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NOTE

from	Secretariat
to	Working Group X "Freedom, Security and Justice"
Subject :	Draft Final Report

Members of the Working Group X "Freedom, Security and Justice" will find enclosed the Draft Final Report of the Group, which will be considered at the meeting of 22 November 2002.

DRAFT FINAL REPORT

INTRODUCTION

If the European Union is to win the maximum support of its citizens, it must show that it can deliver concrete results on issues that really matter. The Convention will be deemed to be a success if it is seen to have put in place means to ensure that freedom can be enjoyed in conditions of security and justice accessible to all. People have the right to expect the Union to address the threat to their freedom and legal rights posed by terrorism and serious crime. The battle against crime is an area in which the European Union can demonstrate its relevance to its citizens in the most visible way. There are a number of areas of cross-border crime which cannot be overcome by States acting on their own nor is defence against the new terrorism threats completely with national autocracy.

Since the entry into force of the Amsterdam Treaty, the establishment of a coherent area of freedom, security and justice has formed one of the key objectives of the European Union. In this context, it is important to make clear that the three components - freedom, security and justice - go hand-in-hand and are of equal importance. This principle should guide the Union policy in this area.

This policy should be rooted in a shared commitment to freedom based on human rights, democratic institutions and rule of law. It is important that the citizens feel that a proper sense of "European public order" ("ordre public européen") has taken shape and is actually visible today in their daily lives. In this respect, the principles of transparency and democratic control are of utmust importance.

On the basis of the Working group's mandate - which was developed in the annotated mandate[1] -, seven meetings were held and a number of experts were heard[2]. The deliberations have shown a considerable consensus on many issues. On others the Group still have different views and this is reflected in the report. The latter focuses though mainly on the common positions which have emerged within the Group.

These have developed on the basis of two following proposed "golden rules", which were broadly accepted by the Working group:

[1] CONV 258/02.
[2] See the list of experts in Annex 1.

- *A common general legal framework recognising the particularities of this area*

The Working Group considers that the current "Third pillar" provisions should be brought under a common general legal framework. This would overcome the pillar structure and its well-known adverse effects (uncertainty about legal bases; necessity of two instruments or separate international agreements for a series of initiatives).

But having a single institutional framework does not mean that the Union procedures would necessarily need to be applied in an identical way to areas currently falling within the Third Pillar : the procedures could vary according to the action envisaged at Union level. The proposals made in this report lead to combine elements of the Community method with mechanisms allowing in some cases for strengthened collaboration between Member States and involvement of national parliaments with a view to taking into account the specific features of the area of police and criminal law.

In addition, one could envisage a multi-annual strategic programme set by the European Council, defining an overall framework for legislation and operational collaboration.

- *Introduce, as much as possible, a separation between "legislative" and "operational" tasks*

A clearer and stricter separation between legislation (legal instruments; legislative procedures; implementation; in large part to be aligned with the general procedures of Community law) and a reinforced co-ordination of operational collaboration within the Council.

This central proposal to distinguish more clearly in future between the legislative function and the operational function is deemed to improve the current (rather confusing) situation and has guided the elaboration of the Working Group's final report.

A. LEGISLATIVE PROCEDURES

I. Areas related to the TEC (current "First Pillar")[1]

1. Asylum, refugees and displaced persons

The Heads of State and Government agreed in Tampere in 1999 on setting up a Common European Asylum System; they decided that this should entail, in the short term, the adoption of a number of concrete legislative intiatives, and in the longer term, a common ayslum procedure and a uniform status for those who are granted asylum valid throughout Europe. However, progress even in realising the short term objectives set in Tampere has been slow, mainly due to the constraints of unanimity, and there must be serious question about the deadlines set by the Seville European Council can at all be met if the rule of unanimity is maintained[2] in these areas. It appears even less likely that the ambitious long term vision agreed in Tampere could be achieved by unanimity voting amongst 25 Member States. Furthermore, in the Amsterdam Treaty, Article 63 § 1 and § 2 TEC were drafted in a complicated way reflecting the situation at the time; this formulation is not consistent with the ambitious project agreed two years later in Tampere.

Against this backdrop, the Group submits the following three recommendations:

- 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. This legal base should, as in the present Treaty, ensure full respect of the Geneva Convention but enable the Union also to provide further, modernised protection not embraced by that Convention;
- to enshrine in the Treaty the principle of solidarity and a fair burden sharing between the Member States, applying as a general principle to the Union's asylum, immigration and border control policies.

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1 For recommendations concerning border control policy, see below, section III. (operational aspects).

2 The Treaty of Nice stipulates that qualified majority voting and co-decision will apply in this area only after the Council has previously adopted, *by unanimity*, legislation defining the common rules and basic principles governing these issues.

