for a Member State that does not meet the standards? Article 4 is without prejudice to Articles 226-228 TEC (infringement actions before the ECJ). It is not clear however whether the procedure under these Articles, *ie* ECJ intervention, will be used as a last resort—triggered only *after* an evaluation has taken place—or whether the processes could run in parallel. But what is significant is, as the Praesidium's Explanatory note

¹ [1997] OJ C 251/1.

² The FATF is an intergovernmental body whose purpose is the development and promotion of policies both at national and international levels to combat money laundering. It monitors progress in implementing anti-money laundering measures, mainly through a mutual evaluation process. Each member country is examined in turn by the FATF on the basis of an on-site visit conducted by a team of experts from other member governments and a report is drafted on the basis of that visit. Where the report is negative, a 'peer pressure' mechanism ensures compliance with the FATF standards. This starts by requiring countries to deliver a progress report at plenary FATF meetings, but may ultimately result in the suspension of the FATF membership of the country concerned.

³ [1997] OJ L 344/7. The Joint Action provides for an evaluation mechanism similar to the one of the FATF, with on the spot visits of expert teams in Member States resulting in the drafting of a Report. But the impact of the exercise is not clear, as the Joint Action provides that the Council 'may, where it sees fit, address any recommendations to the Member State concerned and may invite it to report back to the Council on the progress it has made by a deadline to be set by the Council (Article 8(3)).

indicates, that the Court of Justice will have jurisdiction over the implementation of Union policies relating to Freedom, Security and Justice (see Article 9 below).

Article 5: [Operational cooperation]

In order to ensure that operational cooperation on internal security is promoted and strengthened within the Union, a standing committee may be set up within the Council. Without prejudice to Article [207 TEC], it shall be responsible for coordinating the action of Member States' competent authorities, including police, customs and civil protection authorities. The representatives of Europol, Eurojust and, where appropriate the European Public Prosecutor's Office, may be involved in the proceedings of this Committee. The European Parliament shall be kept informed of the work of the committee.

Explanatory note

"The purpose of this article is to introduce into the Constitution one of the two "golden rules" identified by the Group: that in favour of identifying and introducing a separation between "legislative" tasks and "operational" tasks within the Union and reinforced coordination of operational collaboration at Union level (page 4 of the report: "golden rule"):

"there should be clearer distinction between legislation (legal instruments; legislative procedures; implementation; in large part to be aligned with the general procedures of Community law)".

In this context, the Group was in favour of reinforced coordination of operational collaboration (page 16 of the report):

"To improve confidence and efficiency, the Union's current work on coordination and operational collaboration could be better organised. A clearer distinction between the Council acting in its legislative capacity and the Council exercising specific executive functions in this area would be advantageous. The Group therefore proposes that a more efficient structure for the coordination of operational cooperation at high technical level be created within the Council. This might be done by merging various existing groups and redefining in the new Treaty the current mission of the "Article 36 Committee", which should in the future focus on coordinating operational cooperation rather than becoming involved in the Council's legislative work. How best to associate the Chiefs of Police Task Force with this work is a question deserving further examination. The role of such a reformed structure [committee] within the Council could be a technical one of coordination and oversight of the entire spectrum of operational activity in police and security matters (inter alia police cooperation, fact-finding missions, facilitation of cooperation between Europol and Eurojust, peer review, civil protection). The exchange of personal data should continue to take place within the existing systems (Europol, Schengen, Customs information system, Eurojust, etc.) for which adequate rules on data protection and supervision systems are in place. One could however envisage simplifying these supervision systems by merging the various supervisory bodies."

This proposal by the Group was broadly supported at the plenary session. The wording proposed for this Article 5 is based on the text of existing Article 36 TEU, reducing its area of activity to operational cooperation alone. On the other hand, abolishing the pillars enables all the authorities concerned with "internal security" to be covered for the first time, not merely police forces but also those responsible for customs and civil protection.

The abolition of the pillars in this way will be welcomed by all practitioners who stress that cooperation must cover a broader field than merely police aspects in order to ensure internal security. The consequences of the 11 September attacks have shown the importance of mobilising all services and of cooperation between disciplines.

Finally, it should be noted that the proposed committee is not intended to deal with personal information or data. Its role is confined to general operational cooperation, for example in the event of a major catastrophe, attacks and events or demonstrations on a European scale. Exchanges of personal information, primarily in connection with organised crime, will continue to fall within existing mechanisms (Europol in particular) and to be covered by the relevant legislation in the matter. Involvement of representatives of the Union bodies in this committee is left in square brackets pending decisions on the subject."

COMMENTARY

Article 5 takes forward the reference to ‘operational cooperation’ mentioned in Article 31, while at the same time seeking to pursue the objective of separating the “legislative” from the “executive” (or in this case “operational”) function. Article 5 anticipates the abolition of the Article 36 Committee (a committee of senior officials, established under Article 36 TEU, who are responsible for coordinating activities in the field of justice and home affairs¹). The new Committee would be a standing (not an ad hoc) committee, set up within the Council and consisting of representatives of the Member States, a Commission representative and the Director of Europol. Its remit would be restricted to operational cooperation and would not include legislative work. It would operate “without prejudice to” COREPER (Committee of the Permanent Representatives of the Member States—Article 207 TEC). It is noteworthy that the involvement of the European Parliament would be limited to being kept informed of the work of the committee.

It is envisaged that the new Committee would have responsibility for coordinating the action of national police, customs and civil protection authorities in the event of a crisis of the sort mentioned in the Praesidium’s note (“a major catastrophe, attacks and events or demonstrations on a European scale”). **To what extent this would mean giving the Committee a power to direct the actions of national police and other authorities, and if so to whom the Committee would be accountable, needs to be clarified. As drafted the Article would seem to extend Union competence beyond police and judicial cooperation in criminal matters.**

Article 6: [Measures concerning public order and internal security]

This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of their internal security.

Explanatory note

“Taken over from Article 33 TEU and Article 64(1) TEC.”

COMMENTARY

Article 6 reproduces the language of Articles 33 TEU and 64(1) TEC but with one slight difference. While the current Treaties refer to the ‘safeguarding of internal security’, the word ‘their’ has been added to Article 6, making it clear that the reference is to the internal security of the Member States. This change may imply an attempt to distinguish more clearly between areas of EU action and competence (and the notion of the security of the Union) and areas of Member State action. This view is reinforced if Article 6 is read in combination with Article 9 on judicial control. There, the limitation on the jurisdiction of the Court of Justice is restricted to police operations and other Member States’ action to maintain law and order and safeguard internal security where such action ‘is a matter of national law’.

Article 7: [Administrative cooperation]

The Council shall adopt by a qualified majority regulations to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this Title, as well as between those departments and the Commission. It shall act on a Commission proposal, or, in the areas covered by Chapters 3 and 4 of this Title, either on a Commission proposal or on the initiative of a quarter of the Member States and after consulting the European Parliament.

Explanatory note

“Taken over from Article 66 TEC.”

¹ The Committee comprises a representative from each Member State, the Commission and the Council Secretariat. It assists preparing the briefing of COREPER at Justice and Home Affairs Councils and guides the work of experts’ working groups and can provide the Council with opinions either at the Council’s request or on its own initiative. It usually meets about once a month.

