



Statewatch analysis

EU Reform Treaty analysis 1:

JHA provisions

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Introduction

The following text sets out the text of the Treaty as regards Justice and Home Affairs, after its amendment by the Draft Reform Treaty as proposed on 23 July 2007.

The Reform Treaty would rename the EC Treaty (TEC) as the 'Treaty on the Functioning of the Union' (TFEU). The current 'third pillar' of the EU in the Treaty on European Union (TEU), dealing with policing and criminal law, would be moved to the TEC/TFEU and would be merged with the provisions of Title IV of Part Three of the TEC/TFEU, which currently concern immigration, asylum and civil law.

Most of the amendments set out by the Reform Treaty are based on the relevant text of the EU's Constitutional Treaty as signed in 2004 (OJ 2004 C 310). But certain amendments to the text of the Constitutional Treaty were agreed to in the mandate for the Intergovernmental Conference (IGC) which was agreed by EU leaders on 23 June.

Some further changes to the text are possible before agreement on the text of the Treaty (planned for mid-October) and its signature (planned for December 13). If the text is altered, this analysis will be updated.

This analysis shows how the current Treaty provisions would be amended by the text of the Reform Treaty (current text in ~~strikeout~~, new Text in **bold/underline**). It also indicates how the Reform Treaty would differ from the agreed text of the Constitutional Treaty (Treaty text in *italics*).

This text does not include any reference to the particular position of the UK, Ireland and Denmark, who will have opt-outs from most (Denmark) or all of these provisions (UK and Ireland). This is because the position of these countries is/will be set out in separate Protocols.

The numbering of the Treaty Articles will obviously change, as the draft Reform Treaty states that the entire TEC/TFEU will be renumbered.

Where the Reform Treaty provides for references to the 'ordinary legislative procedure', this means that the current 'co-decision' procedure (a proposal from the Commission, qualified majority voting in the Council and joint decision-making powers with the European Parliament) will apply. Also, where there is no reference to the decision-making procedure to be followed by the Council, the default rule of qualified majority voting will apply.

Only the French text of the draft Reform Treaty was available as of 23 July 2007, and I have translated that text (taking account of the English text of the Constitutional Treaty). When the English text of the

draft Reform Treaty becomes available, this analysis will be amended, if necessary, to take account of any translation errors made.

TITLE IV

~~VISAS, ASYLUM, IMMIGRATION AND OTHER POLICIES RELATED TO FREE MOVEMENT OF PERSONS~~

AREA OF FREEDOM, SECURITY AND JUSTICE

Chapter 1

GENERAL PROVISIONS

Article 61

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

- ~~(a) within a period of five years after the entry into force of the Treaty of Amsterdam, measures aimed at ensuring the free movement of persons in accordance with Article 14, in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration, in accordance with the provisions of Article 62(2) and (3) and Article 63(1)(a) and (2)(a), and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union;~~
- ~~(b) other measures in the fields of asylum, immigration and safeguarding the rights of nationals of third countries, in accordance with the provisions of Article 63;~~
- ~~(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65;~~
- ~~(d) appropriate measures to encourage and strengthen administrative cooperation, as provided for in Article 66;~~
- ~~(e) measures in the field of police and judicial cooperation in criminal matters aimed at a high level of security by preventing and combating crime within the Union in accordance with the provisions of the Treaty on European Union.~~

Article 61 (III-257)

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 62 (III-258)

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

Article 63 (III-259)

National Parliaments shall 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.

The draft Reform Treaty, in accordance with the IGC mandate, includes changes to this Protocol, as compared to the Constitutional Treaty. Although these changes are not specific to JHA issues, they will impact upon it.

Article 64 (III-260)

Without prejudice to [Articles 226 to 228], 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 Chapter 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.

I have inserted a reference to the current Articles of the EC Treaty, in place of the relevant Articles of the Constitutional Treaty (Articles III-360 to III-362). These provisions govern infringement proceedings before the Court of Justice.

Article 65 (III-261)

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 [207], 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.

I have inserted a reference to the current Article of the EC Treaty, in place of the relevant Article of the Constitutional Treaty (Article III-344). This provision concerns the Committee of [Member States'] Permanent Representatives [to the EU] (known as Coreper), which prepares the work of the Council.

Article 66 (III-262)

This Chapter 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.

It shall be open to Member States to organize between themselves and under their responsibility forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations responsible for safeguarding national security.

The first paragraph is identical to the current Article 33 TEU and Article 64(1) TEC.

