

SELECT COMMITTEE ON THE EUROPEAN UNION

**THE FUTURE OF EUROPE: CONSTITUTIONAL TREATY – DRAFT  
ARTICLE 31 AND DRAFT ARTICLES FROM PART 2 (FREEDOM,  
SECURITY AND JUSTICE)**

GOVERNMENT RESPONSE

**Introduction**

**These draft Articles propose a number of important changes. They would take forward common policies on immigration, border controls and asylum. They would strengthen the roles of Europol and Eurojust and enhance operational cooperation between police forces and other law enforcement agencies across Europe. The Commission would have a right of initiative in police and criminal law matters and the majority of measures would be adopted by co-decision (of the European Parliament and Council) and by qualified majority voting (QMV). The jurisdiction of the European Court of Justice would be significantly extended. Particular concern arises from the proposals to increase Union competence over criminal procedures and to create a European Public Prosecutor. We make this Report to the House for information.**

1. The Government welcomes the Committee's report on the draft articles on justice and home affairs. It provides an important contribution to the debate on the Future of Europe. We share the Committee's views that these articles propose some important measures, including building on the existing Treaties in the areas of asylum and immigration, improving the effectiveness of Europol and Eurojust, enhancing operational cooperation between police forces and other law enforcement agencies across Europe, and applying QMV to some areas of police and judicial co-operation.
2. We agree with many of the Committee's specific conclusions. We welcome, for example, the references to the mutual recognition principle, the proposed article on right of initiative, as well as efforts to provide a stronger role for national parliaments of the EU. The Committee identifies some concerns, in particular regarding criminal procedural law and the creation of a European Public Prosecutor. We share those concerns about the proposals to increase Union competence over criminal procedural law and to create a European Public Prosecutor. We are not alone in this. There is no consensus in the Convention on these key areas, and we are working hard to identify an acceptable way forward. The Government has suggested to the Convention that a provision be inserted into the JHA chapter to retain unanimity for all aspects of these articles that affect tax.

**Draft Article 31, Part One: Implementation of the area of freedom, security and justice**

**Article 31(2) is innovative in two respects. It implies the establishment of “evaluation mechanisms”. Second, it provides for an enhanced role for national parliaments, in participating in such evaluation as well as in monitoring Europol’s initiatives. We welcome both these developments. We support, in particular, the notion of national parliaments scrutinising the activities of Europol. There is, however, a problem with the language of the second clause of Article 31(2). The words “shall be involved” imply that the new Constitutional Treaty can impose obligations on national parliaments. We therefore suggest that “shall be involved” should be deleted or that “shall” be replaced by “shall have the right to”.**

3. The Government welcomes the inclusion in Article 31(1) of mutual recognition as a fundamental constitutional feature of the area of Freedom, Security and Justice. Indeed, we believe that this reference could be strengthened further. It should also be made clear that approximation of national laws should take place only where necessary in accordance with the provisions of Part II of the draft Treaty.

4. We agree with the Committee that the reference to “all competent authorities of the Member States for internal security” could be clarified. The Government would prefer the term “law enforcement” rather than “internal security”.

5. On Article 31(2), the Government agrees that it is important to enhance the role of national parliaments in the EU. Evaluation mechanisms are one useful way of achieving this.

6. We further agree that it is necessary to improve the accountability of Europol. We welcome the Committee’s recognition that duplication should be avoided by working together with other national parliaments. We also note the Committee’s drafting suggestion to avoid any implication that the new Constitutional Treaty can impose obligations on national parliaments.

**Article 31(3) maintains Member States’ right of initiative in the field of police and judicial cooperation in criminal matters. But following the Working Group’s suggestion, Member States’ initiatives would have to have the support of a quarter of Member States. This is a welcome limitation.**

7. The Government agrees. We share the Committee’s view that there is a need to provide some limitation on Member States’ right of initiative. A requirement to have the support of a significant proportion of other Member States prior to launching a legislative initiative will result in much greater coherence to future work in the justice and home affairs area.

