

The creation of an EU Interior Ministry

- for the maintenance of law and order, internal security and external borders

by Tony Bunyan *

This analysis looks at one of the proposals coming out of the Convention on the Future of Europe which will see the creation of a potentially hidden and unaccountable committee to coordinate EU-wide police cooperation, internal security and external border management.

Although the "third pillar" of the EU (covering policing and legal cooperation) is to disappear crucial powers are to be retained at the centre under the control of the Council of the European Union (the 15 EU governments and officials).

The proposal emerged during the Working Party discussions at the instigation of "experts" from the Council's General Secretariat, Europol and others, and is spelt out in detail the final report of Working Party X ("freedom, security and justice") for the Convention in December 2002 (www.statewatch.org/news/2003/apr/wpX.pdf). It was further developed in the draft constitutional Articles (www.statewatch.org/news/2003/mar/conv00614.en03.pdf)

"Strengthening operational cooperation"

The introduction to the Working Party report says that "Citizens need to feel a proper sense of "European public order" ("ordre public européen)". To bring this about a "golden rule" is proposed to:

*"Introduce, as much as possible, a separation between "legislative" and "operational" tasks"*¹

The key section of the report says that "current operational collaboration lacks efficiency, transparency and accountability". Efficiency, it argues, is hampered because "operational responsibilities are split" between national police and judicial authorities, Europol, Eurojust and OLAF (fraud). The example given is the "efficient control of the Union's external borders".

It is true that current operational cooperation lacks "transparency and accountability". Numerous issues come to mind, the Schengen evaluation reports are kept secret, so too are most of the documents on EU-US cooperation and opinions of the Legal Services, and the workings of the Police Chiefs Operational Task Force. As to accountability on "operational collaboration" there are no mechanisms for parliamentary or public scrutiny of the implementation of policies - except for sanitised annual reports. The Working Party proposals offer little or nothing to correct these problems, rather it want to make operational matters even more secretive and even less accountable.

To understand the fundamental nature of the proposal, to separate "legislative" and "operational" tasks, it is necessary to step back for a moment and put the idea in context. At the European level, a number of stages are involved in a democratic political process in respect to *third pillar* matters:

¹ Tony Bunyan is editor of Statewatch bulletin

¹ Repeated references are made in the Working Party report to "experts" and "expert testimony" from the Council, Europol and national police officials - they appear to have had a major influence in the decision to separate policy making on third pillar issues.

1. Treaties (setting out the legal and constitutional basis)
2. "Legislation", based on the power in the Treaties. This may be binding on all Member States or allow for "approximation" (that is, in a binding form that brings national laws into line but adapted to take account of national traditions and laws)
3. "Policies" may be defined in "legislation" or be defined in subsequent decisions - the latter is particularly the case in the "third pillar".² The term "policy-making" is thus confusing as it can apply strictly to "legislation" or to policies adopted later which are based on legislation.³
4. "Operational issues" are based on legislation and put into practice through implementing measures which in the third pillar often take the form of Decisions, Recommendations or Conclusions (or in some cases are exercised by EU agencies) - although the form of these decisions are non-binding ("soft law") in practice they authorise actions and are usually implemented.
5. "Operations" per se take place "on the ground", for example, controlled deliveries (of drugs and people), the surveillance of suspects, patrolling the seas for migrants etc
6. "Evaluations" concern reviewing a series of "operations" as to their effectiveness or otherwise, which may or may not lead to a review of policies
7. "Changes in policy" can come about in a number of ways. At present changes usually come about because officers, agents and officials want more powers and put a proposal to the Council.
8. To come full circle, fundamental changes result in the amendment of Treaties.

With the sole exception of point 5 - actual "operations" - all the other stages (with a few additional, very narrowly defined, exceptions) should be subject to parliamentary scrutiny and public debate. A corollary to this is that all documentation should be publicly available, subject again to a few, very narrowly defined exceptions.