2. Immigration policies

As regards the Union's common policies in the field of immigration, the Group's discussions have shown that the current legal bases (Articles 63 § 3 and § 4 TEC) in principle cover the full breadth of the immigration domain, and thus describe an adequate ambition of the scope of the Union's action. It has even been noted that, notwithstanding the potential breadth of the legal bases, the Member States will in practice, according to a generally shared understanding, remain responsible for the volumes of admission of third country nationals and of their integration into the host country. In the latter area, Tampere has called for Union legislation on a legal status for *long term* legal residents with third country citizenship, giving those residents a set of uniform rights (e.g., right to residence, education, work, non-discrimination). It appears that, otherwise, the Union could provide added value to national integration efforts mainly through incentive and support measures as well as through open coordination, rather than through harmonising legislation. In turn, there is a stronger call in practice for common Union action regarding the fight against illegal immigration, including criminal sanctions, given the demonstrable ineffectiveness of purely national policies.

In the light of the foregoing, the Group has not discussed substantive changes to the legal bases contained in Article 63 § 3 and § 4 TEC on the understanding that these include fight against illegal immigration, including criminal sanctions (see part B). The main recommendation of the Group is to move to qualified majority voting and codecision for Union legislation in these areas.

3. Visa policy

The Group notes that the current legal base in Article 62 § 2 (b) TEC covers virtually all aspects of a common visa policy, while however splitting that policy into four specific parts reflecting procedural differences, which were important for the transitional period foreseen in the Amsterdam Treaty, but are no longer justified in a new Constitutional Treaty. That legal base should therefore be simplified into a single provision enabling the adoption, by qualified majority voting and co-decision, of all measures needed for the common visa policy.

4. Cooperation in the field of civil law

The Group has had a discussion about the current drafting of Article 65 TEC, and in particular about the limitation of that article to action on "civil matters having cross-border implications" and "insofar as necessary for the proper functioning of the internal market". While some Members have questioned these limitations, the Group, after careful examination, believes that they could be maintained, and that the wording of the current legal base is broadly appropriate. However, it takes the view that this legal basis on judicial cooperation in civil matters could, within the new overall structure of a single Constitutional Treaty, be dissociated from matters of asylum and immigration and visa policies.

Finally, some members of the Group have proposed that *all* aspects of judicial cooperation in civil matters, i.e. also aspects touching on some aspects of family law, be covered by the same procedure of qualified majority voting and co-decision. Some others have disagreed with this idea.

II. Police and judicial cooperation in criminal matters (areas covered by the present "Third Pillar")

1. Reform of Legal Instruments

The Group recognises the urgent need of reform of the legal instruments presently available in the "Third Pillar" (Article 34 TEU), given that most conventions adopted by the Council have not yet been ratified, that it is very difficult to amend, even for small points, existing conventions (such as that on Europol), and that Framework Decisions and Decisions cannot have direct effect which, as illlustrated by expert testimony, greatly hampers the practical implementation of certain key such as the introduction of the European Arrest Warrant.

Therefore, the Group recommends that Framework Decisions, Decisions and Common Positions be replaced by regulations, directives and decisions (as currently foreseen in the EC Treaty) or their respective successors to be proposed by WG IX. The Group furthermore recommends that the instrument of conventions be abolished. In the future, regulations and directives (or their respective successors) will plainly suffice, and conventions already adopted by the Council under Article 34

TEU should be converted into regulations or directives (or their successors).[1].

2. Clearer identification of the scope of Union legislation

The need for clearer identification of Union competence seems to arise above all for the sectors of approximation of substantive and procedural criminal law. At the same time, the new formulation of these legal bases must reflect the right balance between the principle of mutual recognition and efforts of approximation of 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 may prove necessary in order to facilitate mutual recognition.

The envisaged intensification of the Union's action, through reformed legislative instruments and decision-making procedures, requires at the same time that the scope of future Union legislation be more clearly identified. As a matter of fact, Articles 30 and 31 TUE - which constitutes the applicable legal base - are too vague in many respects, and too narrow in some other aspects. Therefore, the legal bases for cooperation in the area of police co-operation and criminal law should be redrafted in order to achieve more clarity, efficiency and legal certainty.

[1] This would, in particular, solve the pressing legal problems which presently make any future development of the Europol legal framework so cumbersome If the Council were able to convert the Europol Convention into a regulation, it could more easily adapt that text to changing circumstances and define therein appropriate decision-making procedures for the management of Europol. It should be stressed however that the content of the Europol Convention, and thus the basic character of Europol, would not necessarily be affected by such a conversion exercise.