The second paragraph is new as compared to the current treaty or the Constitutional Treaty. It was agreed as part of the IGC mandate.

Article 67 (III-263)

The Council shall adopt measures 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, subject to [Article III-264[68]], and after consulting the European Parliament.

This provision is similar to the current Article 66 EC, and would be subject to the same decision-making procedure (qualified majority voting in the Council, consultation of the European Parliament). This clause is, however, wider than the current Article 66 EC because it would also apply to criminal law and policing.

Article 67a (III-260)

When necessary to achieve the objectives set out in [Article III-257], as regards terrorism and related activities, the European Parliament and the Council, acting 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 in order to implement the framework referred to in the first paragraph.

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

This is Article III-160 of the Constitutional Treaty, which the Reform Treaty moves from the provisions concerning free movement of capital to the general provisions of the JHA Title. The UK, Irish or Danish opt-outs will therefore apply to this clause, as the draft Reform Treaty amendments to those Protocols do not provide for any exception on this point. This is a new clause as compared to the existing Treaties, which do not provide for any powers for the EU to adopt measures restricting the economic activities of 'domestic' groups or individuals who are deemed to be 'terrorists'.

Article 68 (III-264)

The acts referred to in chapters 4 and 5, together with the measures referred to in Article [III-263] which ensure administrative cooperation in the areas covered by these Sections, shall be adopted:

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

This clause, taken over from the Constitutional Treaty, means that the Commission will share its monopoly on making proposals concerning policing and criminal law with a quarter of the Member States (meaning at least seven Member States, out of the current membership of 27). This compares to the current position, where the Commission or any individual Member State may make proposals in this area.

Chapter 2

POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION

Article 62

~~The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:~~

- ~~(1) measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders;~~
- ~~(2) measures on the crossing of the external borders of the Member States which shall establish:~~
 - ~~(a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders;~~
 - ~~(b) rules on visas for intended stays of no more than three months, including:~~
 - ~~(i) the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement;~~
 - ~~(ii) the procedures and conditions for issuing visas by Member States;~~
 - ~~(iii) a uniform format for visas;~~
 - ~~(iv) rules on a uniform visa;~~
- ~~(3) measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than three months.~~

Article 63

~~The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:~~

~~(1) measures on asylum, 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, within the following areas:~~

~~(a) criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,~~

~~(b) minimum standards on the reception of asylum seekers in Member States,~~

~~(c) minimum standards with respect to the qualification of nationals of third countries as refugees,~~

~~(d) minimum standards on procedures in Member States for granting or withdrawing refugee status;~~

~~(2) measures on refugees and displaced persons within the following areas:~~

~~(a) minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection,~~

~~(b) promoting a balance of effort between Member States in receiving and bearing the consequences of receiving refugees and displaced persons;~~

~~(3) measures on immigration policy within the following areas:~~

~~(a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion,~~

~~(b) illegal immigration and illegal residence, including repatriation of illegal residents;~~

~~(4) measures defining the rights and conditions under which nationals of third countries who are legally resident in a Member State may reside in other Member States.~~

~~Measures adopted by the Council pursuant to points 3 and 4 shall not prevent any Member State from maintaining or introducing in the areas concerned national provisions which are compatible with this Treaty and with international agreements.~~

~~Measures to be adopted pursuant to points 2(b), 3(a) and 4 shall not be subject to the five year period referred to above.~~

Article 64

~~1. 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.~~

~~2. 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 and without prejudice to paragraph 1, the Council may, acting by qualified majority on a proposal from the Commission, adopt provisional measures of a duration not exceeding six months for the benefit of the Member States concerned.~~

Article 69 (III-265)

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 appears necessary, to facilitate the exercise of the right referred to in Article [I-10(a)], the Council, acting in accordance with a special legislative procedure, may take

measures 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.

Para. 3 has been moved here from Article 18(3) of the TEC, as amended by the Constitutional Treaty, in accordance with the Reform Treaty mandate. The current Article 18(3) specifies that no legislation on these issues can be adopted at all. In fact, the current practice is to adopt legislation on passports pursuant to the EC's border control powers. The right being referred to is the 'right of every citizen of the Union to move and reside freely'.

Moving this provision to the border controls article means that the UK, Irish and Danish Protocols will be applicable to it, in the absence of any exclusion to the contrary in the proposed amendments to those Protocols in the draft Reform Treaty. This would be the only Treaty provision related to immigration that would be subject to unanimous voting.

