

COVER NOTE

from : Praesidium
to : Convention

Subject : **Area of freedom, security and justice**
– **draft Article 31, Part One**
– **draft articles from Part Two**

Members of the Convention will find attached draft Article 31, Part One, of the Constitution and draft articles from Part Two of the Constitution relating to the "area of freedom, security and justice", proposed by the Praesidium and accompanied by explanatory notes.

Part I of the Constitution

Article 31: Implementation of the area of freedom, security and justice

1. The Union shall ensure an area of freedom, security and justice:
 - by adopting laws and framework laws intended in particular to approximate national laws in the areas listed in Part Two of the Constitution;
 - by promoting mutual confidence between the competent authorities of the Member States, in particular on the basis of mutual recognition of judicial and extrajudicial decisions.
 - by operational cooperation between all competent authorities of the Member States for internal security.
2. Within the area of freedom, security and justice, national parliaments may participate in the evaluation mechanisms foreseen in Article [4, Part Two] of the Constitution, and shall be involved in the political monitoring of Europol's activities in accordance with Article [Article 22, Part Two) of the Constitution.
3. In the field of police and judicial cooperation in criminal matters, Member States shall have a right of initiative under the arrangements set out in Article [8, Part Two] of the Constitution.

Comments

This article contains the specific characteristics of Union action within the area of freedom, security and justice. The first paragraph mentions the areas of Union action, namely legislative and operational cooperation (with the latter being a characteristic specific to this Union policy).

Paragraph 2 specifies the role of national parliaments, in particular concerning evaluation conducted in the Council of the implementation of Union policies (see Article 4, Part Two and their involvement in the political monitoring of Europol (see Article 22, Part Two).

Paragraph 3 mentions another specific characteristic, namely the Member States' right of initiative, which would co-exist alongside the Commission's right of initiative in the fields of police and judicial cooperation in criminal matters.

Part Two: of the Constitution

Title ...: Area of freedom, security and justice

Article 1: [Definition of the area]¹

The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and taking into account the different European legal traditions and systems.

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 and fairness towards third-country nationals.

The Union shall ensure a high level of safety by measures to prevent and combat crime and promote coordination and cooperation between criminal police and judicial authorities and other competent authorities, as well as by the mutual recognition of judgments in criminal matters and the approximation of criminal laws.

The Union shall facilitate access to justice, in particular by the free movement of documents and judgments in civil matters based on the principle of mutual recognition.

¹ Since the articles in Part Two of the Constitution will have no headings, the headings in square brackets are given simply as an aid to Convention members at this stage, but will disappear in the final version.

Comments

This Article constitutes the general definition of both aspects of the area of freedom, security and justice: the legislative and the operational. The text is based on the Working Group's final report. The general reference to the principles of subsidiarity and respect for the different legal traditions and systems is included in this provision. The same applies to the reference to solidarity in the field of the common policy on immigration, asylum and external borders. In the field of police and judicial cooperation in criminal matters and judicial cooperation in civil matters, the Working Group – following the Tampere conclusions – decided that the principle of mutual recognition of judgments should be explicitly enshrined in the Constitution. By the same token, and in the light of the Tampere conclusions, it was considered appropriate to add the reference to access to justice.

Article 2¹: [Role of the European Council]

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

¹ When the Convention has the text of a more general article describing the tasks and operation of the European Council, it will have to determine whether the above provision belongs in this chapter or whether it would not be preferable to insert it into the article in Part One concerning the European Council (Article 15 in the preliminary draft Treaty). For that reason, the Praesidium preferred not to assign an article number to the current wording.

Comments

This Article takes up the Working Group's conclusions according to which, based on the Tampere European Council model, the European Council can establish a multiannual strategic programme defining a general framework for Union action on legislative and operational cooperation.

(cf. page 4 of the report):

"In addition, one could envisage that, in line with the example of the Tampere European Council, a multiannual strategic programme might be set by the European Council (or the Council at the level of Heads of State or Government) following consultation of the European Parliament and national parliaments, defining an overall framework for the Union's action in relation to legislation and operational collaboration."

It became clear that the European Council was able to set broad guidelines and bridge the legislative and operational programmes. The particular role assigned to the European Council within the area of freedom, security and justice is one characteristic of the matter under consideration and this was recognised by the Working Group (cf. page 4 of the report). The Working Group considers that a single legal framework does not mean that Union procedures must necessarily be applied in exactly the same way as those currently under the first pillar. The wording chosen reflects the reality, as it emerges in particular from the decisions and guidelines adopted at the Tampere and Seville European Councils.

Article 3: [Role of national parliaments]

1. National parliaments may participate in the evaluation mechanisms contained in Article 4 of the Constitution and shall be involved in the political monitoring of Europol's activities in accordance with Article 22 of the Constitution.