A new formulation of legal bases should distinguish between the various types of Union intervention in this area, i.e.:

- Approximation in certain areas of substantive criminal law (constituent elements and penalties),
- Approximation of certain elements of criminal procedure
- Rules organising police and judicial co-operation between Member States authorities (e.g. mutual legal assistance, arrest warrant)[1].

These elements are developed hereafter.

a) Approximation in certain areas of substantive criminal law (constituent elements and penalties)

The citizens need to be certain that serious cross-border crime is criminalised in all Member States and that it can attract sufficiently tough penalties across the Union. In that respect, the Group believes that a certain degree of approximation of substantive criminal law (i.e. the definition of constituent elements of a given crime, and penalties foreseen for it) is necessary given notably that certain phenomena of crimes are of transnational dimension and cannot be addressed effectively by the Member States acting alone. This has been recognised both by the Treaty of Amsterdam and by the European Council of Tampere[2].

The Working Group therefore considers opportune that a legal basis be included in the new Treaty permitting the adoption of minimum rules on constituent elements of criminal acts and of penalties in certain fields of crime if one of the following three criteria are met:

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[1] There must also be a specific legal base concerning the activity of Union bodies in this area (see part B).

[2] The Treaty of Amsterdam mentions the establishment of "minimum rules relating to the constituent elements of criminal acts and to penalties in the fields of organised crime, terrorism and illicit drug trafficking" (Article 31 (e) TUE), but does not exclude approximation of laws in the areas mentioned in Article 29 (preventing and combating crime, organised or otherwise, in particular terrorism, trafficking in persons and offences against children, illicit drug and arms trafficking, corruption and fraud). In Tampere, it was mentioned that "efforts to agree on common definitions, incriminations and sanctions should be focused in the first instance on a limited number of sectors of particular relevance, such as financial crime (money laundering, corruption, euro counterfeiting), drug trafficking, trafficking in human beings particularly exploitation of women, sexual exploitation of children, high tech crime and environmental crime".

aa) where the crime in question is of a particular serious nature and has a cross-border dimension;

bb) where the crime is directed against a shared European interest which is already itself subject of a common policy of the Union (eg conterfeiting the euro, PIF), approximation of substantive criminal law should be part of the toolbox of measures for the pursuit of that policy whenever non-criminal rules do not suffice;

cc) where approximation is required to generate sufficient mutual confidence to enable the full application of mutual recognition of judicial decisions or to guarantee the effectiveness of common tools for police and judicial co-operation created by the Union (i.e. common bodies such as Europol, or tools such as the European arrest warrant).

Under the new legal base, any approximation of constituent elements of crime and of penalties would only be possible if it meets one of these three criteria, and it should be carried through only in the form of directives (or their successor).

The Group's discussion showed that the scope of Union action would be further delineated if there was an enumeration of those types of crime that are considered to have a transnational dimension (within the meaning of aa) above). On the other hand, the Group is aware of the difficulty to draw up such a "list" (also taking into account that different lists exist presently, for example in Article 29 TEU, 31 (e) TEU, and in the Tampere conclusions), and of the need for flexible responses to ever changing crime phenomena in the future.

Against this backdrop, the Group recommends that a list of crimes be drawn up:

- either in a Treaty legal base[1] (option 1);
- or by the Council acting by unanimity within a given time after entry into force of the treaty (option 2);

That list would exhaustively define the crimes of transnational dimension within the meaning of criterion aa) but be without prejudice to minimum rules adopted in accordance of criterion bb) and cc). Furthermore, it could be stipulated that the Council, acting by unanimity, could amend this list where a need appears due to changing crime phenomena.

[1] If this were the Group's preference, it would then have to have a concrete discussion on which possible elements of such a list to enumerate in its final report. The lists existing in Article 31 (e) and in Article 29 TEU as well as the list of the Tampere conclusions could serve as guidance for such a discussion.

b) Approximation of elements of criminal procedure

The experts have demonstrated that the need for approximation of certain elements of criminal procedure is widely recognised by practitioners and perhaps more urgent than approximation of substantive criminal law. The Group recognises that such procedural approximation both facilitates the collaboration between law-enforcement agencies of the Member States (and the Union bodies acting in the field), and is a corollary of the principle of mutual recognition, as it strengthens mutual confidence. At present, Article 31 TEU does not reflect sufficiently this point and is too vague on concrete possibilities for such approximation.

Therefore, the Group recommends the creation of a legal basis permitting the adoption of common rules on *specific* elements of criminal procedure where such rules 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 a domain of action common rules on the taking and admissibility of evidence. The Council could subsequently identify (codecision with qualified majority) further elements of procedure on which common rules are needed.