Thus while parliaments and civil society do not have a right to see information or "intelligence"

² An example might be the Schengen Convention which set out general principles but was followed by a swathe of implementing policies (termed the Schengen acquis) on the Schengen Information System (SIS) and numerous manuals.

³ There are many instances where a general power is given under a legislative measure which is then used to legitimise further action. A good example is the Police Chiefs Operational Task Force (PCOTF) which has no legal basis for its activities in the EU. The Council has suggested that its work is covered by Article 3 of the 1997 Joint Action on cooperation on law and order and security. However, this Article gives no legal authority for the creation of an "operational" working party. Article 3 allows for an annual meeting (each "spring") of the "heads of central bodies for law and order and security to discuss matters of common interest" (Article 3.a) and the "holding of exercises and exchanges and training secondment" (Article 3.c). It confers no powers: i) to create a permanent working party; ii) to exchange information or iii) to engage in operational issues.

held on individuals (unless the individual directly concerned is involved) nor the precise details of planned or ongoing operations before they happen, they do have a right to know after the event: what happened, the facts and figures, evaluation reports and any proposed policy changes. Only in this way can the fullness of the democratic process be realised.

The Working Parties proposals would potentially remove from public scrutiny points 3, 4 and 6 above and only make public sanitised evaluation and annual reports - no additional powers of scrutiny are envisaged.

To return to the concrete proposals from the Working Party. It proposes that:

"a more efficient structure for the coordination of operational cooperation at high technical level be created in the Council.. [by] redefining in the new Treaty the current mission of the Article 36 Committee, which should in future focus on co-ordinating operational cooperation rather than becoming involved in the Council legislative work. How best to associate the Chiefs of Police Task Force with this work is a question deserving further examination."

The current Article 36 Committee is comprised of high-level officials from Home, Interior and Justice Ministries meeting in the Council HQ in Brussels. Its current work is largely concerned with new measures that come up through the Council's working parties and to some extent with evaluations of different kinds (eg: on the workings of the Schengen Convention).

The report's primary argument, one often heard in Brussels, is that this new role is *"technical"* and therefore not legislative. It could be, says the report:

"a technical one of coordination and oversight of the entire spectrum of operational activity in police and security matters [in the EU]"

Well, there we have it - a permanent committee of officials will run EU-wide policing and security and, as mentioned elsewhere, external border management from Brussels.

Added to this is the idea that the Police Chiefs Operational Task Force (PCOTF) could be involved in the new central committee. The Working Party seem to be unaware that the *ad hoc* status of PCOTF has been a matter of concern ever since it was set up after the Tampere Summit in October 1999. It was presented as a "think tank" but post-Genoa and 11 September it quickly acquired a whole range of sensitive roles including intelligence and information gathering, cooperation between anti-terrorist "intervention units", opening up the Schengen Information System for security agencies' surveillance purposes, harmonising informant codes, airport security, the coordination of para-military national police units and security at summits meetings and international fora held in the EU.

The position of the PCOTF is controversial because it has no legal basis, no formal rules of procedure, no mechanism for scrutiny and therefore cannot be held publicly or legally accountable for its activities. When *Statewatch* applied for documents concerning its activities there were refused on the grounds that its activities fall "outside of the institutional framework of the European

Union" even though the PCOTF was agreed at the European Council in Tampere, 1999 (www.statewatch.org/news/2003/apr/tb13875.pdf)

The dangers of creating ad hoc unaccountable bodies like the PCOTF is that they end up defining their own terms of reference and procedure. In July 2002 the group met and drew its own conclusions as to its role (www.statewatch.org/news/2003/apr/pcotf11751.pdf). The group decided to set up a Steering Committee comprised of representatives from the past, present and future EU Presidencies, plus Europol, the European Commission, the General Secretariat of the Council. It also decided to involve non-EU state or organisations where "appropriate" and to "evaluate" its own functioning "on a regular basis". Moreover, a Room Document circulated to the Article 36 Committee on 19 September 2002 proposed that the PCOTF should report to the Council through this Committee pre-figuring the Convention proposals.

