



Statewatch analysis

EU Reform Treaty: Analysis 1: Version 3 JHA provisions

Prepared by
Professor Steve Peers, University of Essex
22 October 2007

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 amended by legal experts and then agreed at the informal EU summit meeting on 18 October 2007.

The Reform Treaty would rename the EC Treaty (TEC) as the 'Treaty on the Functioning of the European 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, and this agreement has been transposed into the text of the draft Reform Treaty.

Some further changes to the text are possible before the signature of the text of the Treaty (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*).

The Treaty text does not include any reference to the particular position of the UK, Ireland and Denmark, who will have opt-outs from most (Denmark and Ireland) or all of these provisions (UK). This is because the position of these countries is/will be set out in separate Protocols. It should be recalled that the agreement on the Reform Treaty mandate included a wholly new opt-out for the UK and Ireland over EU policing and criminal law. For more on this topic, see Statewatch Reform Treaty analyses numbers 4 and 5.

The numbering of the Treaty Articles will change, as the draft Reform Treaty states that the entire TEC/TFEU will be renumbered. I have inserted the provisional numbering in square brackets. It is possible that the final numbering will be different.

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. The explanatory notes to each article further explain decision-making changes which have taken place.

The third version of this analysis is updated to include changes to the text of the draft Reform Treaty made by legal experts, whose work was published on 5 October 2007, and made at the final session of negotiations at the Inter-governmental Conference on 18 October 2007.

General comments

Readers will note that there is no specific reference in Title IV as revised by the draft Reform Treaty to the **jurisdiction of the Court of Justice over JHA matters**. That is because, as in the Constitutional Treaty, in the draft Reform Treaty the normal jurisdiction of the Court will apply to all JHA matters, with the sole exception of a specific restriction to be set out in Article 240b of the TEC/TFEU:

In exercising its powers regarding the provisions of Chapters 4 and 5 of Title IV of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

This restriction (which was Article III-377 of the Constitutional Treaty) applies only to criminal law and policing, and retains the current Article 35(5) TEU. The various other restrictions on the Court’s jurisdiction over JHA matters which are set out in the current Article 35 TEU and Article 68 TEC are repealed. However, the UK, Ireland and Denmark can of course avoid the Court’s jurisdiction over a particular act by opting out of the act itself.

The Court’s current more restricted jurisdiction over third pillar matters would be maintained for a five-year period after the entry into force of the Reform Treaty, as regards third pillar measures adopted before the new Treaty’s entry into force, unless those measures are adopted during that period. At the end of that five year period there is a special rule relating to the UK. For more on this issue, see Article 10 of the transitional Protocol to the Treaties, discussed further in Statewatch Reform Treaty analysis no. 5.

There is also a new addition to Article 234 TEC/TFEU (which concerns references, ie questions on EU law sent to the Court of Justice from national courts): *If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.* In fact, discussions on proposals for an expedited procedure before the Court of Justice for urgent JHA cases, within the current Treaty framework, are already underway.

The various **Protocols relating to JHA** (Schengen acquis, asylum for EU citizens, UK and Irish border controls, UK and Irish opt-out from Title IV, Danish opt-out from most of Title IV, external competence over external border controls) are preserved in the draft Reform Treaty, with only technical amendments, except for the revisions to the opt-out Protocols (see Statewatch Reform Treaty analyses numbers 4 and 5).

These revisions extend the **UK, Irish and Danish opt-outs** to the whole of the JHA Title, so now including policing and criminal law (although as before, Denmark does not have an opt-out from measures concerning visa formats or the visa list). While this extended opt-out for Denmark was agreed as part of the Constitutional Treaty, the extended opt-outs for the UK and Ireland were agreed (as noted above) as part of the agreement to negotiate the Reform Treaty. This is therefore a major difference between the Reform Treaty and the Constitutional Treaty. The various opt-outs were amended further in the later version of the draft Reform Treaty circulated in October 2007.

Unlike the UK and Ireland, Denmark does not have the facility to opt in to measures on a case by case basis, but it will be given the option to do so in future.

Leaving aside these specific opt-outs, and the specific rules on the Schengen acquis, the **general rules on flexibility** would be amended by the draft Reform Treaty, along the lines of the Constitutional Treaty (see the new Article 10 TEU and the new Articles 280a to 280i TEC/TFEU). Among other things, these amendments abolish the distinct rules that currently apply to general third pillar flexibility (Articles 40, 40a and 40b TEU). The current first pillar rules on general flexibility (which would themselves be amended by the draft Reform Treaty) would apply to policing and criminal law in future.

Finally, a new Protocol on transitional provisions (Protocol 10 to the draft Reform Treaty) contains a clause (Article 9) that preserves the **legal effect of current third pillar measures**:

The legal effects of the acts of the institutions, bodies, offices and agencies adopted on the basis of Titles V and VI of the Treaty on European Union prior to the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community [ie, the Reform Treaty] shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union.

This text has been adapted from the first subparagraph of Article IV-438(3) of the Constitutional Treaty, which set out detailed rules on the process by which the Constitutional Treaty would have succeeded the existing Treaties. However, no other provision of Article IV-438 appears in the draft Reform Treaty. This clause would mean, for instance, that third pillar measures adopted before the entry into force of the Reform Treaty (or at least, Decisions and Framework Decisions) have no direct effect.

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 [67]
(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 [68]
(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 [69]
(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 (and as compared to the current Protocol on these issues). Although these changes are not specific to JHA issues, they will impact upon it.

Article 64 [70]
(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 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.

Articles 226-228 TEC/TFEU govern infringement proceedings before the Court of Justice.

Article 65 [71]
(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.