This legal base could also foresee 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 and in the Charter of Fundamental Rights and respecting the different European legal traditions. This could be done exclusively through the use of directives (or their successors).

c) Rules on police and judicial co-operation between Member States authorities

Another domain of action, distinct from approximation in certain areas of substantive or procedural criminal laws of the Member States, is the adoption of rules facilitating police and judicial cooperation between the Member States' authorities. Examples include the Convention on mutual legal assistance in criminal matters established by the Council in 2000 or the Framework Decision on the European arrest warrant agreed in June 2002 and also the idea of creating a Judicial College at European level where further training of Judges would be supported.

The present Treaty contains broadly speaking adequate legal bases for the adoption of such rules. 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.

This legal base could explicitly enable the adoption of rules on the resolution of conflicts of jurisdiction between Member States. Moreover, the Group considers that this legal base should not be restricted to specific types of crime on which the Union is seeking approximation of *substantive* laws.

On police cooperation between Member States authorities, the Group considers that the scope and intensity of Union action, as defined presently in Article 30 § 1 TEU, is broadly adequate; a simplified drafting of that provision could however be envisaged.

d) Supporting measures on crime prevention

A crucial aspect of the development of an area of freedom, security and justice is that there should be a *just balance* between the three components; this implies also a balance between preventive and repressive action. Consequently, it is important that the new Treaty also reflect 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 be included in the Treaty allowing to take supporting measures for the prevention of crime, while fully respecting the particular importance of subsidiarity in this area.

3. Reform of Legislative Procedures

a) Codecision as the normal procedure to be used for legislation

The Working Group believes that for all legislation in this area (as opposed to operational acts referred above), the co-decision procedure applies.

b) Cases in which the qualified majority vote could be used

There is broad consensus within the Group that the current situation where unanimity governs all decision making in cooperation in criminal matters cannot endure if, after enlargement, the Union is to preserve and strengthen its capacity to protect the citizens against serious cross border crime. Therefore, the members of the Group are conscious that strong efforts must be made to extend decision-making by qualitified majority voting and codecision, which is (as indicated above) to become the standard legislative procedure of the new Constitutional Treaty. In this respect, it was also pointed out by the experts invited that already today the unanimity rule slowed down the negociations and impoverished considerably the content of the acts adopted.

In the light of the foregoing, a majority of members of the Group is prepared to recommend decision-making by qualified majority voting for the following areas:

i. minimum rules on constituent elements and sanctions of the crimes enumerated. Two options are available:
   - a list[1] of crimes would be incorporated in a provision of the treaty and this provision would also stipulate that any addition to this list would be adopted by an act of the Council by unanimity;
   - the Treaty contains no list, but requires the Council acting by unanimity to draw up a list enumerating the crimes for substantive approximation by qualified majority; the Council may later on add further types of crime by unanimity (see 2 a, aa above);
ii. minimum rules on constituent elements and sanctions of crimes directed against a common policy of the Union, if that policy itself is governed by QMV (see 2 a, bb above);
iii. common minimum standards for the protection of the rights of individuals in criminal procedure, as a corollary to the principle of mutual recognition (see 2 b above);
iv. common rules on *specific* elements of criminal procedure, such as on the taking and admissibility of evidence; where such rules 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 (see 2 b above);

[1] If this were the Group's preference, a concrete discussion would be needed on the possible elements of such a list to enumerate in its final report. The lists existing in Article 31 (e) and in Article 29 TEU, as well as the list of the Tampere conclusions, might serve as guidance for such a discussion.

v. rules on police and judicial co-operation between Member States authorities, except rules concerning the exercise of operational powers of joint investigative teams or of law enforcement authorities on the territory of another Member State (see 2 c above);
vi. measures on prevention of crime (see 2 d above).

As for decision making procedures concerning rules governing Union bodies, careful consideration should be given. The Group sees merit in considering two distinct situations :

- one concerning the creation of new Union bodies for the exercise of certain responsibilities currently performed at national level (such as a possible public prosecution office or a common border guard, see below) which might be decided by unanimity;
- the other situation regards further developement of the existing bodies, i.e. Europol and Eurojust.

Improving the effectiveness of Europol and Eurojust is crucial to the 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.

c) <u>cases in which the unanimity rule would apply</u>

In certain aspects of cooperation in criminal matters concerning core functions of the Member States and deeply rooted in their various legal traditions the unanimity rule remains.

Examples relate to the creation of Union bodies with operational powers, the approximation in certain areas of substantive criminal law (other than referred to above), rules on action by joint police teams or national authorities acting in the territory of another Member State.

