



Guide to EU decision-making and justice and home affairs after the Treaty of Lisbon

**by Steve Peers, Professor of Law, University of Essex
with additional material by Tony Bunyan**

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Guide to EU decision-making after the Treaty of Lisbon

Legislative procedures

The concept of a 'legislative procedure' is now officially defined in the Treaties, following the entry into force of the Treaty of Lisbon. Article 289 of the Treaty on the Functioning of the European Union (TFEU) specifies that there are two types of legislative procedure: the ordinary legislative procedure and special legislative procedures. Most EU legislation must be proposed by the Commission, but as noted in Article 289(4) TFEU, there are a few cases where legislation can be proposed by the European Parliament, Member States, or other bodies. The most important of these for JHA matters is the field of policing and criminal law, where a quarter of Member States can make proposals (see Article 76 TFEU) – and already have done since the new Treaty entered into force.

The **ordinary legislative procedure** is governed by standard rules (set out in Article 294 TFEU). These are essentially the same rules that governed the 'co-decision' process (previously set out in Article 251 EC), ie the possibility of first-reading deals, a second reading deal after the Council adopts its first-reading position (no longer called a 'common position'), the possibility of conciliation if a second-reading deal is not reached. The Treaty of Lisbon has simply amended the wording to emphasise the equality between the European Parliament (EP) and the Council throughout this procedure. Effectively as far as the adoption of EU legislation is concerned, the EP and Council constitute a two-chamber legislature.

The main change resulting from the Treaty of Lisbon is the application of this procedure to a number of additional 'legal bases', not only to a lot of the JHA area (legal migration, visa lists, and most criminal law and policing measures) but also to important other parts of EU law such as agriculture, fisheries and external trade. There are now about 70 legal bases providing for the ordinary legislative procedure. Obviously a bigger percentage of legislation than before will be subject to this procedure.

The cases where the ordinary legislative procedure applies are defined in each of the relevant legal bases. It should be noted that there are no longer any cases in which this procedure is combined with unanimity in the Council – qualified majority voting (QMV) always applies. There are, however, a few cases (criminal law and social security for migrants) where an individual Member State can pull an 'emergency brake' to stop decision-making on specified grounds, followed by an attempt at dispute settlement in the European Council (ie, EU leaders' summits). In the case of criminal law (but not social security), a continued deadlock

concerning each proposal can lead to fast-track authorisation of 'enhanced cooperation'.

The **special legislative procedures** are not governed by standard rules, but by different rules in each of the legal bases which provide for such procedures. There are about 30 cases of special legislative procedures set out in the Treaty. The idea of a special legislative procedure is that the Council and EP are still each involved in the adoption of legislation, but subject to different rules than those which govern the ordinary legislative procedure.

In most cases, the special legislative procedure involves unanimity in Council and consultation of the EP (for instance, Article 89 TFEU, concerning cross-border police operations). In a few cases, it involves unanimity and consent of the EP (for instance, Article 86, concerning the European Public Prosecutor). There are also a few cases where the Council votes by QMV and the EP is only consulted, or where the EP takes the lead role and the Council approves the EP's measure. There is a *sui generis* special legislative procedure concerning the adoption of the annual EU budget; this entails a version of the ordinary procedure which is specially adapted to the particular features of the budget process (QMV in Council applies).

Any EU measure adopted by means of a legislative procedure is a '**legislative act**' (Article 289(3) TFEU). The obvious implication is that any EU measure *not* adopted by a legislative procedure is *not* a legislative act. The distinction between legislative and non-legislative acts has some practical implications: for instance the Council must always meet in public when adopting or discussing legislative acts, but is not under an obligation to do so when discussing non-legislative acts (see Article 15(2) TFEU).

Non-legislative acts

There are several different types of non-legislative acts. First of all, there are non-legislative acts **based on the Treaties**, ie: for which the legal base is provided for in the Treaty on European Union (TEU) or TFEU. For instance, Article 81(3) TFEU (second sub-paragraph) states that the Council may adopt a decision changing the decision-making procedure relating to family law legislation. Since the Treaty does not specify that this decision would be adopted by a legislative procedure, it would therefore be a non-legislative act.

There are no standard rules for the procedure for adoption of non-legislative acts based on the Treaty. For instance, the family law decision just referred to requires the Council to act unanimously on a proposal from the Commission, after consulting the EP. Other legal bases for non-legislative acts provide for the Council to act by QMV (see Article 74 TFEU, on administrative cooperation within the sphere of JHA).

