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REPORT

from	Chairman of Working group X "Freedom, Security and Justice"
to	The Convention
Subject :	**Final report of Working Group X "Freedom, Security and Justice"**

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 is 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 such as cross-border crime, asylum policy or control of the Union's external borders which cannot be dealt with effectively by States acting on their own, nor is defence against the new terrorism threats compatible with autonomous action at national level.
Public concern has considerably heightened following the events of 11 September 2001 and the emergence of more recent threats arising from international terrorism.

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, spelt out in an ambitious political agenda set by the European Council of Tampere of 1999 and further developed in the Treaty of Nice (notably by the inclusion of Eurojust) which is about to enter into force. 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. The activities of the Council of Europe in this context are particularly relevant. Indeed, 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 utmost importance. The establishment of a European Area of Freedom, Security and Justice is also closely linked with respect of the rights of citizens and the principle of non-discrimination (Articles 12 and 13 TEC).

On the basis of the Working group's mandate - which was developed in the annotated mandate[1] -, nine 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:

- *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

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

adverse effects (uncertainty about legal bases; necessity of two instruments or separate international agreements for a series of initiatives addressing the same problem). All the provisions concerning the European Area of Freedom, Security and Justice could thus be brought together under a single title of the Treaty.

But having a single legal and institutional framework does not mean that the Union procedures would necessarily need to be applied in an identical way: the procedures could vary according to the action envisaged at Union level. The proposals made in this report would combine elements of the Community method with mechanisms allowing in some cases for reinforced co-ordination of operational collaboration at Union level, and the involvement of national parliaments, in order to take into account the specific features of the area of police and criminal law.

In addition, one could envisage that, in line with the example of the Tampere European Council, a multi-annual 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.

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

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) and reinforced co-ordination of operational collaboration at Union level. This distinction has guided the elaboration of the Working Group's final report.

A. LEGISLATIVE PROCEDURES

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

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 initiatives, and in the longer term, a common asylum 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 doubt as to whether the deadlines set by the Seville European Council can at all be met if the rule of unanimity is maintained[1] in these areas. It appears even less likely that the ambitious long-term vision agreed in Tampere could be achieved by unanimity voting among 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 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;
- 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.

[1] 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 objective of a common policy in the field of immigration, as set by the Tampere European Council, 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 for the scope of the Union's action. It has 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 and responsibilities (e.g., right to residence, education, work, non-discrimination).

Some members of the Group consider that the Constitutional Treaty should provide an explicit legal base allowing measures on such rights to be adopted. It appears that, otherwise, the Union could provide added value to national integration efforts mainly through incentive and support measures, 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 evident ineffectiveness of purely national policies. Similarly, the negotiation of readmission agreements with third States has proved more effective when conducted at Union level rather than by Member States individually.

In the light of the foregoing, the Group recommends that the objective of a common policy on immigration should be enshrined in the Constitutional Treaty, and 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. Other than these points, the Group does not recommend substantive changes to the legal bases contained in Article 63 § 3 and § 4 TEC on the understanding that these include action against illegal immigration, including criminal sanctions (see part B). The Group recommends a move to qualified majority voting and codecision for Union legislation in these areas [1].

[1] Without prejudice to the procedure for social security matters which should be considered in the context of other social policies.

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. Development of an integrated system of border management

The Group recognises that in an area without internal border controls, the effective management of external borders - including coastal borders - is a matter of shared interest and responsibility. The Seville European Council welcomed the objective of the gradual development of an integrated system of external border management. The Group recommends that the current Article 62(2)(a) TEC is redrafted in order to create a general legal base enabling the adoption of the measures needed to put in place this integrated system. This implies both legislation and operational co-operation. The legislation setting out the rules on standards and procedures for checks at external borders, inherited from Schengen, needs to be maintained and developed, alongside the enhanced operational co-operation described in Part B of this report.

5. Co-operation 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 majority of 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 co-operation 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. Furthermore, the principle of mutual recognition of judicial decisions as a cornerstone of this common policy should be enshrined in the Treaty.