## **Title X: Area of Freedom, Security and Justice**

### **Article 1: [Definition of the area]**

**There is an express reference to the need to respect fundamental rights and to take account of “the different European legal traditions and systems”. This is welcome.**

8. The Government agrees. We welcome the explicit reference to the need to take account of the different European legal traditions and systems. This is an important guiding principle for future action in this area. This article also includes welcome references to the mutual recognition principle.

### **Article 3: [Role of national parliaments]**

**We welcome the involvement of national parliaments in these matters. For the same reason as given above in relation to Article 31(2), “shall be involved” should be deleted or “shall” replaced by “shall have the right to”.**

**Article 3(2) is intended to be placed in the Protocol on national parliaments and provides a special rule for national parliaments monitoring the principle of subsidiarity in the area of freedom, security and justice. A lower (one quarter in place of one third) threshold for the “yellow card” is proposed (this would require the Commission to reconsider its proposal). This is welcome in so far as it goes. But while the “yellow card” will in most cases strike the right balance between the right of national parliaments to be heard and a right of veto, the “red card” principle (which would require the Commission to withdraw its proposal if two thirds of national parliaments objected) should be maintained. If national parliaments are to have a collective voice which could actually make a difference then the “red card” should be available here, perhaps with a one half, instead of a two thirds, threshold.**

9. The Government supports efforts to provide a stronger role for national parliaments in the EU. We have been strong advocates in the Convention of a new mechanism for national parliaments to monitor and enforce the principle of subsidiarity and proportionality. The key to the success of such a mechanism will be its credibility. The Commission should not be able to disregard the strong view of a significant majority of national parliaments that a certain proposal was in breach of subsidiarity.

### **Article 5: [Operational cooperation]**

**It is envisaged that the new Committee would have responsibility for co-ordinating the action of national police, customs and civil protection authorities in the event of a crisis of the sort mentioned in the Praesidium’s note (“a major catastrophe, attacks and events or demonstrations on a European scale”). To what extent this would mean giving the Committee a power to direct the actions of national police and other authorities, and is so to whom the Committee would be accountable, needs to be clarified. As drafted the Article would seem to extend Union competence beyond police and judicial co-operation in criminal matters.**

10. The Government strongly supported Working Group X’s recommendation that the Treaty should separate legislative and operational tasks and strengthen co-ordination and operational collaboration. However, we agree that there is a need to clarify the scope of operational collaboration for which the new Committee would be competent.

11. The Government is also seeking to clarify that, while the new Committee should have a strong co-ordinating function, it should not have powers of direction in relation to specific actions. We want to give the new Committee the role of assisting the

Council in identifying priority areas for Europol. The operation of the Management Board to date has demonstrated the need for some external identification of priorities.

12. The new Committee would be established within the Council. However, we agree that further consideration needs to be given to the accountability of the new Committee and the exact way in which it would work within the Council structures.

#### **Article 9: [Judicial control]**

**We recommend that the ECJ should be entitled to measure the legality of Union action, including that of Member states and their authorities when implementing EU law, against the norms contained in the Charter and the ECHR. Accordingly we are pleased to see that the new Treaty will remove the current limitations of the Court's jurisdiction in relation to justice and home affairs matters. We note that Article 9 contains a very limited (indeed an apparently tautological) exception.**

13. The Government has proposed that there should be JHA-specific rules in connection with the ECJ. For instance, Article 68(1) TEC currently limits the national courts which can make a request to the ECJ for a preliminary ruling to those against whose decision there is no judicial remedy. This acts as a filter mechanism, and stops the ECJ being overloaded with requests in, for instance, the asylum and immigration field. We have proposed that the option to make this limitation be retained, so that Member States would have the flexibility to decide which arrangements for preliminary rulings fit best with their national judicial systems, maintaining the theme of respect for the diversity of legal systems and traditions which needs to run throughout the JHA Title.

14. We also support the retention of a provision corresponding to Article 35(5) of the Treaty on European Union to make it clear that the European Court of Justice does not have jurisdiction in relation to Member States' law enforcement operations or their responsibilities for maintaining law and order and safeguarding national security.