COMMENTARY

This provision is based on Article 66 TEC, but now specifies that Union action on administrative cooperation should take the form of “regulations”. This means “European regulations” as defined in Article 24. So they would be “non-legislative acts” and the “legislative” (co-decision) procedure would not be applicable.¹ Because such regulations would not be delegated or implementing acts (within the meaning of Articles 27 and 28 respectively) Article 7 appears to be an example of regulations being made in a case “specifically laid down in the Constitution” as provided for in Article 26. A further difference is that EU measures in the field will be adopted by qualified majority—and not unanimity as is currently provided. This change is not accompanied by a greater role for the European Parliament, which simply is to be consulted.

Article 8: [Right of initiative]

The acts referred to in Chapters 3 and 4 of this Title shall be adopted:

- on a proposal from the Commission, or
- on the initiative of a quarter of the Member States.

Explanatory note

“This article takes over a proposal contained in the Group's final report (page 15). As already mentioned within the Group, the Convention should carefully examine the possible implications of creating a right of initiative for a group of Member States within the legislative procedure (codecision). Depending on the guidelines which the Convention arrives at for that procedure, it might be necessary to review the wording of this provision.”

COMMENTARY

As mentioned above (see paragraph 17 commenting on Article 31(3)), some form of restraint on Member States’ right of initiative is desirable. The one quarter of Member States criterion, as proposed by Working Group IX on Simplification, seems sensible. It should help to counter the tendency of Member States attempting to ‘export’ their own particular domestic interests and priorities, which may disrupt the timetable and coherence of the legislative programme, lead to proposals for measures that may not comply with the subsidiarity principle, and may do little to enhance the overall quality of legislative drafting.²

The Praesidium’s Explanatory note points to possible problems with integrating Member States’ initiatives into the co-decision (the “legislative”) procedure. The difficulty would seem to be in identifying the Commission’s role in the procedure when it was not the author of the proposal.

¹ We commented on the problems of this terminology in our Report *The Future of Europe: Constitutional Treaty—Draft Articles 24–33* (12th Report, Session 2002-03, HL Paper 71).

² Recent examples of national initiatives where such problems were encountered are the Spanish initiatives on drug trafficking on the high seas and private security, the Danish initiatives on war crimes and confiscation and the Belgian proposal on restorative justice.

Article 9: [Judicial control]

In exercising its competences regarding the provisions of Chapters 3 and 4 of this Title, the Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement 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, where such action is a matter of national law.

Explanatory note

“Having analysed the various limitations on and derogations to the general rules relating to the Court of Justice which currently exist in the area of justice and home affairs (cf. Articles 68 TEC and 35 TEU), Working Group X concluded that these derogations should be abolished (see page 25 of the report):

“The Working Group considers that the specific mechanisms foreseen in Articles 35 TUE and 68 TCE should be abolished and that the general system of jurisdiction of the Court of Justice should be extended to the area of freedom, security and justice, including action by Union bodies in this field.”

However, the report mentions that some members of the Group, although starting from the same general assumption, felt that it was still necessary to maintain a provision to the effect that the Court of Justice has no jurisdiction for police operations and actions related to the maintenance of law and order (cf. Article 35(5) TEU in the area of the current third pillar). This viewpoint, which was contested by a number of other Convention members, was repeated in the plenary debate. In the light of that debate, the Praesidium is proposing this compromise formula, which is based largely on the wording of Article 35(5) TEU and clarifies it: the Court has no jurisdiction for police action and action relating to the maintenance of law and order which is covered by national law; however, in the case of acts carried out pursuant to Union law, the Court shall be competent to give a ruling on the application of Union law.”

COMMENTARY

Article 9 provides an exception to the jurisdiction of the Court of Justice. This excludes review by that Court of the legality of operations by national police forces and the exercise of law and order responsibilities by Member States “where such action is a matter of (*sic*) national law”. It is implicit from this Article that the Praesidium is proposing that the Court has jurisdiction over the matters dealt with in this Title. The Praesidium’s Explanatory note makes clear the intention to sweep away the current limitation on the Court’s jurisdiction contained in Articles 68 TEC and 35 TEU. Second, the Explanatory note also makes clear that the exception does not apply where the action in question is carried out pursuant to EU law.

The Union’s business is no longer solely economic, as recent and current activities in relation to such matters as fraud, organised crime, drugs, terrorism, human trafficking, immigration and border controls clearly demonstrate. As we said in our recent Report on the EU Charter of Fundamental Rights,¹ were the Charter to become legally binding on the institutions and bodies of the Union across the whole area of EU law the jurisdiction of the ECJ should be extended in relation to those areas where it is at present restricted, *ie* Title IV TEC (Justice and Home affairs) and Title VI TEU (police and criminal matters) and the full range of remedies made available. Whereas at present remedies are largely confined to actions within the First Pillar and the major EU institutions and bodies, remedies should extend to the whole field of Union activities. As recent developments, such as the European Arrest Warrant, show, such matters may impinge directly on the interests and rights of the individual. We recommended that the ECJ should be entitled to measure the legality of Union action, including that of Member States and their authorities when implementing EU law, against the norms contained in the Charter and the ECHR. Accordingly **we are pleased to see that the new Treaty will remove the current limitations of the Court’s jurisdiction in relation to justice and home affairs matters. We note that Article 9 contains a very limited (indeed an apparently tautological) exception.**

¹ *The Future Status of the EU Charter of Fundamental Rights* (6th Report, Session 2002-03, HL Paper 48).

CHAPTER 1: POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION

Article 10: [Checks on persons at borders]

1. The Union shall develop a policy with a view to:

- ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;
- carrying out checks on persons and efficient monitoring of the crossing of external borders;
- the gradual introduction of a common integrated management system for external borders.

2. For this purpose, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws or framework laws concerning:

- conditions of entry for a short stay for nationals of third States, including the visa requirement and exemption from this requirement, the rules, procedures and conditions of issue of permits for crossing external borders, and the uniform format for such permits;
- the controls to which persons crossing external borders may be subject;
- the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;
- any measure necessary for the gradual establishment of a common integrated management system for external borders;
- the absence of any controls on persons, whatever their nationality, when crossing internal borders.

Explanatory note

“Paragraphs 1 and 2, drawn largely from existing Article 62 TEC, reflect the Group's conclusions and the outcome of the plenary session concerning external borders. The concept of the gradual introduction of an integrated border management system refers back to points mentioned in the conclusions of the Seville European Council of June 2002 (cf. paragraphs 31 and 32. The content of Article 62 TEC has, however, been shortened so as to take account of the provisions that have already entered into force since its adoption.”

COMMENTARY

Article 10 largely reproduces the ‘border control’ provisions of Title IV (Article 62(1) and (2) TEC). There is, however, one important addition. There is now a specific legal base for the gradual introduction, at an EU level, of a ‘common integrated management system for external borders’. This follows a number of EU initiatives in the field, most notably the Commission Communication on the ‘integrated management of external borders and a subsequent Council Action Plan.’¹ Further political impetus was given by the Seville European Council (June 2002), which called on the Council, the Commission and the Member States to implement a series of steps before June 2003.² It is, however, not yet fully clear what an ‘integrated management for external borders’ will entail and whether it will lead to the gradual establishment of a ‘European Border Guard’. This is the subject of an inquiry currently being undertaken by Sub-Committee F and it is therefore something to which we will return in more detail.

¹ Doc COM (2002) 233 final and Council Doc 9834/02.

² Presidency Conclusions. Doc SN200/02, at paragraphs 31 and 32.

An important development relating to Article 10 is the shift from unanimity (and consultation of the European Parliament) to the adoption of measures by co-decision and QMV, in accordance with the “legislative procedure” referred to in Article 10(2). This will be controversial in view of the close link between border control functions and national sovereignty. **As mentioned above, the document is silent on the question of the special position of certain Member States, including the UK, in relation to the subject matter of this Title (see paragraphs 9-13 above).**

Article 11: [Asylum]

1. The Union shall develop a common policy on asylum and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy shall be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties.