2. [Notwithstanding the provisions foreseen in the Protocol on the application of the principles of subsidiarity and proportionality, where at least one quarter of national parliaments issue reasoned opinions on non-compliance with the subsidiarity principle of a Commission proposal submitted in the context of Chapters 3 and 4 of this Title, the Commission shall review its proposal. After such review, the Commission may decide to maintain, amend or withdraw its proposal. The Commission shall give reasons for its decision. This provision shall also apply to initiatives emanating from a group of Member States in accordance with the provisions of Article 8 of this Title.] ¹

Comments

A broad consensus emerged within the Working Group to recognise the particular role of national parliaments in the area of freedom, security and justice. This area affects fundamental freedoms and is at the very heart of the principle of subsidiarity. Under the current system, national parliaments participate in the adoption of applicable rules, in particular via the national ratification of conventions. Since this legal instrument will no longer appear in the Constitution, the Working Group felt that national parliaments should continue to play an important role. The various measures proposed make it possible to take into account this specific feature of the area of freedom, security and justice. (cf. page 22 of the report on national parliaments):

¹ In a subsequent version of the draft Constitution, this provision will be transferred to the Protocol on the application of the principles of subsidiarity and proportionality (a first draft of which (CONV 579/03) had already been submitted to the Convention when this document was drawn up by the Praesidium.

"The specific nature of this area has already been stressed. The work and the organisation of national police and the content of national criminal law are at the core of the competencies that define a state. On the one hand, there is a need to take account of the particularities of this area, especially sensitive to human rights and at the heart of subsidiarity, for which the national parliaments have responsibility (e.g. ratification of conventions). Reform of the legal instruments, the legislative procedures and operational cooperation is indispensable and will lead to increased responsibility for the European Parliament, but national parliaments should continue to play an important role. On the other hand, the Group could try, as much as possible, to build on results found in the Convention generally on this issue, rather than to devise special mechanisms exclusively for the current 3rd pillar. The Working Group submits the following proposals:

- involvement of national parliaments in the definition by the European Council (or the Council at the level of Heads of State or Government) of the strategic guidelines and priorities for European criminal justice policy. Such involvement will only be meaningful if there are substantive debates in national parliaments about the options to be considered at the European Council well in advance of the latter taking place;
- regular inter-parliamentary conferences on the Union's policies in this area (in particular by joint meetings of the responsible committees on Justice and Home Affairs of national parliaments, as suggested by WG IV);
- use of the "subsidiarity early warning mechanism" (devised by WG I) in particular for the specific aspects of subsidiarity in criminal law matters, i.e. where it is questionable that a crime has actually a "cross-border dimension" and is of a serious nature;
- recognising the continuing role for national legislation through exclusive use of directives (or successor) in approximation of substantive criminal law;
- involving national parliaments in the mutual evaluation mechanism ("peer review") (*see above*);
- involving national parliaments in the consideration of annual reports on the activities of Europol."

It should be noted that several of the proposals formulated by the Group are not necessarily appropriate for inclusion in the text of the Constitutional Treaty.

On the other hand, the current wording provides that the threshold in the Protocol on subsidiarity (set at one third of parliaments) would be lowered to one quarter, for proposals within the scope of judicial cooperation in criminal matters (Chapter 3) and police cooperation (Chapter 4). Since Member States also have a right of initiative in Chapters 3 and 4, it seemed justified to extend the envisaged system to cover cases in which the legislative initiative comes not from the Commission but from the Member States, in accordance with Article 8 of this Title.

Article 4: [Evaluation mechanisms]

Without prejudice to Articles [226 to 228] of this Treaty, the Council may adopt 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. The European Parliament, as well as national parliaments, shall be informed of the content and results of the evaluation.

Comments

Draft Article based on an important recommendation by the Working Group designed to resolve the problem of inadequate monitoring of implementation of Union policy in this area (see final report, C I, page 21):

"First, that mechanisms of "mutual evaluation" or "peer review", as practised successfully over recent years (...) should be encouraged and applied more widely The Group would see merit in an explicit mention in the new Treaty of this technique of mutual evaluation, which is to be implemented flexibly with the participation of the Commission through procedures guaranteeing objectivity and independence. In addition, the "peer review" reports should be supplied to the European Parliament and to national parliaments. Second, as for the legal obligations of the Member States resulting from Union law, the Working Group believes that the Commission should fully play its role as Treaty guardian and that it should be competent to introduce infringement proceedings (Article 226 TEC) before the European Court of Justice, also in the area of the current "Third Pillar"."

