



Statewatch

EU Constitutional annotation no 4

Part III, Title IV, Chapter III: Justice and Home Affairs

The following text includes the entire text of Chapter in Part III of the proposed EU constitution concerning justice and home affairs, with annotations referring to the corresponding indicating how the proposed Constitution compares to the current Treaties, practice and case law.

This area would be subject to more changes in decision-making procedure than any other area of EU law, with qualified-majority voting and co-decision extended to all immigration and asylum legislation and a large majority of criminal law and policing measures. In addition, there would be major changes to the operational coordination of Member States internal security bodies and EU bodies.

There would also be major changes to the EU judicial system as applied to this area; for more see Statewatch annotation no 3.

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CHAPTER IV

AREA OF FREEDOM, SECURITY AND JUSTICE

SECTION 1

GENERAL PROVISIONS

Article III-158¹

1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights, taking into account the different legal traditions and systems 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 chapter, stateless persons shall be treated as third-country nationals.
3. The Union shall endeavour to ensure a high level of security by measures to prevent and combat crime, racism and xenophobia, and measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as by the mutual recognition of judgments in criminal matters and, if necessary, the approximation of criminal laws.
4. The Union shall facilitate access to justice, in particular by the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.

Article III-159²

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

Article III-160³

1. Member States' national Parliaments shall ensure that the proposals and legislative initiatives submitted under Sections 4 and 5 of this Chapter comply with the principle of subsidiarity, in accordance with the arrangements in the Protocol on the application of the principles of subsidiarity and proportionality.

Member States' national Parliaments may participate in the evaluation mechanisms contained in Article III-161 and in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles III-177 and III-174.

¹ Replaces Arts. 29 EU and 61 EC.

² New clause; reflects practice as regards legislation.

³ New clause.

Article III-161⁴

Without prejudice to Articles III-265 to III-267, the Council of Ministers may, on a proposal from the Commission, adopt European regulations or decisions 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 Chapter by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and Member States' national Parliaments shall be informed of the content and results of the evaluation.

Article III-162⁵

A standing committee shall be set up within the Council of Ministers in order to ensure that operational cooperation on internal security is promoted and strengthened within the Union. Without prejudice to Article III-247, it shall facilitate coordination of the action of Member States' competent authorities. Representatives of the Union bodies and agencies concerned may be involved in the proceedings of this committee. The European Parliament and Member States' national parliaments shall be kept informed of the proceedings.

Article III-163⁶

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

Article III-164⁷

The Council of Ministers shall adopt European regulations to ensure administrative cooperation between the relevant departments of the Member States in the areas covered by this Chapter, as well as between those departments and the Commission. It shall act on a Commission proposal, without prejudice to Article III-165, and after consulting the European Parliament.

Article III-165⁸

The acts referred to in Sections 4 and 5 of this Chapter shall be adopted:

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

⁴ New clause; reflects practice.

⁵ Replaces Art. 36 EU; reorients tasks of committee.

⁶ Art. 33 EU and Art. 64(1) EC.

⁷ Art. 66 EC, expanded to cover third pillar.

⁸ Replaces power of individual Member States to make proposals (Art. 34(2) EU).

SECTION 2

POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION

Article III-166⁹

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 this purpose, European laws or framework laws shall establish measures concerning:
 - (a) the common policy on visas and other short-stay residence permits;
 - (b) the controls 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. This Article shall not affect the competence of Member States concerning the geographical demarcation of their borders, in accordance with international law.

Article III-167¹⁰

1. The Union shall develop a common policy on asylum and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*. This policy 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 this purpose, European laws or framework laws shall lay down measures for a common European asylum system comprising:

⁹ Amends Art. 62 EC.

¹⁰ Paras. 1 and 2 amend Art. 63(1) and 63(2) EC; para. 3 amends Art. 64(2) EC.

- (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 or 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 with an emergency situation characterised by a sudden inflow of nationals of third countries, the Council of Ministers, on a proposal from the Commission, may adopt European regulations or decisions comprising provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament.

Article III-168¹¹

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 who reside legally in Member States and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.
2. To this end, European laws or framework laws shall establish 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 reunion,
 - (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.

