



Statewatch

The EU Constitution and Justice and Home Affairs: the accountability gap

The draft EU constitution, agreed in the EU's constitutional Convention in July 2003, will now be subject to an Inter-governmental Conference starting in October, at which Member States' governments will consider whether they will "unpick" the text or not. The issue of Justice and Home Affairs (JHA), where the Constitution is particularly ambitious, will likely be a major issue. What strengths and defects does the Constitution have in this area?

First of all, there would be a number of striking changes regarding the decision-making process and judicial control over JHA matters. All measures concerning border controls, immigration and asylum would shift to a qualified majority vote in the Council (made up of delegates from Member States' governments). Furthermore, in all cases except one (emergency asylum decisions) there would also be co-decision with the European Parliament (EP), giving the EP joint decision-making powers with the Council. As for criminal law and policing, the majority of legislation would be subject to qualified majority voting with co-decision, excluding only creation of the European Public Prosecutor, cross-border actions by police and operational police measures (concerning such matters as the use of joint investigation teams). The Commission would be given the exclusive power to propose immigration and asylum legislation (this will already be the case by 1 May 2004) and the dominant role in proposing criminal and policing legislation, sharing its power to propose only where by a quarter of Member States make a proposal, rather than any one Member State, as at present. Also, criminal and policing legislation would take the form of "normal" EU laws (Regulations and Directives, to be renamed "laws" and "framework laws") with their normal legal effect, rather than framework decisions, decisions and Conventions as at present.

Judicial control would be expanded by applying the normal rules on the Court of Justice's jurisdiction (including the possibility for all national courts or tribunals to send questions to the Court of Justice) to all JHA matters in all Member States, with the exception of the validity and proportionality of policing actions, where this is a matter of national law (Article III-283).

Secondly, the extent of the powers of the "Union" (which replaces the current "Community" and "Union") would also change in all of these areas. In the areas of immigration and asylum (Articles III-166 to 169), visa and border powers would be revised to grant broader powers over visa policy and powers over freedom to travel, and to provide for power to set up an "integrated border management" system (but with no express reference to the idea of establishing a European border guard). Member States would retain the right to determine their geographical boundaries. Immigration and asylum policies would be "common", rather than concerned (at present) with establishing minimum standards in most areas. The EU's asylum powers would be revised to include some of the principles established by the Tampere European Council (summit meeting) of 1999, to give the EU power to adopt rules on a "uniform" status of asylum and to set out "common" rules in various areas, to state more expressly that all of the EU's powers extend to subsidiary protection (a status granted to those who need

protection but who do not meet the definition of “refugee” in the 1951 Refugee Convention), and to add a power concerning external cooperation on asylum (at the urging of the UK government in particular).

As for the EU’s immigration powers, again some Tampere principles would be included in the constitution (for example, “fair treatment” of third-country nationals), but not all (the Tampere reference to equal treatment of long-term residents does not appear). The EU would have new express powers to define the rights of third-country nationals in a single Member State, and the powers over irregular migration would be revised so that the EU could act against anyone resident without authorisation (rather than illegally resident) and would have express powers over removal of such persons. It would also have express power over readmission agreements and the power to adopt incentive measures concerning integration of third-country nationals. However, the EU’s immigration competence would be limited, in that it would not affect Member States’ power to control the volumes of third-country nationals coming from third countries in order to work or obtain self-employment. Finally, there would be a general clause on the principle of solidarity (sharing of persons and funds), which would apply to this entire area, replacing the specific current power to adopt measures on burden-sharing related to asylum.

Policing and criminal law

In the areas of police and criminal law, the EU’s powers would be more precisely defined. The criminal law powers would cover three areas: cross-border cooperation (Article III-171(1)), criminal procedure (Article III-171(2)), and substantive criminal law (Article III-172). In addition, there would be powers to adopt incentive measures concerning crime prevention (Article III-173), to regulate Eurojust (Article III-174) and to establish a European Public Prosecutor (Article III-175). As for policing, there would be powers over police cooperation, Europol and cross-border activities of police forces (Articles III-176-178).