The Group is yet well aware that, after enlargement, there is a risk that this rule could lead to deadlock, since a single State could even refuse any negotiation on an issue conflicting with its specific interests although the Union may have identified it as urgent for the common fight against crime. This is also linked with the question of "opting-out" and reinforced cooperation.

d) Right of initiative

Currently Member States share the right of initiative with the Commission in relation to measures under Title IV TEC and Title VI TEU. After 1 May 2004, Member States will keep this right of initiative within TEU only. Some have pointed out that the initiatives submitted by Member States tend to focus mainly on existing difficulties within that State without taking into account the general perspective of the Union's interests. In addition, some States, when chairing the Council, feel politically obliged to propose initiatives to respond to an actual concern of their population. This can imply the discussion of subjects within the Council for which there is actually limited interest.

The Group has considered several options, like for example:

i. maintaining the right of initiative for each member state;
ii. recognising the right of initiative to the Commission alone or with exceptions in specific areas such as police co-operation, development of law-enforcement agencies;
iii. recognising the exclusive right of initiative of the Commission, but Parliament, Council or a group of Member States could ask the Commission to submit a legislative proposal. Should the Commission refuse, it should give reasons to the Parliament and the Council;
iv. giving a concurrent right of initiative only to a *group* of Member States;
v. giving a concurrent right to the Member States, but establishing a mechanism whereby a proposal could only be submitted following prior approval by the Council deciding by majority vote;
vi. requiring that only a Commission initiative responding to an explicit request from the European Council could be adopted by qualified majority; all the other initiatives (including those of a group of Member States) would be adopted by unanimity.

The Group also noted that from a legal and institutional point of view, opening the possibility for Member States to launch a legislative initiative within the codecision procedure raises issues of compatibility with the very nature of this procedure as described in Article 251 TEC and with the logic of qualified majority voting in the Council.

Against this background, the majority of the Group accepted that the right of initiative of the Commission should be shared with the right of initiative of the Member States; in order to enhance the idea that the latter's initiatives respond to a general concern, the Working Group recommends to set a threshold of 1/5 (1/4) of the Member States for an initiative to be admissible.

B. STRENGTHENING OPERATIONAL COLLABORATION

There is a broad acknowledgement amongst members of the Working Group that current operational collaboration lacks efficiency, transparency and accountability. At present, operational responsibilities are split between Member States' police and judicial authorities (having primary responsibility), Europol, more recently Eurojust (with a mission of support and facilitation of cooperation), and OLAF (tasked with administrative investigation procedures in the specific area of protecting the Community's financial interests). In addition, efficient control of the Union's external borders presents a new major challenge for operational cooperation. In the area considered, major progress should be done to meet the people' expectations and improvements would have an immediate and visible impact on the way Europe is perceived by ordinary citizens.

I. Enhanced collaboration within the Council

To improve confidence and efficiency, the Council's current work on co-ordination 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 co-ordination 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 focuses on co-ordinating operational cooperation rather than becoming involved in the Council's legislative work. It could be examined how to associate the Chiefs of Police Task Force in this context.

The role of that reformed structure within the Council could be one of co-ordination and oversight of the entire spectrum of operational activity in policy and security matters (inter alia police cooperation, fact-finding missions, facilitation of cooperation between Europol and Eurojust, peer review conducted within the Council, common border control system, 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. It could however be envisaged to simplify these supervision

systems by merging the various supervisory bodies.

If there were such a reformed structure of high technical level, the question of its chairmanship would arise. That committee could have a chairman on a permanent basis appointed either by the Council or elected amongst its members. Such a high-ranking official would give visibility to the operational cooperation within the Council. He / she could report regularly to the JHA Council and to the EP and possibly to the national parliaments, and have authority vis-à-vis Europol (e.g. chairing the management board).

However, this recommendation should be distinguished from a proposal for a "High Representative for Justice and Home affairs" with a political role (such as chairing the JHA Council) which has also been made, but has not found sufficient support within the Group. Hence, the group has considered that, if there is a need for such a structure, it should be of technical nature.

II. Management of external borders

There is a general agreement within the group that practical progress should be made in that respect, in order to develop gradually a genuinely integrated system of external border control management, as agreed by the Seville European Council.

Furthermore, most members of the Group have considered the set up of a common European border guard unit as a longer-term perspective. Some more immediate steps (such as enhanced co-operation, closer co-operation between Members States' services, common instruction and training, sharing of equipment, joint teams composed by officials from different Member States in order to make the control of the external borders more effective) could be taken first. Progress in that area would thus be gradual.

There is also a consensus within the group to consider that the principle of solidarity, including financial solidarity, between Member States is of particular importance in the area of border controls.