#### **Article 10: [Check on persons at borders]**

**As mentioned above, the document is silent on the question of the special position of certain Member States, including the UK, in relation to the subject matter of this Title (see paragraphs 9-13 above).**

15. Article E of Part Three (General and Final Provisions) of the draft Constitution provides that the protocols shall remain an integral part of the new Treaty. As the Committee has noted, the question of reconsidering these protocols has not been raised in the Convention. The Government position on the UK's Protocols has not changed. The Government does not intend to give up its right under the Treaties to exercise at its frontiers with other Member States such controls on persons seeking to enter the UK as it considers necessary.

#### **Article 11: [Asylum]**

**The references in Article 11(2) to "subsidiary protection" are especially welcome.**

**The last paragraph of the Praesidium's Explanatory note on this Article states: "Nationals of third countries" must be understood to include stateless persons". We agree. The text of Article 11 should be amended accordingly.**

16. The Government supports the interpretation of third country nationals as including stateless persons. As this is an accepted interpretation, the Government does not believe that the text of the draft articles needs to be amended to reflect that position.

#### **Article 12: [Immigration]**

**In our Reports and day-to-day scrutiny we have repeatedly emphasised the need for a 'common' EU approach to immigration. A further impetus towards the enhancement of EU action in the field, in particular as regards more 'inclusive' measures, will be provided by the shift from unanimity and consultation to qualified majority voting and co-decision ('the legislative procedure') provide for by Article 12(2). This is a positive step to avoid legislative paralysis in an EU of 25, but will be controversial in view of Member States' reluctance to relinquish power in sensitive matters such as the treatment of TCNs.**

17. The Government recognises the need for greater use of QMV in an EU of 25. Nevertheless, in certain sensitive areas, including social security matters relating to third country nationals, it will be necessary to retain unanimity within the Council and consultation with the European Parliament. Our amendments to the articles reflect that position.

#### **Chapter 2: Judicial cooperation in civil matters**

##### **Article 14: [Judicial cooperation in civil matters]**

**The "internal market" criterion has sometimes seemed rather artificial and strained, for example, in the context of measures relating to the recognition and enforcement of judgments in matrimonial matters and to matters of parental responsibility. The new test is preferable, being more apposite to closer co-operation in non-economic matters. What is important is that there should be a genuine and proven need for action at the European level and that in future the Commission will take full account of the need to respect different legal systems, and their values and traditions (as envisaged by Article 1 above).**

**The opportunity should also be taken to clarify the meaning of "extrajudicial cases" and "extrajudicial documents". Further, we note that the eighth indent of paragraph 2 of this Article refers to "support" for the training of judges, while the third indent of Article 15(2) (criminal matters) refers to encouraging judicial training. What is the significance of the different wording? Does "support" imply making money available?**

18. The Government welcomes the proposition that judicial co-operation in civil matters should be based on the principle of mutual recognition.

19. However, this article goes significantly further than Article 65 TEC by providing expressly for the adoption of measures for the approximation of national laws having cross-border implications. The Government has considerable reservations about this extension of competence and has tabled an amendment to delete the second sentence of Article 14(1). Approximation of substantive and procedural civil law should not be an end in itself and should only follow where there is a proven need for it, in particular as a consequence of implementing the principle of mutual recognition.

20. The “internal market” criterion may indeed seem artificial, but it is significant, as is clear from the tobacco advertising jurisprudence of the European Court of Justice<sup>1</sup>. Recent experience in the context of negotiations on civil legal aid has shown that its absence risks allowing measures to be brought forward which primarily have an impact on purely domestic cases, on the grounds that the laws in question are capable of having cross-border implications. That would be an unwelcome development.

21. The Committee sought clarification of the meaning of “extrajudicial cases” and “extrajudicial documents”. These expressions already appear in Article 65(a) TEC. The former relates to an ambition to promote mutual recognition of decisions made in the context of alternative dispute resolution. The latter has its origin in the Hague Convention dating from 1965 on the service abroad of judicial and extrajudicial documents.

22. The Committee drew attention to the different wording in the paragraphs in Articles 14 and 15 concerning support for the training of judges. The Government sees no need for a difference of approach in relation to the subject matter of the two Articles.