Article 5: [Operational cooperation]

In order to ensure that operational cooperation on internal security is promoted and strengthened within the Union, a standing committee may be set up within the Council. Without prejudice to Article [207 TEC], it shall be responsible for coordinating the action of Member States' competent authorities, including police, customs and civil protection authorities. The representatives of Europol, Eurojust and, where appropriate the European Public Prosecutor's Office, may be involved in the proceedings of this Committee. The European Parliament shall be kept informed of the work of the committee.

Comments

The purpose of this article is to introduce into the Constitution one of the two "golden rules" identified by the Group: that in favour of identifying and introducing a separation between "legislative" tasks and "operational" tasks within the Union and reinforced coordination of operational collaboration at Union level (page 4 of the report: "golden rule"):

"there should be clearer distinction between legislation (legal instruments; legislative procedures; implementation; in large part to be aligned with the general procedures of Community law)".

In this context, the Group was in favour of reinforced coordination of operational collaboration (page 16 of the report):

"To improve confidence and efficiency, the Union's current work on coordination and operational collaboration could be better organised. A clearer distinction between the Council acting in its legislative capacity and the Council exercising specific executive functions in this area would be advantageous. The Group therefore proposes that a more efficient structure for the coordination of operational cooperation at high technical level be created within the Council. This might be done by merging various existing groups and redefining in the new Treaty the current mission of the "Article 36 Committee", which should in the future focus on coordinating operational cooperation rather than becoming involved in the Council's legislative work. How best to associate the Chiefs of Police Task Force with this work is a question deserving further examination. The role of such a reformed structure [committee] within the Council could be a technical one of coordination and

oversight of the entire spectrum of operational activity in police and security matters (inter alia police cooperation, fact-finding missions, facilitation of cooperation between Europol and Eurojust, peer review, civil protection). The exchange of personal data should continue to take place within the existing systems (Europol, Schengen, Customs information system, Eurojust, etc.) for which adequate rules on data protection and supervision systems are in place. One could however envisage simplifying these supervision systems by merging the various supervisory bodies."

This proposal by the Group was broadly supported at the plenary session. The wording proposed for this Article 5 is based on the text of existing Article 36 TEU, reducing its area of activity to operational cooperation alone. On the other hand, abolishing the pillars enables all the authorities concerned with "internal security" to be covered for the first time, not merely police forces but also those responsible for customs and civil protection.

The abolition of the pillars in this way will be welcomed by all practitioners who stress that cooperation must cover a broader field than merely police aspects in order to ensure internal security. The consequences of the 11 September attacks have shown the importance of mobilising all services and of cooperation between disciplines.

Finally, it should be noted that the proposed committee is not intended to deal with personal information or data. Its role is confined to general operational cooperation, for example in the event of a major catastrophe, attacks and events or demonstrations on a European scale. Exchanges of personal information, primarily in connection with organised crime, will continue to fall within existing mechanisms (Europol in particular) and to be covered by the relevant legislation in the matter. Involvement of representatives of the Union bodies in this committee is left in square brackets pending decisions on the subject.

Article 6: [Measures concerning public order and internal security]

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 their internal security.

Comment

Taken over from Article 33 TEU and Article 64(1) TEC.

Article 7: [Administrative cooperation]

The Council shall adopt by a qualified majority regulations 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. It shall act on a Commission proposal, or, in the areas covered by Chapters 3 and 4 of this Title, either on a Commission proposal or on the initiative of a quarter of the Member States and after consulting the European Parliament.

Comment

Taken over from Article 66 TEC

Article 8: [Right of initiative]

The acts referred to in Chapters 3 and 4 of this Title shall be adopted:

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

Comments

This article takes over a proposal contained in the Group's final report (page 15). As already mentioned within the Group, the Convention should carefully examine the possible implications of creating a right of initiative for a group of Member States within the legislative procedure (codecision). Depending on the guidelines which the Convention arrives at for that procedure, it might be necessary to review the wording of this provision.

Article 9: [Judicial control]

In exercising its competences regarding the provisions of Chapters 3 and 4 of this Title, the Court of Justice 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, where such action is a matter of national law.

Comments

Having analysed the various limitations on and derogations to the general rules relating to the Court of Justice which currently exist in the area of justice and home affairs (cf. Articles 68 TEC and 35 TEU), Working Group X concluded that these derogations should be abolished (see page 25 of the report):

"The Working Group considers that the specific mechanisms foreseen in Articles 35 TUE and 68 TCE should be abolished and that the general system of jurisdiction of the Court of Justice should be extended to the area of freedom, security and justice, including action by Union bodies in this field."