Having this in mind, the group recommends that the Treaty should reflect explicitly the objective agreed at the Seville European Council, and therefore contain a legal basis allowing the adoption of all necessary measures needed for the gradual development of a common system of external border

management. This provision could serve as legal base for the adoption of such measures (like, in particular, promoting co-operation, training, exchange of information and financial solidarity). Consideration should be given to indicating, in this legal base, the possible longer-term perspective of a common European border guard unit.

III. Development of Union bodies (Europol, Eurojust)

a) Europol

The group has considered that rather than trying to "update" the detailed statement of Europol's tasks in Article 30 TEU - which is already outdated today in certain respects - it would be better to replace it by a shorter and more general provision on Europol in the new Treaty. This provision would contain a legal base giving the legislator a greater margin to develop Europol's tasks and powers.

However, this legal base should not be open-ended. It would rather indicate the direction of possible developments and pose basic limits of such developments, which have not be contested within the Group. Thus, the provision could state Europol's central role within the framework of European police cooperation, define its general scope of action (i.e. serious crime affecting two or more Member States), indicate that Europol's tasks and powers shall be defined by the legislator and that they *may* (to the extent defined in the legislation) include powers relating to the co-ordination and carrying out of investigations, as well as to the participation in operational actions to be carried out jointly with Member States services or in joint teams. Finally, the provision should make clear that any operation action involving Europol would need in any event to be carried out in liaison and agreement with the Member State(s) concerned (analogous formula to current Article 32 TEU) and that coercive measures would always have to be carried out by competent Member State officials

The Group also defended the idea that Europol activities will need in the future to be object of a political control by the European Parliament and possibly by the national parliaments as well as of a judicial control by the ECJ.

b) Eurojust

Eurojust has competence to deal with the types of crime and offences in respect of which Europol is at all times competent to act, as well as computer crime, fraud and corruption and any criminal offence affecting the European Community's financial interests, the laundering of the proceeds of crime and finally participation in a criminal organisation. It acts in the context of investigations and prosecutions, concerning two or more States, but it can also act at the request of a single Member State or of the Commission. Eurojust has the power to request that a Member State undertake an investigation, but such a request is not binding.

The Group has favourably examined solutions to give it more operational powers. In general terms, the Group recommends to replace the detailed statement of Eurojust's mission in Article 31 TEU (Nice) by a shorter, more general provision in the new Treaty which would contain a legal base giving the legislator a greater margin to develop Eurojust's tasks and powers.

This provision could indicate Eurojust's central role for judicial coordination and cooperation, define its general scope of action (i.e. serious crime affecting two or more Member States), indicate that Eurojust's tasks and powers shall be defined by the legislator and that they *may* (to the extent defined in legislation) include tasks and powers regarding in particular:

- the initiation and co-ordination of criminal prosecutions;
- the facilitation of judicial cooperation (including resolution of conflicts of jurisdiction);
- and, possibly, a supervision of (future) investigative and operational activities of Europol.

Finally, it could be specified that formal acts of judicial procedure in the Member States would in any event be taken by the competent national officials (which include the national members of Eurojust to the extent that they have received such competence).

c) The possible creation of a European Public Prosecutor or a Public Prosecutor Office

The Group also considered some proposals made in favour of the creation of a European Public Prosecutor. Some Members pointed out that the fraud perpetrated to the detriment of the Community's financial interests are very important and that current instruments are inadequate to remedy this situation. They thus propose the creation of a European Public Prosecutor responsible for detecting, prosecuting and bringing to judgement the perpetrators of crimes prejudicial to the Community's financial interests before the national courts. Others have considered that a convincing

case was not made for the creation of such a body and that there were strong objections on both practical and accountability grounds. To some other Members, the need exists for a proper European Public Prosecutor Office with a scope of action going beyond the protection of the financial interests of the Union. They believe that the current Eurojust could evolve towards that Office.

The Working Group is in favour of exploring the idea - on a medium/long term basis - of strengthening the powers of Eurojust enabling it, on the basis of a decision taken by the college, to bring cases before national courts, through his/her national representative. The legal basis concerning Eurojust should in this case permit such evolution enabling the adoption of a decision (under the codecision procedure and by unanimity of the Council).

C. HORIZONTAL QUESTIONS

I. More efficient implementation and the maintenance of high standards

As experts demonstrated to the Group, one of the most serious problem hampering the Union's policy in this area is insufficient implementation, especially in the field of the current "Third pillar". All too often, Union law has remained "virtual law": conventions not ratified by all the Member States (despite more than a dozen of conventions had been concluded, only two have been ratified) and framework decisions (or previously: "joint actions") non transposed or incompletely transposed in national law. This problem of lack of implementation also applies to co-operation mechanisms concerning namely agencies (e.g. Europol not receiving enough information from the Member States). It was further pointed out in this context that the failure to implement legislation in this area might seriously jeopardise the security of other Member States (e.g. fight against terrorism, problems related to external borders control, possibly cyber-crime at Union level).