On the issue of data protection the report says that:

"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"

Again the Working Party seems to be totally unaware that the roles of the Supervisory Authorities (or Bodies) are strictly limited to data protection and do not cover the liberties and rights of suspects (for example, was information properly/lawfully obtained).⁴ They do not have the power to order the deletion, correction etc of data (unlike first pillar bodies), nor is there any requirement that national authorities - who initially supply the data - should have these powers either (again unlike under the EC Directive on data protection which does not cover policing or legal cooperation). Supervision of the operation of these EU agencies is carried out by Management Boards similar to the Article 36 Committee (that is, officials from Home and Interior Ministries). Proper external scrutiny and accountability is limited to sanitised annual reports which leaves these agencies, in effect, almost entirely self-regulating.

Data protection rights were simply ignored when it came to the Europol-USA exchange of personal data (www.statewatch.org/news/2002/nov/12eurousa.htm) and are set to be similarly put aside under the planned EU-US agreements on extradition and mutual legal cooperation (www.statewatch.org/news/2003/apr/01Auseuag.htm)

Overall the Convention proposals would create a committee of officials at the EU-level for policing, the maintenance of public order, internal security and the management of external borders. It will be unaccountability, self-regulating and largely run in secret.

The separation of powers

The nature of the decisions in these areas means that, once adopted, some apply to national laws and agencies and others to EU-wide policies and procedures where the Council (or rather its General Secretariat) *implement* the measures. In practice there are a growing number of areas

⁴ There are no EU-wide data protection rules covering the third pillar - discussions in the Council on this issue, which had been going on for years, were permanently shelved in April 2001.

where the Council (comprised of the 15 EU governments) has the right of *initiative*, is the *legislator* and is undertaking the *implementation* (and where the Court of Justice has no standing).

Deirdre Curtin has described the new powers of implementation developed by the Council since the Maastricht Treaty as follows:

*"the Council at precisely the same time as its legislative power has developed.. has developed its own original executive power in quite a substantial manner in the EU areas. In other words, the Council as an institution of the EU acquired and is exercising a series of (executive) tasks which would have been entrusted to the Commission under the Community system"*⁵

Again it is necessary to step back to look at one of the basic tenets of liberal-democracy, the "separation of powers", which is held to be:

"the independence of the executive, the legislature and the judiciary from each other."

The liberal democratic model of the separation of powers means that the executive (governments) *initiate* new laws, parliaments (legislatures) *adopt, amend or reject* them and then the executive sets out administrative orders which are *implemented* by the police, immigration, customs and internal security agencies. These agencies are accountable for their actions to the *law and courts* and are not, in theory, under the direct control of government.

Looking at the role of the executive another way, first it is the *initiator* of legislation, then when it becomes law it passes back to the executive to put into practice. The executive, or in this context, Home/Interior Ministries, take the law and issue a series of instructions/manuals which collectively represent government *policy*. The officials, officers and agencies who act on these policies are answerable to the executive for the overall effect but they are *responsible to the law and courts* (or any complaints mechanism) for the way they carry out and interpret their instructions. In a democracy, in a wider sense, they are accountable too to the people for the way that they act in the streets, homes, police cells, prisons and borders. The effects of executive policy may be reported in the media, taken up by campaigning or lobbying groups, result in a parliamentary debate or inquiry before a parliamentary committee.

The term "executive" thus has a wider meaning than just that of *initiator* of new laws at national level. Governments not only initiate legislation, once a law is passed they implement it. Rules, instructions and manuals set out how policies are to be put into practice and officials, officers and agencies *administer or enforce* them. While these officials, officers and agencies are responsible to government for the overall result they are accountable to the law for the way in which they conduct their duties. The courts, media and civil society will often take a view on the way operations and duties are conducted on the ground and this in turn may lead to questions or investigation by parliamentary committees leading to changes in the basic legislation.