Some non-legislative acts are adopted by the European Council (see the possible extension of role of the European Public Prosecutor, in Article 86(4) TFEU). As for the EP, it is not consulted in some cases (see Article 215 TFEU, concerning foreign policy sanctions), consulted in others (see Article 74 TFEU), and has the power of consent in others (see Article 86(4) TFEU). There is no standard requirement that the Commission has to propose non-legislative acts; its role depends on each legal base (for instance, Article 86(4) only requires consultation of the Commission).

In several cases (anti-terrorist sanctions, agriculture and fisheries) the Treaty specifies that general rules on an issue will be adopted in a legislative act adopted by means of the ordinary legislative procedure, and then provides for the general rules to be supplemented by non-legislative acts to be adopted by a specific procedure (proposal from the Commission, QMV in Council, no EP role).

As for the **negotiation and approval of treaties by the EU**, the Council authorises the Commission to negotiate and then decides on whether to sign the treaty. The conclusion of each treaty, after the entry into force of the Treaty of Lisbon, requires not only the approval of the Council but also the consent of the EP if the subject-matter of the treaty concerned falls within the scope of the ordinary legislative procedure or an area in which the EP has the power of consent. Since most treaties will meet these criteria, almost all treaties are subject to the EP's consent power.

It should be noted that the Treaty rules out the use of legislation in the field of foreign policy – so all foreign policy measures are non-legislative acts.

Non-legislative acts based on secondary legislation

There are also two forms of non-legislative acts based on secondary legislation. There are the **implementing powers procedure ('comitology')** and the possibility of adopting **delegated acts**.

First of all, the concept of **comitology** was first established in the early years of the EC. It was formalised in the EC Treaty in the 1980s and was subject from 1987 to a Council Decision establishing general rules for comitology procedures, which were replaced by a new set of general rules in 1999. The 1999 general rules were amended in 2006. The Treaty base for the principle of comitology and the adoption of these general rules was Article 202 EC (now Article 291 TFEU).

The basic idea of the comitology process is that the power to adopt implementing measures at EU level is normally to be conferred on the Commission – but in exceptional cases that power can be conferred on the Council instead (note that there are no general rules governing the rare cases where implementing powers are conferred upon the Council). The Court of Justice has ruled that other than this framework, there is no possibility to confer some sort of additional secondary legislative power on the Council,

allowing it to adopt measures other than by the procedures listed in the Treaties (Case C-133/06, *EP v Council*, judgment of May 2008, concerning the 'common lists' in the asylum procedures Directive).

The comitology process can be used to implement either legislative or non-legislative acts, but it does not apply to foreign policy measures (they must be implemented by the Council).

The Decision establishing general rules specifies four types of comitology procedure: the **advisory** procedure (very rarely used); the **management** procedure (not often used); the **regulatory** procedure (used most often); and the **regulatory procedure with scrutiny (RPS)** (introduced by the 2006 amendments to the general rules).

The regulatory procedure with scrutiny *must* be used in cases where the basic legislation was adopted by means of the co-decision procedure, and 'provides for the adoption of measures of general scope designed to amend non-essential elements of that instrument, *inter alia* by deleting some of those elements or by supplementing the instrument by the addition of new non-essential elements'. Otherwise, there is a choice which of the other types of procedure to use, provided that if the EU legislators wish to depart from the guidance given in the general procedure as to which procedure to use, they have to explain why they did not follow the guidance.

The basic feature of all comitology procedures is that the Commission chairs committees of Member State representatives, and submits to them draft implementing measures for discussion and vote. In the advisory procedure, the vote of the representatives is not binding in any way. In the management procedure, a QMV of the representatives *against* the measure is necessary to block it. In the regulatory procedure and the RPS, a QMV of the representatives *in favour* of the measure is necessary for it to be adopted.

In the event that a draft implementing measure is blocked by the representatives (which is rare), the Commission must make a proposal on the issue to the Council. Where the management procedure applies, the Commission may defer the adoption of its draft decision, but the Council may take a different decision by QMV within a specified time limit (no more than three months). Where the regulatory procedure applies, the Council can either adopt the act (or presumably an amended version of it) by QMV, or block it by QMV against the proposal, in which case the Commission must re-examine the proposal; the Commission may submit an amended proposal, the same proposal or a legislative proposal on this issue. If the Council does not act, then the Commission can approve the proposal. The EP is informed of the draft proposal, and can express non-binding objections on certain grounds if the measure would implement legislation adopted by

means of the co-decision procedure.