2. For this purpose, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws or framework laws to establish a common European asylum system comprising:

- a uniform status of asylum for nationals of third countries, valid throughout the Union;
- a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- a uniform status of temporary protection for displaced persons in the event of a massive inflow;
- a common procedure for granting and withdrawing asylum status or subsidiary or temporary protection status;
- criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- standards concerning the reception of applicants for asylum or subsidiary or temporary protection.

3. In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, by a qualified majority, may adopt regulations or decisions comprising provisional measures for the benefit of the Member State(s) concerned. It shall act on a proposal from the Commission after consulting the European Parliament.

Explanatory note

“The draft article is based on the Working Group’s recommendations on page 4 of the final report:

..... “That qualified majority voting and codecision be made applicable in the Treaty for legislation on asylum, refugees and displaced persons; – That Article 63(1) and (2) TEC be redrafted in order to create a general legal base enabling the adoption of the measures needed to put in place a common asylum system and a common policy on refugees and displaced persons as set out in Tampere. This legal base should, as in the present Treaty, ensure full respect of the Geneva Convention but enable the Union also to provide further complementary forms of protection not embraced by that Convention”.

Paragraph 3 reproduces current Article 64(2) TEC; the temporary measures that may be adopted are not exclusively confined to the area of asylum law.

“Nationals of third countries” must be understood to include stateless persons.”

COMMENTARY

Article 11 goes a step further than the current Treaty by expressly aiming to establish a ‘European asylum system’ with uniform standards and common procedures. In so doing it reflects political decisions already taken. At the Tampere European Council, Member States decided that a common European asylum system was to be established by a two-stage process. Member States have agreed on a number of matters establishing minimum standards to be addressed in the short (first) term. In the long (second) term a truly common asylum procedure and a unified status for refugees, valid throughout the Union, would be established.

The first stage requires the adoption of a number of key measures, including a Directive on minimum standards in asylum procedures for granting and withdrawing refugee status (the Procedures Directive¹—still under negotiation), a Directive on minimum standards for reception of asylum seekers² (now agreed³), a Regulation (replacing the Dublin Convention) on criteria and mechanisms for determining the State responsible for examining asylum requests⁴ (now agreed⁵), a Directive on qualification and content of refugee status and on subsidiary forms of protection⁶ (still under negotiation).

The references in Article 11(2) to “subsidiary protection” are especially welcome. In our Reports on the Procedures Directive and the Reception Standards Directive⁷ we drew attention to the absence of provision for those claiming such protection status. The draft Directive on qualification and content of refugee status and on subsidiary forms of protection is the only measure in the current asylum package to address the position of those seeking such protection. Union action in this area should take account of all bases for international protection and any common asylum policy should ensure high standards (particularly in relation to procedures and reception conditions) and consistency in application across the Union.⁸

The last paragraph of the Praesidium’s Explanatory note on this Article states: “‘Nationals of third countries’ must be understood to include stateless persons”. We agree. **The text of Article 11 should be amended accordingly.**

¹ The subject of our Report *Minimum Standards in Asylum Procedures* (11th Report, Session 2000-01, HL Paper 59). A revised text of the proposal is being prepared.

² The subject of our Report *Minimum Standards of reception conditions for asylum seekers* (8th Report, Session 2001-02, HL Paper 49).

³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. [2003] OJ L 46/18.

⁴ The subject of our Report *Asylum applications: who decides?* (19th Report, Session 2001-02, HL Paper 100).

⁵ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

⁶ The subject of our Report *Defining refugee status and those in need of international protection* (28th Report, Session 2001-02, HL Paper 136).

⁷ See footnotes 29 and 30 above.

⁸ *Defining refugee status and those in need of international protection* (28th Report, Session 2001-02, HL Paper 136, at paras 42 and 43).

Article 12: [Immigration]

1. The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

2. To this end, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws in the following areas:

— conditions of entry and residence, and standards on the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion;

— definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing the freedom of movement and of residence in other Member States;

— illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;

— combating trafficking in persons, in particular women and children.

3. The Union may conclude readmission agreements with third countries for the readmission of third-country nationals residing without authorisation to their countries of origin or provenance.

4. The European Parliament and the Council, in accordance with the legislative procedure, may adopt laws and framework laws providing incentive and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories.

Explanatory note

“This draft article is based largely on Article 63(3) and (4) TEC, but applies qualified majority voting and the legislative procedure (codecision), as recommended by the Working Group (see page 5 of the report). Paragraph 4 adds a legal base, as recommended by the Working Group (see page 5 of the report):

“that a legal base should be provided to allow the Union to take incentive and support measures to assist Member States’ efforts to promote the integration of legally resident third-country nationals”).

In addition, in paragraph 2, second indent, a slightly different wording has been proposed. It is more in line with the objective set at Tampere of legislating on the legal status held by legally resident third country nationals in their country of residence and in other Member States (on this point, see also page 5 of the Working Group’s final report). Lastly, explicit references have been added to combating trafficking in persons and to readmission agreements, in order to highlight the importance place of these two aspects (which are covered by the existing Treaty) in the Union’s existing policy.

The definition of this sector as one of shared competence (see Article 12 of draft Part One submitted by the Praesidium) means that Member States may maintain national provisions or introduce new ones in this sector, providing that they are compatible with Union law, without it being necessary to repeat the principle (which is currently set out at the end of Article 63 TEC).”

COMMENTARY

Article 12 is a considerably expanded version of Articles 63(3) and (4) TEC. Paragraph 1, which refers to the objectives of the EU immigration policy, mentions for the first time the ‘efficient management of migration flows’—a concept which has been used by the Commission in its work on migration¹ and recently in the conclusions of the Seville European Council². Managing migration flows is to be accompanied by fair treatment of legally resident third country nationals and action to prevent and combat, by ‘enhanced measures’, illegal immigration and trafficking in human beings.

EU competence regarding legally resident third country nationals (TCNs) is considerably extended.³ Article 12 is not limited to defining their right of residence. Paragraph 1 refers to the general objective of ‘fair treatment of TCNs’, while paragraph 2 envisages the adoption of EU legislation defining the rights of legally resident TCNs including (but not limited to) ‘the conditions governing the freedom of movement and of residence in other Member States’. A further and important innovation is the inclusion of Article 12(4), which gives the EU a competence for ‘supporting action’ with the view of promoting the integration of legally resident TCNs.

Changes are also proposed to the Treaty language on illegal immigration. Article 12(1) refers for the first time to its ‘prevention’, while there is also a reference to ‘enhanced measures’ to combat illegal immigration and trafficking in human beings. It is not clear what the meaning of ‘enhanced measures’ is, and whether it signifies a shift to stricter control measures in the field. Article 12(2) also refers to illegal immigration and unauthorised residence, which is deemed to include ‘removal and repatriation of persons residing without authorisation’. This appears to be inspired by the prioritisation of expulsion policies decided at the Seville European Council, coupled with pressure towards the conclusion of readmission agreements between the EU and third countries.⁴ In this respect, Article 12(3) provides a broad legal basis for the conclusion of such agreements enabling the readmission of TCNs residing without authorisation to their countries of origin or provenance.

