

NOTA DE TRANSMISIÓN

de la: Secretaría

a la: Convención

Asunto: Nota del Consejo de Europa, transmitida por D. Sören Lekberg, miembro de la Convención

El Secretario General de la Convención ha recibido la nota adjunta del Consejo de Europa, transmitida por D. Sören Lekberg, miembro de la Convención, quien desea significarla a los miembros de la Convención.

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Convention on the Future of Europe

Freedom, Security and Justice for the whole of Europe

Involving the Greater Europe
in the realisation of an area of freedom, security and justice

Memorandum by the Secretary General of the Council of Europe

The purpose of this memorandum is to propose to the members of the Convention ways in which the Council of Europe and the European Union can jointly work towards the realisation of an area of freedom, security and justice for the whole of Europe:

- ① by building closer cooperation on the solid foundations of the Council of Europe's existing instruments and institutions;
- ② by active participation of the European Union in the preparation of Council of Europe treaties and accession to them;
- ③ by developing jointly pan-European responses to major challenges (terrorism, organised crime, corruption, money laundering, drugs and human trafficking, legal protection of children and the family);
- ④ by using the forum of the Council of Europe for EU foreign policy in the field of justice and home affairs towards its immediate neighbours.

Focusing on questions falling within the mandate of Working Group X "Freedom, Security and Justice", this memorandum is complementary to the Contribution from the Secretary General of the Council of Europe, Mr Walter Schwimmer, "800 Million Europeans – Involving the Greater Europe in responding to key Laeken questions" (Doc. CONV 157/02 of 25 June 2002).

The Council of Europe – a truly pan-european organisation

1.1 Shared values and principles

Created in 1949 to “achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage”, the Council of Europe now unites 44 European states in a common adherence to the values and principles of pluralist democracy, human rights and the rule of law. These include all EU member and candidate countries, as well as all other European states which have committed themselves to the same concept of a democratic society based on the rule of law.

1.2 Shared objective

The Council of Europe shares with the European Union the objective of building an area of freedom, security and justice.

1.3 Pan-european dimension

While the European Union is preparing itself for the most far-reaching enlargement in its history, the Council of Europe has practically achieved its own enlargement. By next year, all European states, except Belarus – where democratic reform is still needed – will be members.

Even after completion of the enlargement process currently under way, almost half of the states of Europe will remain outside the European Union. Therefore, the Council of Europe will continue to be the only truly European organisation in which all European states co-operate on an equal footing.

1.4 Best use of existing structures

Building the future enlarged EU is best done on solid foundations, on existing legal frameworks and institutions. In the past ten years, the Council’s structure and working methods have been radically adjusted to meet new cooperation needs and the challenges of enlargement.

The Council of Europe uses the following means of action:

- the intergovernmental programme of activities, which is adopted by all member States; on this basis, almost 200 conventions and agreements and hundreds of recommendations have been drawn up and adopted;
- a series of mechanisms of monitoring and mutual evaluation, either treaty-based (e.g. the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [CPT]) or established directly under the authority of the Committee of Ministers (e.g. the Group of States against Corruption [GRECO]);
- assistance and cooperation activities to strengthen the rule of law, involving the Council of Europe and one or more member or applicant states.

1.5 Discuss questions of common concern on an equal footing

An ever more integrated European Union runs the risk of creating a sense of exclusion among those states which will remain for the time being outside the Union. The Council of Europe provides a framework where representatives from the whole of Europe can come together to discuss questions of common concern on an equal footing – a Europe without dividing lines¹. The European Union is already an important actor in the Council of Europe. There is nonetheless scope for a much more active participation of the EU institutions in the various bodies of the Council of Europe in order to reinforce the dialogue and co-operation between representatives of the whole of Europe.

¹ For a greater Europe without dividing lines – The Budapest Declaration of the Committee of Ministers (7 May 1999) on the occasion of the Council of Europe’s 50th anniversary.

The conventional *acquis* of the Council of Europe

2.1 A common legal area for the Greater Europe

Many treaties concluded within the Council of Europe have contributed to the creation of an area of freedom, security and justice which is a common goal of the Council of Europe and the European Union.² They form part of the European Union's *acquis* on the basis of which closer co-operation within the Union is being developed.³

The conventional *acquis* in the criminal law field comprises some 25 treaties, including the conventions on extradition (ETS 24, 1957) and mutual assistance in criminal matters (ETS 30, 1959), each complemented by two protocols, the conventions on terrorism (ETS 90, 1977), money laundering (ETS 141, 1990) and the transfer of sentenced persons (ETS 112, 1985). In recent years the fight against corruption became one of the Council of Europe's priorities. The Criminal Law Convention on Corruption (ETS 173, 1999) and the Civil Law Convention on Corruption (ETS 174, 1999) harmonise national laws and foster international cooperation. The Convention on Cybercrime (ETS 185, 2001) is the first international treaty on crimes committed via the Internet and other computer networks. It will soon be complemented by an additional protocol concerning the criminalisation of acts of a racist or xenophobic nature committed through computer networks.