#### **Article 16: [Criminal procedure]**

**As the Praesidium’s Explanatory note indicates, Article 16 reflects Working Group X’s Conclusions with the addition of a provision on victim’s rights. It is a new and potentially controversial provision.**

**Rules on the admissibility of evidence in criminal proceedings may be closely related to the mode of trial (for example, in England and Wales, to trial by jury). That such rules could be changed without the consent of a Member State is, we believe, unacceptable.**

**Accordingly we recommend that if Article 16 is to remain in the Treaty, it should be amended so as**

- (i) to be limited to the adoption of minimum rules under the “legislative procedure” (ie co-decision and QMV) concerning**
  - (a) the definition of the rights of individuals in criminal procedure so as to ensure compliance with fundamental rights;**
  - (b) the rights of victims of crime.**

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<sup>1</sup> See in particular Case C-376/98, Germany v. Parliament and Council, [2000] ECR I-8419

- (ii) **to enable the Council, acting unanimously, to adopt minimum rules relating to other specific aspects of criminal procedure, which shall have been identified in advance by the Council acting unanimously and with the assent of the European Parliament.**

**Further, the power to make any European laws or framework laws under this Article should, as a matter of the division of competence between the Union and the Member States, be restricted to cases having cross-border implications, as would be the case under Article 14 (Judicial cooperation in civil matters). We recognise, however, that even with such restriction any EU legislation under Article 16 would most likely have substantial effects on procedure in purely domestic criminal cases.**

23. The Government shares the serious reservations of the Committee about the proposed article on criminal procedural law, including the Committee's concern that rules on evidence could be changed without the consent of a Member State.

24. The Government remains firmly opposed to giving the EU wide-ranging competence to harmonise criminal procedural law. Judicial co-operation in criminal matters should be based on the principle of mutual recognition and respect for the diversity of Member States' legal systems. Common procedures should therefore be pursued only where they are a necessary consequence of implementing that principle.

25. We recognise that it may be necessary to develop some light minimum standards in the areas where people facing criminal proceedings in a Member State of which they are not a national would be disadvantaged by virtue of that fact. The Government has therefore tabled an amendment to provide for this in the areas of legal advice, information, interpretation and access to diplomatic and consular authorities. The amendment would also make any approximation in this limited area subject to the use of framework laws and unanimity.

#### **Article 17: [Substantive criminal law]**

**We have argued that the definitions used in EU criminal law approximation measures should also be used to define the offences listed in the Warrant. This would improve legal certainty and aid consistency, as between Member States, in the application of the Warrant.**

26. The Government is content with the basic approach in this article. On the list of offences, the Government has tabled an amendment proposing that "computer crime" should be replaced by "attacks against information systems", which is the title of the recent Framework Decision in this area. The amendment also proposes the deletion of "organised crime" from the list of offences since there is no common understanding within the EU of this category of criminal offences.

27. As for approximating substantive criminal law where this is considered essential to ensure effective implementation of a Union policy, the Government has suggested that the policy areas to be covered should be listed in the article. The voting regime should also be based on the voting regime applicable to the Union policy area, as suggested by Convention Working Group X. For example, in the case of

approximating criminal offences related to discrimination based on race, this would be governed by unanimity (Article 13 TEC).

28. In relation to the European Arrest Warrant, the current EU legislation provides for warrants to be issued based on the definition of the offences in the issuing state. EU approximation measures may bring about greater convergence in these definitions, but would not prevent a Member State from criminalising additional conduct which still falls within one of the generic offence categories. The Government believes this is the right approach as it gives the fullest effect to the principle of mutual recognition.

**Article 18: [Crime prevention]**

**Being a new area of competence, EU action is only supporting and excludes approximation of legislation. That is welcome. However, the Article should be amended so as to ensure that Union action can be taken only where there are cross-border implications.**

29. The Government agrees that it is important to make clear that competence is restricted to incentive and support measures to improve cross-border co-operation on crime prevention.