In our Reports and day-to-day scrutiny **we have repeatedly emphasised the need for a ‘common’ EU approach to immigration**. It remains to be seen whether Article 12 will provide a basis for a balanced EU approach to immigration which this Committee has consistently advocated,⁵ combining the opening up of avenues of legal migration with the effective control of illegal immigration. The reference to more ‘inclusive’ measures on legally resident TCNs is a welcome step in this direction. A further impetus towards the enhancement of EU action in the field, in particular as regards more ‘inclusive’ measures, will be provided by the shift from unanimity and consultation to qualified majority voting and co-decision (‘the legislative procedure’) provided for by Article 12(2). **This is a positive step to avoid legislative paralysis in an EU of 25, but will be controversial in view of Member States’ reluctance to relinquish power in sensitive matters such as the treatment of TCNs.**

On the other hand, Article 12 contains no specific references to positive policies to encourage lawful routes for the admission of migrants currently outside the Union. Further, the broad wording relating to illegal immigration (‘enhanced measures’) and the specific reference in the Article to removal and repatriation may lead to a greater emphasis on stricter control measures.

¹ For example in the recent Communication on integrating migration issues in the EU’s relations with third countries (COM (2002) 703 final) currently held under scrutiny by Sub-Committee F.

² Presidency conclusions (paragraph 27).

³ Article 63(4) TEC is a legal basis for the adoption of measures defining the rights and conditions under which legally resident TCNs may reside in other Member States. A proposed Directive under this Article has been the subject of a detailed inquiry by this Committee. See *The Legal Status of Long-Term Resident Third-Country Nationals* (5th Report, Session 2001-02, HL Paper 33).

⁴ Presidency Conclusions, paragraphs 30 and 33-36.

⁵ See our Report *A Community Immigration Policy* (13th Report, Session 2000-01, HL Paper 64) and our latest Report *A Common Policy on Illegal Immigration* (37th Report, Session 2001-02, HL Paper 187).

Article 13: Principle of solidarity

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility (including its financial implications) between the Member States. Whenever necessary, the acts of the Union adopted pursuant to the provisions of this Chapter shall contain appropriate measures to give effect to this principle.

Explanatory note

“Draft article based on the recommendation on page 4 (third indent) of the Working Group's final report.

“... While acknowledging the responsibilities of the Member States, to enshrine in the Treaty the principle of solidarity and fair sharing of responsibility (including its financial implications) between the Member States, applying as a general principle to the Union's asylum, immigration and border control policies. A specific legal basis should enable the adoption of the detailed policies necessary to give effect to this principle.””

COMMENTARY

Article 13 fleshes out the reference to solidarity in Article 1, where it is considered, along with the fair treatment of legally resident third country nationals, as one of the bases of a common policy on asylum, immigration and border controls. The need for solidarity and the fair sharing of responsibility between Member States has been raised in the context of the negotiations of the ‘Dublin II’ Regulation¹ as well as, and perhaps most prominently, in the context of the debate over the need to have an integrated EU management of external borders². The explicit reference to the ‘financial implications’ of solidarity is noteworthy, though it is not clear what it will entail in practice.

¹ The Committee examined this proposal in detail: *Asylum Applications—Who Decides?* (19th Report, Session 2001-02, HL Paper 100).

² Sub-Committee F is currently examining the issue in the context of its “European Border Guard” inquiry.

Chapter 2: Judicial cooperation in civil matters

Article 14: [Judicial cooperation in civil matters]

1. The Union shall develop judicial cooperation in civil matters based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation shall include the adoption of measures for the approximation of national laws having cross-border implications.

2. To this end, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws aiming inter alia to ensure:

- the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;
- the cross border service of judicial and extrajudicial documents;
- the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- cooperation in the taking of evidence;
- a high level of access to justice;
- the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- the development of measures of preventive justice and alternative methods of dispute settlement;
- support for the training of the judiciary and judicial staff.

3. The Council, on a proposal from the Commission, shall unanimously¹ adopt laws and framework laws concerning family law; it shall act after consulting the European Parliament. The European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws concerning parental responsibility.

Explanatory note

"This provision is based on Article 65 TEC. The only amendments to Article 65 TEC which emerged from the Working Group's final report are the following:

- enshrining of the principle of mutual recognition of judgments and decisions in extrajudicial cases (end of page 6 of the report);*
- development of measures of preventive justice and alternative methods of dispute settlement;*
- training of the judiciary and judicial staff;*
- the codecision procedure for measures concerning parental authority, which would be the only sector of family law in which unanimity would not apply (see pages 6 and 7 of the report).*

The Praesidium felt that there was no longer any justification for keeping the current reference to "the proper functioning of the internal market" (Article 65 TEC) in the new provision. The phrase is included in existing Article 65 TEC partly because this provision is an element of Community policies and is linked to the free movement of persons in the context of the internal market.

Once the new Treaty contains a separate title on the area of freedom, security and justice, the reference to "the proper functioning of the internal market" can be considered redundant. Moreover, the most important aspect to be emphasised in this context is that the envisaged measures under judicial cooperation in civil matters have a "cross-border impact", reference to which is included in the proposed provision.

Finally, in line with the Tampere conclusions, it seemed important to add the explicit statement that the Union must also take measures aimed at ensuring a high level of access to justice. This could have consequences for the future establishment of minimum standards guaranteeing an appropriate level of legal aid for cross-border cases throughout the Union, and special common procedural rules in order to simplify and speed up the settlement of cross-border disputes concerning small commercial claims under consumer legislation or to establish minimum common standards for multilingual forms or documents in cross-border proceedings."

¹ Once it has considered Part Two in its entirety, it will be for the Convention to take a decision across the board on any exceptions to the qualified majority rule and, consequently, on the voting rules which should apply in this and other Articles of this draft which refer to unanimity.

COMMENTARY

Article 14 largely replicates Article 65 TEC. The changes are listed in the Praesidium's Explanatory note printed above. It is noteworthy that the current limitation in Article 65 TEC (that measures can be taken only "in so far as necessary for the proper functioning of the internal market") has been replaced by a "cross-border implications" test. The "internal market" criterion has sometimes seemed rather artificial and strained, for example, in the context of measures relating to the recognition and enforcement of judgments in matrimonial matters and to matters of parental responsibility. The new test is preferable, being more apposite to closer cooperation in non-economic matters. **What is important is that there should be a genuine and proven need for action at the European level and that in future the Commission will take full account of the need to respect different legal systems, and their values and traditions (as envisaged by Article 1 above).**

The opportunity should also be taken to clarify the meaning of "extrajudicial cases" and "extrajudicial documents". Further, we note that the eighth indent of paragraph 2 of this Article refers to "support" for the training of judges, while the third indent of Article 15(2) (criminal matters) refers to encouraging judicial training. What is the significance of the different wording? Does "support" imply making money available?

Article 15: [Judicial cooperation in criminal matters]

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judicial decisions and shall include the approximation of legislation in the areas referred to in Articles [16] and [17].

2. The European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws to:

— establish rules and procedures for ensuring the recognition throughout the Union of all forms of judgments and judicial decisions;

— prevent and settle conflicts of jurisdiction between Member States;

— encourage the training of the judiciary and judicial staff;

— facilitate all other forms of cooperation between ministries and judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Explanatory note

“The first paragraph of this draft article is based on one of the Working Group's core recommendations:

see page 8: “... the new formulation of these legal bases must reflect the right balance between the principle of mutual recognition and efforts to approximate criminal laws: as it was politically agreed in Tampere, the principle of mutual recognition should be the cornerstone of judicial cooperation, allowing judicial decisions of one Member States to be recognised by the authorities of another Member State. The Group recommends that this principle of mutual recognition of judicial decisions should be formally enshrined in the Treaty. The Group also recognises that some approximation of certain elements of criminal procedure and of specific areas of substantive criminal law, respecting the different European legal traditions – as well as the provisions of the ECHR as reflected in the Charter in particular concerning the presumption of innocence –, may prove necessary in order to facilitate mutual recognition.”.