Applied to the "first pillar" (social and economic matters) in the EU the separation of powers is reasonably clear. The right of *initiative* lies with the Commission and the Council and European

⁵ "From governing the EU to guarding the governors? Some reflections on mechanisms of accountability of executive power in the EU", Deirdre Curtin, Professor of International Law and European Governance, Utrecht School of Governance, University of Utrecht, Netherlands.

Parliament act as *co-legislators*. Regulations are directly binding on all Member States and Directives are binding as to the result achieved but national governments and parliaments have the "choice of form and methods" (Article 249). Regulations apply at community level and are largely implemented by national authorities as are most Directives.

But in the "third pillar" (policing and legal cooperation) this process is quite different. Measures can be *initiated* by EU governments whether by the Council (in the form of the member state holding the Presidency) or Member States and by the Commission. The European Parliament is "consulted" but its views are routinely dismissed by the Council which is the sole *legislator*.⁶ Under Article 39 TEU the European Parliament is meant to be "consulted" on Framework Decisions, Conventions (which are to be abolished) and Decisions. However, a mass of policy-implementing decisions are not referred to the European Parliament - the argument being that they are non-binding "soft law".

So at the same time as part of the "third pillar" will move under the community method the new the coordination of EU-wide "policing, security and border management" will be removed from any semblance of democratic decision-making and placed in the hands of a re-vamped Article 36 Committee. This committee will have at its disposal the vast number of officials in the Council General Secretariat DG H in Brussels - it will in effect become the EU's Interior Ministry where the Council (EU governments) will act as *initiator* and *legislature*, decide on implementing *policies* and then direct and control their *implementation*.⁷

"Policing, security and border management" can here to taken to potentially include public order (at football matches and protests), the use of para-military police units (at protests or to guard EU Summits and other international meetings), anti-terrorist units, the setting of a European Border Police Force with EU-wide coercive powers and the creation of joint EU-US teams being discussed in the proposed cooperation agreement.

The removal of these coercive and surveillance roles from the democratic process presents major problems of legitimacy. Out of the window goes the separation of powers, accountability in its widest sense and meaningful parliamentary scrutiny.

The draft constitutional Articles on "operational" matters and their impact

The report of Working Party X on justice and home affairs was subsequently translated by the Convention officials into an overall draft Article 31 (Part 1) of the proposed EU Constitution and a series of more detailed Articles under the Title: "area of security freedom and justice" (Part 2) (see Joint submission by the Standing Committee of experts, Utrecht, Netherlands and Statewatch on: www.statewatch.org/news/2003/mar/28jointsub.htm). The new concept of "operational" matters is referred to in a number of the detailed Articles in Part 2 which are examined here as to their

⁶ When *Statewatch* applied for the documents containing the Council's consideration of 24 Title VI opinions from the European Parliament the Council was unable to find them.

⁷ An extraordinary example occurred two years ago when DG H (Justice and Home Affairs) in the General Secretariat of the Council put in a request to the Schengen Information System management to increase the speed of its direct modem access to the data held on the SIS (from 56k to 128k). Council officials (in effect, the JHA Ministers officials) have direct access to data on suspected individuals held on the SIS - such access at the national level would create an enormous scandal. It would be a bit like Home officials in the UK having direct access to the Police National Computer.

meaning and effect.

The overall Article 31 says one of the three main aims of the EU is to ensure an area of freedom, security and justice will be:

"by operational cooperation between all competent authorities of the Member States for internal security"(Article 31.1)

The concept of "internal security" is much wider than the existing third pillar which only covers police and legal cooperation. "Internal security" spills over into civil protection (first pillar), non-military crisis management (second pillar), embraces external border management (pre-Amsterdam third pillar to be transferred to first pillar) and extends to the maintenance of public order.

In the detailed Part 2, Article 2 says that, as agreed at the Tampere Council in October 1999:

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

However, the Tampere Council did not assign an "operational role to the Council. In the "Comments" the draft Article is said to "reflect reality" and although there is to be a single legal framework this:

"does not mean that Union procedures must necessarily be applied in exactly the same way as those under the first pillar"

This strongly implies that procedures on operational matters at the EU level on internal security will be on a different basis to the norm.