Where the regulatory procedure with scrutiny applies, if the draft act is approved by national representatives, the Commission must then send it to the EP and the Council for scrutiny. Either institution can block the draft act (by QMV against it in the Council, or by the vote of a majority of all MEPs) on broad specified grounds, within a specified time period. If the EP and the Council do not object, the Commission can adopt the measure. If either of them does object, the Commission may either submit a new proposal or a proposal for legislation. If the draft act is not approved by national representatives, then the Commission must submit a draft to the Council and the EP, which have a chance to block it or to adopt the text (or presumably a different text), which is in the latter case still subject to the power of the EP to block it.

Other than in the RPS procedure, the EP has a limited role, being informed only of draft implementing measures and also being sent draft agendas of committee meetings and records of committee proceedings.

There is also special provision for a **safeguard procedure** concerning safeguard measures (ie: in the case of international trade). In these cases, the basic legal act may require the Commission to consult with Member States; in any case, the Commission must inform the Member States and the Council of draft measures. A Member State may then refer the draft decision to the Council, which can control the decision-making of the Commission in some form (by blocking or approving it, or taking a different decision) by QMV.

The Treaty of Lisbon provides that general rules on comitology must now be adopted by means of the ordinary legislative procedure (they were previously adopted by means of unanimity in Council with consultation of the EP). **The Commission has presented a proposal for new rules on comitology procedures which are currently being discussed (see EU Council doc no: 14543/10).**

Next, the Treaty of Lisbon has introduced a new procedure for **delegated acts** (Article 290 TFEU). This Article specifies that EU legislation 'may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act'.

It should be noted that the scope of this power is the same as the scope of the RPS procedure (except that the delegated acts procedure can apply regardless of the procedure used to adopt legislation), and indeed the EU institutions recognise that no legislation adopted after the entry into force of the Treaty of Lisbon can establish any new RPS procedures. It is not yet known if there will be proposals to amend any legislation adopted before the entry into force of the Treaty of Lisbon in order to provide for the delegated acts procedure to apply.

It should also be noted that delegated powers can only be

delegated to the Commission, not the Council.

There will not be any general rules governing the delegated acts procedure, except a Commission communication in December 2009 which set out model Articles for legislation which could be adapted on a case-by-case basis.

The Treaty provides that to control the delegation to the Commission, either:

(a) the European Parliament or the Council may decide to revoke the delegation;

(b) the delegated act may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the legislative act.

So far the EP and the Council have adopted a number of legislative acts in 2010 which provide for the adoption of delegated acts by the Commission, and the first few draft delegated acts have already been proposed. The legislation provides for a review of the delegation of power after a fixed period; the application of both methods of control of the Commission; and time periods of two or three months for the EP or the Council to block the adoption of each draft delegated act.

It should be noted that unlike the comitology procedure, there is no requirement of consulting Member States' representatives before the adoption of delegated acts; although the Commission has indicated that it will consult national experts informally on draft delegated acts, there is no power for those experts to block the draft.

Form of acts

The Treaty of Lisbon has consolidated the types of legal acts which the EU may adopt: regulations, directives and decisions (see Article 288 TFEU). However, unlike some national legal systems, the types of legal act do not indicate whether the act in question is a legislative or non-legislative act, or by which means each act was adopted. So, while most Directives are legislative acts, they might have been adopted by either the ordinary legislative procedure or a special legislative procedure, and some Directives are non-legislative acts. Equally while many Regulations and Decisions are non-legislative acts, they might be legislative acts adopted by any type of legislative procedure.

The Treaty of Lisbon does require that implementing acts and delegated acts indicate in their title that they are implementing or delegated acts respectively. While the Council has observed this obligation since the new Treaty entered into force, the Commission has breached it.

THE LISBON TREATY AND JUSTICE AND HOME AFFAIRS

Introduction

Following the entry into force of the Lisbon Treaty, the basic framework for EU law is comprised of the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU).

The Council

The provisions on Justice and Home Affairs come under the JHA Council of Ministers and cover the “Area of freedom, security and justice” set out below from the TFEU.