In a democratic society, measures taken to combat crime and terrorism must respect human rights and fundamental freedoms. For this reason, the European Convention on Human Rights (ETS 5, 1950) and its protocols, which guarantee basic human rights and fundamental freedoms common to all European states, are of vital importance. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS 108, 1981) formulates basic standards of data protection which are applied in the context of justice and home affairs. The Convention is directly referred to in the Europol and Schengen conventions.

Other conventions have been concluded in the field of judicial cooperation in civil matters, an area of Community competence.⁴ One important example is the European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children (ETS 105, 1980) which ensures that children of divorced parents can be returned to their legal guardian quickly. A Convention on Contact concerning Children has been adopted in May 2002. It will complement the EU's work in the area of recognition and enforcement of judgments.⁵

Multilateral conventions concluded within the Council of Europe replace hundreds of bilateral treaties. They constitute flexible instruments, allowing even the participation of non-member states. The Convention on Cybercrime for example was signed by all four non-member States of the Council of Europe that had participated in its elaboration (Canada, Japan, South Africa and the United States of America).

² The text of all treaties concluded with the Council of Europe, their explanatory reports, the chart of signatures and ratifications as well as the reservations and declarations made are available on the Internet at <<http://conventions.coe.int>>.

³ See "Acquis of the European Union in the field of Justice and Home Affairs (Title IV of the TEC and title VI of the TEU) (Consolidated version - Update first half of 2002)", available on the Internet at <http://europa.eu.int/comm/justice_home/acquis_en.htm>.

⁴ See Title IV of the EC Treaty, in particular Articles 61 (c) and 65.

⁵ On 2 October 2002, the European Commission adopted a proposal that the Community signs this Convention.

2.2 Accession by the European Community/Union to Council of Europe treaties

An increasing number of Council of Europe conventions and agreements are open to accession by the European Community.⁶ The European Community has already become a Party to eight Council of Europe treaties. Accession to the European Convention on Human Rights (ETS 5, 1950) is an essential part of a coherent approach to the effective protection of human rights in Europe and has been unanimously recommended by Working Group II.⁷

The European Community is entitled to become a Party *inter alia* to the Convention on Insider Trading (ETS 130, 1989) and the Civil Law Convention on Corruption (ETS 174, 1999). Upon its request, the European Community may also be invited by the Committee of Ministers of the Council of Europe to accede to the European Convention on the Exercise of Children's Rights (ETS 160, 1996) and the Criminal Law Convention on Corruption (ETS 173, 1999). Treaties in the criminal law field have so far not been opened for signature or accession by the European Community because of the hitherto limited Community powers in this field. If and when European Union competences are extended to matters of criminal law, Council of Europe treaties could be opened to accession by the Union using its new single legal personality as it has been recommended by Working Group III.⁸

2.3 Extending European Union standards to the whole of Europe

Council of Europe treaties can also be used to extend European Union standards to the whole of Europe. One example is the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS 182, 2001). Improving and supplementing the European Convention on Mutual Assistance in Criminal Matters (ETS 30, 1959), it follows in many provisions very closely, often literally, the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the member States of the European Union, while in other provisions it follows the Schengen Convention of 14 June 1990. Another example is the Convention on Information and Legal Co-operation concerning "Information Society Services" (ETS 180, 2001), which extends the application of Directive 98/48/EC.

3

Developing pan-European responses to major challenges

3.1 All-European challenges

Our democratic societies face major threats such as

- fighting against terrorism;
- combating corruption, organised crime and human trafficking;
- preventing drug abuse and drug trafficking;
- responding to violence;
- fighting against racism and xenophobia.

The terrorist attacks of 11 September 2001 have tragically emphasised the necessity of further coordination and harmonisation in standard setting and action in the field of criminal law and procedures. These are ideal areas for close cooperation and synergy between the Council of Europe and the European Union. Crime does not stop at the borders of the European Union.

⁶ See the annual reports on relations and co-operation between the Council of Europe and the EU: www.coe.int/sg/e (Documents SG/Inf(2002)7 and SG/Inf(2002)12)

⁷ Final Report of the Working Party II on Incorporation of the Charter and accession to the ECHR, Doc. CONV 354/02 of 22 October 2002. See also the Contribution from the Secretary General of the Council of Europe, Mr Walter Schwimmer, "800 Million Europeans – Involving the Greater Europe in responding to key Laeken questions", Doc. CONV 157/02 of 25 June 2002.

⁸ Final Report of the Working Party III on Legal Personality, Doc. CONV 305/02 of 1 October 2002, §§ 8 et seq.

3.2 Multilateral solutions

The best way of taking effective action is not by a series of bilateral agreements with each of the Union's immediate neighbours, but by the adoption of pan-European multilateral solutions which are coherent with the European Union's own internal measures. Only cooperation within the Council of Europe allows a common approach to crime and judicial cooperation on a pan-European level. The conclusions of the European Council in Tampere rightly foresee co-operation with the Council of Europe in this area.