The powers in paragraph 2, which equate to the powers currently set out in Article 62 EC, would be subject to the ordinary legislative procedure. They are already subject to this procedure (ie, qualified majority voting and co-decision) at present, except for visa lists and the common visa format (currently subject to) However, the competence of the EU over visas and border controls would be altered by this paragraph.

Article 69a (III-266)

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.

This Article can be compared to the current Articles 63(1), 63 (2) and 64(2) TEC. The decision-making process (QMV and co-decision) is the same as at present for asylum measures (paragraph 2), but the competence of the EU would be extended. Paragraph 3 is changed in several respects, and the obligation to consult the EP is also new.

Article 69b (III-267)

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 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.

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.

This Article can be compared to the current Article 63(3) and (4) TEC. The EU's competences would generally be expanded somewhat, but note the limit on competence set out in paragraph 5.

The decision-making process (QMV and co-decision) is the same as at present for illegal migration, but would change for legal migration, which is currently governed by unanimous voting in the Council and consultation of the EP.

Note that this change will not entail the loss of a veto for the UK, Ireland or Denmark, since they have an opt-out instead of a veto in this area currently.

Article 69c (III-268)

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

This provision is new as compared to the current Treaty. The draft Reform Treaty incorrectly refers to this 'section' (as in the Constitutional Treaty), instead of this 'chapter'.

Chapter 3

JUDICIAL COOPERATION IN CIVIL MATTERS

Article 65

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying:

- the system for cross-border service of judicial and extrajudicial documents;

- cooperation in the taking of evidence;

- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

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

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

Article 69d (III-269)

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. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt, particularly when necessary for the proper functioning of the internal market, measures aimed 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) 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, a European law or framework law of the Council shall establish measures concerning family law with cross-border implications. The Council shall act unanimously after consulting the European Parliament.~~

~~The Council, on a proposal from the Commission, may adopt a European 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.~~

3. By way of derogation from 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.

4. 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.

This proposal 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.

Article 67(2) TEC presently allows the Council, acting unanimously, to extend QMV and co-decision to family law, without a requirement of national parliamentary control. This possibility was retained in the

Constitutional Treaty, with the amendment that the Commission would have a monopoly over any proposal to this end. The Reform Treaty mandate included a change to this provision (see para. 4), giving national parliaments control over any extension of QMV and co-decision to the issue of family law. This actually gives more power to national parliaments over this issue than they have at present.

Otherwise this Article is comparable, but not identical, to the current Article 65 EC. Apart from family law, decision-making remains subject to QMV and co-decision, which has applied to this area since 1 February 2003, when the Treaty of Nice entered into force (see Article 67(5) EC).

Chapter 4

JUDICIAL COOPERATION IN CRIMINAL MATTERS

Article 66

~~The Council, acting in accordance with the procedure referred to in Article 67, shall take measures to ensure cooperation between the relevant departments of the administrations of the Member States in the areas covered by this Title, as well as between those departments and the Commission.~~

Article 67

~~1. During a transitional period of five years following the entry into force of the Treaty of Amsterdam, the Council shall act unanimously on a proposal from the Commission or on the initiative of a Member State and after consulting the European Parliament.~~

~~2. After this period of five years:~~

~~- the Council shall act on proposals from the Commission; the Commission shall examine any request made by a Member State that it submit a proposal to the Council;~~

~~- the Council, acting unanimously after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by this Title to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice.~~

~~3. By derogation from paragraphs 1 and 2, measures referred to in Article 62(2)(b) (i) and (iii) shall, from the entry into force of the Treaty of Amsterdam, be adopted by the Council acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament.~~

~~4. By derogation from paragraph 2, measures referred to in Article 62(2)(b) (ii) and (iv) shall, after a period of five years following the entry into force of the Treaty of Amsterdam, be adopted by the Council acting in accordance with the procedure referred to in Article 251.~~

~~5. By derogation from paragraph 1, the Council shall adopt, in accordance with the procedure referred to in Article 251:~~

~~- the measures provided for in Article 63(1) and (2)(a) provided that the Council has previously adopted, in accordance with paragraph 1 of this article, Community legislation defining the common rules and basic principles governing these issues,~~

~~- the measures provided for in Article 65 with the exception of aspects relating to family law.~~

Article 69e (III-270)

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-271].