However, the report mentions that some members of the Group, although starting from the same general assumption, felt that it was still necessary to maintain a provision to the effect that the Court of Justice has no jurisdiction for police operations and actions related to the maintenance of law and order (cf. Article 35(5) TEU in the area of the current third pillar). This viewpoint, which was contested by a number of other Convention members, was repeated in the plenary debate. In the light of that debate, the Praesidium is proposing this compromise formula, which is based largely on the wording of Article 35(5) TEU and clarifies it: the Court has no jurisdiction for police action and action relating to the maintenance of law and order which is covered by national law; however, in the case of acts carried out pursuant to Union law, the Court shall be competent to give a ruling on the application of Union law.

Chapter I: Policies on border checks, asylum and immigration

Article 10: [Checks on persons at borders]

1. The Union shall develop a policy with a view to:
 - ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;
 - carrying out checks on persons and efficient monitoring of the crossing of external borders;
 - the gradual introduction of a common integrated management system for external borders.

2. For this purpose, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws or framework laws concerning:
 - conditions of entry for a short stay for nationals of third States, including the visa requirement and exemption from this requirement, the rules, procedures and conditions of issue of permits for crossing external borders, and the uniform format for such permits;
 - the controls to which persons crossing external borders may be subject;
 - the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;

- any measure necessary for the gradual establishment of a common integrated management system for external borders;
- the absence of any controls on persons, whatever their nationality, when crossing internal borders.

Comments

Paragraphs 1 and 2, drawn largely from existing Article 62 TEC, reflect the Group's conclusions and the outcome of the plenary session concerning external borders. The concept of the gradual introduction of an integrated border management system refers back to points mentioned in the conclusions of the Seville European Council of June 2002 (cf. paragraphs 31 and 32. The content of Article 62 TEC has, however, been shortened so as to take account of the provisions that have already entered into force since its adoption.

Article 11: [Asylum]

1. The Union shall develop a common policy on asylum and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy shall be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties.
2. For this purpose, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws or framework laws to establish a common European asylum system comprising:
 - a uniform status of asylum for nationals of third countries, valid throughout the Union;
 - a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection;

- a uniform status of temporary protection for displaced persons in the event of a massive inflow;
 - a common procedure for granting and withdrawing asylum status or subsidiary or temporary protection status;
 - criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection;
 - standards concerning the reception of applicants 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, by a qualified majority, may adopt regulations or decisions comprising provisional measures for the benefit of the Member State(s) concerned. It shall act on a proposal from the Commission after consulting the European Parliament.

Comments

The draft article is based on the Working Group's recommendations on page 4 of the final report:

..... "That qualified majority voting and codecision be made applicable in the Treaty for legislation on asylum, refugees and displaced persons; – That Article 63(1) and (2) TEC be redrafted in order to create a general legal base enabling the adoption of the measures needed to put in place a common asylum system and a common policy on refugees and displaced persons as set out in Tampere. This legal base should, as in the present Treaty, ensure full respect of the Geneva Convention but enable the Union also to provide further complementary forms of protection not embraced by that Convention".

Paragraph 3 reproduces current Article 64(2) TEC; the temporary measures that may be adopted are not exclusively confined to the area of asylum law.

"Nationals of third countries" must be understood to include stateless persons.

Article 12: [Immigration]

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. To this end, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws in the following areas:
 - 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;
 - definition of the rights of third-country nationals residing legally in a Member State, including the conditions governing the freedom of movement and of residence in other Member States;
 - illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation;
 - combating trafficking in persons, in particular women and children.
3. The Union may conclude readmission agreements with third countries for the readmission of third-country nationals residing without authorisation to their countries of origin or provenance.

4. The European Parliament and the Council, in accordance with the legislative procedure, may adopt laws and framework laws providing incentive and support for the action of Member States with a view to promoting the integration of third-country nationals residing legally in their territories.

Comments

This draft article is based largely on Article 63(3) and (4) TEC, but applies qualified majority voting and the legislative procedure (codecision), as recommended by the Working Group (see page 5 of the report). Paragraph 4 adds a legal base, as recommended by the Working Group (see page 5 of the report):

"that a legal base should be provided to allow the Union to take incentive and support measures to assist Member States' efforts to promote the integration of legally resident third-country nationals").

In addition, in paragraph 2, second indent, a slightly different wording has been proposed. It is more in line with the objective set at Tampere of legislating on the legal status held by legally-resident third-country nationals in their country of residence and in other Member States (on this point, see also page 5 of the Working Group's final report). Lastly, explicit references have been added to combating trafficking in persons and to readmission agreements, in order to highlight the importance place of these two aspects (which are covered by the existing Treaty) in the Union's existing policy.