The second and fourth indents of paragraph 2 are based on existing Article 31(1)(a) and (d) TEU.

The first indent includes a recommendation made by the Working Group (see page 12 of the final report:

“In the field of judicial cooperation, the Group recommends however that the legal basis be complemented so as to enable adoption of the necessary measures for the mutual recognition of judicial orders, fines, disqualification decisions, and all other forms of judicial decisions; this would be a logical consequence of enshrining the principle of mutual recognition in the Treaty.”.

By way of clarification, the third indent incorporates an explicit legal basis for the training of judges and judicial staff, which was mentioned on page 11 of the Group's report.”

COMMENTARY

Article 15(1) restates the principle of mutual recognition of judicial decisions, now set down in Article 31 (see above), as one of the ways in which the Union shall ensure an area of freedom, security and justice. Article 15(2) provides a legal basis for the adoption of measures on judicial cooperation in criminal matters. It is our experience

that the difficulties and sometimes controversy (eg the European Arrest Warrant) lie not in the existence of such a power but fears about the way in which it may be exercised.

Article 16: [Criminal procedure]

In order to strengthen mutual trust between the competent authorities of Member States and to guarantee the effectiveness of common tools for police and judicial cooperation, the European Parliament and the Council, in accordance with the legislative procedure, may adopt laws and framework laws containing minimum rules concerning:

- the admissibility of evidence throughout the Union;
- the definition of the rights of individuals in criminal procedure in compliance with fundamental rights;
- the rights of victims of crime;
- other specific aspects of criminal procedure, which shall be identified in advance by the Council, acting unanimously after receiving the assent of the European Parliament.

Explanatory note

“As the Working Group's final report acknowledges (see page 11), the need for approximation of certain elements of criminal procedure is widely recognised by practitioners and is perhaps more urgent than approximation of substantive criminal law.

Such procedural approximation both facilitates collaboration between law-enforcement agencies of the Member States (and the Union bodies acting in the field), and the application of the principle of mutual recognition, as it strengthens mutual confidence. At present, Article 31 TEU does not reflect this point sufficiently and is too vague on concrete possibilities for such approximation.

This Article is based on the following recommendation by the Working Group:

“The Group recommends the creation of a legal basis permitting the adoption of common rules on specific elements of criminal procedure to the extent that such rules relate to procedures with transnational implications and are needed to ensure the full application of mutual recognition of judicial decisions or to guarantee the effectiveness of common tools for police and judicial cooperation created by the Union. The Treaty legal basis could specify as one domain of action common minimum rules on the admissibility of evidence throughout the Union. The Council could subsequently by unanimity identify all elements of procedure on which minimum rules are required to facilitate mutual recognition.

This legal base could also provide for the setting of common minimum standards for the protection of the rights of individuals in criminal procedure, building on the standards enshrined in the European Convention of Human Rights as reflected in the Charter of Fundamental Rights and respecting different European legal traditions.”

Reference is also made in this Article to victims' rights. Indeed, the European Council had already stressed, in the Tampere conclusions, that "minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs" (see paragraph 32).”

COMMENTARY

As the Praesidium's Explanatory note indicates, Article 16 reflects Working Group X's Conclusions with the addition of a provision on victims' rights. **It is a new and potentially controversial provision.** Article 16 gives

the EU a new competence to adopt measures in the field of criminal procedure, including the admissibility of evidence and procedural rights. It is noteworthy that unlike Article 14 (dealing with approximation of civil laws and procedures) this power is not limited to cases where there are cross-border implications.

Criminal laws and procedures lie at the heart of “legal traditions” (to which Article 1 refers) and divergences in Member States’ laws (and even between different jurisdictions within a Member State) reflect fundamental historical, political and constitutional differences. Rules on the admissibility of evidence in criminal proceedings may be closely related to the mode of trial (for example, in England and Wales, to trial by jury). **That such rules could be changed without the consent of a Member State is, we believe, unacceptable.**

On the other hand the reference to “the definition of rights of individuals in criminal procedure” is unexceptionable. However, in recent inquiries we have received a substantial body of evidence drawing attention to the weight being placed on maintaining “security” to the perceived exclusion or neglect of “freedom”. And it is only very recently that the Commission has produced its Green Paper, *Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union*,¹ which might eventually lead to some form of specific European counterweight to such measures as the European Arrest Warrant. Whether new Article 16 is necessary to achieve that result is debatable and the improvement of such procedural safeguards should not have to await Treaty amendment.

Accordingly we recommend that if Article 16 is to remain in the Treaty, it should be amended so as

(i) to be limited to the adoption of minimum rules under the “legislative procedure” (ie co-decision and QMV) concerning

(a) the definition of the rights of individuals in criminal procedure so as to ensure compliance with fundamental rights;

(b) the rights of victims of crime.

(ii) to enable the Council, acting unanimously, to adopt minimum rules relating to other specific aspects of criminal procedure, which shall have been identified in advance by the Council acting unanimously and with the assent of the European Parliament.

Further, the power to make any European laws or framework laws under this Article should, as a matter of the division of competence between the Union and the Member States, be restricted to cases having cross-border implications, as would be the case under Article 14 (Judicial cooperation in civil matters). We recognise, however, that even with such restriction any EU legislation under Article 16 would most likely have substantial effects on procedure in purely domestic criminal cases. The stricter requirement of (ii) would not apply to a proposal on the admissibility of evidence but would ensure that any proposal was firmly based on a clearly demonstrated need to act and that it respected national legal traditions.

¹ COM (2003) 75 final. Brussels, 19.2.2003.

Article 17: [Substantive criminal law]

The European Parliament and the Council, in accordance with the legislative procedure, may adopt framework laws containing minimum rules concerning the definition of incriminations and sanctions:

- in the areas of particularly serious crime with cross-border dimensions resulting from the nature or impact of the offences or of a special need to prosecute them jointly. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. The Council, on the basis of developments in crime and acting unanimously after obtaining the assent of the European Parliament, may identify other areas of crime that meet the criteria specified in this indent;
- in areas of crime affecting a common interest which is the subject of a Union policy, if criminal sanctions prove essential to ensure the effective implementation of that policy.

Explanatory note

“This draft article implements a very significant recommendation by the Working Group, aiming to define more precisely the Union's competence in the area of approximation of national rules of substantive criminal law. Indeed, a more rigorous delimitation of competences seems necessary in order to make the general decision-making rules (qualified majority and codecision) applicable in this sector.

In accordance with the report, the draft ensures a better delimitation of competences by enshrining two fundamental criteria set out on page 10 of the report (paragraphs "aa": particularly serious crime with cross-border dimensions and "bb": crime affecting a common interest which is the subject of a Union policy) and by a list of areas of crime. As proposed by the report, the list gives an exhaustive definition of the areas of particularly serious and cross-border crime, within the meaning of criterion "aa" in the report, but the Council will be able, according to developments, and acting unanimously after obtaining Parliament's assent, to identify other areas of crime that fulfil this criterion, so that the Union can react to such developments without having to change the Treaty.

The list proposed above draws on Articles 29 and 31(e) of the current TEU and in the conclusions of the Tampere European Council (see paragraph 48). It should be stressed that certain types of crime, such as terrorism in particular, do indeed have a cross-border dimension in the meaning of this Article even where the way in which the act is perpetrated only concerns a single Member State, since there is undeniably a "special need to prosecute them jointly". We would also stress that, in accordance with the Working Group's report (see page 12), this list applies only in the framework of approximation of national laws; police and judicial cooperation, including the action of Europol and Eurojust (see Articles 13 to 15), may cover additional areas of crime.