Article 5 (Part 2) is headed: "Operational cooperation" and defines the role of the re-vamped Article 36 Committee. Although the current Article 36 in the TEU refers to it as being a "Coordinating Committee" its main role in "reality" has been to deal with Title VI legislation and measures. It also deals with evaluation reports.

The remit of this committee of unelected senior officials from Home/Interior Ministries is to be "internal security". Its scope is disguised by the word "including" in the fourth line of Article 5 which reads "including police, customs and civil protection authorities"⁸ whereas "internal security" is a much wider concept embracing, for example, internal security agencies and external border management.

Great emphasis is placed on the abolition of the pillar structure allowing "all the authorities concerned with internal security to be covered for the first time" especially after the "11 September attacks". The new Committee's roles include overseeing operational coordination for "demonstrations on a European scale".

⁸ The selection of "police, customs and civil protection authorities" links the third and first pillars.

No decision-making procedures are set out in Article 5 and the European Parliament is only to be "informed" on its work - which means the new Committee will act outside of any parliamentary scrutiny or accountability.⁹

One of the mechanisms for the new Committee to undertake its work - with and through national agencies - is set out much further down under Article 21 (Part 2): "Cooperation with regard to internal security". Decision-making is set out here with the Council maintaining unanimity and the European Parliament again only "consulted". The scope for cooperation between Member States' agencies and authorities is defined as:

*"internal security, **including** police, customs and other specialised services in relation to the prevention, detection and investigation of criminal offences" (emphasis added)*

Although the "Comments" says it is "limited to police cooperation" this is clearly *not* correct as "internal security" (eg: MI5), "customs" (first pillar) and "specialised services" (whatever these are) are referred to.

It would appear that the Council will be adopting laws and framework laws (Article 21.2) under a very broad heading for the creation of EU-wide databases, analyses and surveillance. However:

"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".

By its silence it would appear that the initiative could be taken by a single Member State (unlike other Convention proposals which would require initiatives by a quarter of the Member States).

Taking Articles 5 and 21 together it appears that there will be a two-stage operational system:

1. Article 21 enforcing cooperation on all matters of internal security *between* the authorities of the Member States, and
2. The new Committee, under Article 5, providing the overall supervision and control in matters concerning EU-level matters (eg: databases etc).

Whereas Article 21 ensures the cooperation of police and security agencies Article 15 adds to the operational "picture" through provisions on "Judicial cooperation in criminal matters", in particular:

"facilitate all other forms of cooperation between ministries and judicial or equivalent authorities of Member States in relation to proceedings in criminal matters..." (15.2)

This would include physical surveillance, informers (for whom they are now drawing up EU-wide

⁹ There is no mention at all of the Police Chiefs Task Force, which is not to say that it will not play a crucial role for the new Committee.

definitions), telecommunications surveillance, searches of homes and offices etc.

Article 23, "Operations on the territory of another Member State", provides another essential "operational" component. It is said to be based on the current Article 32 TEU - but this is expressly limited to: police, Europol and judicial cooperation. As set out now it could cover the whole of internal security including immigration, customs, internal security agencies etc. Again the European Parliament is only to be "consulted"

The combination of Articles 15 and 23 are crucial when it comes to EU joint investigative teams and EU-USA joint investigative teams or any other joint teams. The way it would work is, for example: Where there is an EU-USA joint investigative team involving three EU states and taking place in Italy. The team needs to place a "suspect" individual under surveillance - tapping phone, intercepting their mobile phone, attaching a location bug to their car, searching their home or office - then the "Italian" member of the team would make the requests to the "Italian" competent authorities under "Italian" laws and practices!