The definition of this sector as one of shared competence (see Article 12 of draft Part One submitted by the Praesidium) means that Member States may maintain national provisions or introduce new ones in this sector, providing that they are compatible with Union law, without it being necessary to repeat the principle (which is currently set out at the end of Article 63 TEC).

Article 13: [Principle of solidarity]

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

Comments

Draft article based on the recommendation on page 4 (third indent) of the Working Group's final report.

"... While acknowledging the responsibilities of the Member States, to enshrine in the Treaty the principle of solidarity and fair sharing of responsibility (including its financial implications) between the Member States, applying as a general principle to the Union's asylum, immigration and border control policies. A specific legal basis should enable the adoption of the detailed policies necessary to give effect to this principle."

Chapter 2: Judicial cooperation in civil matters

Article 14 : [Judicial cooperation in civil matters]

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

2. To this end, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws aiming inter alia to ensure:
- the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;
 - the cross-border service of judicial and extrajudicial documents;
 - the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
 - cooperation in the taking of evidence;
 - a high level of access to justice;
 - the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
 - the development of measures of preventive justice and alternative methods of dispute settlement;
 - support for the training of the judiciary and judicial staff.
3. The Council, on a proposal from the Commission, shall unanimously¹ adopt laws and framework laws concerning family law; it shall act after consulting the European Parliament. The European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws concerning parental responsibility.

¹ *Once it has considered Part Two in its entirety, it will be for the Convention to take a decision across the board on any exceptions to the qualified majority rule and, consequently, on the voting rules which should apply in this and other Articles of this draft which refer to unanimity.*

Comments

This provision is based on Article 65 TEC. The only amendments to Article 65 TEC which emerged from the Working Group's final report are the following:

- enshrining of the principle of mutual recognition of judgments and decisions in extrajudicial cases (end of page 6 of the report);*
- development of measures of preventive justice and alternative methods of dispute settlement;*
- training of the judiciary and judicial staff;*
- the codecision procedure for measures concerning parental authority, which would be the only sector of family law in which unanimity would not apply (see pages 6 and 7 of the report).*

The Praesidium felt that there was no longer any justification for keeping the current reference to "the proper functioning of the internal market" (Article 65 TEC) in the new provision. The phrase is included in existing Article 65 TEC partly because this provision is an element of Community policies and is linked to the free movement of persons in the context of the internal market.

Once the new Treaty contains a separate title on the area of freedom, security and justice, the reference to "the proper functioning of the internal market" can be considered redundant. Moreover, the most important aspect to be emphasised in this context is that the envisaged measures under judicial cooperation in civil matters have a "cross-border impact", reference to which is included in the proposed provision.

Finally, in line with the Tampere conclusions, it seemed important to add the explicit statement that the Union must also take measures aimed at ensuring a high level of access to justice. This could have consequences for the future establishment of minimum standards guaranteeing an appropriate level of legal aid for cross-border cases throughout the Union, and special common procedural rules in order to simplify and speed up the settlement of cross-border disputes concerning small commercial claims under consumer legislation or to establish minimum common standards for multilingual forms or documents in cross-border proceedings.

Chapter 3: Judicial cooperation in criminal matters

Article 15: [Judicial cooperation in criminal matters]

1. Judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judicial decisions and shall include the approximation of legislation in the areas referred to in Articles [16] and [17].
2. The European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws to:
 - establish rules and procedures for ensuring the recognition throughout the Union of all forms of judgments and judicial decisions;
 - prevent and settle conflicts of jurisdiction between Member States;
 - encourage the training of the judiciary and judicial staff;
 - facilitate all other forms of cooperation between ministries and judicial or equivalent authorities of the Member States in relation to proceedings in criminal matters and the enforcement of decisions.

Comments

The first paragraph of this draft article is based on one of the Working Group's core recommendations:

see page 8: "... the new formulation of these legal bases must reflect the right balance between the principle of mutual recognition and efforts to approximate criminal laws: as it was politically agreed in Tampere, the principle of *mutual* recognition should be the cornerstone of judicial cooperation, allowing judicial decisions of one Member States to be recognised by the authorities of another Member State. The Group recommends that this principle of mutual recognition of judicial decisions should be formally enshrined in the Treaty. The Group also recognises that some approximation of certain elements of criminal procedure and of specific areas of substantive criminal law, respecting the different European legal traditions – as well as the provisions of the ECHR as reflected in the Charter in particular concerning the presumption of innocence –, may prove necessary in order to facilitate mutual recognition."

The second and fourth indents of paragraph 2 are based on existing Article 31(1)(a) and (d) TEU.