Finally, the Group notes that, by virtue of the Treaty of Nice, all measures concerning judicial co-operation in civil matters, with the exception of aspects touching on family law, will be covered by the procedure of qualified majority voting and co-decision. Some members believe that this procedure should apply to all aspects of family law. After having deliberated, the majority of the Group proposes to make this procedure also applicable to measures of judicial co-operation concerning parental responsibility.

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

1. Reform of Legal Instruments

The Group recognises the urgent need for 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 illustrated by expert testimony, greatly hampers the practical implementation of certain key initiatives 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 normal rules governing these instruments should in the future apply, even if this may require adaptation of legal systems in some Member States. This should include the possibility of direct effect of such directives conferring rights on individuals. 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] Some members have expressed their reservations on these points.

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 to approximate criminal laws: as it was politically agreed in Tampere, the principle of mutual recognition should be the cornerstone of judicial co-operation, 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. Some members have stressed the link between enshrining the principle of mutual recognition into the Treaty and facilitating the adoption of legislation on the approximation of substantive and procedural criminal law, by codecision and qualified majority voting.

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 constitute the applicable legal bases - are too vague in many respects, and too narrow in some other aspects.

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[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.

Therefore, the legal bases for co-operation in the area of police co-operation and criminal law should be redrafted in order to achieve more clarity, efficiency and legal certainty.
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. In addition, concerning "emergency actions" in the fields of the present "Third Pillar", the Group considers that, following a merger of the pillars, it would be appropriate to use a provision, such as present Article 308 TEC, as a legal base.

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

Citizens need to be certain that action against serious cross-border crime is taken in all Member States and that such crime attracts 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 crimes have a 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].

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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".

The Working Group therefore considers it opportune to include a legal base in the new Treaty permitting the adoption of minimum rules, or of rules representing a “socle commun”, on constituent elements of criminal acts and of penalties in certain fields of crime if one of the following two criteria are met:

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

bb) where the crime is directed against a shared European interest which is already itself the subject of a common policy of the Union (e.g. counterfeiting the Euro, the protection of the Union financial interest), 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;

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 two criteria.

Further consideration should be given to the possible inclusion of a third criterion, which was proposed, namely "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)".

Moreover, according to a majority of the Working Group, the scope of Union action could be further delineated by an enumeration, in the Treaty, of those types of crime that are considered to have a transnational dimension (within the meaning of aa) above). If this enumeration were to be exhaustive, it should be stipulated that the Council, acting by unanimity, and after assent of the European Parliament (or, for a few members, consultation), can amend this list in case of need. Such flexibility would allow the Union to respond adequately to changing patterns of crime.

Finally, according to a widespread view, the Treaty could provide that approximation of substantive criminal laws should be carried out in the form of directives (or their successor) only.

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 the application 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 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 co-operation 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.

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 co-operation 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 co-operation, 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 co-operation 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) Measures on crime prevention

A crucial aspect of the development of an Area of Freedom, Security and Justice is that there should be a *fair balance* between the three components; this implies also a balance between preventive and penal action. Consequently, 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, fully respecting the particular importance of subsidiarity in this area, e.g. exchange of best practice, financial programmes for incentive measures or for Union-wide research and documentation, indicators for common statistics on crime. The European Council of Tampere has indicated the following areas of priority for such measures: juvenile, urban and drug-related crime.

3. Reform of Legislative Procedures

a) 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 co-operation 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 qualified majority voting and codecision, which is 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 negotiations and impoverished considerably the content of the acts adopted. On the other hand, the Group is aware of the particular sensitivity of a number of aspects of police co-operation and criminal law, and that therefore progress will be achievable only through carefully crafted compromises.

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

i. minimum rules, or a "socle commun", on constituent elements and sanctions for those crimes with a "crossborder dimension" listed in the Treaty (or added subsequently by the Council, by unanimity, to that list, see 2 a, aa above)[1];
ii. minimum rules on constituent elements and sanctions for 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 admissibility of evidence throughout the Union (see 2 b above);

[1] It is understood that the "list of crimes" in the Treaty would only define the areas of possible approximation of substantive criminal law (in accordance with the criterion (aa) above), but that the approximation itself (i.e. common minimum rules on constituent elements and sanctions) would then have to be carried out through Union legislation adopted by codecision procedure with qualified majority voting.

v. rules on police and judicial co-operation between Member States authorities, 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 2 c above);
vi. measures on prevention of crime (see 2 d above).