To conclude, the main Article 31 says that "all competent authorities" of the EU should cooperate operationally on internal security. Who are these "authorities" - we can assume the following may be involved:

- police forces
- national criminal records databases
- National criminal intelligence agencies
- Special Branches (or their equivalent) for political, public order and anti-terrorist surveillance
- para-military police units (Tactical Support Group, UK, carabinieri, Italy, CRS, France)
- Chiefs of anti-terrorist intervention units
- specialist military units (see points 20 and 21 in WG VIII 22, Defence)
- the Club of Bern group (cooperation between secret services)¹⁰
- internal intelligence agencies (like MI5, Verfassungschutz)
- customs, officials and CIS (Customs Information System and its sub-systems)
- immigration officials, EURODAC, new VISA database
- external border management
- Police Chiefs Task Force
- Europol (especially the "liaison officers from police and intelligence services")
- Schengen Information System
- civil protection (including the meetings of the General Directors for Civil Protection)
- The JHA Working Party on terrorism
- COTER (second pillar working party)
- EU joint investigation teams

¹⁰ The Club of Bern met on 19 November 2001 in Bruges. As noted by the Belgian Presidency: "The Club of Bern raises some questions about the democratic control and the supervision by the competent authorities. The members are coopted and not designated by the competent ministers in Member States. The Club of Bern is an informal working group (larger than the EU) without any link with the EU institutions". Mr Vitorino, JHA Commissioner, wrote to the Presidency on 19 November 2001 expressing concern at the lack of supervision.

- EU-US joint investigation team
- ad hoc joint operations between two or more member states to counter "terrorism" (and protestors/activists)¹¹
- New Transatlantic Agenda meetings with USA

and there is probably a lot more we do not know about.

The maintenance of law, order and internal security in the EU: a seven level system

The Working Party's proposals - and the draft constitutional articles (see below) - will introduce a new level of EU third pillar coordination through the re-cast Article 36 Committee which will be firmly under Council control (level 4 below). This development needs to be located within the on-going levels of police, public order and internal security cooperation in the EU. These fall broadly into seven levels:

1) issues which have no cross-border implications would remain at *national level*, policies and measures to be implemented by national agencies under national governmental direction;

2) issues which have cross-border implications will (for an infinitely expandable list of offences) be covered by increased harmonisation, approximation or mutual recognition for prosecutions, sentencing and judicial decisions. Policies and measures will be set at the *EU level* but implemented at the national level;

3) *EU-level bodies and agencies:*

Europol and Eurojust come under a category called "Union bodies"¹² and the Working Party proposes that their roles, as defined in the Amsterdam Treaty will be deleted and replaced by: "shorter and more general provisions" which give the "legislator a greater margin to develop Europol's/Eurojust's tasks and powers". In short, very general powers in place of specific objectives. Moreover the Council has already decided that once the Europol Convention is converted into a Regulation (which will allow its powers to be amended speedily and with far less national parliamentary scrutiny) the Europol Working Party will be abolished. This will leave Europol as a free-standing agency with its own rules of procedure and access to documents policy.¹³

There are in addition a number of *EU-wide databases* the most prominent of which is the Schengen Information System (SIS) based in Strasbourg. Its original role covered stolen vehicles, lost or stolen documents, people to be refused entry (largely migrants who have been expelled) and the surveillance of "suspect" individuals. It is this latter role which is now being expanded in relation to terrorism and public order.

¹¹ See Spanish measure agreed last year, Statewatch bulletin, vol 12 no 2.

¹² There are curious references throughout the report to "Union bodies" which are undefined as a category. In effect the report is referring to EU-level state agencies created by the EU.

¹³ Europol has yet to adopt the standards in the EC Regulation 1049/2000 on access to documents.

Schengen related cooperation: Since the Amsterdam Treaty came into force on 1 May 1999 there have been no annual reports on Schengen cooperation on policing, immigration and bilateral agreements and cross-border cooperation.

4) *EU-wide operational coordination* will be carried out by a renamed and revamped Article 36 Committee covering policing, public order, internal security and external border management (the latter being displaced from the first pillar). This is likely to pull in the JHA Working Party on Terrorism and COTER (the second pillar group on counter-terrorism), EU-USA cooperation across the New Transatlantic Agenda and planned cooperation agreements (such as joint EU-US investigation teams operating within the EU), and cross-pillar issues like civil protection (from the second pillar).