Meetings of the JHA Council have two Agendas:

“B” Points Agenda: for the formal adoption of legislative measures often held in public and discussions on particular issues (not in public) and

“A” Points Agenda (measures adopted without debate) of the JHA Council is divided into:

- Legislative measures and
- Non-legislative measures

In practice the list of “legislative” measures is usually very short and “non-legislative” measures (adopted without discussion) is very long.

Further, for the lay person the term “non-legislative” could be misunderstood, as in many cases non-legislative acts amend existing legislation and have the force of law. The exception is where the JHA Council adopts a policy statement, for example, “Resolutions”, “Recommendations” or “Conclusions” (which are legally non-binding and known as “soft-law”).

The European Commission

The European Commission has two Commissioners and two Directorate-Generals (staff) dealing with JHA matters. One covers “Home Affairs” (internal security and immigration; Commissioner Mallstrom) and the other Fundamental Rights (Justice, Fundamental Rights and Citizenship (Commissioner Reding).

The European Parliament

The Committee on Civil Liberties (LIBE) deals with most justice and home affairs issues in the Parliament (except for issues dealing with civil law, which are dealt with by the Legal Affairs committee (JURI)). Reports agreed by the committee go to the plenary session of the EP for formal adoption.

The European Parliament also has powers to intervene in “non-legislative” acts, including implementing and

delegated acts (see previous analysis). However, the parliament’s resources to scrutinise the swathe of measures is limited and it can only reject a draft delegated act or draft implementing measure by an absolute majority (ie: a majority of all MEPs not a majority of those actually present).[1]

JHA Decision-making

- **ordinary legislative procedure**: joint decision-making by Council and the European Parliament (11 instances) [2]

- **special legislative procedure**: the European Parliament is either simply consulted and its opinion can be ignored (4 instances), or its consent is required (1 instance)

- other cases where the European Parliament is “**consulted**” (3 instances)

- other cases where the “**consent**” of the European Parliament is needed – the parliament cannot change the text but can accept or reject (3 instances)

- possible “enhanced cooperation” between at least nine Member States where the European Parliament is simply “**notified**” of the decision to trigger enhanced cooperation (4 instances)

- there is no role for the European Parliament regarding: (Art 68) the European Council adopting strategic guidelines for legislative and operational planning (eg: the Stockholm Programme); (Art 71) COSI and (Art 73) internal security agencies cooperation.

Tony Bunyan, December 2010

FULL-TEXT

TFEU

TITLE V

AREA OF FREEDOM, SECURITY AND JUSTICE

CHAPTER 1

GENERAL PROVISIONS

Article 67

(ex Article 61 TEC and ex Article 29 TEU)

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.

2. 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, which is fair towards third-country nationals. For the purpose of this Title, stateless persons shall be treated as third-country nationals.

3. The Union shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws.

4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article 68

The **European Council shall define** the strategic guidelines for legislative and operational planning within the area of freedom, security and justice. [3]

Article 69

National Parliaments ensure that the proposals and legislative initiatives submitted under Chapters 4 and 5 comply with the principle of subsidiarity, in accordance with the arrangements laid down by the Protocol on the application of the principles of subsidiarity and proportionality.

Article 70

Without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the 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, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Article 71

(ex Article 36 TEU)

A **standing committee** shall be set up within the Council in order to ensure that **operational cooperation on internal security** is promoted and strengthened within the Union. Without prejudice to Article 240, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies, offices and agencies concerned may be involved in the proceedings of this committee. The European Parliament and national Parliaments shall be kept **informed** of the proceedings.[4]

Article 72

(ex Article 64(1) TEC and ex Article 33 TEU)

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 internal security.

Article 73

It shall be open to Member States to **organise between themselves** and under their responsibility such forms of cooperation and coordination as they deem appropriate between the **competent departments of their**

administrations responsible for safeguarding national security. [5]

Article 74

(ex Article 66 TEC)

The Council shall adopt measures to ensure administrative cooperation between the relevant departments 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, subject to Article 76, and after **consulting** the European Parliament.

Article 75

(ex Article 60 TEC)

Where necessary to achieve the objectives set out in Article 67, as regards preventing and combating terrorism and related activities, the European Parliament and the Council, acting by means of regulations in accordance with the **ordinary legislative procedure**, shall define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds, financial assets or economic gains belonging to, or owned or held by, natural or legal persons, groups or non-State entities.