With a view to finding ways to improve the implementation by Member State*s* in this area, a distinction should be made between monitoring of practical implementation of Union policies and standards, and control of compliance with legal obligations.

As for the former, the Working Group considers that mechanisms of "mutual evaluation" or "peer review", as practised successfully within the Council over the last years (e.g., in the field of fight against organised crime or concerning effective application of the Schengen aqcuis), should be encouraged and applied more widely. This technique has proven a powerful tool for monitoring an efficient *practical* implementation of Union policies, thus helping to build up mutual confidence in each others' police and judicial systems, which is at the heart of a common area of freedom, security and justice. Indeed, if the system of mutual recognition is to work, there must also be a complete mutual confidence of police and judicial systems in the Member States. High standards not only must be attained, but must be maintained. 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 through procedures guaranteeing objectivity and independence. In addition, the "peer review" reports should be supplied to, and where possible debated, by national parliaments.

As for the obligations upon Member States of a legal nature relating to the area of current Third Pillar, the Working Group believes that the Commission should fully play its role as Treaty guardian and that it should be competent to introduce infringements proceedings before the European Court of Justice, in conformity with Article 226 TEC.

The Group takes the view that both control mechanisms are complementary and of equal importance: monitoring practical implementation in the operational area can be achieved efficiently through "peer review", not by the infringement procedure; that procedure is in turn the natural tool for strictly legal control.

To the (limited) extent that there is a need for implementing Union legislation *at Union level*, the Group considers that the Treaty could make the general regime on implementing measures (i.e., presently and subject to reform by the Convention, Article 211 TEC: implementing measures taken, as a rule, by the Commission in comitology procedures) also applicable in the areas of the current "Third Pillar". This would be in line with an increasing practice of the Council - though not contemplated in the Treaty of Amsterdam - of conferring tasks of implementation of Third Pillar acts on the Commission, to be performed in a comitology procedure (e.g. the management of financial programmes promoting cooperation, training and exchange in various areas of law-enforcement).

II. Involvement of national parliaments

The specific nature of this area has already been stressed. Indeed it has been broadly recognised that in particular the work and the organisation of the national police and the contents of the national criminal law are issues that are at the core of the competencies that define a national 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 (eg ratification of conventions). Reform of the legal instruments, the legislative procedures and operational co-operation is indispensable and will lead to an increased responsibility of 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 of the strategic guidelines and priorities for European criminal justice policy. Such involvement will only be meaningful if there are substantive doubts in national parliaments about the options to be considered at the European Council well in advance of the latter taking place;
- use of the "early warning mechanism" (devised by WG I) also for the specific aspects of subsidiarity in criminal law matters, in particular where it is questionable that a crime has actually a "cross-border effect" and is of a serious nature. One could also consider extending this mechanism to cases where certain national parliaments consider that an initiative runs counter to basic features of national criminal law policy. This mechanism could be triggered in this area by a threshold 1/4 of national parliaments entitled to early warning. In view of the special character of Justice and Home Affairs work, the Working Group also recommends that, subject to proper controls qualified minorities in national parliaments should be able to activate the "early warning mechanism" if concern about a particular issue is sufficiently widespread in the Union. This could be achieved if, for example, the activation of the mechanism could take place if a minimum of 1/3 of the membership of 2/3 of all the national parliaments sign a petition to this effect (this would encourage active co-operation on an inter-parliamentary basis between Parties in national parliaments);

- recognising the continuing role for national legislation through exclusive use of directives (or successor) in approximation of substantive criminal law and for minimum standards of individuals' rights in criminal procedures;
- involving national parliaments in the mutual evaluation mechanism *(see above);*
- establishing political control by the European Parliament together with the national parliaments (eg trough the creation of a mixed committee regarding the activities of Europol and Eurojust and of the European Border Guard Unit, if created).

III. International Agreements

At present, when an international agreement refers exclusively to third pillar matters, articles 24/38 TUE apply (mandate of negotiation is decided by the Council and the Presidency of the Union negotiates, where necessary with the assistance of the Commission).The procedure is actually the same for international agreements concerning second and third pillar matters. Agreements concerning second pillar matters can indeed be politically sensitive. As for agreements concerning Third Pillar matters, they have in principle a different nature, being linked with legislation, in particular of criminal law.

The Working Group stresses the need for a stable representation of the Union in the negotiation of international agreements. It considers that when the latter cover simultaneously different areas, the choice of the negotiator by the Council needs to take into account the content of the agreement in order to optimise the capacity of negotiation of the Union. The Working Group acknowledges that these issues are linked with the institutional development concerning the future international representation of the Union and need further consideration by the Working Group "external action" and by the Convention.