The first indent includes a recommendation made by the Working Group (see page 12 of the final report:

"In the field of judicial cooperation, the Group recommends however that the legal basis be complemented so as to enable adoption of the necessary measures for the mutual recognition of judicial orders, fines, disqualification decisions, and all other forms of judicial decisions; this would be a logical consequence of enshrining the principle of mutual recognition in the Treaty."

By way of clarification, the third indent incorporates an explicit legal basis for the training of judges and judicial staff, which was mentioned on page 11 of the Group's report.

Article 16: [Criminal procedure]

In order to strengthen mutual trust between the competent authorities of Member States and to guarantee the effectiveness of common tools for police and judicial cooperation, the European Parliament and the Council, in accordance with the legislative procedure, may adopt laws and framework laws containing minimum rules concerning:

- the admissibility of evidence throughout the Union;
- the definition of the rights of individuals in criminal procedure in compliance with fundamental rights;
- the rights of victims of crime;
- other specific aspects of criminal procedure, which shall be identified in advance by the Council, acting unanimously after receiving the assent of the European Parliament.

Comments

As the Working Group's final report acknowledges (see page 11), the need for approximation of certain elements of criminal procedure is widely recognised by practitioners and is perhaps more urgent than approximation of substantive criminal law.

Such procedural approximation both facilitates collaboration between law-enforcement agencies of the Member States (and the Union bodies acting in the field), and the application of the principle of mutual recognition, as it strengthens mutual confidence. At present, Article 31 TEU does not reflect this point sufficiently and is too vague on concrete possibilities for such approximation.

This Article is based on the following recommendation by the Working Group:

"The Group recommends the creation of a legal basis permitting the adoption of common rules on *specific* elements of criminal procedure to the extent that such rules relate to procedures with transnational implications and are needed to ensure the full application of mutual recognition of judicial decisions or to guarantee the effectiveness of common tools for police and judicial cooperation created by the Union. The Treaty legal basis could specify as one domain of action common minimum rules on the admissibility of evidence throughout the Union. The Council could subsequently by unanimity identify all elements of procedure on which minimum rules are required to facilitate mutual recognition.

This legal base could also provide for the setting of common minimum standards for the protection of the rights of individuals in criminal procedure, building on the standards enshrined in the European Convention of Human Rights as reflected in the Charter of Fundamental Rights and respecting different European legal traditions."

Reference is also made in this Article to victims' rights. Indeed, the European Council had already stressed, in the Tampere conclusions, that "minimum standards should be drawn up on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs" (see paragraph 32).

Article 17: [Substantive criminal law]

The European Parliament and the Council, in accordance with the legislative procedure, may adopt framework laws containing minimum rules concerning the definition of incriminations and sanctions:

- in the areas of particularly serious crime with cross-border dimensions resulting from the nature or impact of the offences or of a special need to prosecute them jointly. 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. The Council, on the basis of developments in crime and acting unanimously after obtaining the assent of the European Parliament, may identify other areas of crime that meet the criteria specified in this indent;
- in areas of crime affecting a common interest which is the subject of a Union policy, if criminal sanctions prove essential to ensure the effective implementation of that policy.

Comments

This draft article implements a very significant recommendation by the Working Group, aiming to define more precisely the Union's competence in the area of approximation of national rules of substantive criminal law. Indeed, a more rigorous delimitation of competences seems necessary in order to make the general decision-making rules (qualified majority and codecision) applicable in this sector.

In accordance with the report, the draft ensures a better delimitation of competences by enshrining two fundamental criteria set out on page 10 of the report (paragraphs "aa": particularly serious crime with cross-border dimensions and "bb": crime affecting a common interest which is the subject of a Union policy) and by a list of areas of crime. As proposed by the report, the list gives an exhaustive definition of the areas of particularly serious and cross-border crime, within the meaning of criterion "aa" in the report, but the Council will be able, according to developments, and acting unanimously after obtaining Parliament's assent, to identify other areas of crime that fulfil this criterion, so that the Union can react to such developments without having to change the Treaty.

The list proposed above draws on Articles 29 and 31(e) of the current TEU and in the conclusions of the Tampere European Council (see paragraph 48). It should be stressed that certain types of crime, such as terrorism in particular, do indeed have a cross-border dimension in the meaning of this Article even where the way in which the act is perpetrated only concerns a single Member State, since there is undeniably a "special need to prosecute them jointly". We would also stress that, in accordance with the Working Group's report (see page 12), this list applies only in the framework of approximation of national laws; police and judicial cooperation, including the action of Europol and Eurojust (see Articles 13 to 15), may cover additional areas of crime.