*The second indent (“crime affecting a common interest which is the subject of a Union policy”), makes it possible to cover several areas in which there is already either an *acquis* adopted by virtue of Article 31 of the current TEU, or negotiations under way or plans for the near future. The following in particular are covered in this way: fraud affecting the financial interests of the Union, counterfeiting of the euro, facilitation of unauthorised entry and residence, counterfeiting and piracy of products, environmental crime, and also racism and xenophobia (given that Article 13 TEC allows the Community to take action to combat discrimination based on racial or ethnic origin). Because of the existence of this second criterion, it is unnecessary to add all these areas of crime to the list given in the first indent. Moreover, the second indent takes account of the fact that the Union has to define minimum rules for certain crimes, independently of whether or not they are of a cross-border nature, such as for example the counterfeiting of the euro or fraud affecting the financial interests of the Union.”*

COMMENTARY

Article 17 provides the legal base for the adoption of EU measures containing minimum rules concerning the definition of “incriminations and sanctions”. Similar powers have existed since Maastricht. The major changes are twofold. First, the “legislative procedure” (*ie* co-decision and QMV) would apply. Second, EU action would be permitted in two cases: (a) “particularly serious crime with cross-border dimensions” as defined by reference to an exhaustive list including drug trafficking, money laundering and terrorism; and (b) crimes affecting a common interest which is the subject of EU policy (such as fraud). This second category is potentially quite broad and, as the Praesidium’s Explanatory note indicates, is intended at least to cover the current *acquis*. The Praesidium make special reference to the current (and controversial) proposal for a Council framework decision on combating racism and xenophobia.

As the Praesidium’s Explanatory note also states, the list (Article 17, first indent) applies only in relation to approximation measures. So there can be police and judicial cooperation (including Europol and Eurojust) on offences which have not been harmonised. The potential difficulties arising from this lack of congruence may be acute, for example, in relation to the exchange of data and the remit of Europol and Eurojust. It also causes problems with the European Arrest Warrant. We have argued that **the definitions used in EU criminal law approximation measures should also be used to define the offences listed in the Warrant.**¹ This would improve legal certainty and aid consistency, as between Member States, in the application of the Warrant.

Article 18: [Crime prevention]

The European Parliament and the Council, in accordance with the legislative procedure, may adopt laws and framework laws to promote and support the action of Member States in the field of crime prevention, excluding any approximation of Member States’ legislative and regulatory provisions not permitted by other provisions in the Constitution.

Explanatory note

“Draft article based on the recommendation on page 12 of the Working Group’s report:

(“... it is important that the new Treaty also reflects more clearly the pivotal role of crime prevention, which is mentioned in Article 29 TEU but is not included in the specific legal bases of Articles 30 and 31 TEU. The Group recommends that a specific legal base now be included in the Treaty. This legal base should be limited to incentive and supporting measures for the prevention of crime ...”).”

COMMENTARY

A significant step towards the prioritisation of action on crime prevention in the EU was made at the Tampere European Council (October 1999), where the European Council called for the integration of crime prevention aspects into actions against crime and the development of common priorities in crime prevention in the external and internal EU policy which must be taken into account in the preparation of new legislation.² Article 18 takes this commitment a step further, by providing for a specific legal base for the adoption of EU crime prevention measures. Being a new area of competence, EU action is only supporting and excludes approximation of legislation. That is welcome. However, **the Article should be amended so as to ensure that Union action can be taken only where there are cross-border implications.**

¹ *Combating Racism and Xenophobia—Defining Criminal Offences in the EU* (29th Report, Session 2001-02, HL Paper 162). See also correspondence between Lord Grenfell and Lord Filkin, 19 December 2002 and 10 January 2003, which can be downloaded from www.parliament.uk/parliamentary-committees/lords-s-comm-e/cwm-e.cfm

² Presidency Conclusions, paragraph 41.

Article 19: [Eurojust]

1. Eurojust's mission shall be to ensure coordination and cooperation between national prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a joint prosecution, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.

2. The European Parliament and the Council, in accordance with the legislative procedure, shall determine Eurojust's structure, workings, scope of action and tasks. Those tasks may include:

- the initiation and coordination of criminal prosecutions conducted by competent national authorities;
- the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network;
- appropriate supervision of Europol's operational activities.

The law referred to in the preceding subparagraph shall also determine arrangements for involving the European Parliament and national parliaments in the development of Eurojust's activities.

3. In the prosecutions referred to in this Article, and without prejudice to the following Article, formal acts of judicial procedure shall be adopted by the competent national officials.

Explanatory note

“The draft article is based on Article 31 TEU, as amended by the Treaty of Nice, and is in line with the detailed proposals contained in the Group’s final report (page 19). The wording “appropriate supervision of Europol’s operational activities” does not imply overall supervision by Eurojust of all Europol’s activities, but takes account of the fact that, in most of the Member States’ legal systems, the police authorities do not conduct criminal investigation activities in an entirely autonomous manner, but under the instructions or supervision of judges, magistrates or public prosecutors.”

COMMENTARY

Eurojust (a judicial cooperation unit comprising senior lawyers, magistrates, prosecutors, judges and other legal experts seconded from Member States, located in the Hague alongside Europol) was set up¹ in order to help co-ordinate the investigation and prosecution of serious cross-border crime. Eurojust's competence mirrors that of Europol and also covers trafficking in human beings, terrorism, the protection of the euro, “computer crime”, the protection of the European Communities’ financial interests, the laundering of the proceeds of crime and, participation in a criminal organisation.

Article 19 is based on Article 31(2) TEU as amended by the Treaty of Nice but envisages a substantial increase in the remit and powers of Eurojust. First, Article 19(1) defines the mandate of Eurojust as covering ‘serious crime affecting two or more Member States or requiring a joint prosecution’. This is a considerable extension of Eurojust's mandate, as currently (as briefly described above) it is competent to act only in relation to specifically enumerated offences. It would be broader than the current mandate of Europol (see Article 22 below). It is not clear what is meant by ‘serious crime affecting two or more Member States’, but it would seem to differ, and be more extensive in scope, than the definition of “particularly serious crime with cross-border dimensions” in Article 17. **We question whether Eurojust should be given such an open-ended brief.² The current approach, and that of the new Article 17, is preferable,** not least having regard to the additional powers

¹ Council Decision of February 28, 2002. [2002] OJ L 63/1. Eurojust was preceded by Pro-Eurojust, established by Council Decision of 14 December 2000, [2000] OJ L 324/2, which started work in March 2001.

² Initial drafts of the Decision to establish Eurojust extended its mandate to ‘serious crime, particularly when it is organised, involving two or more Member States’. The lack of clarity of such wording was criticised by the Committee. See correspondence between Lord Tordoff and Barbara Roche MP, 16 December 2001 and 15 February 2001, published in *Correspondence with Ministers* (18th Report, Session 2001-02, HL Paper 99).

(considered in the next paragraph) which Eurojust would have. Member States should determine, by a list, those crimes with whose investigation and prosecution Eurojust should be entrusted.