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, acting in accordance with the ordinary legislative procedure, may adopt Directives to 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 one third of the 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 [Articles I-44(2)] and [III-419(1)] shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The changes agreed in the IGC mandate entailed a replacement of paragraphs 3 and 4 of Article III-270 of the Constitutional Treaty, which provided as follows:

3. Where a member of the Council considers that a draft European framework law [Directive] as referred to in paragraph 2 would affect fundamental aspects of its criminal justice system, it may request that the draft framework law [Directive] be referred to the European Council. In that case, the procedure referred to in Article III-396 251 shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

- (a) refer the draft back to the Council, which shall terminate the suspension of the procedure referred to in Article III-396 251, or
- (b) request the Commission or the group of Member States from which the draft originates to submit a new draft; in that case, the act originally proposed shall be deemed not to have been adopted.

4. If, by the end of the period referred to in paragraph 3, either no action has been taken by the European Council or if, within 12 months from the submission of a new draft under paragraph 3(b), the European framework law has not been adopted, and at least one third of the Member States wish to establish enhanced cooperation on the basis of the draft framework law 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 Articles I-44(2) and III-419(1) shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

These changes clarify the prospect of applying an ‘emergency brake’ and the possibility of a group of Member States applying a ‘flexibility’ procedure afterward. This is distinct from the UK, Irish and Danish power to opt out of proposals at the outset. Note that the ‘emergency brake’ does not apply to paragraph 1.

The voting procedure otherwise is QMV and co-decision, a change from the present unanimity and consultation.

The competence on these issues is far more precise than the current Article 31(1)(a) to (d) TEU, but whether it is wider or narrower than Article 31(1)(a) to (d) TEU depends on the scope of Article 31(1)(a) to (d), and there is major dispute about the scope of those provisions. The current provisions are as follows:

- 1. Common action on judicial cooperation in criminal matters shall include:*
 - (a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States in relation to proceedings and the enforcement of decisions;*
 - (b) facilitating extradition between Member States;*
 - (c) ensuring compatibility in rules applicable in the Member States, as may be necessary to improve such cooperation;*
 - (d) preventing conflicts of jurisdiction between Member States...*

Article 69f (III-271)

1. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt Directives to 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 ordinary legislative procedure, or by a special legislative procedure, which is identical to that followed for the adoption of the harmonisation measures in question, without prejudice to Article [III-264].

3. Where a member of the Council considers that a draft directive as referred to in paragraphs 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 one third of the 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 [Articles I-44(2)] and [III-419(1)] shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

Again, the changes agreed in the IGC mandate clarify the prospect of applying an ‘emergency brake’ and the possibility of a group of Member States applying a ‘flexibility’ procedure afterward. This is again distinct from the separate opt-outs for the UK, Ireland and Denmark for each Title IV measure. The relevant provisions of the Constitutional Treaty were as follows:

3. Where a member of the Council considers that a draft European framework law as referred to in paragraph 1 or 2 would affect fundamental aspects of its criminal justice system, it may request that the draft framework law be referred to the European Council. In that case, where the procedure referred to in Article III-396 is applicable, it shall be suspended. After discussion, the European Council shall, within four months of this suspension, either:

(a) refer the draft back to the Council, which shall terminate the suspension of the procedure referred to in Article III-396 where it is applicable, or

(b) request the Commission or the group of Member States from which the draft originates to submit a new draft; in that case, the act originally proposed shall be deemed not to have been adopted.

4. If, by the end of the period referred to in paragraph 3, either no action has been taken by the European Council or if, within 12 months from the submission of a new draft under paragraph 3(b), the European framework law has not been adopted, and at least one third of the Member States wish to establish enhanced cooperation on the basis of the draft framework law 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 Articles I-44(2) and III-419(1) shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The voting procedure otherwise is QMV and co-decision, a change from the present unanimity and consultation.

The competence on these issues is far more precise than the current Article 31(1)(e) TEU, which provides as follows:

Common action on judicial cooperation in criminal matters shall include:

...(e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking.

It should be noted that the UK, Ireland and Denmark will be able to adopt out of criminal law measures adopted to enforce first pillar rules pursuant to para 2, whereas at the moment they have no such power except where the measures concern immigration law or (for the UK and Denmark) the euro (and in most cases, they also lack a veto over the relevant subject matter).

Article 69g (III-272)

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.

There is no express legal base on this issue at present, but measures on crime prevention have been adopted as part of the EU’s criminal law funding programmes. The voting procedure is QMV and co-decision, a change from the present unanimity and consultation.