The principal criteria for action on a pan-European level could be, for example, the pan-European dimension of a crime or its consequences, the effects of existing disparities in national laws on transnational or organised crime, or the need to establish common definitions of certain types of crime on pan-European level. Solutions reached within the Council of Europe do not prevent the European Union from establishing closer cooperation among its member states. Both institutions should ensure better coordination and consistency in the drafting of new instruments, using wherever possible harmonised language.

A solid framework for cooperation between the European Union and the Council of Europe already exists, in particular through the presence of the European Commission in all intergovernmental structures of the Council of Europe, including ministerial sessions. With the "Joint Declaration on Cooperation and Partnership" signed in April 2001, the two institutions confirmed their determination to deepen the existing partnership.⁹ Both institutions should use all possible synergies and to enhance the complementarities of their activities, thereby ensuring maximum benefit for all countries concerned.

3.3 Using common mechanisms and standards

In its Joint Action of 29 June 1998, the Council of the European Union acknowledged that reports drawn up within the Council of Europe on the implementation of Council of Europe conventions and recommendations will be taken into account when evaluating the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of justice and home affairs.¹⁰ Of particular importance are mechanisms of mutual evaluation and peer pressure that have been successfully established within the Council of Europe, notably the Group of States against Corruption (GRECO) and the Select Committee of Experts on the evaluation of anti-money laundering measures (MONEYVAL/PC-R-EV). The recently created European Commission for the Efficiency of Justice (CEPEJ) will assist States in improving the efficiency and the functioning of their justice system. The results of such mechanisms should be used by the European Union, recognising the authority of assessment findings and avoiding any unnecessary duplication of activities.

4

A forum for EU foreign policy towards its immediate neighbours

4.1 A Europe without dividing lines

This steadily developing common legal area for the 800 million Europeans within the Council of Europe's borders, from Reykjavik to Vladivostok, presents a solid basis for a joint vision of

⁹ See the annual reports on relations and co-operation between the Council of Europe and the EU, available on the Internet at: <<http://www.coe.int/sg/e>>; reference: SG/Inf(2002)7 and SG/Inf(2002)12.

¹⁰ Article 3.2 of the Joint Action of 29 June 1998, establishing a mechanism for collective evaluation of the enactment, application and effective implementation by the applicant countries of the *acquis* of the European Union in the field of justice and home affairs, Official Journal of the EC, L 191/8 of 7.7.1998.

building a Europe without dividing lines and consolidating it through a network of interlocking institutions.

4.2 Extending Article 303 of the EC Treaty

The Convention should give its political support to this joint task by recommending in its review of the present Treaties that the European Union make full use of the structures of the Council of Europe. To this end, it would seem desirable not only to preserve Art. 303 of the EC Treaty, which stipulates that the *Community* shall establish all appropriate forms of co-operation with the Council of Europe, but also to extend its scope of application to include all matters falling within the competence of the European *Union*, notably those dealt with under the present third pillar. In accordance with the recommendations of Working Group III, participation of the Union in the work of the Council of Europe should be made more effective by ensuring that, in matters falling within its competence, the Union speaks with a single voice on behalf of all its member States.¹¹ A draft provision on cooperation with the Council of Europe to be included in the constitutional treaty is attached.

4.3 Develop judicial cooperation within the Council of Europe

The Commissioner in charge of justice and home affairs could at regular intervals address the Committee of Ministers and European conferences of Ministers of Justice. This would be one way to promote synergies between action by the European Union and the Council of Europe, making optimum use of the complementary nature of their work. The Council of Europe should be associated to the work of Europol and Eurojust. It provides a unique platform on which to develop the European Union's external policy in the area of justice and home affairs with regard to its immediate neighbours.

5

In conclusion

I am convinced that:

- The instruments and activities of the Council of Europe assist the EU enlargement process.
- Together we need a coherent approach to the major threats facing our democratic societies.
- The Council of Europe provides an ideal forum for the external dimension of the justice and home affairs policy with respect to neighbouring European countries.

The Council of Europe is keen to contribute, at both intergovernmental and parliamentary level, to the discussions in the Convention, as appropriate, during the completion of its important mandate.

¹¹ Final Report of the Working Party III on Legal Personality, Doc. CONV 305/02 of 1 October 2002, § 38.

Appendix

Draft clause on cooperation with the Council of Europe

Article X (Cooperation with the Council of Europe)

- (1) The Union shall establish and maintain close cooperation with the Council of Europe, the details of which shall be determined by common accord.
- (2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature in Rome on 4 November 1950, in accordance with the procedures set out in ...[the current Article 300 EC]. Accession to the Convention shall in no way modify the powers and tasks of the Union as defined by this [Constitution] [Treaty].
- (3) The provisions of this [Constitution] [Treaty] shall not affect the collaboration of its members in the work of the Council of Europe.