Second, it is expressly contemplated that Eurojust would be given the power to initiate criminal prosecutions (though “formal acts of judicial procedure” would be adopted by competent national officials—Article 19(3)). Currently Eurojust has the power to request that a Member State undertakes an investigation, but the Member State is not obliged to act. Second, Eurojust could be tasked to supervise Europol’s operational activities, thus subordinating Europol to Eurojust. **This would not be objectionable and mirrors the regime in some Member States whereby police activity may be subject to the control of the prosecuting authority. It is unclear, however, whether this new supervisory role is intended to compensate for lack of supervision by the courts, since Europol, as an EU agency, will presumably become subject to review by the Community courts.**

Article 20: [European Public Prosecutor’s Office]

1. With a view to combating serious crimes having a cross-border dimension, as well as illegal activities affecting the interests of the Union, the Council, acting unanimously after obtaining the assent of the European Parliament, may adopt a European law creating a European Public Prosecutor's Office within Eurojust. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators, and their accomplices, of serious crimes affecting several Member States and of offences against the Union's financial interests, as determined by the law provided for in the following paragraph. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

2. The law referred to in the preceding paragraph shall determine the general rules applicable to the European Public Prosecutor's Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by the European Public Prosecutor's Office in the exercise of its functions.

Explanatory note

“Through this proposed Article submitted to the Convention, the Praesidium intends to draw the consequences of a rich debate which was first held within the Working Group (which, on this point alone among the questions under its remit, made no consensual recommendation) and then in the Convention plenary on 6 December 2002.

The provision proposed by the Praesidium would introduce a legal basis enabling the Council, acting unanimously and after obtaining the assent of the European Parliament, to establish a European Public Prosecutor's Office if it deems this to be appropriate, but without necessarily involving any obligation to do so. The provisions of paragraph 1, second and third sentences, and of paragraph 2 would therefore become applicable only if the Council were to take such a decision. These proposals would, in addition, deliberately leave the legislator considerable leeway as to any concrete formulation, if appropriate, of the arrangements for setting up the Public Prosecutor's Office (i.e. its structure, workings, tasks and powers), by merely indicating in the Constitution only the essential details of such arrangements. In particular, the phrase “within Eurojust” aims to allow the legislator the necessary flexibility to define the structural and functional relations between the Public Prosecutor's Office and Eurojust that it would deem appropriate.”

COMMENTARY

This Article, establishing a European Public Prosecutor's Office, is a surprising and undesirable inclusion in the new Treaty. It is surprising because there was no agreement in Working Group XI that such a provision was needed.¹ It is clearly controversial, hence the reference to the “rich debate” in the Praesidium's Explanatory note. There is no doubt that more could be done to ensure that effective action is taken against fraud within the Union. But **the European Public Prosecutor (EPP) is not a realistic and practical way forward.**² Eurojust could make a significant contribution to the fight against fraud, particularly through a close cooperation with other agencies and especially with OLAF (the EU's anti-fraud organisation). The benefits of creating another body and in particular an EPP, whose existence and processes could cut across national criminal laws and procedure and which might not be accountable to democratically elected representatives, have yet to be clearly and convincingly demonstrated. **We recommend the deletion of Article 20.**

¹ The report records that the Group was divided on this issue, though a significant number of members favoured exploring the idea of extending the powers of Eurojust and providing a legal base in the Treaty for the creation, by unanimity, of a European Public Prosecutor's Office. Doc CONV 426/02, at p 20.

² See our Report *Prosecuting Fraud on the Communities' Finances—the Corpus Juris* (9th Report, Session 1998-99, HL Paper 62).

CHAPTER 4: POLICE COOPERATION

Article 21: [Cooperation with regard to internal security]

1. The Union shall establish cooperation involving all the Member States' authorities with responsibility for internal security, including police, customs and other specialised services in relation to the prevention, detection and investigation of criminal offences.

2. To this end, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws concerning:

- the collection, storage, processing, analysis and exchange of relevant information;
- the training and exchange of staff, equipment and research;
- any other measure not referred to in the following paragraph, that encourages cooperation between the authorities referred to in this Article.

3. The Council may unanimously adopt laws and framework laws concerning operational cooperation between the authorities referred to in this Article. It shall act after consulting the European Parliament.

Explanatory note

“The proposed wording essentially stems from the existing Article 30(1) of the TEU, although it has been shortened. The scope is limited to police cooperation and is therefore different from that of Article 4 of this title, which covers all of the subject matter covered by the area of freedom, security and justice.

With regard to the decision-making procedure, the draft takes into account, through the differentiation made between the second and third paragraphs, the report of the Working Group, which recommends switching to the qualified majority and codecision rule in the area of police cooperation “except rules concerning the exercise of operational powers of national police authorities, of joint investigative teams or of law enforcement authorities on the territory of another Member State” (see page 14 of the report).

Article 30 of the existing TEU provides that the exchange of information between national services and to Europol shall be carried out “subject to appropriate provisions on the protection of personal data”. On this basis, data protection provisions have been included in the various 3rd pillar instruments which may affect personal data. It would therefore have been possible to include an explicit reference to this topic, in order to create a legal basis for maintaining and developing such provisions.

However, with the merger of the pillars, it seems more logical to bring in general arrangements for the protection of personal data, covering both the current Community arrangements (viz. “data protection” Directive 95/46 based on Article 95 TEC for action by Member States, and Article 286 TEC for action by the institutions) and action under the existing 3rd pillar, without it being necessary to devote a specific legal basis in this chapter to data protection. A new general article on the protection of personal data will therefore be proposed in the Title on “The democratic life of the Union” in Part One of the Constitution. This Article should not only include the existing Article 286 TEC on the action of Union institutions and bodies, but also lay down a legal basis for the adoption of rules on the processing of personal data by the authorities of the Member States when acting within the ambit of Union law. It would of course be possible for the legislator to use this new general legal basis for the adoption of specific data protection rules geared to the police sector.”

COMMENTARY

This provision is based on Article 30(1) TEU and applies the general principles set out in draft Article 31 in the field of police cooperation. A major innovation is the application of the “legislative procedure” (co-decision and QMV) in police cooperation. This could be problematic as EU competence under Article 21 is potentially very broad. Article 21(2) would enable the adoption of ‘any other measure’ which encourages police cooperation. The wording is vague and could lead to extensive EU competence in police matters. **We recommend the deletion of the third indent of Article 21(2).**

The “legislative procedure” would not, however, apply in the adoption of legislation concerning “operational cooperation” between national law enforcement authorities (Article 21(3)). In view of the sensitivity of police operations and their link to the exercise of national sovereignty, EU measures in the field would be adopted by unanimity, with the European Parliament being consulted.

A striking feature of Article 21—and of the whole chapter on police cooperation—is the absence of any data protection safeguards in the text. This is acknowledged in the Explanatory notes, where it is stated that general data protection provisions, covering the whole Treaty, will be included in the Title on ‘the democratic life of the Union’. In view of the vast amounts of data that may be collected, analysed and exchanged under the police cooperation chapter, **we believe that adequate data protection safeguards are essential and should be clearly reflected in the Constitutional Treaty. This is something to which we will return when the Praesidium publishes its proposals on data protection.**

Article 22: [Europol]

1. Europol's mission is to support and strengthen action by the Member States' police authorities and their mutual cooperation in preventing and combating serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy.

2. The European Parliament and the Council, in accordance with the legislative procedure, shall determine Europol's structure, operation, field of action and tasks. These tasks may include:

- the collection, storage, processing, analysis and exchange of information forwarded by the authorities of the Member States or third countries or bodies;
- the coordination, organisation and implementation of investigative and operational actions carried out jointly with the Member States' services or in the context of joint investigative teams.

The law referred to in the previous paragraph also lays down the procedures for scrutiny of Europol's activities by the European Parliament, together with the national parliaments.