As for decision-making procedures concerning rules governing Union bodies, 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 development of existing bodies, i.e. Europol and Eurojust.

Improving the effectiveness of Europol and Eurojust is crucial to European police and judicial co-operation 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. However, according to certain members, further development of Eurojust should be governed by the unanimity rule.

c) Cases in which the unanimity rule would apply

In certain aspects of co-operation in criminal matters concerning core functions of the Member States and deeply rooted in their various legal traditions the unanimity rule would remain.

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

The Group is well aware of the risk that, after enlargement, this rule could lead to deadlock, since a single State could refuse any negotiation on an issue conflicting with its specific interests even though the Union might have identified it as urgent for the common fight against crime. This is also linked with the question of "opting-out" and reinforced co-operation - a question which the Convention may wish to address in a wider context.

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 individual Member States tend to focus mainly on political priorities particular to that State without always taking into account the general perspective of the Union's interests, thus leading to the discussion of subjects within the Council for which there is actually limited interest.

The Group has considered several options[1] and the majority accepted in principle that, in the areas of the current “Third Pillar”, the right of initiative of the Commission should be shared with Member States, but that, in order to ensure that initiatives emanating from Member States respond to a genuinely general concern, a threshold of 1/4 of Member States should be required for an initiative to be admissible. In the view of certain members, the Convention should however carefully examine the possible implications of opening the possibility for Member States to launch a legislative initiative within a procedure of codecision and qualified majority voting.

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 co-operation), and OLAF (tasked with administrative investigation procedures in the specific area of

[1] See WD 18, p. 14.

protecting the Community's financial interests). In addition, efficient control of the Union's external borders presents a new major challenge for operational co-operation. In the area considered, people expect major progress: 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 Union'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 co-operation 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 co-ordinating operational co-operation 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 co-ordination and oversight of the entire spectrum of operational activity in police and security matters (inter alia police co-operation, fact-finding missions, facilitation of co-operation 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.

The Group has also discussed the question of the chairmanship of such a possible reformed structure [committee] of technical level, but concluded that this matter could be addressed in the broader context of reform of the Council; it has also been stressed that the chair of a committee need not necessarily be designated at Treaty level.

This recommendation should, in any case, 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.

II. Management of external borders

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

Most members of the Group consider the possible creation of a common European border guard unit as a longer-term issue. 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 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 measures such as promoting co-operation, training, and 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 operating in conjunction with national border control services.

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 to such developments, which have not been contested within the Group. Thus, the provision could state Europol's central role within the framework of European police co-operation, 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 intelligence, co-ordination and carrying out of investigations, as well as to 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.

It has been noted that if greater operational powers were conferred on Europol, by using this legal basis, the existing Protocol on immunities should be reconsidered.

Finally, the Group also believes that Europol activities will need in the future to be subject to democratic accountability to the European Parliament and to the Council, as well as to judicial control by the ECJ in accordance with the normal Treaty rules.

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 undertakes 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 replacing 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 co-ordination and co-operation, 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 co-operation (including resolution of conflicts of jurisdiction);
- And, possibly, the supervision of (future) Europol investigative and operational activities (certain members of the group have expressed reservations on this aspect).

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 (including the national members of Eurojust to the extent that they have received such competence).

c) The issue of a European Public Prosecutor or a Public Prosecutor's Office

The Group agrees on the objective of a more efficient prosecution of offences against the Union's financial interests. A significant number of members believe that current instruments are inadequate. The Group considered some proposals made in favour of the creation of a European Public Prosecutor responsible for detecting, prosecuting and bringing to judgement in the national courts the perpetrators of crimes prejudicial to the Union 's financial interests. They have proposed that the Treaty should provide a legal basis to that effect. 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's 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.

As regards the protection of the Union's financial interests, the Group also noted the importance of the role played by OLAF.