The **Council**, on a proposal from the Commission, **shall adopt measures** to implement the framework referred to in the first paragraph. [6]

The acts referred to in this Article shall include necessary provisions on legal safeguards.

Article 76

The acts referred to in Chapters 4 and 5, together with the measures referred to in Article 74 which ensure administrative cooperation in the areas covered by these Chapters, shall be adopted:

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

CHAPTER 2

POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION

Article 77

(ex Article 62 TEC)

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

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

2. For the purposes of paragraph 1, the European

Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, shall adopt measures concerning:

- (a) the common policy on visas and other short-stay residence permits;
- (b) the checks to which persons crossing external borders are subject;
- (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;
- (d) any measure necessary for the gradual establishment of an integrated management system for external borders;
- (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a **special legislative procedure**, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after **consulting the European Parliament**.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

Article 78

(ex Articles 63, points 1 and 2, and 64(2) TEC)

1. The Union shall develop a common policy on asylum, subsidiary protection 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 must 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 the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, shall adopt measures for a common European asylum system comprising:

- (a) a uniform status of asylum for nationals of third countries, valid throughout the Union;
- (b) a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;
- (c) a common system of temporary protection for displaced persons in the event of a massive inflow;
- (d) common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status;
- (e) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
- (f) standards concerning the conditions for the reception of applicants for asylum or subsidiary protection;
- (g) partnership and cooperation with third countries for the

purpose of managing inflows of people applying 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, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after **consulting the European Parliament**.

Article 79

(ex Article 63, points 3 and 4, TEC)

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. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, shall adopt measures in the following areas:

- (a) the 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 reunification;
- (b) the definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing freedom of movement and of residence in other Member States;
- (c) illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
- (d) combating trafficking in persons, in particular women and children.

3. The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

4. The European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, may establish measures to provide incentives and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonisation of the laws and regulations of the Member States.

5. This Article shall not affect the right of Member States to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Article 80

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 Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

CHAPTER 3

JUDICIAL COOPERATION IN CIVIL MATTERS

Article 81

(ex Article 65 TEC)

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

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases;

(b) the cross-border service of judicial and extrajudicial documents;

(c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;

(d) cooperation in the taking of evidence;

(e) effective access to justice;

(f) the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;

(g) the development of alternative methods of dispute settlement;

(h) support for the training of the judiciary and judicial staff.

3. Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a **special legislative procedure**. The Council shall act unanimously after **consulting** the European Parliament.

The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after **consulting the European Parliament**.

The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may

adopt the decision.

CHAPTER 4

JUDICIAL COOPERATION IN CRIMINAL MATTERS

Article 82

(ex Article 31 TEU)

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in paragraph 2 and in Article 83.

The European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, shall adopt measures to:

(a) lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions;

(b) prevent and settle conflicts of jurisdiction between Member States;

(c) support the training of the judiciary and judicial staff;

(d) facilitate cooperation between judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the **ordinary legislative procedure**, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

(a) mutual admissibility of evidence between Member States;

(b) the rights of individuals in criminal procedure;

(c) the rights of victims of crime;

(d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the **consent of the European Parliament**.

Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in

case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

Within the same timeframe, in case of disagreement, and **if at least nine Member States wish to establish enhanced cooperation** on the basis of the draft directive concerned, they shall **notify the European Parliament**, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Article 83

(ex Article 31 TEU)

1. The European Parliament and the Council may, by means of directives adopted in accordance with the **ordinary legislative procedure**, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

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.

On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the **consent of the European Parliament**.

2. If the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question, without prejudice to Article 76.

3. Where a member of the Council considers that a draft directive as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft directive be referred to the European Council. In that case, the ordinary legislative procedure shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council, which shall terminate the suspension of the ordinary legislative procedure.

Within the same timeframe, in case of disagreement, and **if at least nine Member States wish to establish enhanced cooperation** on the basis of the draft directive concerned, they shall **notify the European Parliament**, the Council and the Commission accordingly. In such a

case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Article 84

The European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, may establish measures to promote and support the action of Member States in the field of crime prevention, excluding any harmonisation of the laws and regulations of the Member States.

Article 85

(ex Article 31 TEU)

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

In this context, the European Parliament and the Council, by means of regulations adopted in accordance with the **ordinary legislative procedure**, shall determine Eurojust's structure, operation, field of action and tasks. These tasks may include:

(a) the initiation of criminal investigations, as well as proposing the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;

(b) the coordination of investigations and prosecutions referred to in point (a);

(c) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

These regulations shall also determine arrangements for involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities.