*The second indent ("crime affecting a common interest which is the subject of a Union policy"), makes it possible to cover several areas in which there is already either an *acquis* adopted by virtue of Article 31 of the current TEU, or negotiations under way or plans for the near future. The following in particular are covered in this way: fraud affecting the financial interests of the Union, counterfeiting of the euro, facilitation of unauthorised entry and residence, counterfeiting and piracy of products, environmental crime, and also racism and xenophobia (given that Article 13 TEC allows the Community to take action to combat discrimination based on racial or ethnic origin). Because of the existence of this second criterion, it is unnecessary to add all these areas of crime to the list given in the first indent. Moreover, the second indent takes account of the fact that the Union has to define minimum rules for certain crimes, independently of whether or not they are of a cross-border nature, such as for example the counterfeiting of the euro or fraud affecting the financial interests of the Union.*

Article 18: [Crime prevention]

The European Parliament and the Council, in accordance with the legislative procedure, may adopt laws and framework laws to promote and support the action of Member States in the field of crime prevention, excluding any approximation of Member States' legislative and regulatory provisions not permitted by other provisions in the Constitution.

Comments

Draft article based on the recommendation on page 12 of the Working Group's report:

("... it is important that the new Treaty also reflects more clearly the pivotal role of crime prevention, which is mentioned in Article 29 TEU but is not included in the specific legal bases of Articles 30 and 31 TEU. The Group recommends that a specific legal base now be included in the Treaty. This legal base should be limited to incentive and supporting measures for the prevention of crime ...").

Article 19: [Eurojust]

1. Eurojust's mission shall be to ensure coordination and cooperation between national prosecuting authorities in relation to serious crime affecting two or more Member States or requiring a joint prosecution, on the basis of operations conducted and information supplied by the Member States' authorities and by Europol.
2. The European Parliament and the Council, in accordance with the legislative procedure, shall determine Eurojust's structure, workings, scope of action and tasks. Those tasks may include:
 - the initiation and coordination of criminal prosecutions conducted by competent national authorities;
 - the strengthening of judicial cooperation, including by resolution of conflicts of jurisdiction and by close cooperation with the European Judicial Network;
 - appropriate supervision of Europol's operational activities.

The law referred to in the preceding subparagraph shall also determine arrangements for involving the European Parliament and national parliaments in the development of Eurojust's activities.

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

Comments

The draft article is based on Article 31 TEU, as amended by the Treaty of Nice, and is in line with the detailed proposals contained in the Group's final report (page 19). The wording "appropriate supervision of Europol's operational activities" does not imply overall supervision by Eurojust of all Europol's activities, but takes account of the fact that, in most of the Member States' legal systems, the police authorities do not conduct criminal investigation activities in an entirely autonomous manner, but under the instructions or supervision of judges, magistrates or public prosecutors.

Article 20: European Public Prosecutor's Office]

1. With a view to combating serious crimes having a cross-border dimension, as well as illegal activities affecting the interests of the Union, the Council, acting unanimously after obtaining the assent of the European Parliament, may adopt a European law creating a European Public Prosecutor's Office within Eurojust. The European Public Prosecutor's Office shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators, and their accomplices, of serious crimes affecting several Member States and of offences against the Union's financial interests, as determined by the law provided for in the following paragraph. It shall exercise the functions of prosecutor in the competent courts of the Member States in relation to such offences.
2. The law referred to in the preceding paragraph 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 the European Public Prosecutor's Office in the exercise of its functions.

Comments

Through this proposed Article submitted to the Convention, the Praesidium intends to draw the consequences of a rich debate which was first held within the Working Group (which, on this point alone among the questions under its remit, made no consensual recommendation) and then in the Convention plenary on 6 December 2002.

The provision proposed by the Praesidium would introduce a legal basis enabling the Council, acting unanimously and after obtaining the assent of the European Parliament, to establish a European Public Prosecutor's Office if it deems this to be appropriate, but without necessarily involving any obligation to do so. The provisions of paragraph 1, second and third sentences, and of paragraph 2 would therefore become applicable only if the Council were to take such a decision. These proposals would, in addition, deliberately leave the legislator considerable leeway as to any concrete formulation, if appropriate, of the arrangements for setting up the Public Prosecutor's Office (i.e. its structure, workings, tasks and powers), by merely indicating in the Constitution only the essential details of such arrangements. In particular, the phrase "within Eurojust" aims to allow the legislator the necessary flexibility to define the structural and functional relations between the Public Prosecutor's Office and Eurojust that it would deem appropriate.

Chapter 4: Police cooperation

Article 21: [Cooperation with regard to internal security]

1. The Union shall establish cooperation involving all the Member States' authorities with responsibility for internal security, including police, customs and other specialised services in relation to the prevention, detection and investigation of criminal offences.