3. Any operational action by Europol must be carried out in liaison with and in agreement with the services of the Member State(s) whose territory is concerned. The application of coercive measures is the exclusive responsibility of the competent national authorities.

Explanatory note

“This draft article turns the Working Group's recommendations on Europol (see final report, pages 14, 18 and 23) into article form. In accordance with those recommendations, the first paragraph aims only to enshrine Europol's general mission. However, Europol's structure, operating rules, specific areas of action and tasks will now be defined by the law (which will replace the existing Europol Convention) rather than by detailed provisions of the Treaty itself (see existing Article 30(2) TEU). In paragraph 2, the Treaty confines itself to indicating the potential competences which could be conferred upon Europol by the legislator to the extent that it deems opportune. In any case, the legislator would still have to keep within the limits on Europol's potential competences unequivocally set out in paragraph 3, guaranteeing that the Member States will always keep control of any operational action by Europol in the field and that they will have exclusive responsibility for applying any coercive measures. Lastly, this article should be implemented by the legislative procedure (codecision), with the Council acting by a qualified majority, as stated in the Working Group report (see page 13:

“Improving the effectiveness of Europol and Eurojust is crucial to European police and judicial cooperation and should therefore in principle be possible by qualified majority voting and codecision; this should be the case for any possible extension of Europol's and Eurojust's scope of action to new types of crime, for all rules on their organisation and management, and for any extension of their existing powers.”)”

COMMENTARY

Europol (the European Police Office, based in the Hague) is the agency responsible for supporting the EU Member States in combating serious organised crime by collating and analysing intelligence provided by national authorities. It was established by the 1995 Third Pillar Europol Convention, which came into force on 1 October 1998. Europol started its full activities on 1 July 1999, although it had been operating on a limited basis in the form of the Europol Drugs Unit since 1994. Article 30(2) TEU and the Europol Convention itself provide legal bases for the adoption of further measures developing Europol's role—a Protocol *inter alia* enabling Europol officers to take part in joint investigation teams being the most recent example.¹

¹ Protocol amending the Convention on the establishment of a European Police Office and the Protocol on the privileges and immunities of Europol, the members of its organs, the deputy directors and the employees of Europol, [2002] OJ C 312/2.

Article 22 introduces a number of changes to the existing legislative framework. A potentially far-reaching development concerns the extension of Europol's mandate, in Article 22(1), to cover 'serious crime affecting two or more Member States, terrorism and forms of crime which affect a common interest covered by a Union policy' (wording similar to Eurojust's proposed mandate—see Article 19 above). The proposal to extend Europol's remit to 'serious crime' is not new, but was put forward in 2002 by the Danish Presidency in its proposals to amend the Europol Convention. The Committee strongly criticised such extension as being detrimental to legal certainty, potentially leading to significant differences of interpretation of what constitutes 'serious crime' among national authorities, and leaving the interpretation of the term—and hence the delimitation of Europol's remit—to Europol itself, and ultimately the Court of Justice.¹ We welcomed the abandonment, in the course of negotiations, of the reference to 'serious international crime' in favour of a definition which is similar to Article 2 of the Europol Convention and is based on specifically enumerated offences. The re-introduction of 'serious crime' in Article 22 is a matter of concern and somewhat surprising in view of the "general approach" reached in the Council² not to extend Europol's remit in these terms.

Another major change is made by Article 22(2), which would apply the legislative procedure to the adoption of rules determining Europol's structure, operation, field of action and tasks (currently unanimity is required). As the Praesidium's Explanatory note indicates, the Treaty aims to leave the definition of all these aspects to secondary legislation, rather than the Europol Convention as such. Such a move is understandable in view of the inflexibility of the Convention as a legal instrument, any amendment requiring fresh ratification by national parliaments.

It is important to note that Article 22(2) does not contain an exhaustive list of Europol tasks, but merely indicates areas of action. This could lead to a significant extension of Europol powers without democratic supervision. **A defined exhaustive list would be preferable (possibly set out in a Protocol annexed to the new Treaty).** The only restriction on Europol is contained in paragraph 3, which enables operational action but precludes Europol officers from applying 'coercive measures', the latter being the exclusive responsibility of the competent national authorities.

A welcome step is the establishment in Article 22(2) of a legal base for the adoption of measures which will enable the scrutiny of Europol's activities by the European Parliament and national parliaments. As we have said above (see comments on Article 31), **the Committee strongly supports enhancing the accountability of Europol and has recommended the creation of a joint scrutiny committee of members of national parliaments and the European Parliament.**³

Article 23: [Operations on the territory of another Member State]

The Council, acting unanimously, shall adopt laws and framework laws laying down the conditions and limitations under which the competent authorities of the Member States referred to in Articles 13 and 15 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. It shall take its decision following consultation of the European Parliament.

Explanatory note

"This draft article uses the legal basis of the existing Article 32 TEU. It refers only to national authorities since Europol's corresponding powers are covered by the legal basis in Article 22. As recommended by the Group in point v on page 14 of its final report, unlike in the usual legislative procedure, Council unanimity and consultation of the European Parliament are provided for. Of course, neither this article, nor the other articles under this Title, aim to prevent those Member States which so desire from concluding bilateral agreements providing for closer cooperation between their respective authorities."

¹ *Europol's Role in Fighting Crime* (5th Report, Session 2002-03, HL Paper 43).

² Justice and Home Affairs Council, 19 December 2002.

³ See footnote 53.

COMMENTARY

First, it appears that there is a drafting error. The Article refers to the authorities “referred to in Articles 13 and 15” (the principle of solidarity and judicial cooperation in criminal matters—see above). The reference should, we believe, be to Articles 15 and 21.

Article 23, which is based on Article 32 TEU, provides for the adoption of European laws and framework laws enabling the operation of police (and customs and other specialised enforcement) authorities of one Member State in the territory of another Member State. The Article refers to national authorities and not joint investigation teams. Unanimity (and consultation of the Parliament) displaces the “legislative procedure” (co-decision and QMV).

APPENDIX 1

Membership of the European Union Committee, Sub-Committee E (Law and Institutions) and Sub-Committee F (Social Affairs, Education and Home Affairs)

The members of the European Union Committee are:

Baroness Billingham
Lord Brennan
Lord Cavendish of Furness
Lord Dubs
Lord Grenfell (Chairman)
Lord Hannay of Chiswick
Baroness Harris of Richmond
Lord Jopling
Lord Lamont of Lerwick
Baroness Maddock
Lord Neill of Bladen
Baroness Park of Monmouth
Lord Radice
Lord Scott of Foscote
Earl Selborne
Lord Shutt of Greetland
Baroness Stern
Lord Williamson of Horton
Lord Woolmer of Leeds

The members of Sub-Committee E (Law and Institutions) are:

Lord Brennan
Lord Fraser of Carmyllie
Lord Grabiner
Lord Henley
Lord Lester of Herne Hill
Lord Mayhew of Twysden
Lord Neill of Bladen
Lord Plant of Highfield
Lord Scott of Foscote (Chairman)
Baroness Thomas of Walliswood
Lord Thomson of Monifieth

The members of Sub-Committee F (Social Affairs, Education and Home Affairs) are:

Lord Corbett of Castle Vale

Lord Dubs

Baroness Gibson of Market Rasen

Lord Greaves

Baroness Greengross

Lord Griffiths of Fforestfach

Baroness Harris of Richmond (Chairman)

Lord King of West Bromwich

Baroness Knight of Collingtree

Baroness Stern

Lord Wright of Richmond