¹¹ Amends Art. 63(3) and (4) EC.

3. The Union may conclude readmission treaties with third countries for the readmission of third-country nationals residing without authorisation to their countries of origin or provenance, in accordance with Article III-227.

4. European laws or framework laws 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 III-169¹²

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

SECTION 3

JUDICIAL COOPERATION IN CIVIL MATTERS

Article III-170¹³

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and 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. To this end, laws or framework laws shall lay down measures aimed inter alia at ensuring:

(a) the mutual recognition and enforcement between Member States of judgments and 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) a high level of access to justice;

¹² Successor to Art. 63(3)(b) EC.

¹³ Revised text of Art. 65 EC.

- (f) 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 laid down in a European law or framework law of the Council of Ministers. It shall act unanimously after consulting the European Parliament.

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

SECTION 4

JUDICIAL COOPERATION IN CRIMINAL MATTERS

Article III-171¹⁴

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 III-172.

European laws or framework laws shall establish measures to:

- (a) establish rules and procedures to ensure the recognition throughout the Union of all forms of judgments and judicial decisions;
- (b) prevent and settle conflicts of jurisdiction between Member States;
- (c) encourage 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. In order to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, a European framework law may establish minimum rules concerning:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;

¹⁴ Arts. III-171 and 172 amend the current Art. 31(1) EU.

(c) the rights of victims of crime;

(d) any other specific aspects of criminal procedure which the Council of Ministers has identified in advance by a European decision. The Council of Ministers shall act unanimously after receiving the approval of the European Parliament.

Adoption of such minimum rules shall not prevent Member States from maintaining or introducing a higher level of protection for the rights of individuals in criminal procedure.

Article III-172

1. A European framework law may establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with cross-border dimensions 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 of Ministers may adopt a European 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 legislation proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, a European framework law may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned.

Without prejudice to Article III-165, that framework law shall be adopted by the same procedure as was followed for the adoption of the harmonisation measures referred to in the preceding subparagraph.

Article III-173¹⁵

A European law or framework law may establish measures to promote and support the action of Member States in the field of crime prevention. Such measures shall not include the approximation of Member States' legislative and regulatory provisions.

Article III-174¹⁶

1. Eurojust's mission shall be to support and strengthen coordination and cooperation between national 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.

2. European laws shall determine Eurojust's structure, workings, scope of action and tasks. Those tasks may include:

¹⁵ New clause, but reflects practice.

¹⁶ Amends Art. 31(2) EU.

- (a) the initiation and coordination of criminal prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union;
- (b) the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network.

European laws shall also determine arrangements for involving the European Parliament and Member States' national parliaments in the evaluation of Eurojust's activities.

3. In the prosecutions referred to in this Article, and without prejudice to Article III-175, formal acts of judicial procedure shall be adopted by the competent national officials.

Article III-175¹⁷

1. In order to combat serious crime having a cross-border dimension, as well as crimes affecting the interests of the Union, a European law of the Council of Ministers may establish a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after approval by the European Parliament.

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 serious crimes affecting more than one Member State and of offences against the Union's financial interests, as determined by the European law 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 European law 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.

SECTION 5

POLICE COOPERATION

Article III-176¹⁸

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. To this end, a European law or framework law may establish measures concerning:

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

¹⁷ Entirely new clause.

¹⁸ Art. 30(1) EU, amended.

(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. A European law or framework law of the Council of Ministers may establish measures concerning operational cooperation between the authorities referred to in this Article. The Council of Ministers shall act unanimously after consulting the European Parliament.

Article III-177¹⁹

1. Europol's mission is 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. European laws 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 forwarded particularly 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.

A European law shall also lay down the procedures for scrutiny of Europol's activities by the European Parliament, together with Member States' national parliaments.

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

Article III-173²⁰

A European law or framework law of the Council of Ministers shall lay down the conditions and limitations under which the competent authorities of the Member States referred to in Articles III-171 and III-176 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council of Ministers shall act unanimously after consulting the European Parliament.

¹⁹ Art. 30(2) EU amended.

²⁰ Art. 32 EU, with no substantive amendments.