2. To this end, the European Parliament and the Council, in accordance with the legislative procedure, shall adopt laws and framework laws concerning:
 - the collection, storage, processing, analysis and exchange of relevant information;
 - the training and exchange of staff, equipment and research;
 - any other measure not referred to in the following paragraph, that encourages cooperation between the authorities referred to in this Article.
3. The Council may unanimously adopt laws and framework laws concerning operational cooperation between the authorities referred to in this Article. It shall act after consulting the European Parliament.

Comments

The proposed wording essentially stems from the existing Article 30(1) of the TEU, although it has been shortened. The scope is limited to police cooperation and is therefore different from that of Article 4 of this title, which covers all of the subject matter covered by the area of freedom, security and justice.

With regard to the decision-making procedure, the draft takes into account, through the differentiation made between the second and third paragraphs, the report of the Working Group, which recommends switching to the qualified majority and codecision rule in the area of police cooperation "except rules concerning the exercise of operational powers of national police authorities, of joint investigative teams or of law enforcement authorities on the territory of another Member State" (see page 14 of the report).

Article 30 of the existing TEU provides that the exchange of information between national services and to Europol shall be carried out "subject to appropriate provisions on the protection of personal data". On this basis, data protection provisions have been included in the various 3rd pillar instruments which may affect personal data. It would therefore have been possible to include an explicit reference to this topic, in order to create a legal basis for maintaining and developing such provisions.

However, with the merger of the pillars, it seems more logical to bring in general arrangements for the protection of personal data, covering both the current Community arrangements (viz. "data protection" Directive 95/46 based on Article 95 TEC for action by Member States, and Article 286 TEC for action by the institutions) and action under the existing 3rd pillar, without it being necessary to devote a specific legal basis in this chapter to data protection. A new general article on the protection of personal data will therefore be proposed in the Title on "The democratic life of the Union" in Part One of the Constitution. This Article should not only include the existing Article 286 TEC on the action of Union institutions and bodies, but also lay down a legal basis for the adoption of rules on the processing of personal data by the authorities of the Member States when acting within the ambit of Union law. It would of course be possible for the legislator to use this new general legal basis for the adoption of specific data protection rules geared to the police sector.

Article 22: [Europol]

1. Europol's mission is to support and strengthen action by the Member States' police authorities 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, in accordance with the legislative procedure, shall determine Europol's structure, operation, field of action and tasks. These tasks may include:
- the collection, storage, processing, analysis and exchange of information forwarded by the authorities of the Member States or third countries or bodies;
 - the coordination, organisation and implementation of investigative and operational actions carried out jointly with the Member States' services or in the context of joint investigative teams.

The law referred to in the previous paragraph also lays down the procedures for scrutiny of Europol's activities by the European Parliament, together with the national parliaments.

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

Comments

This draft article turns the Working Group's recommendations on Europol (see final report, pages 14, 18 and 23) into article form. In accordance with those recommendations, the first paragraph aims only to enshrine Europol's general mission. However, Europol's structure, operating rules, specific areas of action and tasks will now be defined by the law (which will replace the existing Europol Convention) rather than by detailed provisions of the Treaty itself (see existing Article 30(2) TEU). In paragraph 2, the Treaty confines itself to indicating the potential competences which could be conferred upon Europol by the legislator to the extent that it deems opportune. In any case, the legislator would still have to keep within with the limits on Europol's

potential competences unequivocally set out in paragraph 3, guaranteeing that the Member States will always keep control of any operational action by Europol in the field and that they will have exclusive responsibility for applying any coercive measures. Lastly, this article should be implemented by the legislative procedure (codecision), with the Council acting by a qualified majority, as stated in the Working Group report (see page 13:

"Improving the effectiveness of Europol and Eurojust is crucial to European police and judicial cooperation and should therefore in principle be possible by qualified majority voting and codecision; this should be the case for any possible extension of Europol's and Eurojust's scope of action to new types of crime, for all rules on their organisation and management, and for any extension of their existing powers.")

Article 23: [Operations on the territory of another Member State]

The Council, acting unanimously, shall adopt laws and framework laws laying down the conditions and limitations under which the competent authorities of the Member States referred to in Articles 13 and 15 may operate in the territory of another Member State in liaison and in agreement with the authorities of that State. It shall take its decision following consultation of the European Parliament.

Comments

This draft article uses the legal basis of the existing Article 32 TEU. It refers only to national authorities since Europol's corresponding powers are covered by the legal basis in Article 22. As recommended by the Group in point v on page 14 of its final report, unlike in the usual legislative procedure, Council unanimity and consultation of the European Parliament are provided for. Of course, neither this article, nor the other articles under this Title, aim to prevent those Member States which so desire from concluding bilateral agreements providing for closer cooperation between their respective authorities.