The cross-border criminal cooperation powers would focus explicitly on ensuring mutual recognition of judgments and other judicial decisions (such as decisions on freezing of assets or orders to search homes and seize evidence). Powers over criminal procedure would concern admissibility of evidence, the rights of individuals in criminal proceedings and victims’ rights; in order to extend these powers, the Council would have to agree unanimously with the consent of the European Parliament. A similar solution is proposed for substantive criminal law, where the EU would have powers over ten specific crimes: terrorism, trafficking in human beings; sexual exploitation of women and children; drug trafficking; arms trafficking; money laundering; corruption; counterfeiting of means of payment; computer crime; and organised crime. Again, the Council can extend these powers if it agrees unanimously with the consent of the European Parliament. It will also have powers to adopt criminal law to assist implementation of another Union policy (for example, environmental law or the euro) subject to harmonisation measures. As for Eurojust, the Constitution will allow it to initiate prosecutions (although formally all acts will be taken by national authorities). Finally, the wholly new power to agree to creation of the European Public Prosecutor will allow the Council to establish the Prosecutor with broad jurisdiction to investigate and prosecute not only crimes against EC financial interests, but any serious crimes affecting more than one Member State. Prosecutions will have to be brought in the courts of a Member State.

The EU’s powers over national police cooperation would be broadly unchanged, but the powers and remit of Europol would be expanded to cover all serious crimes with a cross-border element and to permit Europol to coordinate, organise and implement investigations and operations in conjunction with national forces. However, any “coercive action” (eg.: arrests) must be carried out by national forces.

New standing committee on “internal security”

The new Chapter would also contain general Articles applicable to all areas of JHA. First, the general objectives of JHA policy (Article III-158) would include respect for fundamental rights and fairness to third-country nationals, along with the goal of “a high level of security”. The European Council would define strategic guidelines for legislative and operational planning (Article III-159). There would be general powers to adopt evaluation mechanisms (Article III-161) and to establish a standing committee to ensure operational cooperation in internal security (Article III-162), which will coordinate activities of EU and national bodies dealing with the all-embracing concept of “internal security” (including police, customs, border police, possibly even security and intelligence agencies and the use of the military inside the EU). The power to adopt rules on administrative cooperation (current Article 66 EC) would be extended to third pillar rules and such rules will be adopted by QMV with consultation of the EP (Article III-164). At the moment, this power is used to adopt measures concerning the Schengen Information System (SIS). National parliaments have the right to receive information about evaluation mechanisms (Article III-160) and to be kept informed on the standing committee. In areas of police and criminal law it will be slightly easier for a group of them to invoke the (non-binding) system to be set up to ask the Commission to rethink its proposals on grounds of subsidiarity (the principle that EU activity should “add value” as compared to Member State activity).

What is the likely impact of the new rules, if adopted in the form proposed? The moves toward qualified majority voting in the Council will likely mean quicker adoption of legislation, and furthermore adoption of legislation that would not have had any chance of success otherwise. This will particularly be the case where the Council currently uses Conventions (most importantly the Europol Convention), where any change in the rules will also require ratification by all national parliaments. National scrutiny reserves which have been used to delay adoption of JHA legislation will not mean much when the Council can override them by QMV. Clearly the powers for national parliaments foreseen in the new rules are very weak compared to parliaments’ current position. For the Schengen Information System (SIS) and possibly similar information and database systems, there is a risk that the “administrative cooperation” power will be used, so that neither national parliaments nor the EP will have any control over measures.

Co-decision with the European Parliament would mean, if future EPs maintain the EP’s voting record, a considerably more liberal approach to immigration and asylum law but an uncritical approach to the risks posed by mutual recognition in criminal law. There are widespread doubts about the necessity for the European Public Prosecutor in a number of Member States, particularly if its remit will extend well beyond crimes against EU financial interests and counterfeiting the euro. A likely scenario is provision for the Prosecutor to have powers only in those Member States which consent to it, but this raises complex and awkward questions about its jurisdiction regarding those Member States which object to the Prosecutor, as they will be in a situation similar to the United States as regards the International Criminal Court.

The accountability gap

There is no effective system of accountability for the standing committee on operational cooperation in internal security planned by the new Constitution. National parliaments and the European Parliament will only be informed of its activities, but that does not give them any power to control it. Who will the committee be accountable to, and who will be liable if something goes wrong? (see critique in *Statewatch* vol 13 no 1, p21). The planned rules on access to documents (Article I-49) will apply more fully in the case of legislative activity (Article III-305) so there is a big risk, based on present practice, that the Council will not disclose to the public what is going on in this standing committee. Similarly the provisions on effective control and accountability of Europol, Eurojust and the Public Prosecutor are very vague.

Taken as a whole, the Constitution would create a system where much JHA legislation would be subject to joint control by the European Parliament and full judicial control would be exercised by the EU courts. However, the powers of national parliaments would be dramatically weakened, some important legislation would escape effective controls, and the extended powers for EU bodies, agencies and/or Member States collectively to engage in joint operations would not be subject to sufficient accountability.

CONV 850/03, final text of Constitution submitted to Italian Presidency