IV. Mechanisms of Opting-In / Opting-Out and reinforced cooperation

One element of the Groups' mandate concerns the *existing* opting-in / opting-out arrangements provided for by the Treaty of Amsterdam in favour of certain Member States in the area of Title IV TEC Treaty and of the Schengen acquis. It is submitted for consideration whether the extent to which these opt-out arrangements are still needed, might not be reviewed now; this might be the case especially in the areas of cooperation in civil law matters and of asylum, given the practice

meanwhile established in these areas. The area of border control is of a different nature since there are objective geographical factors which might suggest that there are continued reasons for having opting-in arrangements.

Another question relates to the possible need for using opting-in or opting-out arrangements *in the future,* permitting solutions in cases of particular sensitivity (like those identified above on which moving to qualified majority poses difficulty). While Justice and Home affairs is a policy area where the need for such solutions might be particulary strong, this is a general issue which could potentially arise in other policy areas as well and needs to be examined by the Convention. The JHA experience teaches that one of the principal questions to be addressed in that context is whether opting-in / -out possibilities should exist *en bloc* for well defined policy areas (border control would be a candidate for this, for the geographical reasons mentioned above), or whether they should be opened on a case-by-case basis for individual legislative initiatives.

V. Judicial Control

At present the jurisdiction of the Court of Justice regarding acts adopted under Title IV TEC and Title VI TEU is limited. According to Article 35, paragraph 1 TUE, the Court has jurisdiction to give preliminary rulings only if the Member States accept formally this jurisdiction (this has led to a complex "variable geography"); in addition the Court will have no jurisdiction at all to review acts adopted by police forces or other law enforcement services (paragraph 5); the right to bring annulment proceedings is limited to the Member States and to the Commission under the conditions set up in Article 35, paragraph 6 TUE.

The Working Group takes the view that the limited jurisdiction of the Court is no longer acceptable concerning acts adopted in areas (e.g. police co-operation, judicial co-operation in criminal matters) which directly affect fundamental rights of the individuals.

The same view applies to the limited judicial control foreseen in Article 68 TCE. This provision (paragraph 1) limits the preliminary ruling procedure (Article 234 TCE) to requests made by the supreme or last instance courts, but it is well known that the difficulties of interpretation are raised mainly before first instance courts; this implies that the individual has to lodge appeals until the last instance in order to request that a question of interpretation (or validity) be put to the European Court (this is particularly problematic in cases like asylum, where speedy legal proceedings are

crucial). In addition, the jurisdiction of the Court is excluded concerning measures related to the maintenance of law and order and the safeguarding of internal security (control of persons crossing internal borders). Yet, as stated above, the very nature of these measures is to affect individual rights. To the majority of the Working Group it is difficult to justify a continuation of exemption of the jurisdiction of the Court for such measures especially taking into account that other measures relating equally to the maintenance of law and order (eg expulsion from one Member State to another of a EU citizens) have always been subject to judicial control by the ECJ.

The majority of 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.

To the extent that these suggestions would imply an increase in the workload of the ECJ, the provisions provided for in the Nice Treaty on reform of the Court would allow the Court to cope with it.

Annexe

LIST OF EXPERTS INVITED BY THE WORKING GROUP

Fight against organized crime (view point from the National Police Services)

- Mr Patrick ZANDERS, Director of the Federal Police (Belgium)
- Mr John ABBOTT, Director of the National Crime Intelligence Service (United Kingdom)

Fight against organized crime (view point from European bodies)

- Mr Jürgen STORBECK, Director of EUROPOL
- Mr Michael KENNEDY, President of EUROJUST
- Mr Franz-Hermann BRÜNER, Director-General of European Anti-fraud Office (OLAF)

Judicial cooperation in criminal matters: instruments and procedures

- Mr Henri LABAYLE, Professor at the University of Bayonne (France)
- Mrs Christine van den WYNGAERT, Professor at the University of Antwerpen (Belgium)
- Mr Gilles de KERCHOVE, Director (DGH- Justice and Home Affairs), General Secretariat of the Council of the European Union

Asylum, immigration and control of external borders

a) Control of external borders

- Col. Marek ADAMCZYK, Border Guard Unit (Poland)
- Mr Eckehart WACHE, Head of Federal Border Police Office (Bundesgrenzschutzamt), of Frankfurt/Oder (Germany)

b) Asylum and immigration

- Mr Jean-Louis DE BROUWER, Head of Unit, DG Justice and Home Affairs, European Commission

Judicial co-operation in civil matters

- Mrs Alegria BORRAS, Professor of the University of Barcelona (Spain)