Article 69h (III-273)

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, acting in accordance with the ordinary legislative procedure, shall adopt Regulations determining Eurojust's structure, operation, field of action and tasks. Those 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 III-274], formal acts of judicial procedure shall be carried out by the competent national officials.

The voting procedure is QMV and co-decision, a change from the present unanimity and consultation. The current legal base relating to Eurojust, Article 31(2) TEU, provides as follows:

2. *The Council shall encourage cooperation through Eurojust by:*

- a) enabling Eurojust to facilitate proper coordination between Member States' national prosecuting authorities;*
- b) promoting support by Eurojust for criminal investigations in cases of serious cross-border crime, particularly in the case of organised crime, taking account, in particular, of analyses carried out by Europol;*
- c) facilitating close cooperation between Eurojust and the European Judicial Network, particularly, in order to facilitate the execution of letters rogatory and the implementation of extradition requests.*

Article 69i (III-274)

1. In order to combat crimes affecting the financial interests of the Union, the Council, acting in accordance with a special legislative procedure, may adopt a Regulation instituting a European Public Prosecutor's Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.

In case of absence of unanimity in the Council, a group of at least one third of the 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 one third of the 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 [Articles I-44(2)] and [III-419(1)] 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 Regulation 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.

This is a new provision as compared to the current Treaties. The additions to this Article agreed as part of the Reform Treaty mandate provide for possibility of a group of Member States applying a 'flexibility' procedure in the event of a veto by one or more Member States. This is distinct from the separate agreement that the UK, Ireland and Denmark will be able to opt out of proposals at the outset.

Chapter 5

POLICE COOPERATION

Article 68

~~1. Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.~~

~~2. In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security.~~

~~3. The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by the Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become res judicata.~~

Article 69

~~The application of this Title shall be subject to the provisions of the Protocol on the position of the United Kingdom and Ireland and to the Protocol on the position of Denmark and without prejudice to the Protocol on the application of certain aspects of Article 14 of the Treaty establishing the European Community to the United Kingdom and to Ireland.~~

Article 69j (III-275)

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 absence of unanimity in the Council, a group of at least one third of the 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 one third of the 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 [Articles I-44(2)] and [III-419(1)] shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

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

Paragraph 1, but not paragraph 2, will be subject to QMV and co-decision, a change from the present unanimity and consultation. The Article can be compared to the current Article 30(1) TEU, which provides as follows:

1. Common action in the field of police cooperation shall include:
- (a) operational cooperation between the competent authorities, including the police, customs and other specialised law enforcement services of the Member States in relation to the prevention, detection and investigation of criminal offences;
 - (b) the collection, storage, processing, analysis and exchange of relevant information, including information held by law enforcement services on reports on suspicious financial transactions, in particular through Europol, subject to appropriate provisions on the protection of personal data;
 - (c) cooperation and joint initiatives in training, the exchange of liaison officers, secondments, the use of equipment, and forensic research;
 - (d) the common evaluation of particular investigative techniques in relation to the detection of serious forms of organised crime.

The new provisions agreed as part of the Reform Treaty mandate provide for possibility of a group of Member States applying a 'flexibility' procedure in the event of a veto by one or more Member States. This is again distinct from the separate agreement that the UK, Ireland and Denmark will be able to opt out of proposals at the outset. Note that the new provisions do not apply to paragraph 2.

Article 69k (III-276)

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, acting in accordance with the ordinary legislative procedure, shall adopt Regulations determining 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.

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.

The voting procedure is QMV and co-decision, a change from the present unanimity and consultation. This provision can be compared to the current Article 30(2) TEU, which provides as follows:

2. The Council shall promote cooperation through Europol and shall in particular, within a period of five years after the date of entry into force of the Treaty of Amsterdam:

- (a) enable Europol to facilitate and support the preparation, and to encourage the coordination and carrying out, of specific investigative actions by the competent authorities of the Member States, including operational actions of joint teams comprising representatives of Europol in a support capacity;*
- (b) adopt measures allowing Europol to ask the competent authorities of the Member States to conduct and coordinate their investigations in specific cases and to develop specific expertise which may be put at the disposal of Member States to assist them in investigating cases of organised crime;*
- (c) promote liaison arrangements between prosecuting/investigating officials specialising in the fight against organised crime in close cooperation with Europol;*
- (d) establish a research, documentation and statistical network on cross-border crime.*

Article 691 (III-277)

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 III-270 and III-275] may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. The Council shall act unanimously after consulting the European Parliament.

This is identical to the current Article 32 TEU.

Statewatch, 23 July 2007