2. In the prosecutions referred to in paragraph 1, and without prejudice to Article 86, formal acts of judicial procedure shall be carried out by the competent national officials.

Article 86

1. In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a **special legislative procedure**, may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the **consent of the European Parliament**.

In the absence of unanimity in the Council, a group of at least nine Member States may request that the draft regulation be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the

European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and **if at least nine Member States wish to establish enhanced cooperation** on the basis of the draft regulation concerned, they shall **notify the European Parliament**, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

2. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment, where appropriate in liaison with Europol, the perpetrators of, and accomplices in, offences against the Union's financial interests, as determined by the regulation provided for in paragraph 1. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.

3. The regulations referred to in paragraph 1 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 it in the performance of its functions.

4. The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State. The European Council shall act unanimously after obtaining the **consent of the European Parliament** and after consulting the Commission.

CHAPTER 5

POLICE COOPERATION

Article 87

(ex Article 30 TEU)

1. The Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the **ordinary legislative procedure**, may establish measures concerning:

(a) the collection, storage, processing, analysis and exchange of relevant information;

(b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into

crime-detection;

(c) common investigative techniques in relation to the detection of serious forms of organised crime.

3. The Council, acting in accordance with a **special legislative procedure**, may establish measures concerning operational cooperation between the authorities referred to in this Article. The Council shall act unanimously after **consulting the European Parliament**.

In case of the absence of unanimity in the Council, a group of at least nine Member States may request that the draft measures be referred to the European Council. In that case, the procedure in the Council shall be suspended. After discussion, and in case of a consensus, the European Council shall, within four months of this suspension, refer the draft back to the Council for adoption.

Within the same timeframe, in case of disagreement, and **if at least nine Member States wish to establish enhanced cooperation** on the basis of the draft measures concerned, they shall **notify the European Parliament**, the Council and the Commission accordingly. In such a case, the authorisation to proceed with enhanced cooperation referred to in Article 20(2) of the Treaty on European Union and Article 329(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The specific procedure provided for in the second and third subparagraphs shall not apply to acts which constitute a development of the Schengen *acquis*.

Article 88

(ex Article 30 TEU)

1. Europol's mission shall be to support and strengthen action by the Member States' police authorities and other law enforcement services 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, by means of regulations adopted in accordance with the **ordinary legislative procedure**, shall determine Europol's structure, operation, field of action and tasks. These tasks may include:

(a) the collection, storage, processing, analysis and exchange of information, in particular that forwarded by the authorities of the Member States or third countries or bodies;

(b) the coordination, organisation and implementation of investigative and operational action carried out jointly with the Member States' competent authorities or in the context of joint investigative teams, where appropriate in liaison with Eurojust.

These regulations shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with national Parliaments.

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

Article 89

(ex Article 32 TEU)

The Council, acting in accordance with a **special legislative procedure**, shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles 82 and 87 may operate in the territory of another Member State in liaison and in agreement with the authorities

Footnotes

1. European Parliament: Migrants at sea: guidelines for EU border patrols (Press release, pdf): At the plenary session a majority of MEPs voted to reject non-binding guidelines for search and rescue at sea conducted by the FRONTEX and national agencies, however, under its rules an absolute majority of MEPs, 369 out of a total of 738, was required to stop the Commission proposal going ahead. (March 2010).

2. During the last session of the European Parliament (2004-2009) 84.2% of co-decision (now called ordinary legislative procedure) measures considered by the European Parliament's Civil Liberties Committee went through under secret, 1st reading deals with the Council. See: Abolish 1st [and 2nd] reading secret deals – bring back democracy “warts and all”:

<http://www.statewatch.org/analyses/no-84-ep-first-reading-deals.pdf>

3. The European Council (27 Presidents or Prime Ministers) can set the overall agenda without the agreement of the European or national parliaments.

4. This is known as the Standing Committee on operational cooperation on internal security (COSI) which is assisted by the JHA Counsellors/COSI Support Group. COSI is not accountable to the European Parliament who are simply “kept informed” of its “proceedings.”

5. For the first time national internal security agencies are mentioned in the Treaty. They can meet to cooperate under old-style unaccountable intergovernmental cooperation.

6. There is no role for the European Parliament.

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