Article 207 TEC/TFEU concerns the Committee of [Member States'] Permanent Representatives [to the EU] (known as Coreper), which prepares the work of the Council. It remains to be seen whether this committee will replace the current Article 36 Committee, which prepares the Council's policing and criminal law work, although the new committee will have a wholly operational role.

Article 66 [72]
(III-262)

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.

This Article is identical to the current Article 33 TEU and Article 64(1) TEC.

Article 66a [73]

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.

This Article is new as compared to the current Treaty or the Constitutional Treaty. It was agreed as part of the Reform Treaty IGC mandate. In the October draft of the Reform Treaty, it is now a separate Article (in the July draft, it was the second paragraph of Article 66).

Article 67 [74]
(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 Title, as well as

between those departments and the Commission. It shall act on a Commission proposal, subject to Article 68, and after consulting the European Parliament.

This provision is similar to the current Article 66 TEC, 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 TEC because it would also apply to criminal law and policing.

Article 67a [75]
(III-260)

When necessary to achieve the objectives set out in Article 61, 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 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 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'. The October draft of the Reform Treaty requires the Council and EP to act by means of Regulations.

The text is based on Article III-260 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 and 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. However, the Irish opt-out will not apply to this Article, and a declaration by the UK states that it will usually opt in to such measures.

Article 68 [76]
(III-264)

The acts referred to in chapters 4 and 5, together with the measures referred to in Article 67 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.

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 [77]

(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 should prove necessary to facilitate the exercise of the right referred to in Article 17b(2)(a), and if the Treaties have not provided the necessary powers, 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 in this paragraph is 'the right [of every citizen of the Union] to move and reside freely within the territory of the Member States'.

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 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 QMV and consultation). However, the competence of the EU over visas and border controls would be altered by this paragraph.

Article 69a [78]

(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 [79]

(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 [80]

(III-268)

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.

This provision is new as compared to the current Treaty.

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 [81]

(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 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 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.

Article 67(2) TEC presently allows the Council, acting unanimously after consulting the EP, 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 text of Article III-269(3) of the Constitutional Treaty was as follows:

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.

The Reform Treaty mandate included a change to this provision (see para. 3 of the new Article), 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.

This specific 'passerelle' is therefore identical, as far as national parliaments are concerned, to the general 'passerelle' in Article 33(3) TEU, as amended by the draft Reform Treaty. However, the specific and general 'passerelles' still differ in that the family law 'passerelle' is subject to a Commission monopoly and mere consultation of the EP (rather than the right of consent), and in that the family law 'passerelle' decision would be taken by the Council, not the European Council.

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). As for EU competence, the new clause applies 'particularly' when necessary for the functioning of the internal market, and express reference is made to access to justice, alternative dispute settlement and support for training. In fact, measures on these additional issues have already been adopted (as regards legal aid and training as part of the EC civil law programme) or proposed (ADR) under the current Article 65 TEC.

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 [82]

(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 69f.

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 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 10(2) of the Treaty of European Union and Article 280d(1) of this Treaty shall be deemed to be granted and the provisions on enhanced cooperation shall apply.

The word 'Articles' in the final line of this Article is a typo in the draft Treaty text.

The changes to this Article 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 [83]
(III-271)

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 68.

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 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 10(2) of the Treaty of European Union and Article 280d(1) of this Treaty 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 a distinct issue 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.

Paragraph 2 would resolve a long-running dispute as to whether, and to what extent, under the current Treaties, the 'first pillar' can be used to adopt criminal law measures (see the judgment in Case C-176/03 and the opinion in the pending Case C-440/05; the judgment in this case is due on 23 October 2007).

It should be noted that the UK, Ireland and Denmark will (along with other Member States) be able to pull the 'emergency brake' to block the adoption of criminal law measures concerning the enforcement of 'first pillar' rules pursuant to paragraph 2, whereas at the moment they only have a power to opt out of such measures if they concern immigration law or (for the UK and Denmark) the euro.

The Reform Treaty and the Constitutional Treaty both make no mention of the prospect that a Member State might wish to pull the emergency brake set out in paragraph 3 during adoption of a *special* legislative procedure. Presumably this is because nearly every special legislative procedure involves unanimous voting, so an objecting Member State could just veto the proposal. But in that case, there would be no expedited approval of 'enhanced cooperation' for a group of Member States that still wanted to go ahead with the proposal - they would have to use the ordinary rules on enhanced cooperation instead.

Note also that paragraph 2 appears to limit its scope to areas where a *legislative* procedure applies. Therefore it could not apply to EU foreign policy or to international sanctions, for instance.

Article 69g [84]
(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 [85]
(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, by means of regulations adopted in accordance with the ordinary legislative procedure, shall determine 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 69i, 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 [86]
(III-274)

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 institute 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 in Articles 10(2) of the Treaty of European Union and Article 280d(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 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 in the draft Reform Treaty (as compared to the Constitutional Treaty) 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 power of the UK, Ireland and Denmark 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 [87]

(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 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 10(2) of the Treaty of European Union and Article 280d(1) of this Treaty 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 2, but not paragraph 3, 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 in the draft Reform Treaty 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 power of the UK, Ireland and Denmark to opt out of proposals at the outset. Note that the new provisions do not apply to paragraph 2.

Article 69k [88]
(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, 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 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 69l [89]
(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 69e and 69j 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 ISSN 1756-851X. Personal usage as private individuals/"fair dealing" is allowed. We also welcome links to material on our site. Usage by those working for organisations is allowed only if the organisation holds an appropriate licence from the relevant reprographic rights organisation (eg: Copyright Licensing Agency in the UK) with such usage being subject to the terms and conditions of that licence and to local copyright law.