5) There are a number of intergovernmental *ad hoc* bodies and working groups within the EU. Reference is made to the possible inclusion of the Police Chief Operational Task Force coming under the re-vamped Article 36 Committee. But whether or not this happens there are a number of other *ad hoc* fora like the EU Security and Intelligence Chiefs coordinating meetings and multinational teams (eg: France, Italy and Spain) created under the Spanish Presidency measure to combat and destabilise suspected terrorist groups.

6) the *transgovernmental* level is where EU police and security agencies sit on external international fora like G8, ILETS (International Law Enforcement Telecommunications Seminar), the Club of Bern (security services) and the Warsaw Conference on combating terrorism. Some of this interface happens at the European level, some directly with the USA and some at the international level. A number of significant global plans start out in these fora, for example, the surveillance of telecommunications, data retention and the introduction of APIS (Airline Passenger Information System). The USA and the UK are leading players at this level partly due to their long-standing cooperation on intelligence-gathering (eg: ECHELON) and the so-called "Atlantic Alliance".

7) this new and developing level concerns EU-US cooperation. It might be seen as *inter-regional* or *enhanced transgovernmentalism* but neither of these terms adequately describe what is happening. Since 11 September 2001 and Bush's letter to the EU of 16 October 2001, containing 47 demands for the EU to cooperate with the USA, an exceptional level of cooperation has developed. However, it is cooperation based on US demands, not on reciprocal arrangements (ie: the issue of EU data protection standards has arisen on at least four issues but the USA has shown no willingness to adopt a law that would cover data on "foreigners").¹⁴ The cooperation goes even deeper still with US officials sitting on key Council working parties and high-level committees such as SCIFA and the Article 36 Committee as well as re-vamped meetings under the New Transatlantic Agenda (NTA).¹⁵ Requests for documents from the Council where the USA is concerned are almost routinely refused. It is hard to determine - on EU-US cooperation on justice and home affairs issues - whether the USA has become the 16th member state of the EU or whether the EU has become the 51st state of the USA.

¹⁴ The same goes for the imposed agreement on the right of US Customs officials to inspect any container leaving an EU port for their country and the imposed agreement on access to airline passenger personal details. See Statewatch News online, January and February 2003.

¹⁵ At a recent meeting of the NTA the USA asked for direct access to the Schengen Information System.

The second and third levels would be covered by the new legislative forms being discussed in the Convention but with a shared right of initiative between the Commission and Member States on substantive "hard" law. "Soft" law measures, like Resolutions, Recommendations and Conclusions, will continue to be introduced at the sole initiative of the Council or Member States.

The fourth tier would see the creation of the new structure to cover "operational matters", the constitutional status of its decisions and accountability is very unclear. While the fifth, sixth and seventh levels remain intergovernmental and transgovernmental and outwith any meaningful accountability.

Conclusion

The new "Article 36 Committee", supported by the large staff in DG H in the General Secretariat of the Council, will become the hub of *EU-wide operational decision-making and implementation* on policing, public order, internal security and external border management (including a European Border Police Force). Most crucially, in addition to this formal role, it will have informal links and input from the plethora of ad hoc, informal, unaccountable, fora at the EU and international levels. Thus it may well become the de facto "Interior Ministry of the EU", overseeing the use of coercive powers in the emerging EU state. Heiner Busch describes this as:

"The EU is in the process of becoming a full-blown state - with a central police force, extensive databases, closed-down borders and a harsh criminal law... The "area of freedom, security and justice" turns out to be an "area of security, security and security"¹⁶

It might be argued that the creation of this operational committee and infrastructure is a response to the "war on terrorism". However it best understood as a logical (if dangerous) development of the direction that the EU was going anyway but which has been put to the top of the agenda post-11 September.

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¹⁶ Heiner Busch, CILIP no 73, nr 3/2002. www.cilip.de