A significant number of members of the Working Group favoured exploring the idea - on a medium/long term basis - of strengthening the powers of Eurojust, so enabling it to bring cases before national courts (concerning offences against the Union's financial interests or other serious crimes). The Treaty legal basis concerning Eurojust should in this case permit the creation of a European Public Prosecutor's Office by an act of the Council adopted by unanimity with an assent from the European Parliament.
The discussion in the Group showed that members were divided on this issue.

C. HORIZONTAL QUESTIONS

I. More efficient implementation and the maintenance of high standards

As experts demonstrated to the Group, one of the most serious problems hampering the Union's policies 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 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 insufficient implementation also applies to co-operation mechanisms concerning 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 by one State 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 implementation by Member State*s* in this area, the Group makes two recommendations:

- First, that mechanisms of "mutual evaluation" or "peer review", as practised successfully over recent years (e.g., in the field of fight against organised crime or concerning effective application of the Schengen acquis), should be encouraged and applied more widely. This technique has proven a powerful tool for monitoring the efficient *practical* implementation of Union policies by administrative and judicial authorities of the Member States, 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 complete mutual confidence in police and judicial systems in the Member States. High standards not only must be attained, but also 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 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".

The Group takes the view that these two mechanisms will enhance the efficiency of implementation of the obligations undertaken by the Member States within the Union. Monitoring practical implementation in the operational area can be achieved efficiently through "peer review" but where breaches of Member States' obligations occur there must be recourse to legal control through the infringement procedure.

To the (limited) extent that there is a need to implement Union legislation *at Union level*, the Group considers that the Treaty should make the general regime on implementing measures (i.e., presently, but subject to a wider discussion on reform in 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 the 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 co-operation, training and exchange in various areas of law-enforcement).

II. Involvement of national parliaments

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 co-operation 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 an 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, in i.e. where it is questionable that a crime has actually a "cross-border dimension" and is of a serious nature.
  (Certain members of the group propose to develop a similar “early warning mechanism” for cases where certain national parliaments consider that an initiative runs counter to basic features of their national criminal law policy. The triggering of such a mechanism could entail similar consequences as the subsidiarity mechanism, but it could obviously not lead to judicial control);
- 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.

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 presently the same for international agreements concerning second and third pillar matters. However the nature of these agreements is different, those concerning Third Pillar matters being more directly linked with legislation, in particular of criminal law.

The Working Group stresses the need for 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.

Some members have claimed the right for Member States to conclude bilateral or multilateral agreements in the area of judicial co-operation, even if the Union had already adopted internal rules on the same matter. They argue that the fact that the Union has adopted internal rules on a particular matter should not prevent Member States from concluding bilateral or multilateral agreements on their own (a) where the Union has not made an agreement with the third country in question and (b) where the Union has made an agreement with the third country, but the member State wants to agree additional provisions. This question could be considered by the Convention in the context of the Union's external action, in the understanding that, according to the well-established case-law of the ECJ, Member States can only enter into international commitments, which do not affect common policies adopted by the Union.

IV. Mechanisms of Opting-In / Opting-Out and reinforced co-operation

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.

The question is whether and to what extent it is justified for these situations to persist in this area. The question is also whether and how the use of opting-in or opting-out arrangements will be regulated *in the future.* The Group considers that this is a general issue, which could potentially arise in other policy areas as well and needs to be examined by the Convention in more general terms.

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 has no jurisdiction to review acts of 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 from the jurisdiction of the Court for such measures especially taking into account that other measures relating equally to the maintenance of law and order (e.g. expulsion from one Member State to another of EU citizens) have always been subject to judicial control by the ECJ.

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. Some members of the Group have however called for maintaining the exemption of jurisdiction of Article 35 (5) TEU. Others have argued, in this respect, that, if the provision of Article 33 TEU (reserving the Member States' responsibilities with regard to the maintenance of law and order and internal security) were maintained in the new Treaty, this should suffice to make it clear that national acts taken under these responsibilities lie outside the scope of the Union law, and consequently outside the jurisdiction of the Court.

To the extent that this recommendation 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.

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Annex

LIST OF EXPERTS INVITED BY THE WORKING GROUP

Fight against organised crime (viewpoint 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 organised crime (viewpoint 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 co-operation 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).