**Article 19: [Eurojust]**

**It is not clear what is meant by ‘serious crime affecting two or more Member States’, but it would seem to differ, and be more extensive in scope, than the definition of “particularly serious crime with cross-border dimensions” in Article 17. We question whether Eurojust should be given such an open-ended brief. The current approach, and that of the new Article 17, is preferable.**

**Second, Eurojust could be tasked to supervise Europol’s operational activities, thus subordinating Europol to Eurojust. This would not be objectionable and mirrors the regime in some Member States whereby police activity may be subject to the control of the prosecuting authority. It is unclear, however, whether this new supervisory role is intended to compensate for lack of supervision by the courts, since Europol, as an EU agency, will presumably become subject to review by the Community courts.**

30. The Government agrees that the tasks of Eurojust should be more tightly defined in the new Treaty. We have proposed amendments to achieve this. We have also sought to ensure that unanimity will apply to any further extension of the tasks and powers of Eurojust, and that any such extension should take place only on the basis of demonstrable need and taking into account the different European legal traditions and systems.

31. As for the proposed role of Eurojust to supervise Europol’s activities, this would not be compatible with the United Kingdom’s legal tradition and system. However, we are prepared to consider such a role for Eurojust where Europol is supporting an investigation in a Member State whose legal tradition and system provides for the judicial supervision of the investigation. We have proposed an amendment to this effect.

## **Article 20: [European Public Prosecutor's Office]**

**This Article, establishing a European Public Prosecutor's Office, is a surprising and undesirable inclusion in the new Treaty. There is no doubt that more could be done to ensure that effective action is taken against fraud with the Union. But the European Public Prosecutor (EPP) is not a realistic and practical way forward. We recommend the deletion of Article 20.**

32. The Government agrees. We remain firmly opposed to the creation of a European Public Prosecutor's Office. We share the Committee's view that further action needs to be taken to tackle fraud within the Union, but that the European Public Prosecutor is not a realistic and practical way forward. The UK and seven other governments co-sponsored a contribution to the Convention on 21 May entitled 'Improving the Union's response to fraud – alternatives to the European Public Prosecutor' (CONV 753/03 CONTRIB 331). This explained why we are opposed to the creation of a European Public Prosecutor and suggested an alternative way forward based on the principle that criminal prosecutions should remain a national responsibility.

## **Article 21: [Cooperation with regard to internal security]**

**Article 21(2) would enable the adoption of 'any other measure' which encourages police cooperation. The wording is vague and could lead to extensive EU competence in police matters. We recommend the deletion of the third indent of Article 21(2).**

**In view of the vast amounts of data that may be collected, analysed and exchanged under the police cooperation chapter, we believe that adequate data protection safeguards are essential and should be clearly reflected in the Constitutional Treaty. This is something to which we will return when the Praesidium publishes its proposals on data protection.**

33. The Government agrees that "any other measure" is too vague and should be deleted.

34. The Government agrees that data protection safeguards are important for police and judicial co-operation in criminal matters.

## **Article 22: [Europol]**

**It is important to note that Article 22(2) does not contain an exhaustive list of Europol tasks, but merely indicates areas of action. This could lead to a significant extension of Europol powers without democratic supervision. A defined exhaustive list would be preferable (possibly set out in a Protocol annexed to the new Treaty).**

**As we have said above (see comment on Article 31), the Committee strongly supports enhancing the accountability of Europol and has recommended the creation of a joint scrutiny committee of members of national parliaments and the European Parliament.**

35. The Government agrees that this article is currently too broad and open-ended. In particular, crimes which affect a common interest covered by a Union policy should fall within Europol's mandate only to the extent that the crime is serious and affects two or more Member States. If a crime is purely internal to a Member State, it is a matter for that Member State's law enforcement authorities.

36. The Government supports increasing the accountability of Europol particularly with regard to ensuring that due care is taken to protect EU citizens' rights in the treatment of personal data. The UK has supported the Danish proposals to amend the Europol Convention which seek to increase the oversight of Europol by the European Parliament for example on Europol's relations with third countries. The continued involvement of national parliaments in scrutinising Europol's work is equally important. The Government agrees that there is a need to consider establishing inter-parliamentary mechanisms for the supervision of Europol's work.